Legal Issues around the Lack of Renegotiation Clause in Petroleum Contracts, Case Study of the KRG 'Comparative Study'

Asst Lecturer: Arez Mohammed Sediq Othman
Sulaimani University

Introduction

In the current economic climate, the legal principles which allow parties to suspend, modify or terminate performance of their contractual obligations have come under increasing scrutiny. There are numerous contractual arrangements through which a party (normally a foreign private party) makes an investment in the oil and gas fields.[1] The most important category is represented by agreements in the field of petroleum exploration and production; they might be in the form of concession agreements, production sharing contracts, service contracts or other types of contractual relations.[2] There are two major characteristic of these contracts. The first one is they are signed by the investor with the host state (state entity), and the second one is their duration, which is normally longer than common commercial agreements in other sectors.[3] The KRG has signed more than fifty PSCs with foreign companies for exploration and production[4]; the contracts contain many clauses such as freezing and force majeure in order to keep the stability of the parties[5]. However, there are another provision called renegotiation clause which cannot be found neither in the agreements nor the KRG's Oil and Gas Law 2007 No.28. Thus, it is crucial for the KRG to seek for safeguards to renegotiate the terms and conditions of the contracts in times of any change in circumstances that might have a converse impact on its financial condition.

Research objectives

Although it is not very common in petroleum contracts to adopt renegotiation clause, the existence of such clause is recommended in order to give the right to the parties to amend or adjust some parts of the contract in specific circumstances. By looking at the KRG's production sharing contracts, renegotiation clause cannot be found neither in its Oil and Gas Law 2007 No.28 nor the PSCs with foreign companies. In this manner, it is far reaching important for the KRG to foresee the necessary alternative mechanisms for amending its PSCs in the absence of renegotiation clause. The core of this matter will be examined in this paper. Further, this research will be crucial for the KRG seeking for the proper legal solution arising from the absence of renegotiation clause in its petroleum contracts.

---

[1] Timothy Martin, 'Dispute Resolution in the International Energy Sector: an Overview', Journal of World Energy Law and Business, 2011, Vol. 4, No. 4, p.332-340.

[2] Zhiguo Gao, *International Petroleum Contracts: Current Trends and New Directions* (Graham & Trotman/M. Nijhoff 1994), p. 5-12.

[3] B.Piero, 'Stabilization and adaptation in oil and gas investments' Journal of World Energy Law and Business 1, No.1 2008, p.1-5.

[4] Ashti Hawrami, the minster of natural resources in the KRG, during the Television interview with BBC channel 2012, available at <http://www.bbc.co.uk/iplayer/episode/b01mzhk5/HARDtalk_Ashti_Hawrami_Minister_for_Natural_Resources_Kurdistan_Regional_Government/ > accessed on 22 August 2015.

[5] Article 43(3) of the Kurdistan Regional Government model of the Production Sharing Contracts, available at <http://www.krg.org/pdf/3_krg_model_psc.pdf> accessed on 23 August 2015.

Research problem

One of the main concerns in the petroleum agreements concluded with the foreign companies is the lack of renegotiation clause and rare alternative mechanisms which leads to a weak legal position for the KRG. The research concentrated to one specific clause known as renegotiation or adaptation. For the KRG, it is quite crucial to be aware of the legal consequences, particularly for the future disputes with the second party of the contract; it is problematic for the Kurdistan government to demand any amendments without such provision. The paper will mainly focus on these legal concerns and analyze alternative choices to be utilized in the absence of renegotiation terms.

Research Methodology

Comparative study has been chosen to conduct the research by comparing the KRG's model to petroleum contracts in other counties' legal systems in regard with renegotiation clause; with particular focus on regulations and petroleum contracts. The nature of petroleum contracts does not allow comparing two legal systems as some of the norms and principles ruling oil contracts are international. Thus, what have been choosing in this paper is comparing the status of the KRG in terms of renegotiation clause to other contracts or regulation that adopted the same provision.

Research Outline

The paper has been divided into two chapters. The first chapter is dedicated to discuss the concept of renegotiation clause; meaning and its categories. The legal effects resulted from the absent of renegotiation provision and safeguards of the parties will be argued in the second chapter.

