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ALTERNATIVE DISPUTE RESOLUTION IN THE HYDROCARBON SECTOR

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ABSTRACT

This study provides a comprehensive and thorough review of the essentials needed to deal with the disputes encountered in the international hydrocarbon sector.

It begins with a succinct definition of hydrocarbons, explaining how their exploration forms a vast international industry, the oil and gas or petroleum industry. The study then analyzes the characteristics and particularities of the oil and gas industry, which render it not only one of the most vibrant and dynamic industries in the world, but also one of the most dispute-intensive. It explains the reasons why this sector has more disputes than any other business sector and discusses how parties can effectively manage that risk. The study covers the several types of oil and gas contracts, necessary for the comprehension of the petroleum industry's particularities and as regards the legal framework governing these contracts, a section of the study is dedicated to the customary law comprising legal rules adapted to the industry's nature and specificities, deriving from arbitral awards and oilfield practices and usages - 'lex petrolea'. The study also covers the kinds of disputes addressed in the international petroleum industry, the types of dispute resolution mechanisms available and examines the reasons why parties in the industry avoid litigation by assessing its disadvantages. It then indicates the Alternative Dispute Resolution (ADR) techniques most preferably used by the participants in the industry, along with a thorough analysis of their characteristics and respective advantages. The analysis of these ADR methods continues through a specific reference to the Greek Model Lease Agreement for the exploration and exploitation of hydrocarbons in Greece, which provides for multi-tiered dispute resolution clauses, including three different dispute resolution mechanisms that must be exhausted at distinct and escalating stages.

The study concludes by highlighting the importance of how to properly draft dispute resolution clauses and what to consider thereof, that the determination of the most appropriate dispute resolution clause should always be made on a case by case basis and finally, by highlighting the advantages of the current trend of the industry- the aforementioned multi-tiered dispute resolution processes, which indicate that arbitration and litigation are used as a last resort after exhausting more informal ADR methods.

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1. INTRODUCTION

1.1. Hydrocarbons:

Oil, i.e. petroleum or crude oil and natural gas (gas) are classified as fossils fuels consisting primarily of hydrocarbons with the addition of certain other substances. Generally the term 'petroleum' is used to mean both oil and gas, because both contain hydrocarbon compounds and are often found in the same location.[1]

The term ‘hydrocarbon’ refers to the chemical makeup of oil and gas and comprises a compound made up of carbon and hydrogen formed by the compression of organic matter over hundreds of millions of years. Hydrocarbons combined in various ways can form solids, such as the asphalt used to pave roads, liquids such as conventional liquid petroleum, and gases such as natural gas, i.e. a mixture of hydrocarbons in a gaseous state at normal temperature and pressure.[2]

Therefore, oil and gas are also referred to as “hydrocarbons” and constitute valuable resources hidden in the subsurface of the Earth. Hydrocarbon exploration by petroleum geologists and geophysicists under the science of petroleum geology, forms a vast industry extremely important from an economic, geopolitical and several other perspectives.

1.2. International Oil and Gas industry

The oil and gas industry is one of the most vibrant and dynamic industries in the world and encompasses a range of different activities and processes, which jointly contribute to the transformation of underlying petroleum resources into useable end-products valued by industrial and private customers. These different activities are inherently linked with each other (conceptually, contractually and/or physically), and

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[1] T. Boykett/ M. Peirano/ S. Boria/ H. Kelley/ E. Schimana, /A. Dekrout./ R.OReilly, *Oil Contracts, How to Read and Understand a Petroleum Contract,* (Austria , Times Up Press, 1.1 ed., 2012)

[2] A. J. Fagan, *An introduction to the petroleum industry, (a Training Manual),* (Government of Newfoundland and Labrador, Department of Mines and Energy, November 1991)

these linkages might occur within or across individual firms, and within or across national boundaries.[3]

Oil and gas is one of the most dispute-intensive industries in the world, with large, complex and capital-intensive projects that have long life spans, myriads of parties involved and complex contractual agreements of extensive duration.[4] Due to all these characteristics of the petroleum industry, along with the fact that circumstances, economics, governments and parties invariably change in these international oil and gas projects, the oil and gas industry is no stranger to disputes. A dispute can be defined as a disagreement concerning a matter of law, fact, or policy where a claim or assertion of one party is met with refusal, denial or counter-claim by another.[5]

A dispute is considered to be international when it involves parties in different parts of the world. The oil and gas industry is an international market, as aforementioned, with the parties involved potentially having assets scattered in several different countries and has been familiar with disputes from its very beginning ever since the first drilled oil well.[6]

Most of the contracts concerning the oil and gas industry, are long term in their nature, involving multiple stakeholders, therefore they can be particularly complex, both from a technical and legal aspect. Petroleum contractual disputes can cost oil and gas companies millions of pounds, regarding their profit but also in terms of both the damage incurred to reputation and the potential for ruining future contractual relationships. Both these consequences are likely to lead to more severe, sometimes intangible, impacts which may constitute obstacles difficult to overcome.[7]

Due to the collegiate character of the oil and gas industry, long-lasting relationships are favoured and solutions are sought with minimum disruption to existing relationships and projects. Therefore, disputing parties have no desire to halt or stop their activities, and once the dispute is resolved they wish to continue their commercial relationships.

Disputes usually arise when an issue occurs which has not been prepared for and agreed on in the principal agreement between the parties, such as a delay in the

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[3] Christian O. H. Wolf, "The Petroleum Sector Value Chain", University of Cambridge - Judge Business School, (2009), http:// papers.ssrn.com/ (accessed November 13, 2013)

[4] A. T. Martin, "Dispute resolution in the international energy sector: an overview", Journal of World Energy Law and Business, (2011) , http://jwelb.oxfordjournals.org, (accessed October 10, 2013)

[5] M.Alramahi, "Dispute Resolution in Oil and Gas Contracts" , I.E.L.R, 3 (2011) 78-85, http:// papers.ssrn.com/ (accessed September 30, 2013)

[6] Ibid

[7] Ibid

delivery of equipment, maritime boundary issues, a problem with an indigenous community or an unexpected pipeline incident, such as the recent British Petroleum (BP) catastrophe.[8] Further type of disputes arising from oil and gas contracts, include among others, disputes among operators, non-operators and joint ventures in property acquisition, exploration developments, supply and marketing arrangements and construction projects. The potential for disputes is also heightened greatly by the decreasing oil reserves in the shallow coastal waters and the need for the industry to seek previously untapped resources further afield, for example in the Arctic.[9]

The international oil and gas sector is also a major global investor and makes up the largest portfolio of international commercial and state investment disputes in the world. Disputes are therefore a significant risk in the international oil and gas industry. The risk is not whether a dispute will arise, but rather in how well a party will be able to manage that dispute to get a satisfactory result.[10] Since it is impractical for the petroleum industry players to discontinue any business activities whilst seeking settlement over disputes, they consider it as critical to solve disputes in a swift and effective manner along with avoiding public attention which would be disadvantageous to the ongoing businesses. Consequently, parties need to continually manage that risk from the inception of the deal through to the point when a dispute arises and is eventually resolved, by deciding the most suitable dispute resolution scheme.

The tendency among the petroleum industry is to resolve disputes through various forms of Alternative Dispute Resolution (ADR), thus avoiding litigation, for several reasons that will be underlined below. Before evaluating the various types of ADR techniques more frequently applied in the hydrocarbon industry (three of which will be assessed through the provisions of the Greek Model Lease Agreement for the exploration and exploitation of hydrocarbons in Greece), it is necessary to go through an analysis of the several types of petroleum contracts, the most frequent types of oil and gas disputes, as well as the new legal regime-*lex petrolea*, applied as a customary law in the industry, which itself has evolved through the most preferable ADR method in the industry, arbitration.

