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The Efficacy of Dispute Resolution Provisions in Uganda's Production Sharing Agreements and Developing Uganda's Upstream Oil and Gas Sector

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TOPIC

THE EFFICACY OF DISPUTE RESOLUTION PROVISIONS IN UGANDA'S PRODUCTION SHARING AGREEMENTS AND ITS ROLE IN DEVELOPING UGANDA'S UPSTREAM OIL AND GAS SECTOR.

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LIST OF ACRONYMS

ABSTRACT

Dispute Resolutions are key to the development of not only a sector like oil and gas but has a direct correlation with the development of an economy. Key among the dispute resolution mechanism is Alternative Dispute Resolution (ADR) also described as the non-legal nature of dispute resolution. ADR has become the norm in resolving conflicts between IOC's and States in dealing with oil and gas disputes. This is so because it provides a quick and confidential mechanism of resolution of disputes and it can be done in a place or seat agreed by the parties. As a result, it is one of the key considerations in attracting investments unlike the traditional litigation system whose appellate processes are long and in most cases beleaguered with accusations of corruption especially in developing Countries. Uganda like many other jurisdictions has a robust legal framework aimed at enhancing alternative dispute resolutions and it's a party to many conventions for example, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), ICSID and the UNCITRAL Model Law on International Commercial Arbitration and its home based legislations which are key to facilitating alternative dispute resolution. Provisions for Alternative Dispute Resolution are included in the PSAs Models of Uganda as a way of encouraging dispute resolutions in Uganda's oil and gas sector. This Research will basically focus on the efficacy of the dispute resolution mechanisms including legal and non-legal nature in Uganda's Model PSA. The researcher evaluated, resolved and examined the ADRs and legal forms by using, primary, and secondary sources, for example books, journals, Articles, to do qualitative and quantitative analysis. The Study also described the rules, procedure and limitations of dispute resolution mechanisms in the MPSA. This research will recommend that the scope of disputes to be resolved through arbitration under Uganda's Model PSA's should be widened, further that arbitration should be taught to all lawyers as continued legal education process and it will also recommend that institutions like CADER AND ICAMEK be strengthened and our Arbitration and Conciliation Act of 2000 and its rules be revised to meet international standards so as to be relevant in the oil and gas industry and to make it effective in resolving oil and gas disputes.

CHAPTER ONE: INTRODUCTION

1.0 INTRODUCTION.

1.0.1 General introduction.

An efficacious dispute resolution mechanism is key to attracting foreign investments and can spur economic development more so in the Oil and Gas Sector. One of the cardinal tenets of dispute resolution in the administration of justice in Uganda is promotion of reconciliation between parties.[1] It can be argued that this forms the Constitutional basis of dispute resolution in Uganda. In the Oil and Gas industry, Dispute Resolution is a central pillar of Uganda's Production Sharing Agreements.

Whereas Uganda has in its Model Production Sharing Agreements,[2]provisions for dispute resolution, these provisions primarily focus on non-legal and legal dispute resolution mechanisms.

The non-legal form of dispute resolution mechanisms (ADR) found in Uganda's MPSA's and in its fiscal regime include: Amicable Settlement, Agreement, Negotiation, Arbitration, Conciliation, and Expert Determination,[3] while the legal nature involves disputes in the areas of tax, health, safety and environment issues.

It has been postulated that ADR mechanism is one of the best forms of resolving disputes in the commercial world more so in the Oil and Gas Industry. As a result, ADR has been preferred to the traditional litigation of disputes in Courts of Laws by IOC's.