Chapter one
The concept of renegotiation clause in petroleum contracts

Johnston has classified those systems, which are used in oil industry, into two major systems: concessionary and contractual system. The differences in the attitude toward ownership of natural resources are considered to be the basic difference between these two regimes.[6] Regarding the concession system, it has not had any application in today's oil industry. The other pattern, which is very common and also adopted by the KRG, is production sharing contract. The concept of production sharing contracts has been defined by Yinka Omorogbe as 'Arrangements where the foreign firm and the government share the output of the operation in predetermined propositions. This new form has been regarded as being a substantial departure from the old concessions in that the host state is theoretically the undisputed owner of the petroleum, with the foreign corporations being engaged as contractors to perform certain specified tasks in return for a fee in kind.'[7] The term production sharing contracts was first invented in Indonesian petroleum industry to regulate the relationship between Oil Companies and host government. In these contracts, parties are emphasizing on adopting some legal clauses to safeguard their position toward each other.

[6] Daniel Johnson, *International Petroleum Fiscal Systems and Production Sharing Contracts* (Penn Well Corporation 1994), p. 21.

[7] Yinka Omorogbe, 'The Legal Framework for the Production of Petroleum in Nigeria' Journal of Energy and Natural Resources Law, (1987) Vol 5, p 279.

In this chapter, the meaning of renegotiation clause will be illustrated by defining the concept and indicating its categories. The parties who insist on inserting such provision will also be determined.

I. Meaning of Renegotiation Clause

The industry's history indicates a willing disposition towards expropriation, nationalization, breach of contract or renegotiation and review of terms. Therefore, it is important for parties to exploration and production arrangements to protect themselves through appropriate contractual and regulatory mechanisms. Therefore, renegotiation clause is considered to be crucial in preventing the risks facing the company who work in oil and gas field.[8] Renegotiation clause or Adaptation affords the parties of the contract with the needed stability and flexibility through the adaptation of the contract to new circumstances arising during the implementation of the agreement.[9] Renegotiation clauses usually provide that any law, regulation or any other government acts subsequent to the original contract that negatively affects the investor's contractual interests will entitle him the right to request for the contract renegotiation and that the host country will have the obligation of entering in such renegotiations in good faith. A typical renegotiation clause will provide that either the host government or foreign investor has the right to request for the contract adaptation if its equilibrium is negatively affected under the occurrence of an event that is beyond the control of both parties.[10] Nicolas David describes the meaning of renegotiation as the government's desire for change and its original function is to restore an agreement's original terms in response to governmental disruption.[11] Bernardini indicates that 'a workable renegotiation clause for adaptation purposes should clearly highlight: the change of circumstances triggering the renegotiation; the effect of the change on the contract; the objective of the renegotiation; the procedure for the renegotiation; the solution in case of failure of the renegotiation process.'[12] Thus, as Tade has discussed, through an effective renegotiation and adaptation mechanism, parties can create a balanced Internal Adaptation System (IAS), which will guarantee private investment security on the one hand and political or socio-economic acceptability for State parties on the other hand. Its structure must at least ostensibly reflect fairness and equity in the bargaining power balance at the time of negotiation and revision.[13] An example of a PSC provision that effectively allows for

[8] Oyewunmi Tade, 'Stabilization and Renegotiation Clauses in Production Sharing Contracts: Examining the Problems and Key Issues' International Energy Law Review, (2011), p.3-6.
[9] Nwete, 'To what extent can renegotiation clauses achieve stability and flexibility in petroleum development contracts?' IELTR, (2006) 2, p. 57.
[10] Jose Macedo, " From Tradition to Modernity: Not Necessarily and Evolution – The Case of stabilization and Renegotiation clauses", Center for Energy, Petroleum and Mineral Law & Policy, Dundee University, p.10. The article available at <https://www.google.iq/?gfe_rd=cr&ei=EfdqVqXuNqqV8Qeu-K_4DA&gws_rd=ssl#q=A+typical+renegotiation+clause+will+provide+that+either+the+host+government+or+foreign+investor+has+the+right+to+request+for+the+contract+adaptation+if+its+equilibrium+is+negatively+affected+under+the+occurrence+of+an+event+that+is+beyond+the+control+of+both+parties+by+jose+macedo> accessed on 6 Dec 2015.
[11] Nicolas David, Les Clauses de stabilite dans les Contracts Petroliers, (1986) 113 J. Droit Int'l 79, p105. derived from Thomas W. Waelde & George Ndi, 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation' (1996) Texas International Law Journal Vol. 31:215, p.265-266.
[12] Bernardini, 'Stabilization and adaptation in oil and gas investments' Journal of World Energy Law & Business, 2008, Vol. 1, No. 1 (2008), p. 103-110.
[13] Oyewunmi Tade, (note 8), p.3-6.