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[8] The "Deepwater" Horizon oil spill in the Gulf of Mexico on 20-5-2011

[9] M. Alramahi, (supra note 5)

[10] A. T. Martin, (supra note 4)

2. OIL AND GAS CONTRACTS

Hydrocarbon business activities are divided into two main sectors, i.e upstream activities, which comprise of exploration and production and conclude with sales transactions (crude oil or gas) and downstream activities, which include refining and petrochemical production. It is also possible to identify an intermediate phase (midstream) referring to crude oil and gas transportation, that takes place through pipelines or in ships. These activities are all legally framed by contracts which are usually international, due to the location of the resources (hydrocarbons on the one hand and infrastructure and economic and human capital on the other) and the global nature of the demand.[11]

Countries rich in natural resources are interested in using their resources to obtain funds for their social and economic development. In order to achieve this development, many governments enter into contracts with foreign international oil (IOCs) companies to develop and sell their oil or gas. Choosing and negotiating the right contract is vital importance to a government's efforts to reap the benefits of its natural resources.[12]

Governments have three options regarding the development of their natural resources: They can create state companies for exploration, development, and production, as in Saudi Arabia, Mexico, Venezuela, Iran, and Oman. They can invite private investors to develop the natural resources, as in the United Kingdom, United States, Canada and Russia. Finally, they can use a combination of these two systems, as in Indonesia, Nigeria, Kazakhstan and Azerbaijan.[13]

It is estimated by experts that for a large natural resource extraction project, numerous different contracts will be required to build, operate, and finance it - all of which could fall under the broad category of 'petroleum contract'. There may also be myriad parties involved, including:

- governments and their national oil companies (NOCs)

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[11] Carmen Otero García-Castrillón, "Reflections on the law applicable to international oil contracts", Journal of World Energy Law and Business, Vol. 6, No. 2 (2013), http://jwelb.oxfordjournals.org, (accessed October 2, 2013)

[12] J. Radon, "The ABCs of Petroleum Contracts: License-Concession Agreements, Joint Ventures, and Production-sharing Agreements", Chapter-3-reading-material1 (2011), http://openoil.net, (accessed October 2, 2013)

[13] Ibid

- international oil companies (IOCs)
- private banks and public lenders
- engineering firms, drilling companies & rig operators
- transportation, refining and trading companies, and many more[14]

These contacts tend to have a relatively prolonged duration due to the nature of the activity and the level of investment, from at least five or six years for exploration and between 25 and 30 years for exploitation. These deadlines may usually be extended. The type of contract as well as the way it is entered into and finally executed, are determined by the duration, along with the diverse public interests of the contracting State.[15]

The most important among these contracts is the one between the government and the IOC. This contract is most commonly referred to by the industry as a *'Host Government Contract'* because it is a contract between a Government and an oil company or companies (that are being hosted). It is through this contract that the host government legally grants rights to oil companies to conduct 'petroleum operations'. This contract appears in countries throughout the world under several names such as Petroleum Contract Exploration & Producting Agreement (E&P), Exploration & Exploitation Contract, Lease Agreements, Concession, License Agreement, Petroleum Sharing Agreement, Production Sharing Agreement (PSA).[16]

There are three principal types of such Host Government contracts, which can be generally characterized as: *Concession* (old and modern type of concessions)*,* where the contractor owns the oil in the ground, *Production Sharing Agreement, where* he contractor owns a share of oil once it is out the ground and *Service Contract,* where the contractor receives a fee for getting the oil[17] and in particular:

2.1. Concessions

Concessions are the "original" or oldest form of petroleum contract. Concession agreements have evolved considerably since their introduction in the early 1900s as one-sided contracts when many of the resource-rich nations of today were

[14] Ibid
[15] Carmen Otero García-Castrillón (supra note 11) p. 133
[16] T. Boykett et al. (supra note 1), p 21-25
[17] Ibid

dependencies, colonies, or protectorates of other states or empires. The modern form of such agreements often grants an oil company exclusive rights to explore, develop, sell, and export oil or minerals extracted from a specified area for a fixed period of time. Companies compete by offering bids, often coupled with signing bonuses, for the license to such rights. This type of agreement is quite common throughout the world and is used in nations as diverse as Kuwait, Sudan, Angola, and Ecuador. The host country benefits from this form of contract through taxes and royalties, though a state may also hold shares in the concession through its NOC in a Joint Venture with the contractor.[18]

2.2. Production Sharing Agreements (PSAs) and Service contracts

Production Sharing Agreements or PSAs and Service Contracts differ from concessions, in that they do not give an ownership right to oil in the ground. This means that the state, being the owner of the resource in the ground, must contract a company to explore on its behalf. Indonesia can be credited with the innovation of Production Sharing Contracts in 1966. The government refused to grant new concessions and introduced the "Indonesian formula," now widely known as the PSA, in which the state would retain ownership of the resources and negotiate a profit-sharing system. The PSA recognizes that the ownership of the natural resources rests in the state but at the same time permits foreign corporations to manage and operate the development of the oil field.[19] This innovation came about at the same time as many petroleum producing countries were gaining their independence and was part of the first wave of the so called resource nationalism.[20]

Under a *Service Contract*, there is no transfer of title at all. Unlike a PSA, where the oil company is entitled to a share of any petroleum produced, under a Service Contract, the oil company is just paid a fee.[21]

[18] J. Radon, (supra note 12)
[19] Ibid
[20] T. Boykett et. al.(supra note 1)
[21] Ibid

2.3. Joint Ventures –Other combinations

There is another type of agreement, often considered as a fourth type of petroleum contracts, the '*Joint Venture'*. Under the Joint Venture, the state through a national State-owned company, enters into a partnership and works together with an international oil company or companies. The venture may involve creating a jointly controlled project company. In this arrangement, the joint venture itself is awarded rights to explore, develop, produce and sell oil and gas. However, it is quite rare to find any contract that fits entirely into one of the aforementioned descriptions, as oil and gas contract types often blend into one another. [22]

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[22] Ibid

3. THE THEORY BEHIND THE NEW LEGAL REGIME - LEX PETROLEA

Transnational oil and gas contracts share specific unique particularities that cannot be found in any other industry.

One of the main particularities of transnational petroleum contracts is that they are long-term contracts. "*Petroleum agreements are considered a prototype of long-term agreements*".[23] They respond to values that differ significantly than those set out by the traditional exchange contract model that the national and international legal orders have to offer. Traditional contract law, both in civil and common law systems, is based on the contract model of the 18th century, i.e. a short-term contract designed to allow the exchanges of goods and services and to some extend serve the needs of short-term transactions and thus not designed to deal with the perverse effects of time on contractual relations.[24]

Parties enter long term contracts not only for a particular business but also to create or preserve a relationship that will allow them to benefit from, and preserve over time, current business transactions at the same time it allows to develop new ones.[25] The different players in the oil and gas industry "*value maintaining a long-term relationship built on cooperation*" particularly with oil producers.[26]

Therefore, some scholars believe that long-term petroleum contracts create a contractual legal order of their own autonomous from national and international legal orders which needs a transnational frame of reference to serve as a fundamental legal order that effectively serves the needs and interests of the oil and gas industry, not only by eliminating the legal obstacles that hinder oil and gas exploration and production, but also by creating and imposing new rules that guarantee the survival and development of the transnational petroleum industry.[27] Consequently, the transnational petroleum community has witnessed the progressive emergence of a new transnational legal order, *lex petrolea*, i.e. a set of new rules of a private origin,

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[23] A.Z. El Chiati, *Protection of Investments in the Context of Petroleum Agreements*, in *Recueil des Cours, Académie de droit international de la Haye*, (Martinus Nijhoff Publishers, Tome 204, p. 43, n° 23, 1988)

[24] A.De Jesús O., "The Prodigious Story of the Lex Petrolea and the Rhinoceros. Philosophical Aspects of the Transnational Legal Order of the Petroleum Society", *TPLI Series on Transnational Petroleum Law*, Vol. 1, N° 1 (2012)

