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Michał Stachera*

COOPERATION AGREEMENT AS LEGAL INSTRUMENT STIMULATING HYDROCARBON EXPLORATION AND PRODUCTION IN POLAND

Abstract: The oil and gas industry in Poland is burdened with relatively high investment risk. The main reason for this is the complex geology and relatively medium-sized resources that do not guarantee a return on an investment. The above factors have led to the necessity of sharing the risk to minimize the negative financial effect of the investment, which has resulted in the more and more frequent cooperation of several entities towards the realization of a specific project. The "shale revolution" has significantly contributed to the evolution of legal regulations in this area; i.e., the implementation of the act of June 9, 2011 – Geological and Mining Law (Journal of Laws of 2014, Item 1133). It introduces the concept of "cooperation agreement" for the purpose of the joint use of rights and execution of concession obligations in respect to the exploration and prospecting of hydrocarbon deposits as well as the extraction of hydrocarbons from deposits.

In the article, the author intends to show that, contrary to the generally prevailing opinion, the new act of June 9, 2011 – Geological and Mining Law (Journal of Laws of 2011, No. 163, Item 981) was not only aimed at increasing state control over the activity in the field of exploration and production, but on the contrary – it was aimed at liberalizing the market and stimulating domestic and foreign entities to engage in exploration and production activities in Poland. The article presents a new and original approach in light of the interpretation of legal regulations based on which hydrocarbon exploration and production activities are carried out in Poland.

The author uses the formal-dogmatic analysis method (otherwise known as the logical-linguistic analysis method) to clarify the archival, current, and abandoned legal acts pertaining to the macroeconomic environment. This method is well-known in law research.

Keywords: geological and mining law, Poland, concession, cooperation agreement, joint exploration and production works, hydrocarbons

* AGH University of Science and Technology, Faculty of Drilling, Oil, and Gas, Krakow, Poland – PhD student; ORLEN Upstream, Production Department, Warsaw, Poland.

1. INTRODUCTION

Currently, it is becoming increasingly difficult to decide whether to start exploratory works in areas with minor recognition or in insignificantly prospective structures. There is also a tendency for the development of electro-mobility and renewable energy sources, which results in a decrease in the interest of potential investors in involvement in oil and gas projects.

In developing and developed countries, the evolution of legal regulations follows their economic and social development. In the case of the oil and gas industry, legislation should strive to achieve the equilibrium stage, which is to safeguard the public good, energy security of the state, and the environment while leaving space for the free and effective entity operations in this sector [1].

2. COOPERATION AGREEMENT

Entities always seek solutions that allow them to reduce risk; e.g., sharing it with other entities or establishing consortia with complex and capital-intensive projects.

One solution that has been used for years in the global oil and gas industry has been the allocation of risk on the basis of a "cooperation agreement" between two or more entities operating in the energy area. The cooperation agreement itself is not a contract named in the Civil Code [2]; therefore, it constitutes a specific type of contract. The Civil Code does not prohibit the creation of separate unnamed agreements; hence, this form is considered the most convenient. It should be remembered that such an agreement may not be in conflict with other legal regulations governing operations in a specific area of the economy and public life [2, 3]. The basic legal act regulating the activities of oil and gas projects in Poland is the act of June 9, 2011 – Geological and Mining Law (Journal of Laws of 2017, Item 2126) – consolidated text [4] (hereinafter referred to as "the act") combination of civil and administrative law, which defines the principles and conditions for undertaking, executing, and completing activities in the scope of geological works, exploitation from deposits, non-reservoir storage of substances in the subsurface, and storage the waste in the subsurface. Activities in the given profile are regulated in general by a dozen or so acts and several dozen normative acts issued on the basis of these laws [5].

3. GEOLOGICAL AND MINING REGULATION EVOLUTION IN ASPECT OF ENTITY COOPERATION FOR YEARS OF 1855–2006

In order to better understand the current regulations, one should refer to the history of the regulation evolution in the field of geological law and mining law over the years. The oldest documents found by the author regulating oil and gas projects come from the mid-nineteenth century and refer to a commentary on the law in the field of geology and mining from 1855 [6]. They regulated the right to mineral extraction that was usable due to the content of "hydrocarbon resins." There, regulations could be found regarding joint exploration and production (hereinafter referred to as "E&P") works and the legal relations of E&P law partners.