renegotiations of economic imbalance to a large extent is contained in article 16(7) of the Indian Model PSC states "…If any change in or to any Indian law, rule or regulation imposed by any central, state or local authority dealing with income tax or any other corporate tax, export/import tax, customs duty or tax imposed on petroleum or dependent upon the value of petroleum results in a material change to the economic benefits accruing to any of the Parties after the Effective Date, the Parties to this Contract shall consult promptly to make necessary revisions and adjustments to the Contract in order to maintain such expected economic benefits to each of the Parties as of Effective Date…"[14] Another example of adaptation clause would be the one inserted in the agreement between Kuwait and Amonoil stated that " if, as a result of changes in the terms of concessions now in existence or as a result of the terms of concessions granted hereafter, an increase in benefits to the Governments in the Middle East should come generally to be received by them, the Company shall consult with the Ruler whether in the light of all relevant circumstances, including the conditions in which operations are carried out, and taking into account all payments made, any alterations in the terms of the agreements between the Ruler and the Company would be equitable to the parties"[15] These are two examples of renegotiation provision in oil agreements. In the following part, categories of this clause will be discussed.

II. Renegotiation categories

As the term renegotiation applies to different situations, it is important to distinguish these situations. Professor Salacuse categorized renegotiation according to three situations, including Post-Deal Renegotiation, Intera-Deal Renegotiation and Extra-Deal Renegotiation.[16] The last two shall be considered here as the first of them, the Post-Deal Renegotiation, according to Salacuse, is a type of renegotiation that refers to a situation in which negotiation takes place at the expiry of an agreement when the parties, though legally free to go their separate ways, nonetheless try to renew their relationship.[17] While this situation naturally can exist in practice, it cannot be a renegotiating situation. The following example should help to illustrate our point. Imagine that a foreign company enters into an oil exploration agreement (usually a long-term contract that might last for fifteen years or so) with a host state. At the end of the fifteen years, when the contract considers their legal relationship at an end, the foreign company and the host state's national oil and gas company begin voluntary, discussions on a second long-term agreement to utilize the non-associated natural gas of which a commercial quantity has been discovered, during those fifteen years, by chance.[18] This situation cannot be considered as a type of renegotiation because the parties are not engaged in renegotiating their original relationship. Nor are they concerned with whether there was a specific clause (relating to the discovery of non-associated gas) authorizing renegotiation or not. Instead, they are airing the possibility of entering into a new negotiation for a new agreement. The other two categories of renegotiation clause, the Intera-Deal

[14] A.F.M. Maniruzzaman, 'The pursuit of stability in international energy investment contracts: A critical appraisal of the emerging trends' Journal World Energy Law & Business, (2008) 1(2), p.128
[15] Kroll, S. 'The renegotiation and adaptation of investment contracts', Transnational Dispute Management (2004) 1(3), p.1.
[16] Jeswald W. Salacuse, *Making Global Deals: What Every Executive Should Know about Negotiating Abroad* (Pon Books 2002), p.151–155.
[17] Jeswald W. Salacuse (Ibid), p.154-156.
[18] Jeswald W. Salacuse, 'Renegotiating International Project Agreements' Fordham International Law Journal, (2000) Volume 24, Issue 4, p. 1320-1325

Renegotiation and Extra-Deal Renegotiation to define Renegotiation, will be explained more below:

I. Anticipated Renegotiation. This type of renegotiation occurs when the agreement itself provides that during its life, at specified times or on the happening of specified events, the parties must renegotiate or Review certain provisions. For example, the fifteen-year oil exploration agreement mentioned above might include a specific provision calling for the renegotiation of the agreement in the event of a non-associated natural gas commercial quantity being discovered. Here, renegotiation is anticipated as a legitimate activity in which both parties, while still bound to each other in a valid contract, are to engage in good faith.[19] This is called "anticipated renegotiation" because it takes places within the legal framework established in the original contract and that renegotiation is usually suggested by one of the parties. This category is better illustrated by the Winter shall, A.G. et al v. Government of Qatar case.[20] It is the most common way of adaptation in petroleum contracts. The other sort of renegotiation clause is known as involuntary renegotiation.

