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ALTERNATIVE DISPUTES RESOLUTION MODELS: THE PANACEA TO DISPUTES SETTLEMENT IN THE PETROLEUM INDUSTRY OR A DENIAL OF FAIR TRIAL

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ABSTRACT

Petroleum activities are inherently complex and capital intensive. Multiple stakeholders and relationships are based on long-term agreements. The industry is fraught with disputes. Generally, those engaged in the industry opt for an agreed dispute resolution process to avoid recourse to the national courts. There are various reasons behind the use of alternative dispute methods more especially mediation and arbitration. There is increasing support globally for agreed dispute mechanisms between contracting parties. There is however concern whether an agreement to mediate or arbitrate is enforceable and whether the right to fair trial or public hearing may be curtailed by parties opting for an agreed dispute resolution. This paper seeks to examine the position adopted by those engaged in the petroleum industry..

Keywords: Arbitration, Petroleum, Disputes, Fair Trial.

1. INTRODUCTION

Petroleum activities are inherently complex and capital intensive. Multiple stakeholders and relationships are based on long-term agreements. The industry is fraught with disputes. Generally, those engaged in the industry opt for an agreed dispute resolution process to avoid recourse to the national courts. There are various reasons behind the use of alternative dispute methods more especially mediation and arbitration. There is increasing

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support globally for agreed dispute mechanisms between contracting parties. There is however concern whether an agreement to mediate or arbitrate is enforceable and whether the right to fair trial or public hearing may be curtailed by parties opting for an agreed dispute resolution. This paper seeks to examine the position adopted by those engaged in the petroleum industry.

Petroleum activities are inherently complex and capital intensive.[2] They are characterised by multiple stakeholders and relationships are based on long-term agreements. Successful relationships in the industry are highly contingent on collaboration which may be legally and technically complicated.[3] Disputes also abound in the industry.[4] It has been argued that the oil and gas industry is highly heterogeneous and as a result, disputes are intrinsic and bound to occur.[5] A dispute is considered as a kind of conflict which distinctly presents itself in justiciable issues.[6] Normally, when a dispute arises regarding a breach of contract, it is likely for parties to insist on their rights and finding ways to settle the dispute.[7] No party would want to create a sense of weakness in the mind of the other contracting party by attempting to talk about the matter and have it resolved amicably. The parties have a natural inclination to insist on their right by instituting a court action. The disputes that arise in the petroleum industry may include state-to-state disputes, investor-to-state disputes, company-to-company disputes and

[2] Tim Martin, 'International Dispute Resolution', (2016/12PDF Dispute Resolution - Independent Petroleum Association of America) pg 1 <http://www.ipaa.org> accessed on 17 October 2019

[3] Mohammed Alramahi, 'Dispute Resolution in Oil and Gas Contracts',(International Energy Law Review 2011 Issue 3), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2159702> accessed on 14 September 2019

[4] Hew R. Dundas, 'Dispute Resolution in the Oil and Gas Industry: An Oilman's Perspective', OGEL 3 (2004), <http://www.ogel.org/article.asp?key=1368> accessed on 15 April 2014

[5] Ibid n(2)

[6] Henry J. Brown and Arthur L. Marriott, *ADR Principles and Practice,* (2nd edition Sweet & Maxwell 1999) para 1-007

[7] Ibid n(5) 20-007

individual-to-company disputes.[8] Public and private international law issues also arise from these disputes.[9] There are repercussions for having contractual disputes in the petroleum industry. These oil and gas companies may lose a lot of money, profit, sometimes damage to reputation and future arrangements as a result of disputes arising from contracts. It is however important to maintain commercial relationships in such a complex industry when disputes are resolved.[10] Owing to some of these effects of disputes, it becomes important for contracting parties to settle disputes amicably by choosing a method, detailing out the procedure, applicable law, appointment of a neutral body and forum. Generally, those engaged in the industry opt for an agreed dispute resolution process to avoid recourse to the national courts.[11]

Dispute resolution processes normally agreed on include negotiation, mediation, expert determination, dispute review boards, litigation and arbitration.[12] In practice, the contracting parties may decide to resolve their disputes by agreement either on an ad hoc basis or they can decide to provide for a clause in their substantive contract which will stipulate the agreed dispute resolution method.[13] A critical examination of the position adopted by those engaged in the industry would be made in the subsequent paragraphs with emphasis on mediation and arbitration.

[8] Peter Roberts, 'Dispute Resolution' , in Peter Roberts (ed.), *Gas Sales and Gas Transportation Agreements; Principles and Practice* (Sweet & Maxwell 2011) pp 409-411

[9] Margaret Ross, 'Dispute Management and Resolution', in Greg Gordon, John Paterson and Emre Üşenmez (eds.), *Oil and Gas Law [electronic resource]: Current Practice & Emerging Trends*, (2nd edition, Dundee University Press 2011) para 18.39

[10] ibid n(2)

[11] Ibid n(2)

[12] Tim Martin n(1) pg 2

[13] Ibid n(5) Para 9-027

2. REASONS FOR ARBITRATION PROCESSES

Those engaged in the petroleum industry ordinarily choose an agreed dispute resolution process other than recourse to the national court for various reasons. They consider among others enforceability of decision, certainty, neutrality, confidentiality, cost and speed of process.[14] The petroleum industry is concerned with certainty as to the outcome of disputes.[15] Litigating in the national court typically provides less of that certainty. Depending on the laws of the state, an appeal from a decision of a trial court may be allowed. The Amoco CATS case depicts this difficulty when a dispute is tried in the national court.[16] The case travelled through the trial court to the Court of Appeal then to the House of Lords lasting in all for a period of approximately eight years. The decision and the whole process in the Amoco case were viewed to be a lottery, by a contracting party who asserted that there was no "certainty" in the process.[17]