In the traditional litigation system, the resolution of legal disputes is an adversarial adjudicatory process that generally focuses on the law and the court house. That is to say, disputes are legalized by the establishment of rights in Constitutions, Statutes, Court rules, or other sources of law. Persons or entities seeking to vindicate those rights do so in a Court of law according

[1]See Article 126(2) (d) of the Constitution of the Republic of Uganda 1995 as amended which stipulates that in adjudicating cases of both a civil and criminal nature, the Courts shall, subject to the law, apply the following principles. 'Reconciliation between parties shall be promoted'
[2] Uganda Model Production Sharing Contract 1999 and Uganda Model Production Sharing Agreement 2016
[3] Uganda's Model Production Sharing Agreement 2016

to procedures that are generally predictable, well defined, and designed to further the goals of truth seeking, fairness, and accuracy in the pursuit of justice.[4]

In an adversarial trial process, the parties to the dispute present their versions of the facts and the law to triers of fact and law, who in turn issue a decision resolving the dispute that generally may be appealed to a higher authority.[5]

The proceedings are conducted according to strict and intricate rules of evidence and procedure that are normally prescribed by Courts or legislative bodies." As such, litigation is highly formalized, both in its structural institutions and in the agents who engage in the process. Judges decide questions of law. Juries (or sometimes judges) decide questions of fact to which the law will be applied." Attorneys generally represent parties in litigation because of the technical sophistication of the process and the applicable law.[6]

Considerable dispute resolution activity can and usually does take place informally before and after the dispute is legalized by the filing of a complaint. Attorneys for both parties spend considerable time analyzing and evaluating the legal and factual merits of their cases, interviewing potential witnesses and marshaling arguments that may ultimately be used to persuade a trier of fact or law to rule in their favor.[7]

Settlement of disputes taken by the parties through litigation is the ultimate means *(ultimum remidium)* after other alternative dispute resolutions that do not reach agreement. According to Margono, litigation is "a lawsuit over conflict that is ritualized to replace the actual conflict, where the parties give the decision maker two conflicting choices."[8]

The preference of ADR to litigation in Courts is aimed at ensuring that disputes that arises from the industry are resolved efficiently, confidentially and quickly. Under ADR parties agree on the procedure to be used to resolve their conflicts with or without the help of a neutral person or party in order to reach an agreement to avoid litigation.[9]

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[4]Richard C. Reuben: *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice* University of Missouri School of Law Scholarship Repository. Faculty Publication 47 UCLAL. Rev 949 (2000) 961 https://www.scholarship.law.missouri.edu/facpub last visited on 3 March 2021
[5]ibid
[6]Supra note 4
[7]Richard C. Reuben op. cit.
[8] Zakia Vonna, Sri Walny Rahayu, M. Nur: *Compatible Concept of Contract Law with Oil and Gas Production Sharing Contract in Indonesia* IOSR Journal of Humanities and Social Science Volume 24, Issue 9, Series, 3 (September 2019) 13 https://www.iosrjournals.org last visited on 3 February 2021
[9]Bello, Adesina Temitayo: *Dispute Mechanism in Petroleum Industry: An Overview of Arbitration Frontiers* (2017) 1 https://www.papers.ssm.com last visited on 4th January 2021

ADR, takes into account the needs of the parties, reduces costs and saves time. These ADR methods have developed for years and have been very popular of late compared to the traditional way of settling legal disputes involving Litigation in Courts of Law. Prominent in the cluster of ADR is Arbitration which has proved to be one of the stand out forms of alternative dispute resolution in the oil and gas sector. Since most of these IOC's are privately owned entities, their main objective is profit maximization,[10]and there is no better means of achieving these objectives than a quick, time saving and confidential means of resolving disputes like the mechanism offered by ADR generally and arbitration in particular.

That apart, IOCs always want guarantees that their investments will be protected, and the sure method of protection of such investments, is through a dispute resolution mechanism they are party to and there is no such other mechanism other than ADR.

An elaborate dispute settlement mechanism provides the necessary comfort to IOC's especially in developing countries like Uganda. This is largely due to the mistrust and perception these IOC's have in our judicial system, perceived to be corrupt and weak. In that regard, one of the first considerations IOC's take while trying to invest in Countries like Uganda is whether the Country has provision for ADR. To that extent, a proper dispute settlement mechanism is one of the ways of attracting foreign investment in the Oil and gas Sector.[11] This Study therefore is an analysis of the efficacy of dispute resolution provisions in Uganda's PSA and its role in developing Uganda's upstream oil and gas sector**.**

