Dispute Resolution in Petroleum Contracts; A Case Study of the Kurdistan Regional Government's Petroleum Contracts

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Abstract

Premeditated handling of settling disputes is one of the main issues that international parties have to take into consideration in concluding contracts. Having effective dispute resolution provisions is one of the key factors that will lead to success in international agreements. In the recent years, the Kurdistan Region of Iraq has made lots of transactions in petroleum industry by concluding many international agreements with various international companies in the energy sector. Negotiation, mediation and arbitration have been adopted by the Kurdistan Regional Government in details, through its Oil and Gas Law No.28 of 2007 and signed production sharing contracts, as means of dispute resolution. Nonetheless, having less experience in this field has weakened the position of the host government in front of foreign companies. Moreover, the recent case of Dana Gas versus Kurdistan Regional Government has proven this fact; it was an indication that the Kurdistan Region has to be more cautious when it comes to regulate the terms and conditions of the contracts with the international companies, particularly in dispute resolution part. This paper will shed light on the available mechanisms to resolve every kind of disputes between the conflicted parties, with the specific focus on Kurdistan Region. Investigating the effectiveness and enforceability of alternative dispute resolution mechanisms is another major part of this paper.

I. Introduction

Due to the multifaceted and long-term nature of petroleum contracts, disputes and conflicts are inevitable. 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" (M.Gaitis, 2017, p.7). Further, The European Commission defined alternative methods of dispute resolution as out-of-court dispute resolution processes conducted by a neutral third party (Green Paper, 2002, p.29). Involving different parties in different countries who are part of the transaction has given an international character to the dispute. Having large, complex and capital-intensive projects in the petroleum sector require complex set of rules to resolve disputes between the parties of transactions; litigation or alternative dispute resolution will be resorted by parties of petroleum contracts which is also considered as a major concern in all transactions.

Moreover, many forms of disputes might arise in oil and gas contracts starting from upstream activities by oil companies such as joint operating agreements, balancing agreements, production sharing contracts, Joint ventures and mining partnership, drilling contracts and service contracts to midstream disputes such as gas gathering and production handling disputes, gas processing disputes and downstream activities including oil and gas sales agreements, refineries, sales of oil and gas assets and technologies. In all the above-mentioned stages of oil and gas transactions, disputes are invariable between the parties of the agreement (M.Gaitis, 2017, p.12-15). The adoption of alternative dispute resolution mechanism is not always welcomed by scholars, for instance, Nussbaum has argued that "It will be admitted that the increase of arbitration might endanger state jurisdiction and the high ideals of impartial justice, if legislative and judicial measures for the remedy of abuses were not provided" (Contini, 1959, p.283-285). Nonetheless, alternative dispute resolution, in particular arbitration, is commonly used among the national and international characters. The Kurdistan Regional Government, due to its various contracts with international companies, has chosen alternative dispute resolution to resolve any future disputes.

Research objectives

There are many tools for settling the contractual disputes between the parties of any agreement; litigation and what is known as Alternative Dispute Resolution (ADR). The latter is more favorable from the perspective of international contractors as the former will provide extra privilege to the host country due to the lack of knowledgeability of the rules and regulations from international contractors' side. Arbitration is the most prominent mechanism that will be resorted by contracting parties to settle their disputes over the implementation of their contract. Kurdistan Regional Government has entered into many petroleum contracts with international oil companies in the recent years. This paper will try introduce applicable mechanisms of resolving disputes between the KRG and other international oil companies. It will also investigate the provisions of the KRG's Oil and Gas Law No.28 of 2007 and the signed model of the production sharing contracts relating to dispute resolution mechanisms.

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Research problems

Kurdistan Region of Iraq is quite unfamiliar to the petroleum industry which led to the lack of experience when it comes to implement the exploration and production contracts with international companies. Besides, the legal issues with the Iraqi Federal Government has hardened the burden of the Kurdistan Regional Government toward contractors. The Kurdistan Region of Iraq has adopted alternative dispute resolution mechanism over litigation to settle its disputes with the international companies, namely negotiation, mediation and arbitration. The KRG has a bitter experience in resolving its disputes with the international companies as it has lost millions of US dollars with Dana Gas and other international oil companies. The KRG needs extra efforts in dealing with the implementation of the available tools for disputes resolution as oil companies have an accumulated experience in this field. Further, the internal legal conflict between the KRG and the Federal Government has a reverse impact on the position of the KRG in resolving its dispute with the contractors in petroleum sector.