Another reason is enforceability of judgments. Judgments of a local court are typically not enforceable internationally.[18] It may be noted that some adjudicative decisions like arbitral awards and other consensual decisions are generally easier to enforce internationally.[19] Under article III of the New York Convention, for instance, arbitral awards are recognised as binding and enforceable in any contracting state.[20] The industry being characterised by huge investments, the parties would want a decision they can enforce and not be left with just a paper. Furthermore, parties would want to have

[14] Peter Roberts n(7) pp 408-409
[15] Ibid n(3)
[16] Amoco (UK) Exploration Co. v Teesside Gas Transportation Ltd and Imperial Chemical Industries PLC and Others (Consolidated Appeals) [2001] UKHL 18
[17] Joseph Shade, 'The Oil and Gas Lease and ADR: A Marriage made in Heaven Waiting to Happen', (Tulsa Law Journal Vol. 13 Summer 1995 Number 4) pg 599<http://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=2011&context=tlr> accessed on 20 October 2019
[18] Hew R. Dundas n(3)
[19] Ibid n(3)
[20] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, (New York Convention), article III.

control over the whole dispute resolution process.[21] In a national court, the parties have no control over the appointment of the judge. The judge has the most power over the disputants' dispute.[22] But if the parties opt for a dispute resolution process outside the national courts, they may exercise control over the process which enables them to showcase their positions more willingly.[23]

In addition, most parties do not have confidence in the local courts. An example of this situation was exhibited in the Ecuador-Chevron case. Chevron brought an application before the U.S District Court for the Southern District of New York claiming that the $9.5 billion judgment rendered against Chevron by a court in Ecuador was a product of fraud and racketeering activity and thus unenforceable. On March 14, 2014, the court upheld this claim.[24] Trust and confidence are key considerations for parties in the oil industry since the outcome of the case before the national courts may involve huge sums. An agreed dispute resolution process outside the national courts may be preferred in these circumstances.[25] In state-to-state disputes for instance, dispute resolution process in one national court may not be ideal since there may be no neutrality. An example of a referral to a neutral party bordered on the boundary dispute between Cameroon and Nigeria over the Bakassi Peninsula which was settled at the International Court of Justice.[26]

[21] Henry J. Brown and Arthur L. Marriott n (5) para. 20-001
[22] Ibid n(5) para. 2-026
[23] Hew R. Dundas n(3)
[24] Chevron v. Steven Donziger and Others, 11 Civ. 0691 (LAK) Document 1874 Filed 03/04/14
[25] Peter Roberts n(7) pg 408
[26] International Court of Justice, 'Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equitorial Guinea intervening- Summary of the Summary of the Order of 15 March 1996)
<https://www.icj-cij.org/en/case/94/judgments> accessed on 19 April 2019

There are also delays in the national courts system as evidenced by Lord Woolf Access to Justice Report.[27] These delays are sometimes caused by 'overcrowded court dockets and dilatory procedural and legal tactics'.[28] An example of delay in the court's process was evidenced in the London Bridge case which arose from the Piper Alpha incident in 1988. It was only in 2002 that the House of Lords gave its landmark decision.[29] Parties in the industry would want to resolve their disputes by their agreed mode to obviate the delays faced in national courts. One other critical consideration for parties is confidentiality. Litigation of commercial disputes before the national courts is held in public and judgments are public records.[30] Parties in the petroleum industry would want to maintain in private, essential information.[31] Referring a dispute to the national courts would mean a waiver of confidentiality. Again, costs of resolving disputes before the national court may be huge. There are factors that may affect the cost of litigation in national courts making budgeting unpredictable. These factors include the nature of the case, amount involved and the duration of the case.[32] In the AMOCO CATS case for instance, the legal costs for the case stood at £8 to £12million.[33]

[27] Lord Woolf, 'Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales, June 1995; Final Report: Access to Justice, July 1996

[28] Kenneth R. Feinberg, 'Mediation- A Preferred Method of Dispute Resolution', Pepperdine Law Review Volume 16, Issue 5 Symposium: Alternative Dispute Resolution , 15 May1989, Article 2 pg S6 <http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1780&context=plr> accessed on 20 May 2019

[29] Caledonia North Sea Limited v London Bridge Engineering Limited (Scotland) [2002] UKHL 4

[30] Peter Roberts n(7) pg 408

[31] ibid n(7) pg 408

[32] Anebere Stephen Ogubuike, 'Arbitration: Is it truly a 'cheap' alternative to litigation', CAR(CEPMLP Annual Review): CAR Volume 13 <http://www.dundee.ac.uk/cepmlp/gateway/index.php?news=30820> accessed on 19 April 2014

[33] Hew R. Dundas n(3)

2. PARTIES PREFERENCE FOR MEDIATION OR ARBITRATION

It is also a general principle of law that the intention of the parties is expressed in the words used in a contract itself and not what one may guess the intention of the parties may be.[34] Again where parties to a contract have made express stipulations, it is manifestly not desirable to extend them by any implication; the presumption is that, having expressed same, they have expressed all the conditions by which they intend to be bound under that instrument.[35] In that regard, parties can make their intention known by stating an alternative dispute resolution mechanism in their contract.

