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The Efficacy of Dispute Settlement in Promoting Investment in the Petroleum Sector in Cameroon

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Abstract

One unavoidable characteristic of the petroleum industry is the likely occurrence of disputes. These disputes may arise as a result of non-compliance or an improper interpretation of the contractual clauses. Most host countries, as in the case of Cameroon, have taken initiatives to put in place mechanisms that will help resolve these disputes when they arise. The aim of these initiatives is not only to provide an enabling investment environment that will attract investors but also to build the trust and confidence of the investors who must have invested huge capital in this sector. In this light, the Cameroonian government has given judicial recognition to the use of stabilization and renegotiation clauses as an attempt to prevent potential petroleum disputes from emerging. In situations where these disputes become inevitable and cannot be resolved through these clauses, the parties can seize either the court jurisdiction or use the alternative dispute resolution mechanisms recognized under the Cameroonian Petroleum Laws. The findings of this paper point out that the increase in investors' interests in this sector over the years has been tied considerably to the dispositions that have been put in place by the government which serve as catalysts in resolving petroleum contract disputes in the country.

Keywords: Disputes, efficacy, investment, petroleum contracts, petroleum sector, renegotiation clauses, stabilization clauses

INTRODUCTION

Dispute is no longer a strange element in the oil sector. Owing to the complexity and longevity of the project, changes in circumstances may arise which if not carefully handled, can lead to a dispute [1]. The majority of international commercial and state investment disputes in the world stem from oil operations. In the *Mavrommatis Palestine Concession* case, the Permanent Court of International Justice defined dispute as "a disagreement that arises on matters of law or fact, a disagreement on legal views or conflicting interests between two persons" [2]. A dispute can also be taken to mean a situation in which two parties share opposite views about questions relating to performance or non-performance of a treaty's obligations [3].

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The State is considered as the monopoly of justice and as such, has vested upon the courts to resolve disputes. The courts therefore charged with the responsibilities to interpret and apply the laws [4]. However, the adjudicative method of resolving disputes is flawed with delays, high costs, lack of parties' control over the process, and corruption, amongst others [5]. This therefore discourages parties to seek the court for dispute resolution. Due to these drawbacks, recourse is made to alternative dispute resolution mechanisms (Herein after referred to as ADR). The ADR methods are suitable to resolve disputes of a commercial nature among which are oil disputes. The origin of ADR can be traced to the judgment passed by King Solomon between two women who laid claim of a child [6]. The judgement he passed was so profound that up till date, it is considered as the philosophical foundation of ADR. The aim of this paper therefore, is to examine the different types of oil contract disputes in Cameroon and as well as the contractual provisions that have been put into place to ensure stability in oil contracts in Cameroon. The methods used to resolve oil contract disputes in Cameroon are also examined in this paper.

TYPES OF DISPUTES IN THE PETROLEUM INDUSTRY IN CAMEROON

There are different types of disputes that may arise from oil operations or transactions in Cameroon. They are:

State and State Disputes

These disputes are mostly boundary disputes where oil straddles. The major stakeholders in this type of dispute are governments. This is so because most governments have permanent sovereignty over petroleum resources. This gives them the power to claim sovereign title and resolve boundary disputes with their neighbouring states that involve oil [7]. Since most developing countries lacks the capital and legal human capacity to resolve these disputes, oil companies may be asked to finance them since their interest is also at stake, thus getting indirectly involved in the disputes.

A glaring example of this type of dispute was seen in the land boundary disputes between *Cameroon* v. *Nigeria* over the Bakassi Peninsula [8]. This dispute was resolved through protracted negotiation on 10th October 2002, by the International Court of Justice. The ICJ delivered judgment on the disputed oil-rich Bakassi Peninsula conflict in favour of Cameroon. Through the *Green Tree Agreement (*2006*)*, there was a peaceful transition of the disputed area to Cameroon in the presence of UN officials and diplomats from many countries [9].

Oil Company and State Disputes

These disputes arose in situations where the government introduces new terms in the oil contracts which were not so from the onset or expropriate the investments of the oil companies. One of the measures to advert such disputes is the introduction of stability clauses in oil contracts. However, countries may still use renegotiation clauses to bring readjustments in oil contractual arrangements.