1.0.2 Historical Background

With an increasing number of African countries having discovered commercially viable quantities of oil and gas in recent years, including, for example, Kenya, Chad, Ghana and Uganda, there is both excitement and trepidation about the prospects for increased incomes and investments, economic growth and development on the continent. This is due to comparative historical evidence of the link between natural resource exploitation, economic growth and development on the one hand and natural resource exploitation, economic decline and socio-political crises on the other hand.[12]

[10]ibid
[11] See Article 24 of Uganda's PSA model of 2016.
[12]Arnim Langer, Ukoha Ukiwo & Pamela Mbabazi: *Oil Wealth and Development in Uganda and Beyond: Prospects, Opportunities and Challenges* Leuven University Press, 2020 p. 17 https://www.library.oapen.org last visited on 28 December 2020

Uganda discovered commercially viable quantities of oil and gas in its western rift valley in the Albertine region of Western Uganda in 2006.[13] By the end of 2017/2018, Uganda had 21 oil and gas discoveries with an estimated accumulation of 6.5 billion barrels of oil equivalent, of which 1.3 billion barrels is recoverable.[14]

On the other hand, Uganda's gas reserves are estimated at 672 billion cubic feet of gas, with 499 billion barrels of non-associated gas and 173 of associated gas. Moreover, there is still considerable potential for discovering more petroleum, given that less than 40 per cent of the total area in Albertine Graben with the potential for petroleum production has been explored.[15]

Whereas, Uganda granted some eight licences over oil fields in Exploration Area 1 (EA I), Exploration Area 2 (EA2) and Kingfisher Area, shared out between Tullow Uganda Operations Pty Limited, Total E & P Uganda B.V. and China National Offshore Oil Corporation (CNOOC) Uganda Limited following its discovery of oil and gas, two more petroleum production licences were cleared by the Cabinet, and on 14 September 2017 the Government signed a Production Sharing Agreement with an Australian company, Armour Energy Limited.[16]

There are also efforts to search for oil and gas in other prospective areas of the country, including Amuru in Northern Uganda and the Karamoja area.[17]

As a result, cumulative foreign direct investment in petroleum exploration in Uganda since 1998 was estimated to be over US$ 3 billion at the end of 2016. From 2017 to 2019, there has been little activity as the development phase is yet to commence pending the final investment decision by the international oil companies. Investment in the petroleum sector is expected to increase significantly as the country enters the development, and subsequently the production, transportation and refining phases of the petroleum value chain.[18]

To add value to oil and gas resources there are plans to develop the Uganda Refinery with a capacity of 60,000 barrels per day and the associated down-stream infrastructure. In addition, feasibility studies on the development of a crude oil export pipeline from the Albertine Graben

[13] Ministry of energy and mineral development policy report of 2006
[14]Pamela Mbabazi and Martin Muhangi: *Uganda's Oil and Governance Institutions: Fit for Purpose* in Arnim Langer, Ukoha Ukiwo & Pamela Mbabazi *Oil Wealth and Development in Uganda and Beyond*: *Prospects, Opportunities and Challenges* Leuven University Press, 2020 Page 33
[15] ibid
[16]Pamela Mbabazi and Martin Muhangi op cit.
[17]supra note 13
[18]Infra note 19

in Uganda to the East African coast were undertaken, with a view of selecting the least-cost route for transporting Uganda's crude oil to the coast.[19]

The Hoima (Uganda)–Tanga (Tanzania) route was selected for being more secure, and cheaper in terms of cost. Consequently, a 1,445 km long, 24-inch diameter, heated East Africa crude oil pipeline (EACOP) will be developed to transport crude oil from Uganda to Tanga Port in Tanzania.[20]

The development of this pipeline is spearheaded by the licensed upstream oil companies in Uganda, with participating interests by the governments of Uganda and Tanzania through the Uganda National Oil Company and the Tanzania Petroleum Development Corporation respectively. These developments are indicative of the expectations that oil production will increase government revenue, improve economic growth and promote development in Uganda.[21]