After the First World War and the establishment of the Polish state, the Regulation of the President of the Polish Republic – Mining Law (Journal of Laws of 1930, No. 85, Item 654) was established on the basis of the constitution on November 29, 1930 [7]. Crude oil (then known as rock oil or hydrocarbon resin) was additionally covered by a different act from March 18, 1932 (Journal of Laws of 1932, No. 30, Item 306) [8] on regulating relations in the oil industry. The regulations introduced the possibility for foreign buyers to acquire mining properties and conduct E&P works. This applied to individuals and entrepreneurs – alone or together. No guidelines were laid down as to the terms of a "joint agreement." An interesting solution was the ability to work together without the need to draw up any contract [7, 8].

After the Second World War and the transformation of the political system, a decree from May 6, 1953, of the Mining Law (Journal of Laws of 1953, No. 29, Item 113) was created [9]. The superior role of the state in the field of E&P is strongly emphasized here. The concept of a mining enterprise appears, and there is no information about the possibility of participating of more than one entity in E&P. As for a natural person, there is only a mention that running the abovementioned works is possible with the approval of the state apparatus [9]. Up until 1989, there was a period of intense exploratory work carried out by the USSR in Poland with the help of state-owned enterprises and the discovery of the largest oil and gas deposits in the country (such as "Przemyśl").

Due to successive changes in the political system in 1989, there was a breakthrough in the regulations. First, on March 9, 1991, the act amending the Mining Law act (Journal of Laws of 1991, No. 31, Item 128) [10] entered into force, which allowed for the possibility of applying for a concession, which is synonymous with the admission of foreign and physical entities for E&P projects [10]. Then, on February 4, 1994, the Geological and Mining Law act (Journal of Laws of 1994, No. 27, Item 96) was created [11], which was written anew – a modern legal act. There was no information here about the possibility of conducting joint operations, which did not prevent entities from cooperating in this area [11]. Taking into account the significant technical progress at the turn of the 20th and 21st centuries (i.e., the commencement of horizontal drilling and hydraulic fracturing), this is a period of significant discoveries of oil and gas reservoirs. On the Polish market, foreign investors appeared again after being absent for several decades.

4. YEARS 2007–2011 REFER TO DIRECTION OF CURRENT REGULATION CHANGES

In 2007, the "shale revolution" reached Poland. During the years of 2007–2011, a total of 171 concessions were granted for exploration and prospecting of hydrocarbon deposits as well as the extraction of hydrocarbon from deposits (hereinafter referred to as "Concession"); during the period of 2000–2006, only 14 were granted [12]. The state came up with proposals for extensive legislative changes, hoping to provide an instrument for the rational management of hydrocarbon deposits and fulfillment of the obligation to protect the environment. This was the first act of June 9, 2011 – Geological and Mining Law (Journal of Laws of 2011, No. 163, Item 981) [13]. The changes mostly concerned issues related to hydrocarbons. A number of mandatory conditions and restrictions were introduced that would significantly improve the existing system of selecting winners of tenders, granting, and transferring

concessions. Priority was given to appoint the best systems for the Concessions; it wanted to eliminate the possibility of granting concessions to entities under the control of a third country, which could endanger the security of the Polish state.

Up until then, the transfer of concession rights and obligations took place outside the control of the concession-granting authority. Regulations in the Code of Commercial Companies [14] and Civil Code [2] did not provide for the necessary safeguards from the point of view of public interest [15]. In 2011, the creation of NOKE (i.e., the National Operator of Energy Minerals – under the supervision of the Ministry of Treasury) was proposed, which would have the right to preempt a concession on the secondary market and could participate in the co-creation of E&P consortia. There was also a project to create a "generations fund" (like the fund established in Norway) that would inflate several billion PLN each year (obtained from the taxes on hydrocarbon E&P) in order to secure future generations (i.e., pension payments). The Ministry of Finance presented a bill on taxing hydrocarbon E&P [16], which was to impose further several taxes – a total of about 40% on profits.