Research methodology

An analytical approach has been adopted in conducting the research; the concept of alternative dispute resolution will be illustrated with the depth discussion on how the Kurdistan Regional Government's legal system has adopted these mechanisms. The KRG's Oil and Gas Law No.28 of 2007, the KRG's model of Production Sharing Contracts, the Convention on the Settlement of Investment Disputes (ICSID Convention) and Washington Convention will be discussed to answer research question.

Research outline

One section of the paper has been dedicated to study dispute resolution clause, and this includes negotiation, mediation and arbitration. Followed by the discussion of the valid dispute resolution clauses in the KRG's Oil and Gas Law no.28 of 2007 and signed production sharing contracts. Finally, the enforceability of arbitration clause in international law is another significant part of the argument.

II. Conflict resolution clauses

As the general principle, parties of any contractual relation will determine methods of resolving disputes that might arise as a result of implementing the content of the contract. In the absence of such clause, the disputed parties might face two potential problems: they might recourse to find a mutually agreed mechanism to solve the dispute by negotiating the process while the tension between the parties will decrease the chance of coming to the compromise. The second choice is when one party (most of the time the company) might resort to the local court of the host country; in this scenario, the foreign company is at the risk of language and unfamiliar legal system of the host state (Li, 2006, p. 791 – 792). Thus, it is highly agreed that parties of any international contractual relation shall determine methods of resolving disputes. The most common tools of resolving disputes are negotiation, mediation and arbitration.

First: Negotiation

There are multiple choices for the parties to international commercial contracts to be used when it comes to settle the potential disputes over the terms and conditions of the contract (Contini, 1959, p.285-287). The mechanisms of dispute settlement vary based on the mutual agreements of the parties; they can be separately adopted or on the proviso basis. Negotiation, mediation and arbitration are among the most prominent methods of dispute resolution. The most commonly used tools of conflict resolution are negotiation as a non-binding way to the parties and it is considered to be the least costly mean compare to mediation and arbitration. Further, resolving the issues between the parties of the conflict by negotiation will produce a positive indication that parties have understood the essence of the problem and came to a mutual agreement (Holland, 2000, p. 453). Negotiation has been defined as "any form of direct or indirect communication whereby parties who have opposing interests discuss the form of any joint action which they might take to manage and ultimately resolve the dispute between them" (The Law Society of Upper Canada, 1992, p.6). Moreover, if the contract articulated a provision with regard to use such tool, the parties are bound to recourse to it without having any obligation to the outcome of the discussion. Hence, negotiation is seemed to be ineffective mechanism of dispute resolution outcome-wise. The KRG in its production sharing contracts with international oil companies have adopted negotiation as a first step to settle any dispute arise between the parties. It states that "…. in the event of any dispute between the parties (or between any entity constituting the contractor and the government) arising out of or relating to this contract, including a dispute regarding its existence, validity or termination, the parties shall first seek settlement of the dispute by negotiation" (Article 41(1) of the KRG's model of production sharing contracts). This indicates that resorting to negotiation by the parties of the conflict is mandatory before seeking any other tools.