[25] Ibid

[26] C. Duval/ H. Le Leuch/A. Pertuzzio/ J. WEAVER, *International Petroleum Exploration and Exploitation Agreements: Legal, Economics & Policy Aspects* (Barrows Company, New York, Second Edition, 2009)

[27] A. De Jesús O. (supra note 24)

specifically designed to govern petroleum contracts. These new rules, which in practice compete with traditional state rules, are not only governing the relations of the transnational petroleum society but are often enforced by arbitral tribunals. They are the ones that better satisfy the needs and interests of the ever changing transnational petroleum industry and they aspire to (in fact they are being treated as rules of law) be as valid and binding as traditional state rules. [28]

3.1. Lex Petrolea

As it was aforementioned, there is a body of literature arguing for the existence of a specific regime, 'Lex Petrolea'. This regime has developed through international and national dispute settlement in the energy sector but also through governments' petroleum legislation, specific Host Government Contracts as analysed above, and the petroleum industry's business practices visible in its model contracts. [29]

When most practitioners refer to lex petrolea, they call to mind the Kuwait v Aminoil case from 1982, which concluded that the international petroleum industry in its disputes had "generated a customary rule valid for the oil industry- a lex petrolea that was in some sort a particular branch of a general universal 'lex mercatoria'[30] or Doak Bishop's 1998 article which concluded, after a thorough examination of 25 years of arbitral awards, that the precedential value of those awards had 'not yet created a mature set of legal regulations, but it had developed the beginnings of a lex petrolea that serves to instruct, and in a certain sense even regulate – within broadly-defined boundaries – the international petroleum industry'.[31]

Moreover, the more recent article of Thomas C.C. Childs'[32] on the subject summarizes and classifies the key substantive rulings contained in all arbitral awards published since 1998 that relate to the international oil and gas exploration and

[28] Ibid
[29] K.Talus/ S.Looper/ S. Otillar, "Lex Petrolea and the internationalization of petroleum agreements: focus on Host Government Contracts", Journal of World Energy Law and Business, Vol. 5, No. 3 (2012), http://jwelb.oxfordjournals.org, (accessed October 11, 2013)
[30] Government of the State of Kuwait v American Independent Oil Co (AMINOIL), Award of 24 May 1982, (1982) 21 International Legal Materials (ILM) 976.
[31] R. Doak Bishop, *International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea* (XXIII YEARBOOK COMM. ARB'N 1131, 1998)
[32] T.C.C. Childs, "Update on Lex Petrolea: The Continuing Development of Customary Law Relating to International Oil and Gas Exploration and Production", Journal of World Energy Law and Business, vol.4 no3 (2011), http://jwelb.oxfordjournals.org, (accessed October 20, 2013)
p 214–259

production industry, serving as an update of Doak Bishop's groundbreaking 1998 article. Both the aforementioned articles primarily relied on a number of published arbitral awards from state investment disputes, along with a couple of commercial arbitration awards, to draw their conclusions on the meaning of 'lex petrolea' and their underlying thesis is that the published awards relating to the international oil and gas exploration and production industry have created a 'lex petrolea' or customary law comprising legal rules adapted to the industry's nature and specificities.[33] Unlike the courts, the world of international arbitration is not bound by precedent which means that decisions of arbitral tribunals are not binding on other tribunals. However, in practice, arbitrators make their decisions in context and not in a vacuum. Counsel use precedent in arguing their cases and arbitrators refer to precedent in writing their awards. The practical result is that precedent is relied on in international arbitration and a lex petrolea has developed accordingly. [34]

Therefore, in some respects, lex petrolea reflects the common law of the international petroleum industry. Much as United States common law came to inform business contracts before being incorporated into the Uniform Commercial Code and adopted by most State legislatures to regulate business transactions,[35] many calls have been made for a more formalized arbitration process to build a lex petrolea to govern cross-boundary petroleum transactions.[36]

Unfortunately, given the confidential nature of international arbitration and the scarcity thereof of such published awards, along with the unwillingness of some oil-exporting countries to recognize internationally recognized arbitral boards, international commercial arbitration awards are often of little help in establishing the regime of a lex petrolea. As a result, the determination of the lex perolea of the international oil and gas agreements and the disputes arising therefrom is primarily found in the oil and gas industry's business practices which are recorded in the model contracts, both model contracts used between IOCs and 'model Host Government Contracts' , the guidance notes, commentary and research arising from such models. The manner in which the industry develops its model contracts is the most thorough,

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[33] Ibid

[34] T. Martin, "Lex Petrolea in the International Oil and Gas Industry", in R. KING, Dispute Resolution in the Energy Sector: A Practitioner's Handbook (Globe Law and Business 2012)

[35] K. Talus et al. (supra note 29)

[36] See, eg, LE Cuervo, ''OPEC From Myth to Reality' (2008) 30 Houston Journal of International Law 433, 535 ('Advancing the construction of a true lex petrolea could only contribute to international investment and cooperation')

documented and peer-reviewed process for international oil and gas agreements and thus the most credible source of lex petrolea for such agreements.[37] Notwithstanding the existence or not of a Lex Petrolea, certain international best practices are increasingly visible in international petroleum contracts regardless of the transaction location[38] (best oilfield practices).

As already mentioned, lex petrolea is most often established from decisions arising from disputes within the international oil and gas sector, as this is where the contracts, legislation and treaties that affect the petroleum sector are tested and interpreted.

To conclude with, lex petrolea covers a wide area of international law, given the size and significance of the oil and gas industry. It can be viewed either as the application of international law to the hydrocarbon sector or as a specific legal regime that has evolved in order to meet the particular needs of the international oil and gas sector or as both. The growing development of lex petrolea in areas such as boundary disputes, human rights and environmental claims is more akin to the former, i.e. the application of international law to the oil and gas sector, whereas the areas of state investment disputes and international commercial disputes are more the latter, i.e. a customary law of the international oil and gas sector that has been adapted to the industry's nature and specificities. Regardless of the adopted view, lex petrolea has significantly affected a great deal of international public and private law as we know it today and as it directly impacts on worldwide oil and gas disputes, it subsequently affects the way companies and governments conduct their oil and gas operations.[39]

[37] A. T. Martin (supra note 4)
[38] K. Talus et al. (supra note 29)
[39] A. T. Martin (supra note 4)

4. TYPES OF OIL & GAS DISPUTES

Disputes in the Industry can range from maritime boundary disputes between States through oil and gas trading contract disputes to offshore construction and pipeline disputes. There are essentially four types of disputes found in the petroleum industry, specifically:

4.1. State versus State disputes

These are primarily boundary disputes concerning oil and gas fields that cross international borders and most of them are located in maritime waters. Strictly speaking, they only involve governments since only they are able to claim sovereign title and resolve boundaries with their neighbouring states. Nevertheless, oil and gas companies get indirectly involved in such disputes when they are granted concessions that straddle disputed boundary lines. IOCs are sometimes asked by developing nations to fund the dispute costs, and provide data and legal expertise to aid in resolving such boundary dispute. IOCs therefore need to be familiar with these disputes in order to manage them properly when they find themselves involved in one.[40]

4.2. Company versus State disputes

These are often called investor–state or state investment disputes. They occur when governments significantly change the terms of the original deal or nationalize or expropriate an investment. The investor (in this case, an IOC or a consortium of IOCs) can base its claim on its investment contract (eg a production sharing contract (PSC) or risk service agreement) or an investment treaty, or possibly both. Most treaty claims are made under bilateral investment treaties (BITs), negotiated and ratified by two sovereign states. There are currently more than 2,500 BITs involving approximately 180 countries in existence throughout the world. There is one multilateral investment treaty of significance to the oil and gas industry, the Energy

[40] Ibid, p.3

Charter Treaty. Such disputes are not particularly common with international oil companies. But when they occur, they involve large sums of money and therefore have a significant impact on the company. IOCs should therefore seek qualified legal advice on how to structure their investments in the most favourable manner and draft the dispute resolution clauses in their host government contracts.[41]

4.3. Company versus company disputes

These are usually called international commercial disputes. There are two subcategories of disputes occurring between energy companies. The first subcategory is amongst joint venture participants in contracts such as:

. Joint Operating Agreements

. Unitization Agreements

. Farmout Agreements

. Area of Mutual Interest Agreements

. Study and Bid Agreements

. Sale and Purchase Agreements

. Confidentiality Agreements.

