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THE EFFICIENCY OF ALTERNATIVE DISPUTE RESOLUTIONS IN THE OIL AND GAS INDUSTRY

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Abstract. Given the perceived benefits of alternative dispute resolution (ADR) processes such as negotiation, mediation and arbitration, and their importance, it seems that it is an adequate option for oil and gas industry to opt for. This paper will point out to the fact that opting for ADR that provides speedy, cheap, effective, and flexible resolution. However, this does not mean to ignore the point that there are a number of risks associated with using these alternatives. So, it is the aim of this paper to approach these issues.

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INTRODUCTION

With the increasing volume of the global market (globalisation), the need for a sufficient strategy and effective management systems to ensure the survival and sustainability of businesses is prerequisite and should be taken into consideration by major companies, in particular in the oil and gas industry. In addition, the nature of contracts in the oil and gas industry differs from the generality of contracts giving that one of the parties will generally be a state or agency and the parties to the contract will usually be from different nations. Additionally, the parties in these industries have their own particular approaches to dealing with a wide variety of issues, including the handling of disputes. Although not all commercial agreements will inevitably give rise to disputes, there will be always disputes of some kind arising out of commercial contracts.

It is, therefore, not surprising that participants in the oil and gas industry should seek to consolidate their relationship with each other in order to ensure the continuity of their project. To achieve this end, players in these industries always fortify their agreement with a number of clauses dealing with dispute matters (Clark, 2004). Furthermore, they will generally strive to put into place processes which are speedy, efficient, private, and are designed to cause minimum disturbance to working processes and maintaining relationship between the contracting parties (Ross, 2007). Hence, parties in these industries are disposed in favour of agreed dispute resolution processes-whether personal to their contract (such as negotiation and meditation or as laid down by

international instrument (such as arbitration)-rather than placing reliance upon the procedures of the national courts. As will be shown below, for a variety of reasons such an approach is adequate for industry requirements, even though there may be particular problems that might arise in implementing it.

This article will not explain what each one of these alternatives of dispute resolutions means; however it will take some of them as an example to illustrate how they are appropriate approaches to industry needs over litigation (Renfrew, 2004). This article will take into account the positive arguments in support of the case for alternative dispute resolutions (ADR), and then illustrating how their option is of a great importance for satisfying the needs of the industry. Further, the negative aspects of these alternative processes will be considered.

Speedy, Cheap and Effectiveness

The contracting parties in the oil and gas industry will usually, during the drafting stage of an agreement, select dispute resolution processes which provide speedy, cheap and effective resolutions to any problems that may arise at any stage in the contract. Thus, they seek to obtain a resolution through non-adversarial approaches, such as negotiation, mediation, expert determination or arbitration, rather than through an adversarial approach such as litigation (Clark, 2004). That is an important thing in term of industry needs since parties will desire to maintain good relations in order to facilitate continued future

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trading with each other. Thus, considering the time consuming and costly nature of litigation, Bentham (1986/87) found the case strongly made for negotiation, mediation and arbitration as means of dispute resolutions, as these are fast, inexpensive and effective techniques for dealing with dispute matters. For example, in the case *Caledonia North Sea Ltd v London Bridge Engineering Ltd*, the Piper Alpha disaster occurred on 6 July 1988 and the proof began on 3 March 1933; in all, 391 days of evidence were heard (Gordon, 2007). This case shows how litigation is considered to be time consuming and costly. Unlike litigation where the cost is usually paid by the losing party, in an alternative dispute resolution the cost is often shared by the parties involved.

However, it might be argued that it is not always the case that these alternatives are less expensive than court proceedings and, also, nor is it inevitable that a dispute will not be dealt more quickly than it would be the case before the courts (Morrison and Panayides, 2001). In arbitration, for example, the parties have to bear the cost of the actual arbitral hearing and they would have to bear the expense of the accommodation for the arbitral tribunal. There has been, for example, a very large arbitration with 60 or 70 hearings days which took place in a London Hotel at the cost of about £5,000 per week (Bentham, 1986/87).

Also, the high value of offshore constructions disputes mean that most cases require that the members of any arbitration tribunal should be well-known leaders in their respective fields of expertise which entails that further amounts of money have to be paid (Morrison and Panayides, 2001). As a result, court proceedings can sometimes be cheaper than arbitration. Also, it may be claimed that where, for instance, a mediation is not successful, it will create a further expense because parties might have to follow that failed mediation with litigation. Also, it might be asserted that if the parties select an expert determination as a means for solving their arguments and the expert's decision was challenged before the court that means a double cost has to be paid by the parties of the dispute (Kendall, 1992; King, 1994).

Despite the fact that ADR processes sometimes can be more expensive than the court procedures, by making a balance between the additional financial cost in an unsuccessful arbitration or mediation or expert determination and the possible saving where a complex case is successfully mediated or arbitrated or determined, it will be evident that they are still cheaper than litigation.

