Makale Gönderilme Tarihi / Article Submission Date: 07-03-2021

Makale Kabul Tarihi / Article Acceptance Date: 28-04-2021

Araştırma Makalesi / Research Article

IJHE: CİLT / VOLUME 7, SAYI / ISSUE 15, S / P. 17 – 29.

Alternative Dispute Resolution in International Petroleum Agreements: A Critical Analysis

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Abstract

This article includes an analysis on Alternative Dispute Resolution (ADR) mechanisms available in international petroleum agreements. ADR is a formal mechanism that involves a structured process with a third-party overseer who, depending on the chosen method, may have the power to impose an outcome. This article aims to examine the different ADR mechanisms available to parties within the international agreements. This descriptive analysis is followed by critical evaluation, identifying the pitfalls and benefits of using such methods while resolving conflicts. The ADR methods are evaluated within themselves as well as being compared to the method of litigation in court. The article provides extensive details on international petroleum agreements with references being made to the petroleum industry's needs and requirements. Stemming from the findings of the critical evaluation conducted between the diverse methods of dispute resolution; the article finishes with a comprehensive discussion highlighting the most beneficial ways of dealing with disputes within the international energy sector.

Key Words: International Petroleum Agreements, Alternative Dispute Resolution, Mediation.

Introduction

In order to critically analyse the mechanisms of ADR[2], there needs to be an introduction to the significance of dispute resolution in the oil and gas industry. Understanding the culture and needs of the industry are essential in evaluating the types of ADR methods. In some situations, there is no singular ADR method that could be regarded as the most beneficial. In those cases, multi-tiered dispute resolution (Tevendale, Ambrose & Naish, 2015) may be utilised, this will be further discussed. Moreover, types of disputes which can arise will be outlined. The main types of dispute resolution methods include negotiation, mediation, expert determination and

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[2] Some may choose to refer to it as Effective Dispute Resolution.

arbitration, they are collectively referred to as ADR (Tevendale, Ambrose & Naish, 2015), Dispute Review Board could also be mentioned alongside these methods. These ADR methods will be compared to litigation in court when necessary.

This article contributes to the theoretical discussion of ADR mechanisms and clauses regarding the international petroleum agreements. It extends the legal research field of effective dispute resolution. This research aims to provide a new perspective to the dispute resolution methods by analysing them from the viewpoint of oil and gas contracts. It has the potential to contribute to the improvement of international petroleum agreements.

"Petroleum contracts determine how much a producing nation earns from its natural resources and whether a government will have the regulatory authority to enforce environmental, health, and other standards that apply to the contractors" (Radon, 2005, p. 62). Therefore, the analyses of these contracts and their ADR clauses are of importance to the legal debate.

International Petroleum Agreements

Business within the international petroleum sector tends to rely on investments in large, complex, capital-intensive projects. "Circumstances, economics, governments and parties invariably change in these international oil and gas projects, which can often lead to a dispute" (Martin, 2011, p. 332). Disputes are almost always international since the parties are almost always from different parts of the world. "A dispute can be defined as a disagreement concerning a matter of fact, law, or policy where a claim or assertion of one party is met with refusal, denial or counter-claim by another" (Alramahi, 2011, p. 78). Disputes can naturally arise within the oil and gas industry, there are always different understandings and interpretations of the contract provisions. Overall, disputes range from issues relating to the quantity and quality of the produce (*Petroleos des Portugal and Petrogal SA v BP Oil International Limited*, 1999), jurisdictional disputes (*Shell International Petroleum Co Limited v Coral Oil Co Limited*, 1999), concerns involving equipment (*Smedvig Limited v Elf Exploration UK Pic*, 1998), etc. (Connerty, 2002).

Disputes are managed in two ways: The first arises when parties incorporate a dispute resolution clause into their agreement at the time of drafting the contract and the second occurs when an actual dispute arises.[3] "Nobody likes discussing potential future disputes when making a deal.

[3] Disputes usually arise when an issue occurs which has not been discussed and agreed on in the initial agreement between the parties. Thus, the settlement of disputes or the subject matter of disputes are not always discussed in the contract beforehand.