The second subcategory of disputes is between operators and service contractors for the following kinds of agreements:

. Drilling and Well Service Agreements

. Seismic Contracts

. Construction Contracts

. Equipment and Facilities Contracts

. Transportation and Processing Contracts.

These disputes make up the majority of disputes in which oil and gas companies more frequently get involved in. They run the full gamut of size, complexity and financial significance.[42]

[41] Ibid, p.3-4
[42] Ibid, p.4

4.4. Individual versus company disputes

Finally, a number of situations exist where individuals initiate claims against oil and gas companies. The first is when an individual suffers a personal injury and begins a tort claim against a company. The second group of claims by individuals arise when promoters of oil and gas deals allege they have an interest in a host government contract and the accompanying joint operating agreement, sometimes in the context of a claim of tortious interference by a third party. The final group of claims regards agents or consultants who demand payment under their agent agreements for winning a government contract for a company. A series of arbitrations have taken place over the last 50 years where companies have refused to pay their agent based upon corruption allegations after securing the host government contract[43].

[43] Ibid, p.5

5. DISPUTE RESOLUTION METHODS

Since the oil and gas industry constitutes one of the most dispute-intensive industries in the world, it becomes increasingly important to have clear methods of dispute resolution which detail the choice of forum and the choice of law.[44] It is more beneficial to focus on drafting efficient dispute resolution techniques to manage the discord that appears to be an inseparable part of the petroleum industry relationships.[45]

Players in the petroleum industry consider critical the resolution of disputes in a swift and effective manner along with avoiding public attention which would be disadvantageous to the ongoing businesses. Consequently, they must decide the most suitable scheme and at the same time, still able to maintain the ongoing relationship.

As the oil and gas industry is a heavily regulated industry, it is often necessary to have decisions from the court on a point of law, or protective or injunctive remedies. Thus when a dispute arises, litigation procedure may be unavoidable, at least for the aspect of the dispute for which an order is necessary. Historically, litigation has been the medium of choice to settle disputes based on the value of money involved and the assumption that a court judgment would give certainty. However, for the reasons outlined below, litigation may not be the most suitable method to serve the needs of the oil and gas industry, therefore the tendency among the industry is to resolve the disputes at hand outside the court through various forms of ADR (alternative dispute resolution).[46]

ADR is generally defined as the use of a neutral third party -with no stake in the outcome of the dispute- to facilitate the resolution of disputes outside of a formal court of law. [47] This broad definition includes a wide range of procedures, which can be used separately or in various combinations. The principal distinguishing factor among the various ADR procedures is whether the neutral third party has the power to impose a solution on the disputants or merely assists the disputants in arriving at their own solution. Procedures, in which solutions are imposed, such as arbitration, are

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[44] M.Alramahi, (supra note 5)

[45] L.W. Moore/ D. E. Pierce, "A Structural Model for Arbitrating Disputes Under the Oil and Gas Lease", *Natural Resources Journal*, Vol. 37 (1997)

[46] M.Alramahi, (supra note 5)

[47] K. K. Kovach, *ADR - Does It Work?* (South Texas College of Law, Advance Civil Litigation Inst, 1989)

called adjudicative or decisional procedures. Procedures in which the parties, assisted by the neutral third party, work out their own solutions, such as mediation, are called consensual or non-decisional procedures. There are also certain procedures which contain both consensual and adjudicative characteristics in varying combinations.[48]

Before evaluating the various types of alternative dispute resolution techniques more frequently used in the hydrocarbon industry, it is useful to mention some reasons against the adoption of litigious proceedings by the industry players.

5.1. Litigation

Litigation may not be a promising route to provide a clear jurisdictional path for resolving disputes in the oil and gas industry for the reasons outlined below:

Time consuming process

Courts are slow in arriving at decisions in disputes brought before them.[49] Litigation may even lead to temporary stoppage of work for years. Since the oil and gas industry involves huge investment, each day with no production as a result of a dispute may result in losses of millions of dollars.[50] Furthermore, the parties in litigation have no control over the timeline of the process, thus a dispute may not be resolved for a great length of time during which the expenses involved will continue to spiral higher.[51] On the contrary ADR offers a faster means of resolving disputes.[52]

Xenofobia - Neutrality concerns

Due to the international nature of the oil and gas industry, contracting parties are usually domiciled in different countries where they also usually have most, if not all, their assets and property.[53] 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 according to a foreign law system. Contracting parties do not trust the competence or independence of the judges in these countries, because there is always a worry that a foreign court may have a

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[48] J. Shade, "The oil & gas lease and ADR: A marriage made in heaven waiting to happen", *The University of Tulsa, Tulsa Law Journal*, 30 *Tulsa* L.J. 599 (1995)

[49] P. Roberts, *Gas Sales and Gas Transportation Agreements Principle and Practice* (Sweet and Maxwell, London, 2004) p 313

[50] M Ross, 'Dispute Management and Resolution' *in Gordon and Paterson (eds), Oil and Gas Law-Current Practice and Emerging Trends*, Dundee University Press (2007)

[51] M.Alramahi, (supra note 5)

[52] P. Roberts (supra note 49) p317

[53] M.Alramahi, (supra note 5)

level of xenophobia against a foreign company.[54] Under ADR, contracting parties can chose a neutral ADR institution in a neutral country.

Rigidity

The particularities and the peculiar needs of the petroleum industry may not be met, in certain circumstances, by the rigid procedures the court follows. [55] For instance, where a key witness to an oil dispute is abroad, the courts (with few exceptions) will have to hold the case until the witness is able to attend. On the contrary ADR being more flexible can receive his testimony by correspondence.

Lack of expertise

The parties in litigation have no control over the appointment of the judge, therefore they will suffer uncertainty and worry that the judge and court involved may lack the necessary expertise to deal with the nature of the dispute and time may be wasted in conveying the relevant knowledge or by referring the matter to third party for an expert opinion.[56] On the other hand, the parties to a dispute submitted for ADR can select a facilitator with particular technical or other expertise in the subject matter of the dispute who can deal efficiently with the particularities of the dispute.[57]

Lack of confidentiality

Litigation is typically conducted in public and proceedings and judgments are kept in public records. Depending on the nature of the dispute, this could be potentially damaging to the company's reputation and affect their investor relations and market shares. Such publicity would even allow potential competitors an insight into the company's contract and perhaps give them a competitive edge in future bids.[58] On the other hand, ADR methods are typically confidential.

Lack of finality

In litigation, the Judgment of the court is generally (with limited exceptions) subject to appeal, therefore there may not be immediate closure for a dispute with consequent greater expense, whereas the decisions rendered by the facilitators under an ADR method are usually final.

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[54] Ibid
[55] P. Roberts (supra note 49) p317
[56] M.Alramahi, (supra note 5)
[57] P. Roberts (supra note 49) p318
[58] M.Alramahi, (supra note 5)

Cost

Litigation is generally more expensive than alternative dispute resolution process. However, the term ‘general’ is used due to the fact that arbitration, in particular, may, at certain circumstances, cost much more than litigation.