Mediation is a facilitative process in which disputing parties engage the assistance of an impartial third party who aids them to try to reach a consensual resolution of their dispute.[36] The two common methods of mediation are facilitative and evaluative.[37] The mediator does not provide any comment on the strength or weakness of any party's side of the dispute when mediation is facilitative. Mediation is evaluative when the mediator comments with his knowledge on the strengths and weaknesses of a party's side.[38] There are benefits that may accrue to industry players for opting for mediation. First, consensual outcomes being generated by cost and time efficient mediation process is achievable which is ordinarily non-achievable in national courts.[39]

[34] Professor Hugh Beale, *Chitty on Contracts*, (31st ed. Vol. 1 Sweet & Maxwell 2012) para 12-043(online resource). See also British Movietonews v. London and District Cinemas [1952] A.C. 166; Smith v. Lucas (1881) 18 Ch D 531, 542

[35] Aspdin v. Austin (1844) 5 Q. B.

[36]Henry J. Brown and Arthur L. Marriott n(5) para 9-027

[37]Margaret Ross n(8) para 18.32

[38]Ibid n(8) para 18.33

[39] Helen Waller, 'Towards A Mandatory Mediation in England?', The Student Journal of Law, Issue 5:March 2013 <https://sites.google.com/site/349924e64e68f035/issue-5/towards-mandatory-mediation-in-england> accessed on 18 September 2019

The mediator unlike a judge in national court has no power to impose any judgment on the parties.[40] Again, in mediation, consideration is given to the commercial and related interests of both parties whereas in the national courts, the focus would be on the legal rights of the parties. In a joint venture for instance, where there will be ongoing relationship, mediation may be a useful tool in dealing with disputes since mediation has been viewed as less disruptive to relationships.[41] Lord Phillips' states that in mediation, '… You can preserve, or restore, good relationships with the other party to the dispute…'.[42]

The tendency of severing relationships among industry players may be a consequent effect of settling disputes in the national courts. Again, the mediation process is private and confidential.[43] By explicit agreement or by implication, a mediator must treat matters arising in the process as confidential.[44] Some international instruments like the UNCITRAL Model Law recognise the importance of 'confidentiality'.[45] Arbitration on the other hand is a flexible, consensual process for resolving business disputes in a binding, enforceable manner.[46] The parties have party autonomy and at the end of the arbitral proceedings, the arbitral award is final and binding and can be mostly enforced in national courts and foreign courts.

[40]Henry J. Brown and Arthur L. Marriott n(5) para 7-001

[41] Helen Waller n(38)

[42] Speech by Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales, " Alternative Dispute Resolution: An English Viewpoint, India 29 March 2008 <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_adr_india_29 0308.pdf> accessed on 20 April 2019

[43]Henry J. Brown and Arthur L. Marriott n(5) para 7-020

[44] John Michael Richardson, 'How Confidential is Mediation Confidentiality' in Arthur W. Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham papers 2008*,(Martinus Nijhoff Publishers 2009) pg 273

[45] United Nations, UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002, (United Nations Publication 2004) article 9. See also of the United Nations Commission on International Trade Law Conciliation Rules (A/CN.9/514) article 14 para. 58

[46] International Chamber of Commerce, 'Arbitration', <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/ > accessed on 22 February 2014

3. WHETHER AN AGREEMENT TO MEDIATE IS ENFORCEABLE

Traditionally, these agreements to mediate were considered by the common law courts as unenforceable on the grounds of uncertainty and also because they sought to oust the jurisdiction of the national courts as held in the Walford v Miles case.[47] Currently in most common law jurisdictions like England and Wales, such an agreed method may be enforceable if the contract terms are certain. In Channel Tunnel case, the English court held that it had an inherent power to stay any proceedings brought before it in breach of an agreement to decide disputes by an alternative method.[48]

In *Cable & Wireless v IBM United Kingdom Ltd*),[49] an agreement to resolve a dispute by alternative dispute resolution was sufficiently certain to be enforceable and a stay of proceedings was granted for the matter to be resolved by the parties' chosen dispute resolution mechanism.[50] Similar stance has been taken in other jurisdictions. In Nepean Highway v Leigh Mardon, the Victorian Supreme Court upheld a decision to stay proceedings owing to the fact that there was an agreed dispute resolution procedure between the parties.[51] Standard contracts for instance having such agreed dispute procedures may be upheld by the English courts if it is certain. An example of such agreed alternative procedures can be found in the LOGIC's standard contracts. Clause 31, provides the dispute resolution procedure chosen by the parties with litigation being the last resort if the agreed ADR fails.[52]

[47] Walford v Miles [1992] 2 A.C. 128
[48] Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd [1993] A.C. 334
[49] [2002] EHHC 2059 (Comm
[50] See also DGT Steel & Caldding Ltd v Cubitt Buiding & Interiors Ltd [2007] EWHC 1584 (TCC)
[51] Nepean Highway v Leigh Mardon [2009] VSC 226
[52] LOGIC, 'Standard Contracts for the UK Offshore Oil and Gas Industry: General Conditions of Contract (including Guidance Notes) for Services (On- and Off-shore) Edition 4, February 2019, Clause 31< http://www.logic-oil.com/frontpage> accessed on 06 May 2019

It may however be noted that the enforceability of agreed dispute resolution methods is not automatic as evidenced in some cases. In Sulamerica Cia Nacional De Seguros SA v. Enesa Engenharia SA, the English Court of Appeal confirmed a decision of the trial court to stay proceedings on the ground that the mediation process in the agreement of the parties was not clearly defined.[53] This position has been followed by other English cases.[54] In *Hyundai Engineering and Construction Co. Ltd v. Vigour ltd [2005] 1 HKC 579*, the Hong Kong Court of Appeal held that an agreement which lacked certainty was unenforceable.[55] It may be noted that from the above cases that the parties' agreed dispute resolution method may be unenforceable or enforceable on the basis of certainty of provisions. One mediation clause that the parties can adopt is the LCIA mediation clause which reads as follows:

> *"In the event of a dispute arising out of or relating to this contract, including any question regarding its existence, validity or termination, the parties shall seek settlement of that dispute by mediation in accordance with the LCIA Mediation Rules, which Rules are deemed to be incorporated by reference into this clause."*[56]

A mediator cannot provide interim relief orders like preservation for the purpose of preserving rights and property.[57] Also, the coercive powers of the court like contempt orders against a party may not be realised by the use of

[53]Sulamerica Cia Nacional De Seguros SA v. Enesa Engenharia SA [2013] 1 WLR 102

[54] Tang Chung Wah v. Grant Thornton [2012] EWHC 3198, Paul Smith ltd v. H & S International Holding Inc [1991] 2 Lloyd's Report 127 and Courtney & Fairbairn v. Tolaini Brothers (Hotels) Ltd [1975] 1 WLR 297

[55] Hong Kong of Hyundai Engineering and Construction Co. Ltd v. Vigour ltd [2005] 1 HKC 579

[56] LCIA, 'Recommended Clauses', <http://www.lcia.org/Dispute_Resolution_Services/LCIA_Mediation_Clauses.aspx> accessed on 20 August 2019

[57]Herbert Smith Freehills Dispute Resolution, 'ADR Notes' 31 October 2013 <http://hsfnotes.com/adr/2013/10/31/failure-to-engage-with-adr-proposals-uk-court-of-appeal-extends-the-halsey-principles/ > accessed on 20 April 2019

mediation.[58] Again, it is not every instance that the rule of confidentiality would be upheld by the courts. UK Supreme court's decision in the Ocean bulk case makes it clear that some matters that may come out during the settlement discussions can be admitted in court to assist in interpretation of the settlement agreements.[59] Again, in Farm Assist case, it was held that if in the interest of justice disclosure is required, the rule of confidentiality cannot be invoked.[60]

4. WHETHER AN AGREEMENT TO ARBITRATE IS ENFORCEABLE

Whether or not an arbitration agreement will be enforceable may be dependent on some factors. The first point is issue of arbitrability. It has been argued that legal rights and obligations must exist within an agreed legal system. The parties must first agree on a particular law to regulate their arbitration proceeding and in this case, the English law.[61] The English Arbitration Act 1996 and the Civil Procedure Rules 1998 therefore apply. Under the English Arbitration Act 1996, most disputes of commercial nature are arbitrable if the parties agree on arbitration as the mode of resolution of disputes but this is subject to public interest considerations.[62] It may be argued that if the liability arising from a dispute between the parties is commercial and in conformity with public interest, the matter is thus arbitrable under English law.

The English courts normally recognise and confirm parties' autonomy which include the parties' choice of law, procedural rules and seat in arbitration

[58] Owen M. Fiss, 'Against Settlement' 93 Yale Law Journal (1983-1984) pg 1073 <http://www.law.yale.edu/documents/pdf/againstsettlement.pdf> accessed on 18 April 2019

[59] Oceanbulk Shipping and Trading SA v TMT Asia Ltd [2010] UKSC 44

[60] Farm Assist Ltd (in liquidation) v Secretary of State for the Environment, Food and Rural Affairs (No 2) [2009] EWHC 1102 (TCC)

[61] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Student edition Sweet & Maxwell 2003) para 2-02. See also Lord Diplock in Ameen Rasheed Shipping Corporation v. Kuwait Insurance Co. (1984) A. C. 50

[62] Arbitration Act 1996, s.1(b)

agreements.[63] In addition, it has been decided in the English courts that the proper law of an arbitration agreement might not be the same as that of the substantive contract to be performed and that there is no rule that the proper law of the arbitration agreement was not the law of the place of the seat.[64] The parties may also agree on the applicable rules of arbitral proceedings like the LCIA rules. Such institutional rules are recognisable under the Arbitration Act 1996 under the non-mandatory provisions if they are not contrary to public policy.[65] The rules of procedure will be determined by the institution agreed on to conduct the arbitral proceedings.[66]

After determining the arbitrability of the dispute, the next issue to be resolved is whether an arbitration agreement between the parties satisfies the formal requirements of a valid arbitration agreement under the Arbitration Act, 1996. Under the Act, the arbitration agreement will only be valid if it was put in writing in the form of arbitration clauses and incorporated in the main contracts.[67] Most national laws and international agreements stipulate that such agreements must be in writing.[68] Under the New York Convention for instance, only written arbitration agreement shall be recognised and enforced.[69] Again, the arbitration clause in the LOGIC may be included in the main contract as the arbitration clause under English law. It may also be noted that arbitration agreement may not necessarily be incorporated in main contracts but can be a separate document in its own right and this is viewed as the principle of separability. The principle of separability has been endorsed in some cases like Fiona Trust case where the court held that the