The Oil law was created, which was meant to separate the regulations, taking into account the specificity of the industry and clarifying the administrative procedures. In addition, it was planned to create a law on special rules for the preparation and implementation of investments in the, exploration, prospecting, extraction, and transport of hydrocarbons [15]. In the end, NOKE, the "generations fund," and the Oil Law were not established. However, the act of 2 March 2, 2012, on the tax on the extraction of certain minerals (Journal of Laws of 2012, Item 362) (including natural gas and crude oil) [17] and the act of July 25, 2014, on a special hydrocarbon tax (Journal of Laws of 2014, Item 1215) (comes into force starting in 2020) were introduced [18].

5. COOPERATION OF ENTITIES BASED ON COOPERATION AGREEMENT [19]

Until July 11, 2014 [20], Concessions could only be granted to one entity. However, this did not exclude the possibility of cooperation in the field of E&P on the basis of the "agreement on joint operations" concluded between entities, where one of them had a concession together with an agreement on the establishment of a mining usufruct. The "joint operations agreement" was not synonymous with the creation of a consortium or a third party that would merge the entities covered by the agreement. Sharing the resulting costs, profits, and obligations from the conduct of joint operations was arranged loosely by entities and subject to compliance with the requirements of the regulations (primarily, the actual Geological and Mining Law and the actual Civil Code).

On July 11, 2014, in the act of amending the Geological and Mining Law act (Journal of Laws of 2014, Item 1133) [20] in Division III – Concessions, a new chapter was created: Chapter 4 – the Cooperation Agreement (specifically, Arts. 49zi–49zw). The Cooperation Agreement is a widely used form of agreement valid in countries with highly developed oil & gas industries. The amendment introduced the possibility of concluding a cooperation agreement; i.e., obligations to jointly conduct activities in the field of Concessions was subject to obtaining a concession and concluding an agreement on the establishment of a mining usufruct.

Given all of the considerations and interpretations from Chapter 4 of the Cooperation Agreement act, the author intends to prove the assessment made in the title of the article.

Art. 49zi
Cooperation agreement – definition [21]

The agreement defines the framework for cooperation in the execution of the concession obligation of the conducting E&P works. This applies to joint duties in the area of carrying out works, rights resulting from discoveries and extraction, and responsibility for arising liabilities and damages.

Art. 49zj
Parties to the cooperation agreement, participation to the parties of agreement in cost and profits [21]

The agreement can be joined by any entity that will pass the qualification procedure. The party to the agreement may be not only a company but also a natural person and an organizational unit (which is not a legal person). This also applies to entities with foreign capital. The percentage breakdown in costs and profits from conducting the work is determined in advance (which is legally binding); the change of shares is possible only by amending the cooperation agreement.

Art. 49zk
The essence of the cooperation agreement [21]

The content of the agreement is not specified, whereas the essence is (which is obligatory); namely, specification of the activity covered by the agreement, indication of the operator, and determination of the percentage shares in costs and profits from the E&P works.

Art. 49zl
Co-ownership of property; i.e., assets and benefits arising when conducting E&P works [21]

As for property brought, acquired, or created as part of joint works, the law only suggests shares of property according to the percentage breakdown in costs and profits; it leaves some latitude as to this. As for the benefits (which are hydrocarbons), the share of profits corresponds to the shares of costs.

Art. 49zm
Representing parties to a cooperation agreement by an operator and handling cases [21]

The operator is authorized to perform the duties and rights as well as bear the responsibility resulting from the granted concession to the public administration authorities

and third parties. The operator is defined in a separate article (Art. 49a). The operator is entitled to undertake activities related to the day-to-day management of the activities carried out by the parties. These activities concern the area of civil and public law. Matters beyond ordinary management are approving and changing annual and multi-annual plans, appointing an auditor to audit the annual accounts drawn up on the basis of the accounts referred to in Art. 49zo, and approving the annual financial statements and termination of the cooperation agreement. In matters of ordinary management, the operator may entrust its obligations to the other parties to the agreement on the basis of a specific power of attorney.