Due to the oil industry's features of large investment, long period and high risk, as well as the particularities of international petroleum cooperation modes, oil price and major contract elements coupled with the fact that future oil price is full of uncertainties, and due to oils more and more significant financial attributes,[22]Governments do not have capacity to explore, develop and produce oil. As such they enter into oil contracts common of which is the Production sharing Agreements, whose feature is that the oil resources are owned by the host government (often represented by national oil companies, NOCs), while IOC's undertake all risks as well as the cost in the entire exploration process. Production is as a result split at an agreed rate between the NOC and IOC. Also, the IOCs have to pay income tax on their share of profit oil.[23]

Uganda passed the 1999 Model Production Sharing Contract,[24] as a basis upon which Tullow Uganda limited and Uganda Government negotiated and executed the Production Sharing Agreements for Petroleum Exploration, Development and Production in respect of Exploration

[19]Pamela Mbabazi and Martin Muhangi op cit.
[20] Pamela Mbabazi and Martin Muhangi op cit.
[21]Pamela Mbabazi and Martin Muhangi op cit.
[22] Liu Mingming, Wang Zhen, Zhao Lin, Pan Yanni and Xiao Fei: *Production sharing contract: An analysis based on an oil price stochastic process Pet. Sci.* **9,** 408–415 (2012). 408 https://doi.org/10.1007/s12182-012-0225-6 last visited on 3 March 2021
[23]Pamela Mbabazi and Martin Muhangi op cit.
[24] Uganda 1999 Model Production Sharing Contract

Area 1,[25] and Kanywataba Prospect Area.[26] Uganda has signed Production Sharing Agreements with various International Oil Companies including French Firm Total, Chinese firm CNOOC and U.K firm Tullow Oil.[27] These Production Sharing Agreements provide for dispute Resolution Mechanisms.[28]Uganda has also developed model Production Sharing Agreements which too have dispute resolution mechanisms.[29]

The enactment of the Petroleum (Exploration, Development and Production) Act,[30] created the framework for promulgating the 2016 PSA Model.[31] The 2016 PSA model provides for amongst others, royalty, bonuses and many other tax and fiscal instruments. In all these laws and PSAs, the Government enacted several provisions aimed at resolving oil and gas disputes anticipated to occur in the future.

1.0.3 Conceptual Background

Disputes may be seen as a result of a dynamic relationship between interested parties, struggling to gain control of valuable resources.[32] A dispute has been referred to as "a conflict or controversy,'[33]and as such disputes are an inevitable part of human relationship, which may arise in the economic, social, political and even international aspect of human relationship. Nonetheless, what is of essence is the way in which such dispute is resolved or handled between the disputing parties.[34]

The 1980s and 1990s have seen the unprecedented rise of ADR in both governmental and contractual spheres. This movement toward more informal methods of dispute resolution may be one of the most significant developments, since the advent of modem discovery in 1938.[35]

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[25] See Production Sharing Agreement for Petroleum Exploration, Development and Production Between Uganda and Tullow Uganda Limited in respect of Exploration Area 1 (Feb. 2012)
[26] See Production Sharing Agreement for Petroleum Exploration, Development and Production Between Uganda and Tullow Uganda Limited in respect of Kanywataba Prospect Area (Feb. 2012)
[27]Seven PSA have been signed between Uganda and International Oil Companies
[28]See Article 24 of the 2016 Uganda Model Production Sharing Agreement
[29] See the Uganda Model Production Contract of 1999 and the 2016 Uganda Model Production Agreement
[30] The Petroleum (Exploration, Development and Production) Act No. 3 of 2013
[31] Uganda's 2016 Model Production Sharing Agreement op. cit.
[32]Bello Adesina Temetayo op. cit.
[33]Garner, B. *Black's Law Dictionary,* 5th Edition, USA West Publishing (1979)
[34]Bello, Adesina Temitayo op. cit.
[35]Lorna McGregor: *Alternative Dispute Resolution and Human Rights: Developing a Rights based Approach through the ECHR* The European Journal of International Law Vol.26 No. 3 Oxford University Press (2015) 616 https://www.academic.oup.com last visited on 4 March 2021