Enforceability: In terms of enforcing a court judgment in foreign jurisdictions, this option may not be suitable unless bilateral recognition and enforcement treaties exist between the parties' countries of dispute. For instance, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) provides an extensive enforcement regime for arbitral awards. Most industrialized nations are parties to the New York Convention (it has been ratified by 142 of the 192 countries which are members of the United Nations, although it should be noted that states with significant oil and gas resources have not ratified the New York Convention, including Angola, Iraq, Libya and Sierra Leone). No real equivalent for enforcement of court judgments exists.[59]

Maintenance of relationships: *Walde* notes that any litigation makes it much more difficult to continue a relationship thereafter due to the fact that court processes are adversarial in nature and breed mutual antagonism.[60] The participants in the petroleum industry are repeat players and it is in their interest to preserve their relationships.[61] Such maintenance can only be accomplished through ADR processes.[62]

5.2. Alternative Dispute Resolution procedures

There are several ADR Procedures, which are conventionally applied in the oil and gas industry and include inter alia negotiation, mediation, technical advisory committee, expert determination and arbitration:

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[59] Ashurst LLP, “Governing law and dispute resolution clauses in energy contracts” (2011), http://www.ashurst.com (accessed November 1,2013)

[60] T.W. Walde “Mediation/ADR in Oil, Gas and Energy Transactions: Superior to Arbitration/Litigation from a Commercial and Management Perspective” (2003), http://www.ogel.org, (accessed November 4, 2013)

[61] M. Ross (supra note 50)

[62] H. Brown/A. Marriot, *ADR Principles and Practice* (London, 2nd edn, Sweet and Maxwell, 1999)

5.2.1. Negotiation

Goldberg, Sander, and Rogers in *Dispute Resolution: Negotiation, Mediation, and Other Processes (1992)* define negotiation as "communication for the purpose of persuasion".[63]

Negotiation is a non-decisional process, adversarial in nature, in which parties to a dispute discuss possible outcomes directly with each other. Parties exchange demands and proposals, make arguments, and continue the discussion until a solution is reached, or an impasse declared.

An agreement may or may not contain a negotiation clause and negotiation between the parties at the time of a dispute usually happens as a matter of course. It can be formalized as part of a multi-step dispute resolution process. If so, the agreement needs to set a clear time frame when each step is finished. Otherwise, failure to complete one step can be used as an obstacle to get to a binding process. It is the least expensive resolution method and potentially the most commercially viable. However, negotiation requires the full co-operation of the parties and a great deal of objectivity and detachment in the parties' behavior in order to avoid negative emotions and entrenched views that usually get in the way of a settlement. Therefore, mediation should not be the only dispute resolution method relied upon since it may result in no resolution. [64]

5.2.2. Mediation

Mediation is also a non-decisional process that employs a neutral/impartial person to facilitate negotiation between the parties to a dispute in an effort to reach a mutually accepted resolution through a negotiated settlement. This person is called a mediator.

Mediation is a process close in its premises to negotiation: "mediation is an assisted and facilitated negotiation carried out by a third party". [65] Parties can employ

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[63] S.B. Goldberg/F. E. A. Sander/ N. H. Rodgers, *Dispute Resolution: Negotiation, Mediation, and other Processes* (Boston, Toronto and London, 2nd edn, Little, Brown & Co, 1992)
[64] A. T. Martin (supra note 4)
[65] Goldberg at al., 1992 (supra note 63)

mediation as a result of a contract provision, by private agreement made when a dispute arises, or as part of a court-annexed program that diverts cases to mediation.[66]

The mediator should have no direct interest in the conflict and its outcome, and has no power to render a decision. The mediator has control over the process, but not over its outcome. Power is vested in the parties, who are the architects of the solution and have control over the outcome. The mediator's role is to listen to the evidence, help the parties understand each other's viewpoint regarding the controversy, and then facilitate the negotiation of a voluntary resolution to the case. In general the mediator's role is to steer the process away from negative outcomes and possible breakdown towards joint gains.[67]

One of the advantages of mediation is that it helps the disputing parties preserve their ongoing relations after their dispute is managed, since the agreement – settlement is by consent and none of the parties should have reason to feel as the loser of the case. Mediation creates a foundation for resuming the relation after the particular issue has been resolved, it may therefore be very useful for petroleum disputes, where the maintenance of the ongoing long—term relationships is of vital importance. There are other additional advantages of mediation, such as its flexibility - it can be adapted to meet the needs of the parties during the process and in formulating a solution- its informality, and confidentiality.[68]

Furthermore, mediation is faster and cheaper than arbitration [69] and has a high success rate of settlement.[70]

Mediation can cost less than 5 per cent of the cost of an arbitration dealing with a similar dispute, take less than 15 per cent of the time of an arbitration and have a success rate in the 75–85 per cent range. However, despite these obvious advantages, it is still not frequently used in international disputes for a number of reasons including lack of familiarity with the process, differences in culture, language and values, and the large distances separating the parties.[71] Furthermore, successful mediation requires compromise from all the parties involved and some disputes

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[66] The ABCs of ADR*:* "A Dispute Resolution Glossary", http://www.ilr.cornell.edu (accessed at November 18, 2013)

[67] "Mediation in Oil and Gas Law Disputes", http://www.lexisnexis.com/ (accessed November 25, 2013)

[68] Ibid

[69] A. Timothy Martin, "International mediation: an evolving market' *in A Rovine (ed) Contemporary Issues in International Arbitration and Mediation*, The Fordham Papers (2010)

[70] "The Fourth Mediation Audit: A Survey of Commercial Mediator Attitudes and Experience"*, Centre for Effective Dispute Resolution* (CEDR), London *(2010)*

[71] A. T. Martin (supra note 4)

simply do not lend themselves to compromise.[72] Finally, unlike other forms of ADR, mediation is not a legally binding process and its results only become binding with a signed settlement agreement, thus it should be considered as an adjunct and not as a replacement to a binding process, such as international arbitration.[73]

As regards the rest of the most frequently used ADR methods in the hydrocarbon sector, i.e. the technical advisory committee, expert determination and arbitration, they will be assessed specifically through the parallel analysis of the dispute resolution clauses of the Greek Model Lease Agreement for the exploration and exploitation of hydrocarbons in Greece,[74] which provide for all three of them.

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[72] Ibid p.7

[73] Ibid p.7

[74] Draft Model Lease Agreement, Greek Ministry of Environment, Energy & Climate Change - Directorate of Petroleum Policy, Athens (YPEKA, 2013)

6. HYDROCARBON EXPLORATION IN GREECE

The process for the granting of exploration and production rights for hydrocarbons in Greece is regulated by Law 2289/1995 (the "Hydrocarbons Law"),[75] which harmonized the Greek legislation with the European Regulation 94/22 EC. This framework was applied during the first round of assignments in 1997.

Recently, the Greek State amended the abovementioned law by introducing Law 4001/2011[76] in order to create a more appealing investment climate and to attract serious investments which will stimulate the exploration activities in Greece.

An extensive number of provisions have been amended, with most important the introduction of a new regulatory authority, the 'Hellenic Hydrocarbons Resource Management S.A' (HHRM S.A.).

The right for search, research and exploitation of hydrocarbons existing in land, below lakes and underwater on which the Hellenic Republic correspondingly exercises its dominance or dominant rights according to the provisions of the United Nations Convention on Law of the Seas, as such was ratified by virtue of Law 2321/1995, exclusively belongs to the State and its exercise always regards the public interest. The management of the said rights on behalf of the State is exercised through the Hellenic Hydrocarbon Resources Management (HHRM) established by virtue of new Law 4001/2011, actually in formation.[77]

For the first time, all of the rights and obligations relating to the research, exploration and production of hydrocarbons are vested in an independent State authority, the mission of which is to act on behalf of the Greek State and manage said rights and obligations. Previously, the management of these rights and obligations were granted to the State-owned companies (originally to DEP S.A. and after to DEPEKYS. A.), the main activity of which was the commercial operation in the upstream oil market.[78]

[75] Law 2289/1995 "Prospecting, exploration and exploitation of hydrocarbons and other provisions" (Government Gazette Issue 27/A/8.02.1995).
[76] Law 4001/2011 "Operation of Electricity and Gas Energy Markets, for Exploration, Production and transmission networks of Hydrocarbons and other provisions" (Government Gazette Issue 179/A/22.08.2011).
[77] Law 2289/1995 "Prospecting, exploration and exploitation of hydrocarbons and other provisions" (as amended by Law No.4001/2011), art.2 par.1
[78] Kyriakides Georgopoulos/ Daniolos Issaias, *"Greek legislation on hydrocarbons"*, KGDI Law Firm, Athens (2012)

In order to promote the production of petroleum in Greece, the Greek Government has prepared and published a Model Lease Agreement to serve as a basis of negotiation with international oil companies to conduct petroleum operations in Greece, thus contributing towards the general economic development of the country.