Privacy

Most alternative dispute processes are conducted in private, and this privacy helps to ensure commercial confidentiality so industries' data can remain secret. To achieve this end, parties usually agree to settle their disputes amicably by negotiation or by mediation (which involves a neutral person who assists the parties to a dispute in reaching their own resolution) (Maniruzzaman, 2003). To clarify this, a mediation agreement,

for instance, will usually require for the respecting of confidentiality of communications between the parties and neutral person (Boullé, Jones and Goldblatt, 1998; Zamboni, 2003). Thus, this confidentiality is one of the major motivations for opting for the mediation process. For example, it is a reasonable expectation of the parties to a mediation that their business and private confidences will be treated as being strictly confidential (Zamboni, 2003). It is worth bearing in mind that, in the UK, the neutral person, in principle, cannot reveal any information unless he obtains permission from the parties involved. This is in contrast to the position in the USA where the neutral person, in principle, has the right to reveal the information to another party unless he is prevented by the parties (Zamboni, 2003). It should be noted that confidentiality can be expanded by parties' agreement (to cover, for instance, witness and experts) and require those parties to be bound by a confidentiality agreement (Moses, 2012).

Although the majority of ADRs are performed in private, an arbitral award might be published if enforcement through registration becomes essential (Oberts, 2004). Also, it might be asserted such cases are tried in private - in particular where it is considered by the court - to protect the privacy of some major industry. Thus, litigating before a court can provide this confidentiality.

Even though the hearing before the court might be conducted in private, the announcement of the judgment will be in public. Hence, ADR processes are much favourable by the oil and gas industry over than litigation, because in litigation players' reputation might be affected.

Flexibility

Furthermore, the ADR techniques offer greater flexibility than litigation. As a result, the oil and gas industry prefers to opt for alternative resolution processes rather than automatically having recourse to court proceedings. This flexibility allows the parties to remain in control of the procedures and the outcome of any disagreements, in contrast to litigation where the parties are unable to control the court proceedings and have to be abided by the court decision (Oberts, 2004). For example, if the parties have agreed that any disputes arising during the period of their contract shall be resolved by negotiation but the negotiation fails, they nevertheless still have all of the other alternative options - such as mediation, expert determination or arbitration - available to them.

Despite the flexibility of ADR techniques, they are sometimes unsuitable where one of the parties has no actual interest in achieving a settlement. For instance, if power imbalances exist between the parties, reaching an agreement via ADR will become to some extent more difficult because a less powerful party may seem to be the weaker player in a dispute with an intercontinental operating company (Ross, 2007). As a result of this power

imbalance, one party, usually the stronger, may impose their solution on the other party.

However, although in some cases alternative disputes resolutions are not an appropriate option, in many cases ADRs offer an adequate option for industry needs, and, furthermore, the parties can overcome any power imbalances during drafting their agreement.

Moreover, it might be argued that even if the parties are able to control the outcome of their dispute, sometime they face some difficulties relating to the enforcement of any decision. For example, if a dispute concerns a foreign company against a state organisation, the enforcement of any arbitral award will be not easy. Nonetheless, since many countries are parties to the New York Convention on the recognition and enforcement of international arbitral awards, such difficulties will be overcome (Ross, 2007).

Maintaining Relationship

Maintaining good working relationships is very important thing, and the oil and gas industry should make positive efforts to preserve such relationships. If parties have played a major role in shaping the resolution of a dispute, they are more likely to make the contract works (Sharpless, 2008). Thus, opting for alternative dispute processes as an alternative to litigation to solve any problems is considered to be a sufficient choice for industry needs. In this regard, it is argued that the oil and gas lease relationship can be improved by incorporating into the lease contract a pre-dispute arbitration clause which requires the exhaustion of formal negotiation and mediation processes (Moore and Pierce, 1997). It is not surprising that dispute settlements in oil and gas industry, particularly in Asia, tend to be consensual rather than argumentative (Maniruzzaman, 2003). The reason behind this is that the industry players desire to maintain their relationships without any difficulties in order to achieve their longer term aims.

In addition, ADR option helps to sustain satisfactory business relations. If the parties to a dispute, for instance, select a

negotiation as a means for dispute resolution and they get together in an informal setting and each one of them presents his points in a friendly way, at the end of the day, usually both of them will be satisfied. They furthermore, could achieve a satisfactory consequence by inviting a neutral person who helps them to reach a compromise (Maniruzzaman, 2003). However, it is not always true that using ADRs process leads to a satisfactory result. For example, sometimes one party waives his rights in order to settle the dispute as soon as conveniently possible, but in reality he is not pleased with the outcome. Furthermore, defining arbitrator's authority might be difficult and may lead to future disagreement (Park, 1984). For instance, in Mobil Oil vs. Asamera case (1980), a contract for exploration and production of petroleum in Indonesia provided for Mobil to pay royalties on "crude oil". However, the arbitral award required Mobil to pay royalties on gas and liquid hydrocarbons other than crude oil. Mobil disagreed and claimed that the arbitrators had exceeded their authority by rewriting/modifying the contracts terms. The U.S. District Court for the Southern District of New York refused to vacate the award, finding it sufficient that the arbitrators' statement of reason contained a "barley colourable" justification for the outcome (Asamera Case, 1980).

CONCLUSION

Given the perceived benefits of alternative dispute resolution processes such as negotiation, mediation and arbitration, and their importance, it seems that it is an adequate option for oil and gas industry to opt for them rather than litigation. Alternative dispute resolution (ADR) provides speedy, cheap, effective, and flexible resolution rather than court proceedings which are slow and costly. Moreover, ADRs are adequate for industry needs since they maintain the parties' relationships and are able to overcome the complexity that is found in many disputes. However, a mediation and arbitration are not cheap if they fail and a subsequent court action has to be raised. Thus, there might be a double cost that has to be paid by the parties of such a dispute.

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— This article does not have any appendix. —