Close in its premises, there is clause that will be inserted by international companies in their agreement allowing the parties to seek for reviewing the terms and the conditions known as renegotiation clause. The concept of renegotiation should not be mixed with negotiation of the contract as a tool of alternative dispute resolution or ADR, as negotiation is either a section before signing an agreement or a practice to be followed in time of dispute between the parties during the life of the agreement before resorting to litigation or arbitration. In the KRG's Oil and Gas Law No28 2007 negotiation could be found for both purposes. For instance, in article 4, the relevant authority to sign any agreement with the contractor would be either the minister of natural resources or any other agencies appointed by the minster (Article 4(b) of the KRG's Oil and Gas Law, No.28 of 2007). In Indonesia, PERTAMINA (state Oil Company) is responsible of negotiations and preparing a draft of contract then the minister gives its advice and recommendations. This method will give opportunity to the host country for further scrutinizing and monitoring the terms and conditions of the contract (Fabrikant, 1975, p. 306-310). In the KRG, the minister of natural resources responsible for every procedures regarding negotiation and concluding contracts; giving such a sole discretion to the ministry (or the minister) may lead to corruption and the lack of transparency (E. Smith, 1992, p. 503-504). Regarding negotiation as a way to settle legal disputes between the parties of the agreement, the KRG in its petroleum act under resolution of

disputes states that "…. If a dispute arises relating to the interpretation and/or application of the terms of an authorization between an authorized person and the minister, the parties shall attempt to resolve that dispute by means of negotiation" (Article 50/second(1) of the KRG's Oil and Gas Law, No.28 of 2007).

Second: Mediation

When parties of the dispute will not reach to an agreement after negotiating the surrounding circumstances of the conflict, there is another step that can be utilized as an advanced form of alternative dispute resolution which is known as mediation; merely asking the third party to resolve the problem based on the mutual agreement. As it has been mentioned by Sir Robert A. Baruch Bush and Joseph P. Folger, in the Promise of Mediation, "in any conflict, the principal objective ought to be to find a way of being neither victims nor victimizers, but partners in an ongoing human interaction that is always going to involve instability and conflict." (Robert A. Baruch Bush & Joseph P. Folger, 1994, p. 229).

The process of mediation is considered as the voluntary and informal in settling disputes between the conflicted parties. Thus, it is the assigning of the third party, a neutral person by using specific negotiation and communication techniques and it is totally controlled by the parties themselves. The mediator behaves like a facilitator in reaching an agreement to end the disputes; hence, the mediator will not make any decision except the express of their views on the issue and leave the decision to the parties (Sheffield, 2014, p.29). In the KRG's model of production sharing contracts, it is stated that parties of the dispute shall use the London Court of International Arbitration (LCIA) rules for mediation. Article 1 of the LCIA articulates that "Where there is a prior existing agreement to mediate under the Rules (a "Prior Agreement"), any party or parties wishing to commence a mediation shall send to the Registrar of the LCIA Court ("the Registrar") a written request for mediation". Meanwhile, article 2 of the same rules specify the situation when there is no prior mutual agreement between the parties. It states that "Where there is no Prior Agreement, any party or parties wishing to commence a mediation under the Rules shall send to the Registrar a Request for Mediation, which shall briefly state the nature of the dispute and the value of the claim". Thus, all the mediation procedures will be derived from the LCIA rules in case of dispute settlement between the KRG and any other international oil companies.

Third: Arbitration

The final resort for the disputed partied, who do not choose litigation in resolving their contractual disputes, is arbitration. When the parties of any contractual relationship agreed on having arbitration to resolve their disputes, they abandon their relationship to be ruled and subjected to the jurisdiction of the national court (Julian D M and others, 2003, p.5-6). Arbitration will give a wide authority to the arbitrators to determine the most appropriate measures and procedures in any arbitration trial. For instance, article 19 of the International Chamber of Commerce Rules states that "The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration." The Kurdistan Regional Government of Iraq, in both Oil and Gas legislation and its contracts with contractors, has adopted arbitration to settle its contractual disputes with the international oil companies. In the following part, the light will be shed on the KRG's oil and gas dispute resolution on the concentration of arbitration.