This Model lease agreement is actually a *concession* agreement because under its provisions (pursuant to paragraph 10 of article 2 of the Hydrocarbons Law), the Greek State acting through the HHRM S.A. (referred to as 'Lessor' in the agreement) grants to an International Oil Company (referred to as 'Lessee' in the agreement), in accordance with the terms and conditions thereof, exclusive rights to carry on Petroleum Operations in the Contract Area.[79] This Model Lease -concession- Agreement and its clauses draw from international petroleum industry practice and hold no surprises for international petroleum companies.

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[79] Draft Model Lease Agreement, (supra note 74) art. 1 *'Scope of the Agreement'* .

7. ADR CLAUSES IN THE GREEK LEASE AGREEMENT

7.1. Multi-tiered dispute resolution clauses

The current trend in the petroleum industry indicates an increased use of multi-tiered dispute resolution processes, especially in international contracts. The process involves resolving disputes through multi-tiered dispute resolution clauses which provide different dispute resolution mechanisms at distinct and escalating stages. The multi-tiered dispute resolution clause may take various forms.[80]

In particular, the Greek Model Lease Agreement initially provides for a Technical Advisory Committee (TAC) as a dispute mechanism, consisting of an equal number of lessor and lessee nominees, to monitor the petroleum operations. If the Technical Committee is unable to reach agreement on the revision of the matters specifically submitted to it, then these matters shall be referred to a Sole Expert for final determination. Finally, in case any dispute, relating to the Agreement, is not to be referred for determination by a Sole Expert or a Sole Expert failed to be appointed or the Sole Expert's decision is appealed on a point of law, then the dispute shall be finally settled by arbitration.[81]

7.2. Technical Advisory Committee (TAC)

According to an axiom of modern business practice, the investor of money gains the right to manage how the money is spent. Despite this, in the case of modern petroleum practice (particularly when the IOC is contractor to the government- as is the case in most lease agreements for petroleum exploration and exploitation- and does not have equity rights to the crude oil or gas produced in the national territory), a Technical Advisory Committee is established.[82]

The TAC is not a joint management committee since the government contributes no funds to the petroleum operators. it is a forum of discussion where any technical

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[80] M. Alramahi, (supra note 5)

[81] Draft Model Lease Agreement, (supra note 74) art. 24.3 *'Sole Expert Determination and Settlement of Disputes'*.

[82] T. Walde/ M A. G. Bunter, *The Promotion and Licensing of Petroleum Prospective Acreage*, (Kluwer Law International, 2002) p. 276

and other matter may be discussed in informal debates amongst the technical and other experts from both the government and IOC sides.[83]

Under the Greek Model Lease Agreement the appointment and functions of the TAC are provided in its art. 4. In brief, this committee is staffed by three representatives, i.e a chairperson and two other persons appointed by the Lessor (Greek government acting through the HHRM S.A) and three representatives of the Lessee (IOC). Meetings are held approximately every three months and its specific functions shall be: [84]

-to oversee the conduct of the Petroleum Operations by the Lessee

-to review the Work Programme and Budget submitted by the Lessee and consider proposals for the revision of specific features thereof submitted by the Lessor

-to review any Appraisal Programme submitted by the Lessee to the Lessor and to monitor the implementation of the Appraisal conducted thereunder

-to review any Development and Production Programme submitted by the Lessee to the Lessor in connection with a discovery of commercially exploitable Hydrocarbons

-to review the Estimated Production Schedule submitted with each Work Programme and Budget relating to Exploitation Operations

-to review the accounting of expenditure and the maintenance of operating records and reports kept in connection with the Petroleum Operations for compliance with this Agreement; and

-generally, to assist the Lessor in the exercise of its functions under this Agreement.

Therefore, the disputes more likely to be resolved in the TAC regard issues such as the locations and objective of exploratory wells, the results of wells and conclusions to be drawn from them, the Application for Consent to Drill, The Development Plan and the Application for a Production License. Other areas likely to cause controversy may be the valuation of crude oil and natural gas, unitization agreements and contractual stabilization provisions. Furthermore, matters of Good Oilfield Practice or of sound Environmental Operation will be debated in the TAC.[85]

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[83] Ibid, p. 317

[84] Draft Model Lease Agreement, (supra note 74), art. 4.4 *'Technical Advisory Committee'*

[85] T. Walde, et al. (supra note 82) p. 318

In the event that the TAC is unable to reach agreement on the revision of a work programme and budget considered by the Committee under Article 4.4(b) of the Lease Agreement, the matters in issue shall be referred to a Sole Expert for final determination.[86]

Some IOCs regard the TAC as a threat to their management autonomy. In fact, the IOC is always constrained by the provisions of the contract which stipulate that certain work must be carried out to certain standards and a degree of government oversight is implicit.

However, the TAC is actually of benefit both to government and the IOCs. Its advantages are in particular: a) that the Government is seen by the public and press to be involved in the petroleum operations, b) the IOC gains a friend in the government through their joint membership of the TAC, c) Government is obliged to defend the IOC in public debate and d) Controversial issues can be discussed privately and resolved before they reach the public domain and become the subject of political maneuvering.[87]

Consequently, it may be considered that the TAC is more of a help to the IOC than a hindrance.

7.3. (Sole) Expert Determination

Several types of international oil and gas agreements incorporate Expert Determination or Sole Expert Determination (different term for the same ADR method) to resolve technical disputes arising or relating to these Agreements. Sole Expert determination was first used as a mechanism for valuation, but increasingly has been used as a dispute settlement mechanism, particularly adept at resolving technical disputes[88] in areas such as the Development Plan, Maximum Efficient Rate, commercial reserves, Good Oilfield Practice and environmental standards.[89]

Sole Expert determination is also an adjudicative ADR method, inquisitorial in nature, whereby the Sole Expert may reject both parties' views in favour of his own

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[86] Draft Model Lease Agreement, (supra note 74), art. 4.10 *'Technical Advisory Committee'*

[87] T. Walde, et al. (supra note 82) p.277

[88] S.P. Stultz-Karim, Hugh Fraser Intl. Legal Consultancy, 'Expert Determination in International oil & Gas Disputes: The Impact of Lack of Harmonization in Reserves Classifications Systems and Uncertainty in Reserve Estimates', *Society of Petroleum Engineers* (2007), http://www.onepetro.org, (accessed November 26, 2013)

[89] T. Walde, et al. (supra note 82) p. 284

view. The decision is binding unless it is agreed by the parties at the outset that the determination will not be.

In the context of petroleum disputes the Sole Expert is usually an expert petroleum consultancy or consultant, or a legal or financial expert such as well qualified economic analysts, major firms of accountants, reservoir engineers, testing laboratories and the like.[90]

In Sole Expert determination the disputants enjoy autonomy in choosing their umpire and agreeing on the rules of procedure and timelines. Thus, the Sole Expert is appointed by the mutual agreement of both parties in order to evaluate the disputed matter and to rule whether either sides' proposal or interpretation is scientifically correct or in accordance with Good Oilfield Practice or the Agreement. The Sole Expert's decision is based upon his/her knowledge and investigations rather than persuasion by the parties, even though he/she may be required (or he/she may request) to receive submissions from the parties, therefore in the event that neither party is correct, the Sole Expert may suggest an alternative.[91]

In the event that neither party can agree on the appointment of the Sole Expert there should be a provision in the agreement that allows a professional institute or an independent appointing authority, to nominate a well-qualified neutral consultant to serve.