It is a bit like discussing how you want to handle your divorce at the time you make your marriage proposal" (Martin, 2011, p. 334). However, it is very important to include dispute resolution clauses at the time when a contract is being negotiated and drafted. This is because it provides great relief to the parties since they are prepared for any disputes in advance (Gordon & Paterson, 2007). When ADR clauses are concerned; namely, ex-ante ADR arrangements are made before disputes arise and ex post ADR agreements are made after disputes arise (Shavell, 1995). There are two main mechanisms to resolve contractual disputes: informal dialogue and formal dialogue. A more formal mechanism is known as ADR (McManus, 2013).

Moving on, due to the industry culture:

> There is a need for dispute resolutions that are fast, effective and cause minimum disruption to working processes and relationships. Preference is on private and flexible dispute resolution. They require to be capable of crossing both international boundaries and business cultures. There is an incentive to not create future enemies out of the present dispute (Gordon & Paterson, 2007, p. 432).

Thus, dispute resolutions that are fast, cost-effective and flexible are chosen, where the control over the outcome is at the hands of the parties. The types of disputes within the industry include: State against State Disputes (*Libya v. Malta*, 1985)[4], Investor against State Disputes[5], Company against Company Disputes[6], and Individual against Company Disputes.[7]

Types of Dispute Resolution Methods

Negotiation, mediation, expert determination and arbitration, which are collectively referred to as ADR, will be discussed. They are regarded as alternatives to litigation for the resolution of civil disputes and the courts recognise the benefits of ADR, and if appropriate, the parties may be referred by the court to any such mechanism (McManus, 2013). "Methods of alternative dispute resolution vary from one another; they share the feature that a third-party is involved who offers an opinion or communicates information about the dispute to the disputants"

[4] These are usually relating to boundary disputes concerning oil and gas fields that cross international borders, most of which are located in maritime waters. *Continental Shelf (Libya v. Malta),* 1985 I.C.J. 13 (June 3): This case concerned a dispute on the delimitation of the continental shelf between Libya and Malta. Furthermore, for example, Lebanon and Israel have a dispute of oil located in between their territories. Both claim right over a particular area. Lebanon does not recognize Israel as a state so they refuse to interfere with them on this issue (since negotiating with them would result in recognition of Israel). Indirectly, International Oil Companies are affected by this too.

[5] These disputes relate to individual companies and the host state. They occur when a government significantly changes the terms of the original deal or expropriate an investment.

[6] Usually referred to as international commercial disputes. These can fall within two subcategories of disputes between petroleum companies.

[7] Where individuals initiate claims against companies for personal injury and bring a tort claim or when agents or consultants demand payment under their agent agreement for winning a government contract for the company.

(Shavell, 1995, p. 1). They are beneficial due to the formality, length, and complexity of them being less than those of official proceedings (Shavell, 1995).

It could be argued that ADR is the most effective and least costly way to resolve disputes or risks (Ahmed, 2021). To state further:

> ADR may engender superior incentives through greater accuracy of result or other characteristics. Suppose, for instance, that substandard performance of a contract would be correctly assessed by expert arbitrators under ADR but not by courts. Then the parties to the contract might well prefer to adopt ADR because it would induce good performance, thereby raising the willingness of the promisee to pay for the contract . . ., ADR may result in improved incentives to engage in disputes or to refrain from that. For example, it may be that the number of disputes brought under the legal process would be excessive, dissipating substantial resources of the parties without instigating mutually desirable changes in behaviour; thus, an ADR agreement that would serve to limit the number of disputes would be advantageous (Shavell, 1995, pp. 1-2).

Below the ADR methods will be evaluated with their legal advantages and disadvantages declared.

Negotiation

This is a dialogue between two or more people or parties intended to reach a beneficial outcome (Faris, 1995). This beneficial outcome can be for all of the parties involved, or just for one or some of them. Situations where a good outcome for one/some exists, the possibility of a desired result for the other/others might be excluded (Colosi, 2002). Principled negotiation is the type that is most used in petroleum disputes.

It is aimed to resolve points of difference, to gain the advantage for an individual or collective, or to craft outcomes to satisfy various interests. It is often conducted by putting forward a position and making small concessions to achieve an agreement. Pitfalls with negotiation is the fact that its effectiveness depends heavily on negotiating parties trusting each other to implement the negotiated solution (Martin, 2011). Furthermore, the agreement to negotiate has been unenforceable due to the uncertainty of it having any binding force. Nevertheless, advantages include being the least expensive form of ADR as well as potentially being the most commercially feasible solution (Martin, 2011). Moreover, parties remain in control of the process, negotiated resolutions tend to have greater durability, reduced management of time and costs, confidentiality, and negotiators impartiality (Dispute Prevention and Resolution Services, 2017).