[63] C v D [2007] EWCA Civ 1282.
[64] Sulamerica Cia Nacional de Seguros SA v. Enesa Engenharia SA [2013] 1 W.L.R. 102
[65] ibid n(60) ss.3 and 4
[66] Peter Roberts, 'Dispute Resolution' in Peter Roberts (ed.) *Gas sales and gas transportation agreements: principles and practice* (Sweet & Maxwell 2011) para. 39-006
[67] Ibid n(60) ss. 5 and 6
[68] Henry J. Brown and Arthur L. Marriott, *ADR Principles and Practice* (Sweet &Maxwell 1993) 7
[69] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), article II.1

principle of separability contained in section 7 of the Arbitration Act 1996 meant that the arbitration agreement had to be treated as a distinct agreement.[70] In situations where the main contract is rendered invalid, the distinct arbitration agreement survives the invalidity of the main contract (if it arises).[71]

The next important issue for consideration is the court's interpretation and enforcement of the arbitration agreement. It is a general principle of law that clauses on dispute resolution must be clear and unambiguous to be given effect.[72] An arbitration agreement gives evidence of the parties' consent and obligation to arbitrate and it is through this evidence that the arbitral institution derives its mandate.[73] An arbitration agreement which is ambiguous may be considered as void for uncertainty.[74] The Act reiterates the principle of parties' autonomy which is an essential feature in English law of arbitration.[75] The court will only recognise the parties' autonomy if the arbitration agreement is clear and unambiguous.[76]

The object of arbitration under the Arbitration Act 1996 is to ensure resolution of disputes between parties in a fair manner and the court can only intervene in arbitration proceeding under specific circumstances provided under the Act.[77] The English court will generally decline to exercise

[70] Fiona Trust & Holding Corporation and ors v Privalov and ors [2007] UKHL 40
[71] Ibid n(60) s. 7. See also Guy Pendell and David Bridge, 'Arbitration In England and Wales', <https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_ENGLAND%20WALES.pdf> accessed on 24 February 2014
[72] Mark Clarke and Jessica Neuberger, 'Drafting Effective Dispute Resolution Clauses', in Ronnie King, *Dispute Resolution in the Energy Sector: A Practitioners Handbook* (Global Business Publishing Ltd, 2012)9. See also Fiona Trust & Holding Corporation and ors v Privalov and ors [2007] UKHL 40
[73] Redfern n(59) 1-11
[74] Peter Roberts n(7) 39-006. See also Wah v. Grant Thorton International Ltd. [2013] 1 Lloyd's Rep. 11
[75] Henry J. Brown and Arthur L. Marriott n(12)58
[76] Ibid n(59) 1-10
[77] Ibid n(60) s.1

jurisdiction if the parties have agreed to arbitrate.[78] Once the parties have agreed on arbitration as a dispute resolution mechanism, they must pursue their claim in that medium or they can decide not to pursue their claim altogether.[79] The Court is therefore under obligation not to intervene in this agreed process but under only strong circumstances.[80] Stay of proceedings can be granted by the English Court if a party to an arbitration agreement makes an application on notice to the other party. The party to the arbitration agreement must bring this application without delay.[81]

The party bringing the application for stay of proceedings must as a condition precedent, acknowledge the service of the writ on him and he must have taken no further step to file a defense.[82] Lord Saville has also stated that it is an encroachment on the principle of party autonomy if the court ignores the bargain of the parties to arbitrate their disputes merely because one of the parties to the dispute thinks he may be able to enforce his rights in the courts faster.[83] The Court has an inherent power to stay any proceedings brought before it in breach of an agreement to decide disputes by an alternative method.[84] If the parties had agreed to refer a matter to arbitration, a party who so wished should be entitled to have the agreement upheld and to have the court stay the proceedings for that purpose.[85] The principle has been confirmed in various cases like the Channel Tunnel, DGT Steel and Halki cases. It may however be noted that when this application for stay of proceedings is made in the English court, there are a number of courses open to the court in determining whether the matter falls within section 9 of the

[78] ibid n(7) 314
[79] Redfern n(59) 1-10
[80] Ibid n(60) s.4
[81] Ibid n(60) s. 9(1)
[82] Ibid n(60) s.9(3)
[83] The Denning Lecture 1995, 'Arbitration and the Courts' at 13
[84] Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd [1993] A. C. 334; DGT Steel & Cladding Ltd v Cubitt Building & Interiors Ltd [2007] EWHC 1584 (TCC); Halki Shipping Corp v Sopex Oils Ltd [1998] 1 W.L.R. 726
[85] Lombard North Central Plc v. GATX Corp [2012] EWHC 1067 (Comm)

Arbitration Act. This is evident in some cases like the Al-Naimi case.[86] The court may grant or dismiss the application for a stay by determining the available evidence of whether there is an applicable agreement.

The court can also stay proceedings whilst the arbitral tribunal determines its own substantive jurisdiction as to whether there is a valid arbitration agreement.[87] The court can also give directions for an issue to be tried by not deciding the application for stay. Finally, the court can decide that there is no arbitration agreement and dismiss the application for a stay.

The Civil Procedure Rules 1998 and the Arbitration Act 1996 give a commendatory environment for the resolution of disputes by an ADR mechanism. Rt. Hon. Lord Woolf's report on the review of the English legal system which led to the introduction of the CPR gives confidence to the courts to manage cases brought before it by allowing the parties to pursue resolution through ADR if the court considers that appropriate.[88] The CPR encourages the English court to stay proceedings upon a written request based on a valid arbitration agreement.[89] However, the jurisdiction of the court to stay proceedings is discretionary. The party making the application for stay must provide good reasons for the grant of stay (if the other party wishes to contest).[90] The grant of stay of proceedings is therefore, not automatic.