III. KRG's oil and gas dispute resolution

All parties of disputes have right to recourse to arbitration to resolve arisen conflicts, national or international. The International Chamber of Commerce has described the nature of business dispute of an international character between the disputed parties of international agreement by stating that "the international nature of the arbitration does not mean that the parties must necessarily be of different nationalities. By virtue of its object, the contract can nevertheless extend beyond national borders, when for example a contract is concluded between two nationals of the same State for performance in another country, or when it is concluded between a State and a subsidiary of a foreign company doing business in that State." (The International Solution to International Business Disputes-ICC Arbitration,1983). Further, the French Code of Civil Procedure has conditioned the international nature of arbitration when interest of international trade is involved (Article 1492 of the French Code of Civil Procedures). Thus, any dispute between the KRG and international oil companies are of international nature and the KRG has right to file arbitration claim against foreign parties and vice versa. By resorting to arbitration, the jurisdiction of the national courts in Iraq will be precluded and the arbitration clause in production sharing contracts will replace the national court to settle any potential dispute with international oil companies.

In the KRG's Oil and Gas Law No.28 of 2007, dispute resolution has been ranged in chapter thirteen, article 50. The law determines two main mechanisms for dispute resolution, namely negotiation and arbitration; hence, mediation or conciliation have not adopted in the applicable law unlike the KRG's model of production sharing contracts when it adopted mediation between the disputed parties if they fail to sort their issues by negotiation (Article 41 of the KRG's model of production sharing contracts). According to the valid law, the minister of natural resources in the KRG is authorized to settle all the disputes among the persons in case if dispute resolution tools have not agreed upon between the contracting parties or any other disputes in relation to other parties apart from the Kurdistan Regional Government (Article 50v(first) of the KRG's Oil and Gas Law No.28 of 2007). However, with regard to the disputes that arose out of the interpretation or application of the terms related to authorization between an authorized person (contractor) (Article 1(24) of the KRG's Oil and Gas Law No.28 of 2007, that defines authorized person as a Contractor; or the Person to whom the responsibility has been granted in accordance with the Authorisation and Access Authorisation.), and the minister, negotiation shall be taken as a mean of resolving the dispute. In case the dispute could not be resolved by negation, the dispute shall be submitted to arbitration (Article 50(second/1&2) of the KRG's Oil and Gas Law No.28 of 2007). Thus, it can be said that arbitration is the final step to be taken to settle the disputes.

The recognized arbitration procedures and rules in conducting arbitration between Minister and authorized person(contractor) are the following conventions

"(a) the 1965 Washington Convention, or the regulations and rules of the International Centre for the Settlement of Investment Disputes (ICSID) between States and Nationals of other States;

(b) the rules set out in the ICSID Additional Facility adopted on 27 September 1978 by the Administrative Council at the ICSID between States and Nationals of other States, whenever the foreign party does not meet the requirements provided for in Article 25 of the Washington Convention;

(c) the Arbitration Rules of the United Nations Commission on International

Trade Law (UNCITRAL);

(d) the arbitration rules of the London Court of International Arbitration (LCIA);

or

(e) such other rules of recognised standing (as agreed by the Parties, in respect of the conditions for implementation, including the method for the designation of

the arbitrators and the time limit within which the decision must be made)". Article 50(second/3) of the KRG's Oil and Gas Law No.28 of 2007).

In addition, more details of arbitration rules and procedures can be found in the KRG's model of production sharing contract that have been signed with many international companies in the region such as Hunt Oil, GEP GKP/MOL and many others. Article 42 of the adopted model of production sharing contracts provide more details on arbitration procedures. The agreement states that "In the event that any Notice of Dispute is given in accordance with this Article 42.1, the parties to the Dispute shall first seek settlement of the dispute by Negotiation"

In case, the disputes were not resolved by negotiation, the agreement set out mediation according to the mediation procedures of the London Court of International Arbitration (LCIA) (Article 42(b) of the KRG's model of Production sharing Contracts). Despite the fact that this mechanism has not been adopted by the KRG's Oil and Gas Law No28 of 2007, mediation can be followed as it will provide extra space to the parties of the conflict to settle their disputes. This does not create any impact on the enforceability of mediation as it has been agreed upon throughout contracts with the contractors. Moreover, if mediation cannot resolve the dispute within (A) sixty (60) days of the appointment of the mediator, or such further period as the parties to the Dispute may otherwise agree in writing under the mediation procedure under Article 42.1 (b), and (B) one hundred and twenty (120) days after the delivery of the Dispute Notice, each party has right to refer the case to arbitration according to the provisions of London Court of International Arbitration (Article 42(c) of the KRG's model of Production sharing Contracts). The arbitration will take place in London and the applicable law will be English law (Article 42(c/4) of the KRG's model of Production sharing Contracts). These terms have weakened the legal position of the Kurdistan Region as the disputes will be subjected to the English law the Iraqi legal system has been alienated totally. Thus, KRG needs to hire international legal consultants. More concerningly for the KRG as a host government is that the arbitration awards are not subject to any appeal, this is according to article 42(C/5) of the KRG's model of production sharing contracts. The recent disputes between the KRG and Dana Gas have proven the fact that the KRG seems to be in a difficult position.