Mediation

Mediation is a process where an impartial person is appointed by the parties to act as an intermediary; the mediator is not required to be an expert or to provide a determination on the matter. They simply act as a non-adversarial neutral person who helps the parties objectively reach a negotiated agreement. Mediation is favoured in many resolution cases. Duncan argues that mediation is extremely efficient in resolving oil and gas disputes (Duncan, 2013).

> The increase of the use of mediation would prove beneficial in lease disputes between lessors and lessees, environmental disputes, and international cross border commercial disputes through its 1) emphasis on the preservation of relationships; 2) cost-effectiveness; and 3) insertion of control in the hands of the parties (Duncan, 2013, p. 85).

She also argues that since more international disputes will be resolved using mediation, this will help the nation's economic wellbeing (Duncan, 2013).

Furthermore, in mediation, the control is given to the parties and the mediator over the unfolding of the proceedings. No mandatory procedural routine exists, making mediation an even more successful resolution method. It is also preferred by parties who would like to continue their amicable business relationships since mediation is less adversarial. Additionally, "Mediation allows the parties to craft creative solutions to their problems that the adjudicative process does not afford" (McManus, 2013, "The Benefits and Challenges," para. 2). Moreover, "mediation is faster and cheaper than arbitration and has a high success rate of settlement" (Martin, 2011, p. 337).

One could observe a shift in the industry if the example of Shell is taken into consideration. Shell has ongoing legal disputes in 90 jurisdictions and they are clearly showing a change from litigation to mediation as a result. Shell's global head of litigation claimed to see mediation as a critical component in resolving disputes. Litigation, on the other hand, is seen as ugly, costly, time-consuming and ineffective (Fennell, 2013). Even when the company wins a dispute, they essentially lose due to damage to business relationships, reputation and management time. They also argue that mediation provides confidentiality. However, this is not always the case, parties may fear that to "discuss the dispute in mediation will reveal commercially sensitive information which they could withhold in litigation, and unscrupulous disputants may use the mediation simply to fish for information without the intention of coming to an agreement" (Gordon & Paterson, 2007, p. 450).

Nevertheless, powerful companies in the industry still choose to promote Centre for Effective Dispute Resolution, since they sign a pledge (21st Century Pledge) to explore mediation first.

This approach is also taken by judges, for example, Lord Justice Briggs and Lord Justice Jackson emphasised the effectiveness of mediation in their judgments. Mike McIlwrath of GE Oil and Gas has stated that mediation saved them enormous amount of money and management time (Fennell, 2013).

Additionally, "unlike the blunter instrument of litigation, mediation of the dispute has the scope to elicit the finer details of power balance and those can be acknowledged and used to move the dispute towards a commercially viable resolution" (Gordon & Paterson, 2007, p. 449). Last but not least, the judgment in the Court of Appeal *Dunnett v Railtrack Plc* (2002), illustrates that "mediation may sometimes be able to provide a better outcome and solution than it is within the power of the courts to provide" (Alramahi, 2011, p. 84). The main advantages of mediation over litigation are the timely proceedings, decreased cost, confidentiality, privacy and flexibility in terms of the degree of control enjoyed by the parties over the process and outcome.

Apart from all the benefits;

> There are a number of reasons for mediation not being widely used in international business disputes including lack of familiarity with the process, differences in culture, language and values, and the large distances separating the parties. Finally, successful mediation requires compromise from all parties involved and some disputes simply do not lend themselves to compromise (Martin, 2011, pp. 337-338).

Furthermore, mediation is not legally binding.

Expert Determination

Expert determination allows for the appointment of an expert with particular expertise on the issue. The expert is upon agreed between the parties and is usually selected according to the nature of the dispute. The decision of an expert is not enforceable.[8] This is only effective in highly technical matters. The difficulty arises when there are matters of both fact and law being disputed. Thus, this method of ADR is not widely used in international oil contract disputes.[9]

Arbitration

This is the resolution of disputes between two or more parties through a voluntary or a contractually required hearing with determination by an impartial third-party. Arbitration[10] has

[8] Unless it is stated otherwise in the contract between the parties, to then be acceptable in court systems around the world.
[9] However, it may be seen in limited circumstances where the issue is primarily technical or commercial in nature.
[10] The choice of law, scope of the arbitration and the location of assets are issues which must be considered whilst drafting the arbitration clauses in an oil contract or at the dispute resolution process.

the advantage of recognition and enforcement of arbitral awards in foreign jurisdictions, court judgments generally do not have such a wide range of enforceability. A disadvantage is; adverse parties can make the process similar to litigation resulting in high costs and time-consuming processes. Companies can adopt a number of strategies to manage time and cost concerns in international arbitration.