Art. 49zn
Parties to a cooperation agreement meeting [21]

Conducting cases under a cooperation agreement that exceed the matters of ordinary management requires the convocation of a meeting and adoption of a resolution. The meeting may be convened in two ways – obligatorily, and at the request of the parties to the agreement. This is obligatory in the following cases: the auditor's presentation of an opinion on the annual financial statements; issuing the final decision on granting the concession and the schedule of geological works, including geological works or mining works with the planned date of their implementation; a common bank account number; proposals for amending the cooperation agreement to adapt it to the content of the concession; and approval of the annual and multi-annual plan. The request for convening the meeting may be submitted by each of the parties to the agreement, preparing the appropriate draft of the proposed resolutions. The operator is then obligated to call such a meeting in the territory of the Republic of Poland with the proposed agenda.

Art. 49zo
Keeping accounting books and preparing annual financial statements by the operator [21]

The purpose of the rule is to reliably and clearly report the state of the assets and financial condition in accordance with the provisions of Polish law; i.e., the act of September 29, 1994, on accounting (Journal of Laws of 1994, No. 121, Item 591). This report is subject to an audit by a certified auditor.

Art. 49zp
Creating and maintaining a joint bank account by the operator [21]

By means of a joint bank account, payments are made in connection with the concluded cooperation agreement and are the sole basis for settlements. Pursuant to the banking law act of August 29, 1997 (Journal of Laws of 1997, No. 140, Item 939), a bank account may be maintained by several natural persons, several local government units, or several parties to a cooperation agreement. It can be conducted only in connection with the execution of concessions and regulations of the cooperation agreement. The operator has the exclusive

right to dispose of the funds in the joint bank account. The other parties to the agreement have a full right to inspect the account balance, obtain statements and account history, and audit any sub-accounts.

Art. 49zq
Responsibility for liabilities arising under the cooperation agreement [21]

All liability arising from all public and private law obligations rests with the operator. These commitments should result from approved annual or multi-annual plans. However, the operator is also charged with the insolvency of the other parties. Claiming claims by the operator towards the contracting parties resulting from the necessity to settle liabilities not resulting from annual and multi-annual plans may take place only after settling these obligations. This means that the operator may demand coverage of part of the liabilities according to the contributions of the parties only after fulfilling the obligation that is on it (i.e., satisfying the obligations).

Art. 49zr
Termination of the cooperation agreement by the operator [21]

In this case, the law treats each party to the cooperation agreement equally, and the termination of the agreement by the operator requires the consent of each party. Then, the operator is required to submit a candidacy for a new operator. In the absence of such a candidacy, the termination becomes ineffective. The given notice is adopted by way of a resolution. It is worth noting that the parties may agree to the operator's resignation but not agree to the approval of a new operator in accordance with the presented candidacy and the succession of rights and obligations to him. This also applies to the concession-granting authority (which must approve such a change) because it is relevant to the concessions and the agreement on the establishment of a mining usufruct.

Art. 49zs
Withdrawal of the concession [21]

In the case of the above situations as well as the termination of the cooperation agreement and termination of activities, the obligations imposed on the operator in the field of environmental protection and mining plant liquidation are not terminated. These obligations are much broader than those specified in the environmental protection act of April 27, 2001 (Journal of Laws of 2001, No. 62, Item 627).

Art. 49zt
Termination of the cooperation agreement by a party other than the operator [21]

The termination of the agreement by a non-operator is not subject to the regulations that govern such termination for the operator. There is no need to obtain the consent of the other parties or present the successor's candidacy. The termination may result in a sharing

of the existing shares of a given party between the other parties to the agreement. This does not require a decision from the concession-granting authority. In the case when there is a change in the legal relationship from outside then it is required to obtain the consent of the other parties to the agreement and obtain the decision of the concession-granting authority specified in the act. Then, it is taken into account that the entity must obtain a positive decision from the qualification procedure, the consent to take over all of the terms of the concession, and the agreement on the establishment of the mining usufruct, showing that you are able to meet the requirements related to the performance of the intended activity. In the absence of obtaining the required decisions, the other parties assume the rights and obligations of the terminating party. It is possible to terminate the agreement in part by a non-operator.

Art. 49zu
Settlements between the parties within the framework of Art. 49zr and 49zt [21]

The article emphasizes that any changes between the parties under the cooperation agreement do not exempt them from their obligations to third parties (in particular, the operator). This also applies to a new operator or new part to the agreement as well as the responsibility for liabilities that were created even before entering into the rights and obligations of the parties to the cooperation agreement. This protects the interest of third parties from avoiding liability by the party terminating the agreement.