Recently, the Kurdistan Regional Government has concentrated its attention on exploring and producing gas as it is announcing that a 461-million-squarefoot as a reserve site for building the Kurdistan Gas City has been designed (KRG-MOP, A Report of The Republic of South Korea Course from 2004 to the End of 2008). In 2007, both Dana Gas and Crescent Petroleum were granted a service contract for exploring and producing natural gas in Chemchemal and Khor Mor gas field which resulted in producing gas for local power generation. Under the agreement, these two companies with both OMV and Mole who joint them in May 2009, are paid for LPG as by products (Robin Mills, 2016, p.8-9). However, many legal issues have come between the KRG and Dana Gas by which Dana Gas claims millions of US dollars throughout arbitration process via the London Court of International Arbitration. The case was filed with the London Court of International Arbitration in 2013 over payments for gas liquids production; in July 2015 the arbitration court confirmed the claimants' long-term contractual rights, and in November that year it awarded them $1.96 billion for outstanding unpaid invoices, the validity of which was confirmed by a judgement of 20 November 2015 (England v. Wales, 2015). On 29 November 2015, Dana Gas said that it had been awarded $1.981 billion for unpaid condensate and LPG, with a judgement on compensation for the delayed development of the Khor Mor and Chemchemal fields still to be made (Article 33 of the Regulations of the Abu Dhabi Stock Exchange). It can be realized that the KRG might face similar outcomes with other oil companies if they follow the same pattern in concluding the contracts. In the following part, the enforceability of arbitration clause in international contracts will be argued.

IV. Enforceability of arbitration clause in international contracts

When it comes to arbitration or any other alternative dispute resolution tools, enforcement is a major issue, particularly the obligations of the disputed parties toward the arbitral award. In international transactions between states and foreign companies, the latter's main concern is enforcement. Nevertheless, the establishment of such procedures is considered a milestone in resolving conflicts among the disputed parties. As Lauterpacht pointed out, it is for the first time when a system was designed by which non-state actors such as corporations and individuals are able to sue states directly without giving them the right to use immunity or sovereignty. In this relationship, international law is directly in application between the states and investors with the direct implementation of the tribunal's award within territories of relevant parties and the enforcement of domestic rules are excluded (Lauterpacht, 2001, p.11-12). Further, Lando has indicated that in some cases, the parties to an international contract will agree on not to have their dispute governed by domestic law. Instead they recourse to international law by submitting it to the customs and usages of international trade, to the rules of law which are common to all or most of the States engaged in international trade or to those States which are related with the dispute. Where such common rules are not applicable, the arbitrator tries to apply the rule or chooses the solution which appears to him to be the most appropriate and equitable. In this

regard, he considers the laws of several legal systems. Further, he calls this judicial process, which is partly an application of legal rules and partly a selective and creative process, an application of the lec inercatoria (Lando, 1985, p. 747)