Despite some of its shortcomings, it is still chosen over litigation due to:

The high level of control that can be retained by the parties: they can decide in which country the arbitration will take place, the legal seat (*the lex arbitri*), and the language to be used for the purpose of the dispute hearing. The parties will decide whether to follow an ad hoc arbitration or an institutional arbitration.[11]

Choice of the arbitrator: Parties can choose a neutral arbitrator or tribunal, or arbiters based on their specialist knowledge. Whereas in litigation, there is always concern that a court will not have the necessary expertise and experience to adequately decide on the issues at hand. The arbitral tribunal's decision will be binding on the parties and is final unless otherwise agreed by the parties that an appeal can be pursued against such decision.

Privacy and confidentiality are the other advantages to entering arbitration, not only with respect to the final award imposed, but also in relation to information generated or produced in the course of proceedings. However, if arbitration is private and litigation is public, it makes it almost impossible to challenge or to enforce an arbitral decision in court whilst preserving the confidential nature of the matter. Therefore, confidentiality could be controversial.

Enforceability: Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, arbitral awards are enforceable in most trading nations across the world. Arbitral award is more enforceable for international contracts than a court award (Alramahi, 2011).

Overall, ADR is more appropriate for relatively straightforward cases, rather than disputes which involve complex legal issues. Its use and scope very much depend on the inclusion of an appropriate clause within the terms of the original agreement. ADR is often an inappropriate solution in cases where a punitive damages award should be imposed in order to deter negligent or illegal behaviour in the future.

[11] Institutional Arbitration: International Chamber of Commerce (ICC), United Nations Commission on International Trade Law (UNCITRAL), the Stockholm Chamber of Commerce, the London Court of International Arbitration (LCIA) or the World Bank's International Centre for the Settlement of Investment Disputes (ICSID).

As ADR is conducted within private hearings, no precedents are set by the outcome. This means that the process does not contribute to the development of the law in this area or to the standards of public justice and fairness, as is the case with public court hearings and decisions.

Litigation

In the event that a dispute arises, without an agreed contractual provision on dispute resolution, it will be referred to the national courts to be resolved by litigation. The main concern for a company facing such a dispute is the prospect of the litigation taking place in the courts of a foreign country, where proceedings will be conducted in a foreign language and in line with a foreign system of laws. Also, there is concern that a foreign court may have a level of bias against a foreign company (Alramahi, 2011).

A negative aspect of the litigation process is that the parties involved have no control over the duration. Therefore, a dispute may not be resolved for a great length of time, during which the expenses involved will continue to spiral higher. Litigation is usually public, and all the proceedings and judgments will be recorded publicly which could potentially be damaging to the parties' reputation and affect their international relations and market shares.

The judgment in litigation can usually be appealed at first instance so there may not be immediate closure of the case and this would result in increased expenses. For the reasons outlined, litigation may not be a promising and preferred dispute resolution method in the oil and gas industry. However, litigation may be the only option available to parties, depending on whether the sums of money involved are considerable or if any other dispute resolution processes were unsuccessful. There have been a number of key cases where litigation has been used. For example, *Amoco (UK) Exploration Co v Teesside Gas Transportation Ltd* (2001) where litigation was the preferred choice and resulted in a House of Lords judgment overturning a decision made in favour of the respondent in the Court of Appeal (Alramahi, 2011).[12]

The Critical Analysis

It could be argued that, one should always include a dispute resolution clause into their agreement at the time of drafting the contract. Leaving the dispute resolution processes to be dealt with when an actual dispute arises is also an option but an unfavourable one. It could be

[12] The case related to the commencement date in a capacity reservation and transportation agreement. The significance of the commencement date was that the respondent would at that point become obliged to accept and redeliver the gas and make, send or pay payments at a rate of £8 million per quarter, whether it used the capacity or not.