Despite the foregoing, time to bring the arbitration proceedings is of the essence. Limitation to arbitration proceedings can be found under the

[86] Al-Naimi v Islamic Press Agency, Inc *[2000] 1 Lloyd's Rep. 522* at 524; Anglia Oits Ltd v Owners of Marine Champion (The "Marine Champion") *[2002] EWHC 2407* and by the Court of Appeal in Fiona Trust and Others v Yuri Privalov & Others *[2007] EWCA 20* at [37]

[87] Ibid n(60) s. 30(1). See also Fiona Trust case at 34;

[88] The Woolf Reforms and the Civil Procedure Rules 1998, Part 2; Civil Procedure Rules 1998, rule 1.4

[89] CPR 1.1,3.1 and 3.1

[90] DGT Steel & Cladding Ltd v Cubitt Building & Interiors Ltd [2007] EWHC 1584 (TCC).

English Law. Under section 13(1) of the Arbitration Act 1996, it stipulates that the Limitation Act 1980, the Foreign Limitation Periods Act 1984 and any other enactment that will be passed in the future relating to limitation of action will be applicable to arbitral proceedings as they apply to legal proceedings. What this means is that the time frame within which legal proceedings must be brought in court is applicable for arbitral proceedings. The limitation period of six years is applicable for a civil suit to be brought in court and same is applicable for arbitration proceedings. It may however be noted that the court may extend this statutory period only under limited or exceptional circumstances.

It may be argued that the position adopted by the English Courts in favour of the parties' agreed dispute resolution process was influenced by Lord Woolf's 'Access to Justice' report of 1996. It propelled the adoption of the Civil Procedure Rules 1998. In England, under Part 1 of the Civil Procedure Rules 1998 (CPR), the court would encourage parties to use an ADR procedure if appropriate as part of its case management duty. The courts are empowered by the CPR to further its overriding objectives under Rule 1.4 (2). With the oil industry and its complexities, alternative dispute resolution mechanism proves to be an attractive approach.[91] Furthermore, the CPR Pre-Action Protocols also stipulate that proceedings in a court should be the last resort for a party which confirms the importance of parties to opt for their own agreed mechanism. Lord Justice Jackson in his 2009 Report for instance strongly promotes the use of mediation, as a means to obviate increasing costs incurred by parties to litigation in national courts.[92] The European Mediation Directive has also endorsed the use of mediation for cross-border

[91] Helen Waller n(38)

[92] Lord Justice Jackson's Review of Civil Litigation Costs, Final Report; Summary of Recommendation', December 2009 <http://www.law-now.com/cmck/pdfs/nonsecured/jacksoncost.pdf> accessed on 20 April 2019

disputes in civil and commercial matters which include oil and gas disputes.[93] EU Member States have to ensure that any agreements resulting from mediation are enforceable, as long as such enforcement is not contrary to that country's national law.[94]

5. ISSUE OF COSTS UNDER THE ENGLISH LEGAL SYSTEM

Encouragement of an agreed dispute resolution process including ADR process in the English Legal System is evidenced by costs impositions on parties. In *Dunnet v Railtrack Plc*,[95] it was held that if a party rejected ADR out of hand, he would suffer the consequences when costs came to be decided. Costs would be incurred by a party if he unreasonably withholds consent to resolve a dispute by ADR as held in *Halsey v Milton Keynes General NHS Trust,*[96] which has been followed in the Burchell v Bullard case.[97] The costs imposed on both parties in the Burchell case were described by Ward LJ as "horrific". Exception to this rule has been delivered in the Hurst v Leeming where it was held that in appropriate cases, it is acceptable to refuse to mediate. The critical factor in coming to a decision on the reasonableness to mediate is whether the mediation had any real prospect of success.[98]

6. ENFORCEABILITY OF SETTLEMENT AGREEMENTS

Usually, parties to a mediation process would record their mediated outcomes in writing, signed by the parties themselves or their authorised representatives. Ordinarily, such an agreement is a binding contract and thus enforceable.[99] Article 7.1 of LCIA Mediation Rules for instance provide that 'if terms are agreed in settlement of the dispute, the parties, with the assistance of the mediator if the parties so request, shall draw up and sign a

[93] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters
[94] **Directive 2008/52/EC, a**rticle 6
[95] [2002] EWCA Civ 303; [2002] 1 WLR 2434
[96] [2004] 1 W.L.R 3002
[97] Burchell v. Bullard [2005] EWCA Civ 358
[98] *Hurst v Leeming* [2002] EWHC 1051
[99] Henry J. Brown and Arthur L. Marriott n(5) para 23-037

settlement agreement, setting out such terms'.[100] By signing the settlement agreement, the parties agree to be bound by its terms.[101] In English Civil Procedure Rules (Amendment) 2011, Part 78-Rules 78.24 and 78.25, the settlement agreement is enforceable as a court order. In *Thakrar v. Ciro Citterio Menswear plc (in administration)*,[102] it was held that a mediated settlement was an enforceable contract. The terms of settlement reached between parties can also be given the force of a court order by using a Consent or "Tomlin" Order to impose a stay on the proceedings.[103] This settlement contract, capable of enforcement provides certainty to the parties.[104]

Arbitration on the other hand has been the most popular method of resolution of disputes owing to the fact that the arbitral award can be enforced with minimal difficulty. A case in point is *Scot v. Avery*[105] where the court upheld an agreement to arbitrate. This case created the obligation to arbitrate and the compulsion on a party to use arbitration to resolve disputes before any right of action can arise. This decision of the court has come to be known as Scott v. Avery clause.[106] Lord Campbell expressed dissatisfaction with the general attitude of parties and the judiciary in Scott v. Avery on the relevance of an arbitration clause in a contract. The decision came at a time when arbitration clauses agreed on in contracts were not complied with by the parties. The courts also played a complimentary role by refusing to stay proceedings when a party objected to the proceedings in court on the basis of the arbitration clause. The obligation on a party to arbitrate is based on a