Individual and Oil Company Disputes

Individuals can also become parties to oil disputes. This arises when an individual suffers personal injury as a result of consuming the products of an oil company. The individual can in this regards bring a tortious action against the company. A glaring example of this type of oil dispute was seen in the Cameroonian case of *Egbe Mauren Arrey v. ELF Cameroon & Ors* [10].

Oil Company and Oil Company Disputes

The majority of disputes in the oil industry arise between oil companies. There are two sub-categories of disputes occurring between oil companies. The dispute may arise when two oil companies operate under a joint venture agreement in an oil contract or in other cases, as operators and service contractors in an oil venture [11].

A typical example of this type of dispute emanated in the case of *Société Nationale de Raffinage v. African Petroleum consultant,* [12] where Société National de Raffinage sued African Petroleum consultant for violation of contractual terms. African Petroleum consultant dissatisfied with the judgment rendered by the Buea High Court had to make an appeal before the Buea Court of Appeal. On appeal, the learned judge upholds the same verdict of the lower court by stating that, African Petroleum Consultant had not only violated the contractual terms but also could not use an arbitral tribunal to resolve their dispute.

STABILITY PROVISIONS IN PETROLEUM CONTRACTS IN CAMEROON

One major feature in oil operations is the long-term agreement [13]. Given that these agreements may change over time, there is the need for the interest of the oil operators to be protected. One possible way of protecting their interest is through the insertion of stability clauses. These clauses impose on the host state the obligation of not introducing new legislative or economic terms that may affect the nature of their contract. However, in a situation where changes cannot be avoided, the parties to the contract may also accept readjustment of the original contractual provisions to permit both parties fulfil their respective obligations in the contract. The aim of this section therefore is to examine the role played by stabilisation and renegotiation clauses in ensuring oil contractual stability in Cameroon.

The Use of Stabilisation Clauses in Cameroon's Petroleum Contracts

In petroleum agreements, one way through which stability is achieved is through the insertion of stabilisation clauses. The aim of these clauses is to protect oil companies from abusive legislative, economic or administrative changes that may be introduced by the HC into the contract [14].

Nature and Purpose of Stabilisation Clauses in Petroleum Contracts

Stabilisation clauses impose on the HC the introduction of new terms into the contract without the consent of the investors [15]. These clauses are designed to protect foreign investors from any political, adverse legislative or regulatory changes that a host state may want to introduce in the contract [16]. These clauses are so profound in oil transactions owing to the fact that the host state has permanent sovereignty over her resources and may want to use such powers against the interests of the foreign investors [17]. Thus, to ensure that the host state is willing to respect the doctrine of sanctity of contract, oil companies also seek that such clauses are introduced in their contracts. There are different types of stabilisation clauses which include freezing clauses, prohibitions on unilateral changes, and balancing clauses.

The insertion of stabilisation clauses in international oil contracts can be attributed to the issue of nationalisation of foreign based industries by host governments as was seen in the case of the *Government of the State of Kuwait v. the American Independent Oil Company*. In this case, the state of Kuwait had to nationalize the American oil company. States, by principle, have to adhere to the principle of *pacta sunt servanda,* [18] in their contractual relations with investors. However, many host states find it difficult to completely adhere to this doctrine, and as such, can expropriate the contractual rights of investors [19]. Notwithstanding, these clauses have been articulated in the Cameroonian petroleum laws to guarantee their effective implementation.

Legal Basis of Stabilisation Clauses in Cameroon's Petroleum Contracts

The legal validity of stabilisation clauses has been upheld in the Cameroonian Petroleum Code. In this light, the Code provides that:

> *Petroleum contract may provide for special regimes with regard to the stabilisation of economic conditions, particularly where conditions for the execution of the said petroleum contract are aggravated by the introduction, in the Republic of Cameroon, of laws or regulations after its effective date* [20].