The concept of dispute resolution through Alternative Dispute resolution is rooted to self-governing system, which is a consequence of enactment of private law in the business world which is a legal regime that gives freedom to parties to determine their own dispute resolution based on their concepts and interests (the principle of freedom of contract). For example, the freedom to choose experts in certain fields who are considered to have the competence to resolve disputes.[36]

Alternative Dispute Resolution is an effort to settle disputes out of litigation (non-litigation. In ADR there are several forms of dispute resolution including consultation; negotiations, meditation; conciliation; arbitration; good offices; mini trial; summary jury trial; rent a judge.[37]

The underlying core principles of ADR, such as a speedy process for mutual agreement between the parties, assistance of a neutral third party for reaching an agreement between the victim and offender, and maintaining confidentiality at the highest level have made ADR more confident and popular among the general public.[38]

In other words, the growing importance of ADR mechanisms is fueled by the significant advantages that such mechanisms offer compared to the court process, such as speed, confidentiality, low cost, the possibility of defining the dispute and the procedure, as well as the involvement of an expert/neutral third party in the matter concerned. ADR methods also generate a better understanding between the rival parties in the search for a resolution to a given dispute. ADR methods make it possible for the parties to reach agreements based on their common interests, resulting in an outcome that, as far as possible, allows the parties to put aside their differences.[39]

Arbitration is the central adjudicatory process in ADR. Like trial, it is an adversarial process in which a third-party neutral simply decides the dispute between the parties.[40]In Uganda, Arbitration is governed by the Arbitration and Conciliations Act.[41]

[36] Vonna Z. et al op. cit.
[37] Vonna Z. et al op. cit
[38] Vonna Z. et al op. cit
[39] M.A.D.S.J.S Niriella: *Amicable Settlement Between the Disputed Parties in a Criminal Matter: An Appraisal of Mediation as a Method of Alternative Dispute Resolution with Special Reference to Sri Lanka* Sri Lanka Journal of Social Sciences 2016 39(1): 15-25 https://www.researchgate.net last visited on 3 March 2021
[40]Richard C. Reuben: op. cit
[41]The Arbitration and Conciliation Act Cap 4 Laws of Uganda

It should be noted that different interpretations have been given by national courts on various aspects of arbitration depending on the different theories.[42]

Taking the issue of delocalization as an example, both French and US courts have placed more emphasis on the contractual element and enforced some arbitral awards which have been set aside at the place of arbitration whereas the English courts are still embracing the jurisdictional nature by following Lord Mustill's statement that; '*At all events it cannot be the law of England, for otherwise this House would have dismissed at the very outset the attempt to procure an interim injunction during the currency of an ICC Arbitration*' in *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*[43]

Generally speaking, the various commentaries about the nature of arbitration have been collected into four different theories: the jurisdictional theory, the contractual theory, the hybrid theory (or the mixed theory) and the autonomous theory.

Among them, the jurisdictional theory is based on the complete supervisory powers of states to regulate any international commercial arbitration within their jurisdiction. In this theory also known as the traditional theory, every arbitration must be attached to a legal seat of arbitration.[44]

The contractual theory argues that international commercial arbitration originates from a valid arbitration agreement between the parties and that, therefore, arbitration should be conducted according to the parties' wishes.[45] The Contractual theory is also known as delocalized theory and is to the effect that no link need exist between the seat of arbitration and arbitration proceedings taking place in that jurisdiction.[46]

The hybrid theory stands as a compromise between the jurisdictional and contractual theories. It maintains that international commercial arbitration has both a contractual and a jurisdictional character. The autonomous theory, which has been developed more recently, dismisses the traditional approach and places emphasis on the purpose of international commercial arbitration. Instead of fitting arbitration into the existing legal framework, the autonomous

[42]Frédéric-Edouard K, (1958), '*Autonomie de la Volonté et Arbitrage'*, 47 REVIEW CRITIC 255.
[43] Ancel, J. P. (1993), French Judicial Attitudes towards International Arbitration, 9(2) ARBITRATION INTEREST 121.
[44] Simon Greenberg, Christopher Kee and K.Romesh Weeramantry: *International Commercial Arbitration* ; An Asia-Pacific Perspective; Cambridge University Press (2012) 66
[45] Mann F.A. (1967), '*State Contracts and International Arbitration*', 42 BRITISH YEARBOOK INTERNATIONAL LAW 1.
[46] Simon Greenberg, Christopher Kee and K.Romesh Weeramantry op. cit.

