



The Netherlands Who is the Operator?

1. Introduction

The upstream oil and gas is high risk. It is, consequently, often undertaken by a number of companies working jointly where one of the companies is chosen to actually carry-out or commission the various activities under the licence¹. This company is the Operator.

The Operator as an entity is more typically defined in terms of its rights and obligations rather than by its capacity. These rights and obligations are mostly set-out in the context of joint operating agreements (JOA).

This article, however, will examine the Operator in terms of its different capacities. Written from a Dutch law perspective, the article looks firstly at the legal definition of what constitutes a licence, its co-holders and the Operator under the Dutch Civil Code. This is followed by considering the meaning of the term 'representation' under Dutch law and the various functions of the JOA. The article concludes with a summary of the capacities in which the Operator may act and some consequences of this.

2. Licence – Community of Goods

The exploration and production of oil and gas, in The Netherlands, is carried out pursuant to an exploration or production licence. Such licence may be held either by a single company or by a number of companies, the latter being jointly the co-licence holders. Each licence, nevertheless, is only ever held by one Licensee, meaning that where there are several co-holders they are still regarded legally as a single Licensee.

Activities to be carried-out under a licence, such as drilling a well or developing a field, may under the Dutch Mining Act be carried-out or commissioned by only one of the co-licence holders: that party being the so-called Operator (*uitvoerder*), designated by the Licensee and approved by the Minister of Economic Affairs.

A licence, if held by more than a single company, might best be regarded, under the Dutch Civil Code, as a community of property². Such community of property would also include the goods acquired as part of the licence's normal operation and management (*beheer*).

The co-licence holders, as participants in a community of goods, may by their mutual agreement, arrange for the benefit, use, operation and management of their community of good (i.e. the licence and joint property thereunder) and designate one of them, to be the administrator (*beheerder*) of this community of goods. The administrator carries an implied authorization to represent the participants in the community of goods. This designated party is the Operator and accordingly the Operator implicitly holds the right to represent the Licensee.

¹ The term 'licence' is used here broadly and outside the Netherlands might also include production sharing agreements, concessions or leases.

² This is a personal interpretation as the Dutch Mining Legislation does not explicitly deal with this issue.

3. Representation

Under Dutch law a distinction is made between direct representation and indirect representation.

Direct Representation

Direct representation is the execution of legal acts by a person (the authorized representative³) in the name of another person (the principal). It is the principal that is bound by the legal acts of the authorized representative.

Indirect Representation

Indirect representation is the execution of legal acts by a person (the mandatory) in its own name but for the account and at the risk of another person (the principal). It is the mandatory that is bound by the legal acts that the mandatory performed for the account and at the risk of the principal.

4. Authorization for Representation

Under Dutch law the authorization of a representative to act in the name of and bind the principal may exist by operation of the law itself (e.g. director of a company), by express or tacit power of attorney or by a mandate. The authorization of a mandatory to act in its own name but for the account and at the risk of the principal is based on a mandate.

Power of Attorney

A power of attorney is an authorization given by the principal to another person to carry out legal acts in the principal's name. Representation under a power of attorney is, by definition, direct representation (the principal shall be bound) and can be given expressly or implicitly.

The representative is liable towards the third party for the existence and to the extent of the powers he claims to be acting under. As a general rule, the absence or insufficiency of a power of attorney results in the relevant legal act not having been executed and the unauthorized representative having to pay the third party for any damages that might result from his unauthorized actions. This rule may be displaced in favour of the rule of "legitimate expectation". Here, due to a statement or the conduct of the apparent principal, the third party was led to believe that a (sufficient) power of attorney had been given. As a consequence, but only if so desired by the third party, the contract concerned will be honoured at law and the principal will be bound.

Mandate

Mandate is a contract where one party (the mandatory) commits itself to carry out legal acts for the account and risk of another party (the principal). Representation pursuant to a mandate may be direct or indirect, depending on the mandate. Direct representation implies a power of attorney.

A mandate for indirect representation binds the representative who, instead of the principal, becomes a party to any contract concluded for the account and at the risk of the principal.

Despite the fact that it is the mandatory, and not the principal, that is party to a contract concluded under a mandate for indirect representation:

- a. by written notification to the mandatory and the third party, the principal can take over certain rights of the mandatory under the contract in the event the mandatory does not perform its obligations towards the principal (under the mandate agreement) or, say, in the event that the mandatory becomes bankrupt; and
- b. by written notification to the mandatory and the principal, the third party can exercise certain rights under the contract towards the principal, in the event the mandatory does not fulfill its obligations towards the third party or in the event the mandatory becomes bankrupt.

³ The term 'agent' is not used here being a component of the English legal system and case law

5. Joint Operating Agreement

The JOA legally represents the commercial agreement among co-licence holders as a joint venture; setting out how they shall work together, conduct activities, and defining their respective contractual rights and obligations in respect of and under the licence.

Being the agreement among the participants in a community of goods, here determining the benefit, use, operation and management of the licence, the JOA can be regarded as the constitutional documents for the community. It can therefore be considered as the community's 'articles of association'; setting out the governance for the relevant licence, for the goods acquired under the licence, and for the co-licence holders.

Being the agreement that designates a single co-licence holder as the licence Operator (the community of goods administrator), the JOA is also that agreement which authorizes and obliges the Operator to perform certain legal acts for the account and at the risk of the Licensee. In other words the JOA constitutes the mandate given to the Operator. Depending critically on the precise wording of the specific provisions of the JOA, i.e. the content of the mandate, the Operator may therefore either perform acts in the name of the Licensee (direct representation) or in its own name (indirect representation), thereby binding either the Licensee or itself.

6. Conclusion - Who is the Operator?

Under Dutch law an exploration or production licence, held jointly by a number of companies, might best be regarded as of a community of goods. The Operator, in addition to being a participant in this community of goods (i.e. a co-licence holder), is, importantly, the administrator of the community of goods and, as such, the representative of the Licensee.

The Operator, then, has several roles, namely:

Co-licence holder

As a participant in a community of goods, the Operator (as is equally true for the other co-licence holders) has to act towards the other participants reasonably and fairly.

Administrator

As administrator of the licence, the Operator has to act in the interest of the community of goods consisting of the licence and the goods acquired thereunder: i.e. it may not act in its own interest.

Representative

As representative of the Licensee, the Operator must act within the mandate given by the Licensee. Depending on the mandate's provisions, the Operator may carry out legal acts, either in the name of the Licensee (binding the Licensee) or in its own name (binding itself), but either way, this will always have to be in the interest of the Licensee.

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