Arbitration can achieve some outcomes for the disputed parties when litigation cannot. For instance, dissimilar to courts, when it is possible that it refuses to hear a dispute despite the consent of the parties, in arbitration the dispute will be heard if the parties pay the fees. Besides, the court may refer the case to the third country where the whole legal system and legal procedures are unpredictable than the rules and procedures of the arbitration when it has been chosen by the parties based on their consent and familiarity (Jane L. Volz & Roger S. Haydock,1996, p. 867). Moreover, despite the fact that according to the survey by the World Bank the major concern of the contracting party in arbitration is neutrality of the Arbitration tribunals, (Le Sage ,1998, p.19). Arbitration has more privilege over litigation when it comes to enforceability. Enforcing an arbitral award is backed by three main international conventions namely: Panama Convention, The New York Convention and Washington Convention. For instance, the New York Convention forced the contracting states to implement the arbitration award when it states that "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon…" (Article 3 of the Convention on the Recognition and Enforcement of Foreign Arbitral Award, New York 1958). Further, the arbitration process was agreed upon by the contracting parties and the same agreement would enhance the possibility of enforcing the award. The enforceability of the arbitration award has also supported in the local courts, for example the enforceability of a dispute resolution clause was definitively established by the Ireland High Court in Health Service Executive v Keogh, trading as Keogh Software (Health Service Executive v Keogh, 2009). However, Iraq does not ratify or even sign the convention, hence, the contracting parties cannot depend on the content of this convention to enforce the arbitration award. Nonetheless, there other conventions that can be relied on. Taken article 53 of The Convention on the Settlement of Investment Disputes as an instance which is also known as Washington Convention states that "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention." (Article 53 (1) of the Convention on the Settlement of Investment Disputes (ICSID Convention)).

The Convention on the Settlement of Investment Disputes (ICSID Convention) was formulated by the Executive Directors of the World Bank and entered into force in 1966 when it had been ratified by twenty countries; at present, it is ratified by 153 Contracting States, it has an essential role in underpinning arbitration between disputed states. The core of the convention is to establish a forum to resolve the disputes that arise out of investment between the host countries and foreign nationals of other countries. The convention allows the parties to submit their disputes to the International Centre for Settlement of Investment Disputes which is known as ICSID Centre. The Centre has jurisdiction to reconcile the legal disputes between a contracting state and a national of another state by stating that "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally." (Article 25(1) of the ICSID). Thus, this description will exclude the jurisdiction of the court over two kinds of disputes: First, a non-legal dispute and the second if the dispute was not resulted directly from investment (Blanco,2006). Iraq is a contracting state of the convention since November 2015 and the convention entered into force by December 2015; Which left Iraq as a subject to all the provisions of the Convention. With regard to Panama Convention, it is enforced only among the signatory of the convention and it is inter-America convention on international commercial arbitration.

V. Conclusion

Despite having the considerable use of arbitration as an effective means of dispute settlement, it is still the most complicated tool among the parties of international commercial contracts. This paper has focused on the main tools of dispute resolution among the parties of the international contracts. The paper explained three main methods, namely negotiation, mediation and arbitration. Although both negotiation and mediation are less likely to sort the disputes, they are commonly resorted to before stepping to arbitration which cost the parties more money and longer duration. The Kurdistan Regional Government of Iraq has adopted alternative dispute resolution in its related petroleum regulations and production sharing contracts with international oil companies. Mediation was only adopted in the signed production sharing contracts with no indication in the KRG's Oil and Gas Law No.28 of 2007 regarding mediation. The LCIA rules of mediation shall be used for any dispute between the KRG and oil companies. Moreover, if mediation could not resolve the disputes, arbitration is final destination. Arbitration is well organized in both Oil and Gas Law and production sharing contracts; it will provide better outcome for the parties who recourse to arbitration. Despite the fact that the enforceability of arbitration award is a major concern for the parties of arbitration tribunals, it is widely agreed that arbitration can resolve the dispute among the international parties of any agreement and the implementation of arbitral award is backed by many international conventions.

However, the KRG has faced a serious dispute over its agreement with UAE giant, Dana Gas, as the latter has requested millions of dollars in compensation through the London Court of Arbitration. The KRG has to respect the arbitration awards by international arbitration entities as there are many conventions that emphasize on the enforcement of the award. The most prominent covenant is The Convention on the Settlement of Investment Disputes ratified by Iraq which states in article 53 that the award will be obligatory on the parties of the arbitration and they do not have the right to challenge the award or even appeal it. Thus, Iraq has to respect the award by any arbitration tribunals, including Kurdistan Region when they reach an agreement.

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