theory defines arbitration as an autonomous institution, which should not be restrained by the law of the place of arbitration. As a result, parties should have unlimited autonomy to decide how the arbitration shall be conducted.[47]

In order for Uganda to effectively benefit from its new black gold, it needs an effective dispute resolution mechanism which can help in boosting the oil and gas sector and also ensure that the Government gets as much revenue from oil and gas activities as possible which is normally threatened by continuous litigation.

In this regard, the Government enacted many laws aimed at ensuring tax compliance and benefit accrual before even oil exploration took effect, this was aimed at ensuring that international oil companies don't take advantage of weaker dispute resolution regime to benefit more from the resource than the host nation itself.

This research therefore is an analysis of the efficacy of dispute resolution provisions in Uganda's production sharing agreements and its role in developing Uganda's upstream oil and gas sector.

1.0.4 Contextual Background

Article 244 of the Constitution of the Republic of Uganda,[48] commands the Government of the Republic of Uganda to hold in trust for the people of Uganda natural resources which include oil deposits. Oil proceeds if well utilized would potentially turn around the Ugandan economy and assist it to make strides towards becoming a middle income Country.[49]

The Petroleum (Exploration, Development and Production) Act,[50]enjoins the Government with power of licensing and management of the oil resources among other roles and developing model PSA's. By their nature, PSA's are central in the Petroleum exploration, Development and Production and as such form the bedrock of the development of Uganda's upstream oil and gas sector.[51] Whereas these PSA's define relationships between Uganda Government and International Oil Companies, one pertinent point is a mechanism of resolving disputes arising under the said PSA's.

[47]Mann F.A. (1983), Lex Facit Arbitrum, 2(3) ARBITRATION INTEREST 245.
[48]The Constitution of the Republic of Uganda 1995 as amended
[49]Pamela Mbabazi and Martin Muhangi, Uganda's Oil Governance Institutions: Fit for Purpose? CRPD Working Paper No 60 (2018) Centre for Research on Peace and Development
[50] The Petroleum (Exploration, Development and Production) Act No. 3 of 2013.
[51] Uganda's 2016 Model Production Sharing Agreement.

The PSA's create legal certainty.[52] This is premised on the proposition that "all agreements made in accordance with the law apply as the law for those who make them *(pacta sunt servanda):* hence such agreements are interpreted in good faith.

Oil and Gas Production Sharing Contracts regulated by the oil and gas law are written contracts with terms and conditions.[53] Whereas Oil and Gas Production Sharing contracts have been categorized into economic development contracts or state contracts, they have also been categorized as public contracts.[54]

The *raison d'etre* of categorizing Oil and Gas Production Sharing Agreements into economic development contracts or state contracts is because of the form of the contracts. Usually, these contracts are of a long period of time, 25 (twenty-five) to 70 (seventy) years, with values which are quite large and the object of the contract is not solely for profit, but also for social purposes. Further these contracts are subject to Government monopoly, the applicable and selected law is the national law of the host country, and the existence of administrative requirements that are public, and the object concerns the interest of the people.[55]

Oil and Gas Production Sharing Contracts are also categorized as public contracts because some of these contracts are controlled by public law such as legal subjects, one of which is the Government.[56]

One can therefore assert that the enactment of public law and private law on contracts occur simultaneously, which are complementary and not in conflict with each other. Thus the two kinds of law intersect, but still show the characteristics of each.[57]

The existence of a public element in the Oil and Gas Production Sharing Contracts is inseparable from social interests as the purpose of management of Oil and Gas itself so that sometimes the meaning of the balance in the contract shifts. This principle of balance has a

[52]Vonna Z. op. cit.
[53]Vonna Z. op. cit.
[54]Vonna Z. op. cit.
[55]Vonna Z. op. cit.
[56]Vonna Z. op. cit.
[57]Supra note 56