A number of international institutions, such as the ICC International Centre for Expertise, provide lists of experts and administered services in this area.[92]

Apart from the Sole Expert, the Terms of Reference of the Sole Expert are also agreed between the parties prior to his/her appointment. Sufficient time and money need to be allowed for the evaluation and determination by the Sole Expert and an opportunity to debate the conclusions with both parties must be provided. It is also necessary for maximum disclosure of data to take place.[93]

However, without any statutory or other external framework of rules or supervision applying to Sole Expert determination, a party which is uncooperative or which for tactical reasons wishes to 'drag its feet' can delay such agreement for weeks

[90] H. R. Dundas, 'Perspectives of Dispute Resolution: the UK Oil & Gas Industry', ABA journal "international litigation quarterly"
[91] T. Walde, et al. (supra note 82) p. 318
[92] A. T. Martin (supra note 4) p.8
[93] T. Walde, et al. (supra note 82) p. 319

or even months.[94] On the other hand, an individual expert's ability to control the Sole Expert determination process is critical to time, cost and reliability of outcome--much more so than in other forms of dispute resolution where there are external rules and/or supervision. An effective Sole Expert will establish a clear, robust and sensible procedure which gives each side a proper opportunity of presenting its case whilst also keeping the volume of submissions down to a reasonable level and ensuring that a decision can be given within a reasonable time.[95]

Consequently, the Sole Expert Determination, as a much less structured process than arbitration, is much less costly, it does not need to be so international and the whole process is much less vulnerable to the charges of violations of national sovereignty. Furthermore, the cost of the Determination is usually borne equally by both parties so that recourse is not resorted to willy-nilly and to encourage conciliation.[96]

Both parties to the dispute must agree to be bound by the decisions of the Sole Expert and, unless otherwise provided in the agreement, the determination by the Sole Expert, under several national laws, could be only be challenged on the basis of a mistake of law or on the grounds of fraud, bias or that the expert has answered the wrong question or has otherwise materially departed from his or her instructions.[97]

Finally, the Sole Expert need not give reasons for his/her decision, which allows for confidentiality in the procedure.

Unlike the other adjudicative processes of litigation and arbitration which are "default" procedures for oil and gas dispute resolution,[98] the choice to use Sole Expert determination is a matter of privity of contract. The decision of a Sole Expert is not enforceable as an arbitration award, as it does not fall under any known international framework such as the New York Convention. It can only be enforced as a contract between the parties in court systems around the world.[99] Consequently, the methods of enforcement, more frequently used in Sole Expert determination are: a)

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[94] J. Williams, "Expert Determination: no panacea", *International Energy Law Review* (2008)

[95] Ibid

[96] T. Walde, et al. (supra note 82) p. 319

[97] J. Williams, (supra note 94)

[98] H. J Brown,/A. L Marriott, *Choice and Timing of Process Use in H J Brown, and A L Arthur, ADR Principles and Practice* (Sweet and Maxwell Ltd, 1999)

[99] A. T. Martin (supra note 4) p.7

Termination or action for damages for breach of agreement, b) Stay of proceedings, until process followed or c) Specific performance.[100]

Considering that it is essential for the industry to keep any business activities running whilst the disputing parties seek settlement over disputes, it is common for the parties to choose Sole Expert determination over any other mechanisms, as its key features such as informality, flexibility, speed, reliance on the independence, neutrality and expertise of the Sole Expert, allow for the parties in the industry to preserve their commercial relationships.

7.3.1. The Greek Model Lease Agreement approach

The Greek Model Lease Agreement,[101] according to the three pillar (or multi-tiered as aforementioned) dispute mechanism it has adopted, in case the TAC is unable to reach agreement on the specific matters referred to it, provides for resolution through Sole Expert determination.

The whole mechanism and provisions for the resolution by Sole Expert Determination are stated in its art. 24.

It is worth mentioning at this point, that the Greek Model Lease Agreement has adopted some variations from the abovementioned generally applicable provisions in the petroleum industry, regarding Sole Expert Determination, the most important one being the process of the appointment of the Sole Expert.

It is provided in its art. 24.2 (a) and (b)[102] that unless the parties agree otherwise, the appointment of the Sole Expert and of the alternative Sole Expert (in case the former is unwilling or unable to accept such appointment), will be made by the Lessor, i.e the Greek state represented by the HHRM S.A., in accordance with articles n 2.1 and 2.2 of the Presidential Decree No.127/96.[103]

One of the key elements, in fact the quintessence, of all ADR methods is party autonomy. Because of its private nature, ADR affords parties the opportunity to exercise greater control over the way their dispute is resolved than would be the case in court litigation. In contrast to court litigation, the parties themselves may select the

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[100] R. Middleton Young , "Expert Determination", http://www.findlaw.com (accessed December 13, 2013)

[101] Draft Model Lease Agreement (supra note 74)

[102] Ibid. art.24.2 (a) and (b)

[103] Greek Presidential Decree No.127/96, "Lease terms of the right for exploration and exploitation of hydrocarbons"

most appropriate decision-makers for their dispute. In addition, they may choose the applicable law, place and language of the proceedings. Increased party autonomy can also result in a faster process, as parties are free to devise the most efficient procedures for their dispute, as well as material cost savings.[104]

Therefore, as is the case for all ADR methods, in Sole Expert determination as well, the disputants enjoy autonomy in choosing their umpire and agreeing on the rules of the procedure.

Consequently, the Greek model agreement by nominating the selection of the Sole Expert to one party and specifically to an independent State authority with the mission to act on behalf of the Greek State, violates the party autonomy provided by the ADR mechanism of Sole Expert determination.

Furthermore, a Sole Expert determination clause will usually specify that absent an agreement as to the identity of the expert, he/she is to be nominated by an independent appointing authority.[105] This is also not the case with the Greek model agreement, as it leaves the nomination of the Sole Expert to the Lessor-State in all cases.

Under such circumstances, recourse to Sole Expert Determination by the IOC-Lessee, under the Greek agreement, may actually have no difference than recourse to litigation, whereby the judge is a civil servant nominated by the Greek State. IOCs, when contracting to such international petroleum agreements, prefer ADR for the resolution of potential disputes, because they do not trust the competence or independence of the judges in foreign countries.

According to all the aforementioned, such a nomination made merely by the Lessor- Greek State, unless it is made in good faith and after consideration of both parties' interests, is likely to deter IOCs from conducting petroleum operations in Greece.

However, the Greek Agreement offers the alternative for the parties to choose differently, as it particularly states in its art. 24.2 that the provisions therein shall apply '*unless the Parties agree otherwise*'. Consequently, the parties in such agreements in order to manage the discord of the lease relationship, should focus their drafting efforts on mutually agreed and efficient dispute resolution techniques that meet all their needs.

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[104] "ADR Advantages", http://www.wipo.int (accessed December 13, 2013)
[105] J. Williams, (supra note 94)

7.4. Arbitration

Finally, the Greek Model Lease Agreement, as the final stage of its multi-tiered dispute resolution process, foresees that in the event that a dispute is not to be referred for determination by a Sole Expert under Article 24.1; or has been referred to the Sole Expert whose decision is appealed on a point of law; or if the Lessor has not appointed a Sole Expert (or, as the case may be, a replacement Sole Expert) within the prescribed time limits, then the dispute shall be finally settled by Arbitration.[106]

Arbitration is a decisional proceeding, governed by contract, in which a dispute is resolved by an independent, impartial and neutral adjudicator, called an arbitrator, chosen by the parties, whose decision the parties have agreed to accept as final and binding [107].Arbitration can be entered into by agreement at the time of the dispute, or prescribed in pre-dispute clauses contained in the parties' underlying business agreement.[108] Several major factors must be taken into consideration while designing an arbitration clause such as the nature of disputes, the identity of the parties, the choice of forum and choice of law, the scope of the arbitration and the location of assets.[109]

Arbitration has become the principal method of dispute resolution in the petroleum industry, where the parties' relationships are characterized by long-term agreements and their success is highly dependent on co-operation, especially in cases of international contracts spanning many countries.