Art. 49zv
Termination of the cooperation agreement [21**]**

There are only three reasons for the termination of a legal relationship between parties; i.e., the withdrawal of the concession, the expiry or loss of its validity, and the termination of the cooperation agreement by the parties in the resolution.

Art. 49zw
Unregulated matters [21]

As with any civil agreement, it is a must to apply the Civil Code in unregulated matters. Thus, the civil law nature of the agreement was underlined while not requiring the application of the entire scope of civil law. It should be remembered that the condition allowing for the application of the regulations of the Civil Code is the emergence of a dispute between the parties (which must be resolved arbitrarily). The legislator did not specify the mode of dispute resolution. It is recognized that such a solution would only result in the court setting a legal basis for resolving the dispute rather than ordering a solution in a specific manner.

The cooperation agreement is inseparably connected with the way of administrative proceedings regarding the permission to conduct E&P works. After its conclusion, the parties are obligated to comply with its regulations and cannot accept another legal basis for conducting joint E&P works. It is not excluded to modify its regulations, provided that the parties

strive to achieve a common economic goal by acting in a designated way (in particular, by contributing). The following is a brief summary of the procedure for obtaining a concession and placing a cooperation agreement in this brief.

Qualification Procedure [22]

Anyone intending to apply for Concessions is required to undergo verification by the minister responsible for environmental issues in the qualification procedure. The qualification procedure assesses the ability of the interested entity to conduct activities in the field of the E&P of hydrocarbons. There is also an assessment of the entity in terms of state security. The proceeding ends with issuing a decision on obtaining a positive assessment from the qualification procedure or the decision on refusing to obtain it. This decision is valid for a period of five years and entitles the entity to submit an offer in the tender procedure for the granting of a concession.

It is required for the operator to obtain positive opinions of the General Inspector of Financial Information, the Polish Financial Supervision Authority, the Head of the Internal Security Agency, and the Head of the Foreign Intelligence Agency; it is also required to document his experience in the field of the E&P of hydrocarbons. For the non-operator, only positive opinions are required from the authorities mentioned above; there is no need to document the experience in the field of the E&P of hydrocarbons.

Tender procedure [23]

Once a year, the Public Information Bulletin announces the areas for which the tendering procedure is planned for the following year. Subsequently, the concession-granting authority shall publish an announcement on the initiation of the tender procedure in the Official Journal of the European Union and in the Public Information Bulletin for the purpose of granting the concession. This starts the stage of accepting offers submitted by the entity or entities – together. Already at the stage of submitting an offer, entities that apply for jointly obtaining a concession must submit a pre-agreed-upon cooperation agreement. The winner of the tender is the entity or entities that obtained the highest evaluation from the tender procedure, which consists of the evaluation of the bidder's technical and financial capacities as well as the technical and financial possibilities along with the proposed technology, scope, and work schedule.

Concession and mining usufruct [22, 23]

The selection of the winner of the tender or winners (if they constitute their entities covered by the cooperation agreement) entitles them to submit an application for obtaining a concession. A concession is an authorization issued by a concession-granting authority to conduct strictly defined business activities. It is granted for a period of 10 to 30 years and is divided into two phases: exploration and prospecting (with a duration of up to five years, with the possibility of extending it by two years) and extraction (the remainder of the time). The next step is to conclude an agreement for the mining usufruct. This is the right to use

the space in the rock mass. The mining property includes the deposits of minerals (including hydrocarbons). The mining property belongs to the state. The establishment entitles the entrepreneur to produce hydrocarbons.

The diagram (Fig. 1) showed below is a fragment of the administrative procedure regarding the obtaining of a concession, mining usufruct, and start-up of E&P works (including the location of a cooperation agreement therein).