II. Involuntary Renegotiation, this can be described as "the most difficult, stressful, and emotional renegotiations because they are undertaken in the events of violation of the contract or in the absence of a specific clause authorizing a renegotiation."[21] These renegotiations are "involuntary" For they arise outside the framework of the existing agreement and one of the parties usually seeks Relief from a legally binding agreement without any basis for renegotiation in the agreement itself. The renegotiation of the concession contracts of the 1960s and 1970s and financial agreements in the wake of the Asian financial crisis of the late 1990s can fit within the category of Involuntary Renegotiation.[22]

Renegotiation clause shall be distinguished from negotiation; this difference will be illustrated in the next part.

III. Renegotiation and negotiation

The KRG's production sharing contracts do not contain any provision regarding renegotiation right for the parties. The term renegotiation should not be confused with negotiation of the contract, as the latter is either a segment before signing a contract or a procedure to be followed in time of conflict between the parties during the contract before resorting to litigation or arbitration. In the KRG's Oil and Gas Law No28 2007 negotiation could be found for both. For instance, in article 4, the relevant authority to sign any agreement with the contractor would be either the minister of natural resources or any other agencies appointed by the minster.[23] In Indonesia, PERTAMINA (state Oil Company) is responsible of negotiations and preparing a draft of contract then the minister gives its advice and recommendations. This method will give opportunity to the host country for further scrutinizing and monitoring the terms and conditions of the contract.[24] In the KRG, the minister is responsible for every procedures regarding negotiation and concluding contracts; this

[19] William F. Fox *International Commercial Agreement: A Primer on Drafting, Negotiating and Resolving Disputes* (The Hague: Kluwer Law International 1998) p. 33–46

[20] Wintershall, A. **G.,** et al. v. Government of Qatar, 28 I.L.M. 795, 814 (Ad Hoc Arbitral Tribunal 1989); J. Carver & H. Hossain, *An Arbitration Case Study: The Dispute That Never Was,* 5 ICSID 311 (1990).

[21] Jeswald W. Salacuse, (note 18), p.1319- 1321.

[22] Bernard Taverne, *Petroleum, Industry, and Governments: A Study of the Involvement of Industry and Governments in the Production and Use of Petroleum* (2nd edition, Kluwer 2008), p. 150-151.

[23] Article 4(b) of the Kurdistan Petroleum Law 2007.

[24] Robert Fabrikant, 'Production Sharing Contracts in the Indonesian Petroleum Industry.' Harvard International Law Journal (1975) 15, p. 306-310.

might lead to corruption and the lack of transparency.[25] In other countries, for example in Azerbaijan and Turkmenistan every production sharing contract with the contractors has to be approved by parliament as a legitimate representative of the public.[26] Regarding negotiation as a way to settle legal disputes between the parties of the agreement, the KRG in its petroleum act under resolution of disputes states that "….. If a dispute arises relating to the interpretation and/or application of the terms of an authorization between an authorized person and the minister, the parties shall attempt to resolve that dispute by means of negotiation".[27] Further, if the dispute could not be settled by negotiation, the parties shall recourse to arbitration.[28] Moreover, the KRG's model of production sharing contracts states that the parties to the dispute shall first seek settlement of the dispute by negotiation between senior representatives.[29] If the dispute could not be resolved by negotiation, the parties may seek settlement of the dispute by mediation.[30] Thus, within the framework of renegotiation, it can be said that negotiation is a stage comes after the agreement of the parties to renegotiate some terms of the contracts. The parties who try to use renegotiation section will by indicated in the next part.