[100] LCIA, 'LCIA Mediation Rules', article 7.1 <http://www.lcia.org/Dispute_Resolution_Services/LCIA_Mediation_Rules.aspx> accessed on 20 August 2019
[101] ibid article 7.2
[102] [2002] EWHC 1975 (Ch)
[103] CEDR, 'Response to EU Green Paper on ADR', <http://www.cedr.com/library/articles/EUGreenPaperResponse.pdf> accessed on 08 May 2019
[104] LCIA n(96)
[105] [1843-1860] All E.R Rep 1 HL
[106] David St John Sutton; Judith Gill and Matthew Gearing, Russel on Arbitration (24th edition, Sweet & Maxwell 2015)

valid arbitration clause as stipulated in the Arbitration Act 1996, section 9 and UNCITRAL Model Arbitration law article 8. The court in modern times and under the Arbitration Act 1966, are required to support parties if they so desire to agree on arbitration as a means to resolve their disputes as provided under sections 1(b) and 1(c). In Emmot v. Micheal Wilson & Partners Ltd [2008] EWCA Civ 184 for instance, the trial judge urged the judiciary to reduce interference in arbitration. Rather, the courts were encouraged to support the arbitral process.

7. ENFORCEMENT OF NATIONAL AND FOREIGN ARBITRAL AWARDS

Enforcement of national arbitral award can be done in two ways under section 66 of the Arbitration Act 1996. The arbitral award is final and binding on the parties and any person claiming through them as provided under section 58 of the Arbitration Act 1966. Permission can be sought by a party from the court by a summary procedure to enforce the award. This is normally done without notice to the other party. The second approach is to bring a court action on the arbitral award and then seek judgment on the same relief as granted in the arbitral award.[107]

Section 66(1) makes available the enforcement of an arbitral award with the leave of the court in the same manner as enforcement of a judgment of the court. For foreign arbitral awards, they are enforced by an action in the English courts like the domestic arbitral awards. The courts will recognise and enforce a foreign arbitral award of states which are parties to the Conventions that the UK has ratified. They include the European Convention on International Commercial Arbitration 1961 (Geneva Convention), Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 (the ICSID or

[107] Stephen Jagusch and Epaminontas E. Triantafilou, 'Arbitration procedures and practice in UK (England and Wales): overview

Washington Convention), which applies to ICSID awards. A breach of a foreign arbitral award may constitute a ground for action at law and the aggrieved party can bring a suit for the award's enforcement.[108]

It can be enforced without much difficulty among states who have ratified the Convention of the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). A framework has been provided by the New York convention with regards to enforcement of arbitral awards from any of the states that have ratified the convention.[109] Foreign awards can be enforced with leave of the court in England and Wales or Northern Ireland under section 66, 101 and section 105, if only, the award was made in a country that is also a party to the New York Convention. Judgement may be entered in terms of the award if the leave is granted under section 66(2) of the Arbitration Act.

A party however, is at liberty to challenge the award on some grounds through an appeal or a review as provided in the Act. The English courts will only refuse to recognise or enforce the foreign award in some instances as provided in section 103(2) of Arbitration Act 1996. If there is evidence to show that a party to the arbitration agreement was under some incapacity; if a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings; or the matter is not capable of settlement etc., the courts will fail to recognise the award. The courts will refuse to enforce the award in limited circumstances, such as those set out in Article 5 of the New York Convention.

[108] Professor Greg Chukwudi Nwakoby and Dr. Charles Emenogha Aduaka, 'The Recognition and Enforcement of International Arbitral awards in Nigeria: The Issue of Time Limitation', Journal of Law, Policy and Globalisation Vol. 37, 2015

[109] Ashurst London, 'Governing law and dispute resolution clauses in energy contracts', February 2011

If an aggrieved party can show that the tribunal lacked substantive jurisdiction under section 66(3), leave will not be given to enforce the award. A party can also challenge the enforcement of an award for serious irregularity affecting the tribunal.[110] A party has a right to appeal to the English court on a question of law arising out of an award made in the proceedings under section 69. In addition, a party may make an application or bring an appeal under section 70 within 28 days of the date of the award or if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process. This challenge or appeal may be brought to court if the applicant or appellant has first exhausted any available arbitral process of appeal or review and any available recourse under section 57 (correction of award or additional award).

Articles 53, 54 and 55 of ICSID Convention on the other hand provides for the recognition and enforcement of ICSID awards. An award given under the ISCID is binding on all the parties to the arbitral proceeding under article 53 (1) of ISCID. If a party fails to comply with the award voluntarily, an aggrieved party can bring an action for the recognition and enforcement of arbitral award in any court of any ISCID member state as though the award is a judgement of a court. The aggrieved party is required under this circumstance to submit a certified copy by the Secretary-General to a court for the necessary action.[111] This position of the ISCID Convention however, does not override the laws of sovereign immunity of member states as provided under article 55 of ICSID. It may be noted that 'ICSID itself has no formal role in the recognition and enforcement of an award under the ICSID Convention. However, if a party informs ICSID of the other party's non-compliance with an award, it is ICSID's practice to contact the non-

[110] Arbitration Act 1996, ss. 68

[111] ICSID, 'Recognition and Enforcement-ICSID Convention Arbitration' <https://icsid.worldbank.org/en/Pages/process/Recognition-and-Enforcement-Convention-Arbitration.aspx >accessed on 01 November 2019

complying party to request information on the steps that party has taken, or will take, to comply with the award'.[112]

Despite the foregoing, it has been argued that limitation affects enforcement of an arbitration award. The issue then is when does time start to run for a party to enforce an arbitral award. In *Agromet Moto import Ltd v. Maulden Engineering Co (Beds) Ltd*,[113] the court held that time begins to run from the date of the breach of the implied term to perform the award and not from the date of the accrual of the original cause of action giving rise to the submission. What this means is that, in knowing the period within which a party must enforce an arbitral award, computation will start from the time the other party failed to perform the award.