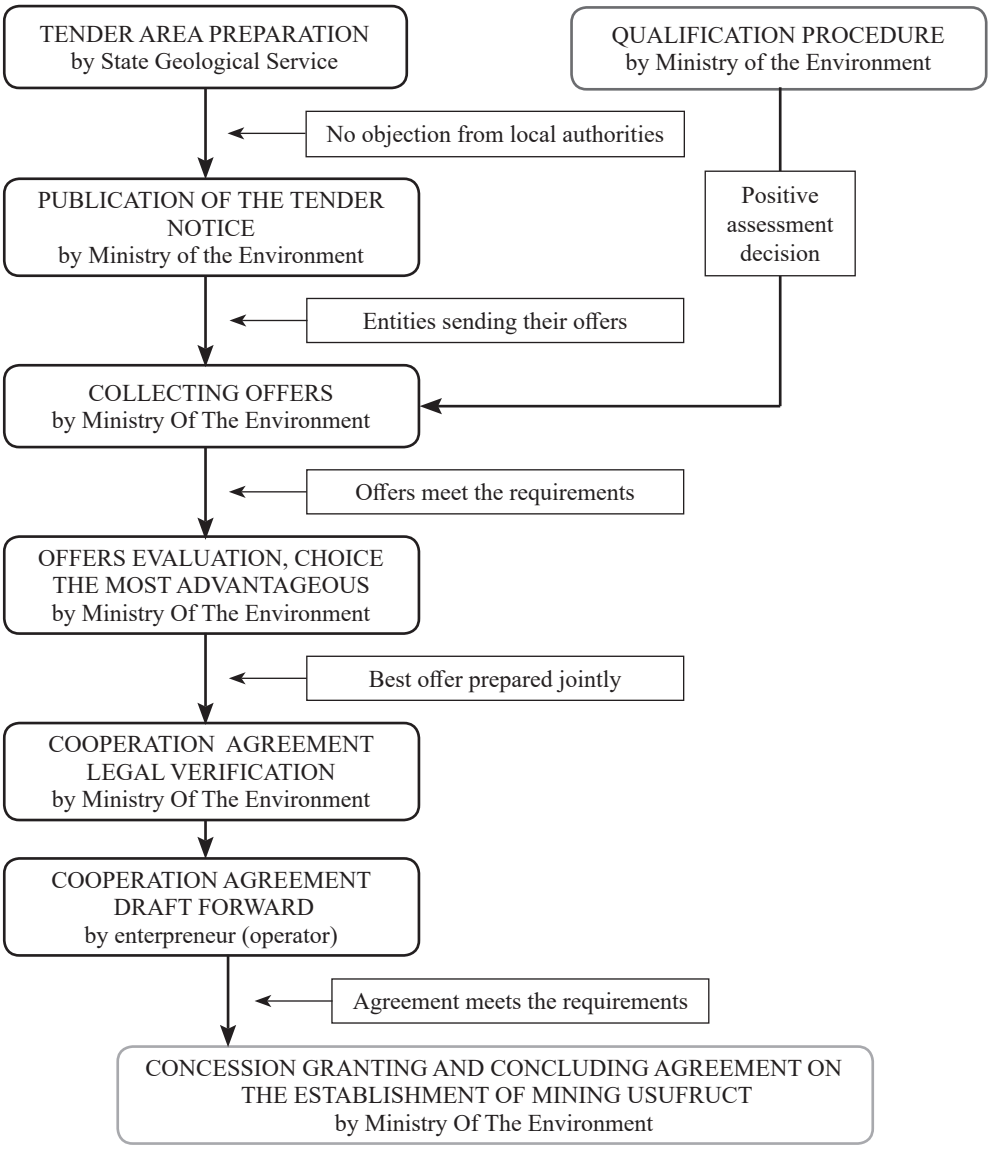

Fig. 1. Diagram of procedure for granting concession and agreement on establishment of mining usufruct

6. WEAKNESSES OF CURRENT LEGISLATION

The article does not exhaust the problems of the legal environment accompanying E&P works in Poland. Wishing to remain objective, the author compiled the most important allegations against the current regulations of lawyers and various types of institutions and organizations [1, 24]. They are primarily as follows:

- the lack of unambiguously set and hierarchical objectives of supervisory authorities.
- defective preventive supervision at the general control stage,
- incorrect concession-granting authority,
- the lack of the possibility of regulatory supervision to direct and improve the Concessions execution process,
- the multiplicity of administrative decisions,
- the multiplicity of supervising authorities,
- the lack of activity coordination,
- the lack of legal flexibility of the authorities' forms of operation,
- the lack of an operating strategy of regulatory authorities,
- unjustified subordination of the state energy security to the planning policy of local government units.