Similarly, the Cameroonian Model Production Sharing Agreement recognises these clauses. It should be however mentioned that when the oil operators advance reasons contesting the effects the legislative or regulatory change may have on their economic equilibrium as guaranteed in the contract, the Minister of Hydrocarbons may upon their request accept or reject such regulatory changes [21]. Readjustments concerning the terms of the contract can be made to reestablish the economic equilibrium of the parties in situations where new legislative or economic terms must have been introduced [22]. The revisions should in no way increase or diminish the responsibilities of the parties. But if an agreement for revision cannot be reached between the parties within 90 days, the dispute may be submitted by either party to the arbitration procedure.

The Chad-Cameroon project is one of those contracts where stabilisation clauses were instituted and respected. The governments in the project agreed not to modify the legal, tax, customs, and exchange control regime in manner that will adversely affect the rights and obligations of the investors [23]. No legislative, regulatory or administrative measure, which runs contravene to the provisions of the convention were to be applied to the investors without their prior written consent. Similar cases where stabilisation clauses were enforced were in *AGIP v. Republic of Congo,* [24] *Saudi Arabian* v. *Arabian American Oil Co.,* [25] and *Texaco Overseas Oil Petroleum* Co. v. *Libya* [26].

However, there have been series of cases where host state fails to respect stabilisation clauses and goes ahead to expropriate the assets of the IOCs. These were seen in the cases of *Libya America Oil Co. v. the Government of Libya Arab Republic (LIAMCO)* [27], *Kuwait v. American Independent Oil Company* (*Aminoil*), [28] *Texaco Overseas Petroleum Co Texaco) & California Oil Co v. Government of the Libya Arab Republic (Texaco)* [29]. This therefore leads to the conclusion that the strict interpretation of the doctrine of pacta sunt servanda is not an absolute principle.

The Use of Renegotiation Clauses in Cameroon's Petroleum Contracts

Renegotiation clauses may serve as an alternative to stabilisation clauses. The 2007 Model Production Sharing Contract was drafted taking into consideration renegotiation clauses and possible changes that could affect the commercial and fiscal equilibrium of the parties [30]. The flexibility of renegotiation clauses is that such clauses can be inserted at any time when there is a significant modification of the petroleum contractual terms as provided under the MPSA.

The doctrine of sanctity of contract is strongly upheld in English common law [31]. The contracted parties have no prerogative to renegotiate the contracts once concluded. However, certain circumstances can exonerate parties from this responsibility. Frustration of a contract may exonerate parties from the responsibility of performance of the contractual obligations [32].

Force majeure is another way that can exonerates parties from performing their contractual obligations. An event will be considered an event of force majeure under the eyes of the 2007 Cameroonian production sharing contract if it has the effect of temporarily or permanently preventing either of the parties from performing the obligations incumbent on them in the contract [33]. However, force majeure does not in any way prevent the payment obligations in the petroleum contract in Cameroon. Examples of events that constitute force majeure are strikes, work stoppages, and fires, among others [34]. The 2008 joint venture agreement between *Perenco Oil and Gas (Cameroon) Ltd, Kosmos Energy Cameroon HC, and National Hydrocarbons Corporation over the Kombe-Nsepe block* is a glaring example of oil contracts in Cameroon where provisions for force majeure were introduced [35].

The 2007 MPSA makes it imperative for the party in the oil contract that was unable to perform his own part of the contract to immediately notify the other party [36]. Where force majeure, leads to partial or late performance of a contract, the party is still under an obligation to continue to carry out the clauses specified in the oil contract that they are in a position to carry out despite the force majeure. Also, the impeded party will do everything possible to meet up with its obligations under the oil contract. The aim of this is to minimise the consequences of the force majeure [37]. The 2007 MPSA is very flexible as it extends the duration of the exploration, exploitation, and development phases equal to the time of the force majeure [38].

METHODS OF RESOLVING PETROLEUM CONTRACT DISPUTES IN CAMEROON

Litigation and Alternative Dispute Resolution make up the principal methods utilised by the various actors involved in oil activities to resolve any disputes that arise from their contractual arrangements in Cameroon [39]. This research provides a comparative analysis of the two methods. The aim of comparing these two methods is to see which amongst them is more suitable to resolve oil disputes in Cameroon and at the same time, provides an incentive to attract IOCs in the Cameroon's oil sector.