The principal advantages for arbitration are:

Party autonomy

Arbitration can be tailored so that it is appropriate to the contractual circumstances. Parties can agree on a procedure suitable for the specific dispute which arises. They can decide in which country the arbitration will take place, thus providing for determination of disputes in an independent country, by an independent arbitrator, or panel of arbitrators. They can also decide on the legal seat (the lex arbitri) of the arbitration and the language to be used for the purpose of the dispute hearing. They are not constrained by the application of court rules which are intended to be

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[106] Draft Model Lease Agreement, (supra note 74), art. 24.3 *'Sole Expert Determination and Settlement of Disputes'*

[107] R. Bales, "An Introduction to Arbitration", *Bench & Bar, Kentucky* (2006), http:// papers.ssrn.com/ (accessed November 13, 2013)

[108] The ABCs of ADR *(supra note* 66)

[109] M. Alramahi, (supra note 5)

appropriate for any possible commercial dispute.[110] Therefore, arbitration provides the parties with neutrality and relative flexibility to resolve the disputes privately outside a national court system. However, this flexibility is limited by the extent that it needs to be associated with a legal system.[111]

The parties will decide whether to follow an ad hoc arbitration or an institutional arbitration. Institutional arbitration entails the supervision of the arbitral process by an institution, such as the International Chamber of Commerce (ICC) in Paris, the London Court of International Arbitration (LCIA), the Stockholm Chamber of Commerce (SCC), the American Arbitration Association (AAA) and its international arm, the International Centre for Dispute Resolution (ICDR), etc.[112]

In Ad hoc arbitration the parties manage themselves. No arbitral institution oversees the process by supervising the conduct of the arbitrators and the parties. The most popular rules governing ad hoc arbitration are the United Nations Commission on International Trade Law (UNCITRAL) Rules and since the parties in ad hoc arbitration are provided with the freedom to decide on every aspect of the procedure, they can either opt for the UNCITRAL Rules or even conduct their own.[113]

Choice of arbitrator

Arbitration is attractive to those in the oil and gas industry, as the parties may select a neutral arbitrator or tribunal of arbitrators with specific expertise in the subject matter of a dispute or with the process of arbitration, which in practice is different from any national court system. In litigation there is always the worry that a court will not have the necessary expertise and experience. The tribunal's decision will be binding on the parties and is final, so there is no right of appeal unless otherwise agreed by the parties.

Confidentiality/Privacy

Contrary to court proceedings which are public, save in exceptional circumstances, and statements of case and judgments are publicly available, arbitration is private. Hearings are held in private and awards are generally confidential (a notable exception is in the context of investment disputes, where awards are usually published). Privacy and confidentiality are of paramount importance to the petroleum industry, not only with respect to the final award, but also in relation to information

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[110] Ashurst LLP, (supra note 59)
[111] M. Alramahi, (supra note 5)
[112] Ashurst LLP, (supra note 59)
[113] Ibid

generated or produced in the course of proceedings. In some cases, parties may wish by the very existence of arbitration to be protected by an obligation of confidentiality. However, identifying and defining the extent of any obligation of confidentiality in arbitral proceedings appears to be rather controversial. Since arbitration is private and litigation public, when a party to arbitration seeks to challenge or to enforce an arbitral decision in court, a dichotomy appears. The status of an arbitral award is something that only the courts can determine. Therefore, if the judge gives a reasoned decision for enforcing or refusing to enforce an arbitral award, there is a serious potential for the details of the arbitration to leak out through the rendering of the court's public decision, thereby losing confidentiality in those matters.[114]

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. A national court may, however, refuse to recognize an award if the process or law used to reach the award does not conform to the procedure and law of the seat, in line with art.V para.1 of the Convention. On the contrary there is no real equivalent for the enforcement of court judgments. Therefore, an arbitral award is more enforceable for international contracts than a court judgment, and courts do not like to interfere with such determinations[115].

Costs and speed

Arbitration is traditionally perceived to be faster and less expensive than litigation and can lead to a more tailored and creative conclusion to suit the parties' interests than litigation. Arbitration has been utilized in many high profile oil and gas cases and is also used in industry and company standard contracts and model clauses. However, large companies who are often involved in joint ventures may be reluctant to engage in arbitration and occasionally prefer a different method to resolve disputes. Moreover, in the event of arbitration against a government, there is a high risk that there will be retaliation and hence arbitration may not be the best option. It is argued that in complex disputes, with substantial issues of fact which require determination, arbitration can be as time consuming, expensive and formal as litigation. It can

[114] M. Alramahi, (supra note 5)

[115] See *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184; [2008] Bus. L.R. 1361, where it has held that judicial interference "should be kept to a minimum and the proper role of the court was to support the arbitral process rather than review it".

involve procedural complexity, unpredictability and legal challenges to jurisdiction or competence of proceedings.[116]

[116] M. Alramahi, (supra note 5)

8. CONCLUSION

The petroleum industry displays unique particularities, due to its transnational and multifaceted character that cannot be found in any other industry, rendering it one of the most dispute-intensive industries in the world. Potential disputes must be properly managed, otherwise they could undermine the economic viability of petroleum projects. Therefore, the oil and gas industry requires fast and cost effective dispute resolution with the least possible impact on operations and relationships between the industry participants, as the maintenance of business relationships after the resolution of any dispute is imperative for the industry.

Planning for the disputes that arise from international oil and gas agreements is essential for the long-term success of an international energy project. Parties therefore need to begin addressing potential disputes from the drafting of their agreements to the appointment of the adjudicators of their disputes. Efficient drafting of dispute resolution techniques will mean the difference between success and failure.[117]

Litigious proceedings cannot meet the particular needs of the industry, thus players in the industry tend to opt for specific methods of ADR. The most commonly used technique in the oil and gas industry is Arbitration.

Determining the most suitable and effective dispute resolution method for petroleum disputes is a quite difficult task, thus the most appropriate dispute resolution scheme should always be determined on a case by case basis, depending on the particular circumstances of each case. The nature of the dispute, the identity of the parties and the location of assets are only some of the many factors which should be taken into account when deciding which form of dispute resolution scheme is more appropriate.[118]

However, it must be noted that the current trend of the industry indicates that arbitration and litigation are used as a last resort after exhausting more informal ADR methods. It was often held that war was “ultima ratio regis”, the final resort of the King. So it is with litigation and arbitration. Resolution of disputes between government or its entities and the international investor-IOC is fraught with

[117] A. T. Martin, (supra note 4) p.32
[118] “Parties the oil and gas industry”, http://www.lawteacher.net (accessed December 18, 2013)

difficulties and they are likely to be concerned about subjecting themselves to the jurisdiction of the local courts.[119]

It is more common to opt for multi-tiered dispute resolution processes, such as the one provided by the Greek Model Lease Agreement which includes progressively technical advisory committee, expert determination and finally arbitration. Such a multi-tiered process can improve efficiency and lower the cost of the dispute resolution process, as it acts as a filtering process where only serious and complex disputes are resolved by arbitration and less complicated disputes are addressed at a lower level, for instance through the TAC or Sole Expert determination, thus saving time, energy and money.[120] After all, if government and IOCs are obliged to resort to Arbitration, their contract is already terminated and their relations have seriously broken down and may never be restored. In such a case the necessary equilibrium between government and the IOC may never again prevail and day-to-day business will become extremely difficult if not impossible.[121]

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[119] T. Walde, et al. (supra note 82) p. 318
[120] M. Alramahi, (supra note 5)
[121] T. Walde, et al. (supra note 82) p. 318

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