In order to ensure internal consistency, the law-making process is a highly time-consuming process. Considering the sudden "shale revolution" and the massive inflow of foreign investors interested in E&P works, it can be concluded that all of these factors exerted considerable pressure on legislative actions. This does not justify the mentioned negligence (although it explains it to some extent).

7. EXAMPLES OF PREVIOUS ENTITY COOPERATION IN POLAND

Until the "shale revolution," the cooperation of entities on the basis of a "joint operations agreement" practically did not take place. The idea of introducing the regulations governing the cooperation agreement was to primarily concern the exploration of unconventional gas. However, during the years of 2011–2014, the majority of the entities that came to Poland did not participate in cooperation agreements with each other. Some examples of cooperating companies are 3Legs Resources and ConocoPhillips as well as Marathon Oil Poland and Nexen. The companies that are on their own can include ORLEN Upstream, PGNIG, LOTOS Petrobaltic, Talisman Energy Poland, Chevron Poland Energy Resources, San Leon Energy, BNK Petroleum, Eni Poland, ExxonMobil Corporation, Silurian Hallwod, Hutton Energy/Baasgas, Petrolinvest, and DPV Service [25, 26].

Despite the end of the "shale revolution," there has been an increase in the number of entities cooperating on the basis of a cooperation agreement from 2014 until now. This is due to the fact that domestic entities have realized the possibilities offered by this type of agreement. This led to the revival of work on the domestic market. The following are examples of entities cooperating on the basis of a cooperation agreement in the E&P of hydrocarbons:

- PGNIG S.A. and FX Energy Poland Sp. z o.o. – since 90s in the area of Przedsudecka Monocline and Block 255 (constantly developed cooperation since 2011) [27, 28];

– PGNIG S.A. and ORLEN Upstream Sp. z o.o. – since 2009 in the areas of the Polish Lowland, Lublin Basin, Pomeranian Basin, Gorzów Bloc, Carpathian Foothills, and Carpathians (constantly developed cooperation since 2011) [28, 29];
– PGNIG S.A. and Grupa LOTOS S.A. – since 2012 in the areas of the Pomeranian, West Pomeranian, Warmian-Masurian, and Lublin Voivodeships (constantly developed cooperation) [30, 31];
– PGNIG S.A. and Petrolinvest S.A. – since 2009 in the area of owned and future concessions [32];
– PGNIG S.A., KGHM S.A., Tauron S.A., PGE S.A., and ENEA S.A. – from 2012 to 2013 in the Wejherowo concession area [33];
– PGNiG and Chevron Poland Energy Resources – from 2014 to 2015 in the area of southeastern Poland [34].

It is worth mentioning the cooperation of companies not only in the E&P of hydrocarbons but also the extraction of methane from coal deposits (which is also classified as a hydrocarbon within the meaning of the act):
– PGNIG S.A. and the Polish Geological Institute – National Research Institute – since 2016 in the area of the Silesian Voivodeship [35];
– PGNIG S.A., PGG, S.A., JSW S.A., and Tauron S.A. – signed a letter of intent in 2018 in the Upper Silesian Coal Basin [36].

8. CONCLUSION

Analyzing the historical aspects of the evolution of the regulations of geological and mining laws, dynamic changes in the macroeconomic environment, and real operations undertaken by entities in the aspect of the exploration and production of hydrocarbons in Poland, the author states that the regulations seek to stimulate and ensure latitude in participating in the oil and gas business. The best example is the introduction of a tender procedure in applying for a mining usufruct and concession, which gives equal opportunities to all entities in their efforts to obtain a concession and carry out work in the field of hydrocarbon exploration and production. In addition, regulating the essence of a cooperation agreement secures the interests of not only the state but also the entities (primarily minority shareholders), providing them with guarantees regarding the principles of cooperation with the operator as well as state administration and supervision authorities. This does not change the fact that it should be aimed at eliminating the previously mentioned shortcomings and inconsistencies. One of the solutions that was very well evaluated by the author is the model of supervision over the oil and gas sector that can be found in the [1].

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