8. WHETHER THE RIGHT TO FAIR TRIAL OR PUBLIC HEARING MAY BE CURTAILED BY PARTIES OPTING FOR AN AGREED DISPUTE RESOLUTION

It has been argued that the use of agreed dispute resolution methods may curtail fair trial or public hearing. Writers like Owen Fiss have considered party's agreement to resolve their disputes by alternative method as an infringement of justice.[114] He argues that agreed dispute resolution mechanisms impede vigorous enforcement powers of the court. He also argues that the conclusions of the agreed mechanism is a product of a bargain between parties with unequal powers and that decisions in those forums are normally by coercion.[115] He adds that the judiciary's duty to maximise the ends of private parties may not be met if parties can agree to resolve their own disputes.[116] Others have argued that mediation encourages compromise

[112] ICSID, 'Recognition and Enforcement-ICSID Convention Arbitration' <https://icsid.worldbank.org/en/Pages/process/Recognition-and-Enforcement-Convention-Arbitration.aspx >accessed on 01 November 2019
[113] (1985) 1 WLR 762
[114] Owen M. Fiss n(56) pg 1085
[115] ibid n(56) pg 1085
[116] Ibid n(56) pg 1085

and it often ignores public values which the law and the courts promote.[117] Mediated outcome involving for instance, the environment, may not cater for public interests.[118]

The US Government was the first to issue a writ against BP for violations of the Clean Water Act 1972 and the Oil Pollution Act 1990 because of public interest. However, others have argued to the contrary. Lord Clarke has considered mediation as a supplement to the national courts because an agreed dispute mechanism like mediation allows more ingenuity and variations than is usually possible in the national courts.[119] To him, all parties' interests are maximised in mediation. This position is shared by Professor Genn that settlements reached by parties can be found more acceptable by the parties.[120] It may be gleaned from these two arguments that the interests of the disputants among others is important. And if their agreed dispute resolution mechanism would safeguard that interest, credit must be given to it as considered by Lord Clarke and Professor Genn.

9. CONCLUSION

The peculiar and complex nature of the petroleum industry encourages parties to agree on dispute resolution procedures other than a referral to the national courts. The current trend in the industry indicates that litigation in

[117] Thomas Noyes, 'What the lawsuit against BP can achieve', (The Guardian, Thursday 16 December 2010) <http://www.theguardian.com/commentisfree/cifamerica/2010/dec/16/justice-department-bp-lawsuit-deepwater-spill > accessed on 08 May 2019

[118] Ian Hanger, 'Has mediation made the courts irrelevant?', ,?, An Australian Perspective', World Arbitration and Mediation Review, April 2003 Vol. 14, No.4, < https://arbitrationlaw.com/library/has-mediation-made-courts-irrelevant-australian-perspective-wamr-2003-vol-14-no-4 > accessed on 07 May 2019

[119] Lord Clarke of Stone-Cum-Ebony, Master Of the Rolls, 'Mediation-An Integral Part of Our Litigation Culture', (Littleton Chambers Annual Mediation Evening Gray's Inn 08 June 2009) pg 2 <https://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-littleton-chambers-080609.pdf> accessed on 04 May 2019

[120] Professor Hazel Genn, 'The Central London County Court Pilot Mediation Scheme; Evaluation Report', July 1998 <http://www.ucl.ac.uk/laws/judicial-institute/docs/5-98%20CLCC%20Pilot%20Mediation%20Scheme.pdf> accessed on 05 April 2019

the national courts is the last resort. An agreed dispute resolution process like mediation or arbitration offers a solution to some problems faced in resolving matters in a national court. Parties are convinced that by adopting alternative dispute resolution mechanism, their interest will be protected and not curtailed by the coercive power of the state. The courts therefore must not intervene with the process to mediate or arbitrate in respect of the parties' autonomy. However, contracting parties must be clear and consistent on their agreed dispute resolution method, lest they would be unenforceable.

There are drawbacks with mediation which include the fact that the mediator cannot provide interim relief orders like injunction. Arbitration provisions in a contract between parties on the other hand is binding and enforceable under English law. Foreign arbitral awards are also enforceable especially within member states of the New York Convention and the ICSID. The Court has an inherent power to stay any proceedings brought before it by a party in breach of an agreement to mediate or arbitrate. The grant of stay however is not automatic. The issues to be determined must be capable of being mediated on or be arbitrable. Parties however, are at liberty to apply for a review or appeal an arbitral award under some limited circumstances. There are arguments in support of the fact that parties may waive their civil right to resolve their disputes in court. They argue that if the parties decide not to use the normal adversarial procedure in court, public hearing or fair trial is curtailed which to some extent may be understood. But what must be paramount for the petroleum industry may be to protect their commercial interest and relationship as best as possible through a non-adversarial medium of dispute resolution. It can therefore be argued that when parties obtain an amicable solution of their disputes through alternative dispute resolution, fair trial has not been curtailed.