The Viability of Litigation in Settling Petroleum Contract Disputes in Cameroon

This section of the work is focused on the use of litigation as a means to resolve petroleum disputes and the resultant effects of using this method in settling petroleum disputes in Cameroon.

The Conceptual Framework of using Litigation to Resolve Petroleum Contract Disputes in Cameroon

This has been the traditional method of settling disputes where the state exercises its power as the monopoly of justice [40]. In the event that a dispute arises between those engaged in the oil industry and they have not agreed on contractual provisions for dispute resolution, it will be referred to the national courts to be resolved by litigation. Ceasure of competent jurisdiction for the resolution of an oil contract dispute is also not different from that of other disputes. This has been organized by the law of 2006 modified by the law of 2011 [41]. This can be based on material and territorial jurisdiction [42].

The Cameroonian Petroleum Code has been very clear on the use of litigation in resolving oil contract disputes. All petroleum contracts and authorisations are to be resolved using the rules and regulations of the Republic of Cameroon [43]. By doing so, the Code eliminates conflict of rules when it comes to the settlement oil contract disputes in the country. In cases where there are violations of the rules governing oil contracts and authorisation, the Cameroonian courts have the prerogatives to resolve such breach of contractual arrangements [44]. One of the famous cases that parties seized the court jurisdiction to resolve their oil contract dispute was in the case of *Egbe Maureen v. ELF Oil Cameroon and 5 Ors* [45]. In this case, the court of Kumba in Meme Division had the opportunity to examine the negligence principle in connection with defective kerosene, sold by ELF Oil Cameroon. ELF was convicted even though she was not the producer and was equally under no contractual relationship with the plaintiff that bought the kerosene from a retailer, who in turn bought it from the distributor ELF. The court, inter alia, held that the contract/tort dichotomy was no longer a requirement in negligence once the duty, breach, and damage suffered by the person to whom the duty was owed are established. At the end of the case, the claimant was compensated for the defective kerosene she bought.

Similarly, the High of Buea was also used to settle the dispute between *Société National de Raffinage v. African Petroleum Consultant*, [46] where Société National de Raffinage sued African Petroleum consultant for violation of contractual terms. Verdict was given in favour of Société National de Raffinage. African Petroleum consultant dissatisfied with the judgment rendered by the Buea High court had to make an appeal before the Buea Court of appeal. On appeal, the learned judge upholds the same verdict of the lower court by stating that, African Petroleum consultant had not only violated the contractual terms but cannot also use an arbitral tribunal to resolve their dispute. Litigation was also used to resolve the disputes of *Joseph Atanga shell Cameroon SA*, [47] and *Mukoro S. Tembi v. Texaco Cameroon* [48].

Disadvantages of Seizing State Jurisdiction in Settling Petroleum Contract Disputes in Cameroon

Here are some of the disadvantages of using the court as a means to resolve oil contracts.

Slow Process

Courts' procedures are plagued with inordinate delays caused by several adjournment of cases. This does not only increase the expenditure involved in resolving the cases but also discourages the litigants. A glaring example was seen in the Cameroonian case, *Nkeh Napoleon v. Forlepia Thomas and Guinness Cameroon S.A* [49] *and* of *Maxebong Hope Sone* v. *Ikoe Esoe David and Guinness Cameroon* S.A. [50].

Lack of Confidentiality

The general principle is that justice must be rendered in an open court. This is to prevent the judge from rendering judgement in favour of another party. This helps to increase transparency in the judicial system. This principle is embedded in the 2006 Judicial Organisation in Cameroon, which provides that:

> *Justice must be rendered in public and judgment delivered in open court [51]. ……When this is not done, the whole proceedings will be declared null and void ab initio.*

The disadvantage of this is that other competitors may have an entry into the company's contract, and as such, can use it against them [52]. This may reduce the company's chances with other competitors. As a result of this, oil companies may not see litigation as a suitable method of resolving their disputes.

Costly Nature of Litigation

The costs involving in hiring of lawyers, registration of the court cases and other fiscal duties makes litigation more costly than ADR [53].