argued that ex-ante ADR agreements made by knowledgeable parties raise their well-being and social welfare (Shavell, 1995). This has also proved to be beneficial in litigation (Wallace, 1981), for example, in *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Government of the Libyan Arab Republic* (1978)*;* plaintiff won the litigation against a 'The Organization of the Petroleum Exporting Countries' member nation due to the pre-existing provision of the arbitration clause.[13] Furthermore, there are many examples of these clauses in Petroleum agreements such as the Namibia Model Petroleum Agreement[14], Seychelles Model Petroleum Agreement[15] and Sierra Leone Model Petroleum License.[16] Thus, parties should include clear dispute resolution clauses in their international petroleum agreements. This enables them to have control over the process, to choose the most beneficial method, applicable to their situation. As observed from the previous discussions, both litigation and arbitration can end up being time-consuming and expensive, thus their effectiveness and mitigation of pitfalls essentially depend on the provisions of the contract.

Even if disputes arise and there is no pre-existing provision, the best option for the parties would be to use multi-tiered dispute resolution methods (Tolson, Glover & Ibrahim, 2019).

> The primary benefits of using a multi-tiered process are to improve efficiency and lower the cost of the dispute resolution. This acts as a filtering method where only serious and complex disputes are resolved by arbitration and less complicated disputes are addressed at a lower level, therefore saving time, energy and money. By shifting the resolution of disputes to adopting a sequence of ADR proceedings aimed at co-operation, future relationships between the parties are preserved (Alramahi, 2011, p. 85).

Last but not least, when it comes to comparing ADR methods with litigation; it could be argued that ADR methods are becoming more favourable due to the control, effective solution, confidentiality, as well as time-efficiency benefits. They provide a flexible resolution where one can choose[17] the mediator, where and when the meeting will take place, so it is private and flexible, and parties have control over the proceeding. Litigation in courts are very expensive

[13] This provided that in the event of a party's refusal to arbitrate, the other party could petition the International Court of Justice to appoint a sole arbitrator.

[14] Clause 29: Any dispute arising between the parties relating to the construction, meaning or effect of this Agreement or the rights or liabilities of the parties in terms of this Agreement shall be resolved amicably by negotiations.

[15] Clause 39: In the event of a dispute arising between the Parties concerning the interpretation or application of this Agreement, the parties to the dispute shall seek to resolve the dispute by consultation and negotiation.

[16] Clause 25.1: Any dispute or difference arising between the State on one hand and Licensee on the other in relation to or in connection with or arising out of any terms and conditions of this License shall be resolved by consultation and negotiation.

[17] Parties can choose the time and place of mediation and negotiation unlike litigation where one cannot choose the deadline set by the court.

and cause disruption to businesses. It also has an impact on a personal level which amplifies the problems (Gordon & Paterson, 2007).

> A survey conducted in 2003 among Chief Executive Officers across a range of large commercial bodies revealed significant evidence (67 percent of respondents) to the effect that commercial disputes generate personal stresses for CEOs, including sleeplessness and relationship problems. Disputes clearly have a corrosive impact upon work performance and personal reputation (Gordon & Paterson, 2007, p. 436).

Overall, ADR is preferred due to its benefits and we can observe this from *Emmott v Michael Williams & Partners Ltd* (2008) and *O'Donoghue v Enterprise Inns Plc* (2008) where the court showed support for and reluctance to intervene in the arbitral process. Additionally, Pre-Action Protocols under the CPR and The LOGIC standard contract illustrate the importance given to ADR (Alramahi, 2011). On the other hand, sometimes litigation can be the only realistic option open to the parties, for example, in jurisdiction disputes or injunctions or challenges to arbitral processes (Connerty, 2002).

Conclusion

Consequently, it could be concluded that ADR methods tend to be more beneficial if parties have trust and are willing to voluntarily compromise. A multi-tiered resolution process should be utilised where parties exhaust the ADR methods applicable to their situation in a logical order. Parties should also include dispute resolution clauses into their agreement since this enhances the ADR methods' as well as litigation's effectiveness. If ADR proves to be insufficient, and punitive damages are required to set precedents, then litigation should be deployed as a last resort. Nonetheless, parties should refrain from using it when unnecessary, due to the expenses and inflexibility of it.

This article sheds light on many legal issues related to Alternative Dispute Resolution, especially those methods utilised in international petroleum agreements. The main focus is on critically analysing each method's effectiveness, as well as inadequacies. The article provides for a thorough examination of the oil and gas industry's needs in the legal sphere. This analysis is essential for the development of law within the petroleum sector since oil and gas project agreements are likely to be key drivers of the world economy for the foreseeable future.

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