Damage to Investment Relationships

One setback with litigation is that it may destroy relationship between the parties. This is because court processes are adversarial in nature [54]. Litigation breeds hatred and instils the spirit of revenge. Since oil operations involved huge sum of money, parties may want to preserve their ties even in the outburst of a dispute. This can better be achieved using ADR than court processes.

THE CODIFICATION OF ARBITRATION IN CAMEROONIAN PETROLEUM LAW

Arbitration remains one of the ways to resolve oil contract disputes in Cameroon. It is defined in the Halsbury's Laws of England as:

> *The reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction''* [55].

This method of resolving oil contract disputes has been articulated in Section 125(2) of the Cameroonian Petroleum Code [56]. The MPSC equally gave room for oil disputes between the Cameroonian government and the IOCs to be settled amicably using arbitration [57]. An arbitral tribunal for the settlement of oil contract disputes in Cameroon is usually made up of three (3) arbitrators [58]. From the foregoing, one competent body to resolve oil contract disputes is ICSID. The rules of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration may be used in situations where ICSID is incompetent to resolve oil contract disputes [59]. Cameroon is also a signatory to OHADA uniform act on arbitration which has equally encouraged parties in commercial disputes to resolve it by way of arbitration [60]. To this effect, it provides that all physical and moral persons have the right to use the arbitral tribunal to resolve their disputes [61].

Centre d'Arbitrage du Groupement Interpatronal du Cameroun (GICAM Centre), is the main arbitrary body to resolve commercial disputes in Cameroon [62]. The courts have also been instrumental in resolving contractual disputes through arbitration. This was seen in the case of *Ste Napoleon Gottlob v. Ste Jetliner Cameroon SA*, [63] where the parties had agreed that any dispute that arises from the contract will be resolved by arbitration in Switzerland. The plaintiff later brought the matter before the Bamenda High Court but the court declined its competence in handling the case since the parties had already chosen arbitration. This common understanding has been reflected in the UA on arbitration [64].

THE PLACE OF ADR IN RESOLVING PETROLEUM CONTRACT DISPUTES IN CAMEROON

The researcher in this section of the work x-ray the development of ADR and in doing so, expatiated on the various ADR options used in resolving oil disputes in Cameroon. The legal basis that supports the usage of this mechanism in resolving oil contracts disputes in Cameroon are equally discussed as well here.

Meaning and Development of ADR

ADR is a method of settling disputes without affecting the relationship between the parties. It can be termed as an "out of court settlement" [65]. Today, amicable settlement of disputes is preferred to litigation. It is more desirable than litigation because of its friendly nature which even after the settlement can promote investment relationships between the disputed parties.

The Legal Basis of using ADR as a Tool to Resolve Petroleum Contract Disputes in Cameroon

The legal value of ADR in Cameroon is justified by the different treaties and agreements that Cameroon has signed and ratified them [66]. The code to lay down private incentives in Cameroon strongly affirms settling of disputes using amicable settlement [67]. The Petroleum Code equally promotes amicable method of resolving oil contract disputes through the use of conciliation and arbitration procedures [68].

The aforementioned provisions show Cameroon's commitment in solving oil disputes by resorting or engaging in ADR. This obviously provides a platform where the IOCs that must have invested huge capital can peacefully resolve any disputes that might arise in the course of executing oil contracts in Cameroon. It is believed that by engaging this method, investment ties will be maintained by the Cameroonian government with the IOCs.

ADR Processes Opt to Settle Petroleum Contract Disputes in Cameroon

The ADR mechanisms to resolve oil contract disputes in Cameroon include the following:

Conciliation

It is a practice of bringing together the parties in a dispute to an independent third party, a conciliator, who meets with the parties so as to resolve their differences [69]. The main duty of a conciliator is to prepare a solution that may help resolve the dispute and then proposes to the parties. While proposing the solution, he must have listened to both parties and review the relevant documents of the case also. Section 125(2) of the Cameroonian Petroleum Code recognises this method as a means of resolving oil contract disputes [70].

Negotiation

The Black's Law Dictionary defined negotiation as:

> *A consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. Negotiation usually involves complete autonomy for the parties involved without the intervention of third parties* [71].

Negotiation can take several forms: hard, soft, and principled negotiation. Negotiation was used to resolve the oil contract dispute in Cameroon between *Republic of Cameroon* and *Victoria Oil and Gas Plc* [72]. Similarly, negotiation was also used to solve the land boundary disputes between Cameroon and Nigeria over the Bakassi Peninsula.

Mediation

Though the Cameroonian Petroleum Code does not mention mediation as a means to settle oil disputes, mediation equally serves as alternative in the settlement of oil disputes in Cameroon [73]. The OHADA uniform act on mediation is the main legal framework on mediation in Cameroon. Mediation can be considered as an extension of direct negotiation [74]. With this process, a neutral third party is appointed to act as an intermediary between the disputing parties. The aim of a negotiator therefore is to assist the partiers to reach an amicable settlement [75]. He therefore does not have the power to prescribe a solution to the parties. Summarily, the benefits of using ADR in resolving oil contract disputes include: speed, cost effective, choice of arbiter, privacy and confidentiality and preserves relationships.

CONCLUSION

Cameroon's petroleum legislation provides mechanisms for the settlement of oil contract disputes. This can be done either seizing the ordinary court jurisdiction or ADR mechanisms. However, the use of stabilisation and renegotiation clauses can be a common ground to advert potential disputes from arising. The recognition of these clauses under Cameroonian law is a clear indication of the state's commitment in fostering this sector of the economy. In situations where these disputes cannot be adverted, the parties involved consequently can rely on the court's jurisdiction or ADR options. Resolving petroleum contracts using adjudicative method can be an ideal method to an extent taking into consideration its binding nature. This notwithstanding, its rigidity and unfriendly nature can act as a reason why investors may be discouraged to invest in this sector of the economy. As stated here, the legislative provisions confer a positive obligation to the government to resolve any oil dispute through the ADR mechanisms. This is so because ADR promotes friendly commercial relationship between the HC and the IOCs. As a result, settling disputes in the oil sector using adjudicative process may scare these IOCs that readily provide the capital and technical-know how needed for the exploration and development of her oil wealth or resources. From the foregoing discussion in this paper, one can strongly admit that the Cameroonian government has put in place viable mechanisms to promote the growth of this sector through the use of stabilisation and renegotiation clauses and has also provided the possibility for investors to resort to the use of ADR options to resolve the likely occurrence of disputes that may arise during the execution and interpretation of oil contractual terms in the country.

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61. *Ibid*, Section 2.
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64. Section 13 of the UA on Arbitration which states that: National courts must decline jurisdiction where there is an arbitration agreement and where the arbitral tribunal has yet been composed, save where, the arbitration agreement is manifestly void.
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66. ICSID (Washington Convention) 1966 and the New York Convention, (Recognition and Enforcement of Foreign Arbitral Awards) 1958, the OHADA Uniform Act on Arbitration adopted on 11 March 1999, Uniform Act on Mediation, Law N 2013/004 of 18 April 2013 to lay down private investment incentives in the Republic of Cameroon and the 2007 MPSC Law.
67. Section 26(1) of Law N 2013/004 of 18 April 2013 to Lay Down Private Investment Incentives in the Republic of Cameroon provides that: Investors granted the incentives under the Private Investment Code must first seize the control committee in case of dispute to seek amicable settlement….They may, where amicable settlement has not been obtained, refer the dispute to an arbitration body recognized by the state of Cameroon.
68. Section 125(2) of the 2019 Cameroonian Petroleum Code.
69. Rahim M. Theory and Research in Conflict Management. New York: Praeger; 1990.
70. The petroleum contract may include a clause providing for conciliation and arbitration procedure to settle any dispute between the State and the holder relating to the interpretation or execution of petroleum contract.
71. Campbell B. Black's Law Dictionary. 4th ed. St Paul Minn: West Publishing Co.; 1968. p. 1188.
72. Pretty J. Social Capital in Biodiversity Conservation and Management. Conservation Biology. 2004; 18(3): 631–638.
73. Blackburn J et al. Mediating Environmental Conflicts. 2nd ed. Westport: Quorum Books; 1995. p. 30.
74. Amy J. The Politics of Environmental Mediation. New York: Columbia University Press; 1987.
75. Article 1 (a) of the Uniform Act on Mediation.