IV. The parties who insert renegotiation clause

Despite the fact that some authors does not agree with the concept of renegotiation to be adopted in petroleum contracts, the parties to international agreement insist on having such clause as an extra safeguard. Gotanda has mentioned many reasons for excluding this clause; namely the reduction of stability in the transaction and the host government's capability to overcome some circumstances which can be used unfairly to alter the contract for the benefit of the host state. He argues that "the renegotiation clause may interject the uncertainty into the contractual arrangement"[31] Further, professor Berger has indicated the risk of misusing this clause by the host country to change its rules and regulations under circumstances that can be tackled by the authority and he states "these clauses as operating in place of stabilization clauses by allowing the host state to change its laws in ways that can affect the economic equilibrium of the contract"[32] An Egyptian contract provides an example of a contract that avoids renegotiations: " (b) The rights and obligations of EGPC and ESSO[33] under, and for the effective term of, this Agreement (as well as matters relating to the Joint Company subject to Article IV hereinabove) shall be governed by and in according to the provisions of this Agreement and can only be altered or amended by mutual agreement of the parties."[34] However, other authors emphasized the role of this clause and they

[25] Ernest E. Smith, 'From concessions to service contracts', (International Energy Law Symposium)' Tulsa Law Journal (1992) 27(4), p. 503-504.
[26] Ilias Bantekas and others, *Oil and Gas Law in Kazakhstan: National and International Perspectives*, (Kluwer Law International 2004), p. 190-192.
[27] Article 50 second (1) of the Kurdistan Petroleum Law 2007.
[28] Article 50 second (2) of the Kurdistan Petroleum Law 2007.
[29] Article 42(1) (a) of the KRG's PSCs.
[30] Article 42(1) (b) of the KRG's PSCs.
[31] John Y. Gotanda, 'Renegotiation and Adaptation Clauses in Investment Contracts, Revisited' Vanderbilt Journal of Transnational law, (2003) vol 36, p.1461-1466.
[32] Berger, K. P., "Renegotiation and Adaptation of International Investment Contracts: The Role of contract Drafters and Arbitrators", Vanderbilt Journal of Transnational Law,(2004) 36, p. 1351-1352.
[33] EGPC is the abbreviation of Egyptian General Petroleum Corporation; and ESSO is an international trade name for ExxonMobil.
[34] Egypt-Egyptian-General Petroleum Corporation/Esso: Concession Agreement for Petroleum Exploration and Production 12/14/74: Article XVI Rules and Regulations (b)

considered effective mechanism to protect the parties against any unforeseen risk. For instance, Zyad A Al Qurashi argues that "a renegotiation clause may play a facilitative role in stabilizing long-term agreements such as international petroleum agreements, whose nature creates a high risk of instability"[35]. Some writers believe that shift from traditional concession system to the modern type of partnership and sharing in petroleum industry encouraged the host states to use renegotiation clause in their agreements. They argue that the developing countries are seeking such clause to be a mean for renegotiating their contracts with colonial countries. On the other hand, particularly after the wave of nationalization in the 1970s and 1980s, oil companies have sought using other legal tools such as stabilization clause to prevent host governments to change their laws and regulations which have a converse impact on their financial conditions.[36] The KRG, as mentioned earlier, does not utilize provisions related to renegotiation or adaptation right despite inserting stabilization clause by oil companies in all contracts concluded by the KRG. Thus, it is vital for the Kurdistan Government to look for alternative means in case of changes in circumstances and having desire to alter the concluded agreements. These legal mechanisms will be discussed in the second chapter.

Chapter two
The legal effects resulting from the absence of renegotiation clause

The renegotiation clauses strike a balance between the investors and the host government. The clause mainly tries to preserve the interests of host country by leaving the state's sovereignty intact and allows modifying the agreement which is previously concluded between the parties rather than the termination of contract by either party when a dispute arises.[37] As mentioned in the first chapter, the KRG does not adopt renegotiation clause in neither Oil nor Gas Law 2007 nor petroleum contracts. In this chapter the legal issues facing the KRG in case of the lack of this provision and other authorized procedures which could be utilized in the absence of this clause will be discussed.

I. Legal issues facing the KRG as the host government

Resource-rich countries can choose modern concession or license system in its upstream operation.[38] In the Kurdistan Regional Government, according to the Petroleum Law 2007, the minister may enter into other contracts, which may include service contracts, field management contracts, supply and installation contracts, construction contracts, consulting contracts, or any other types of contracts that the Minister may from time to time require to efficiently manage the Petroleum

[35] Zyad A. Al Qurashi, 'Renegotiation of international petroleum agreements' Journal of International Arbitration (2005) 22(4), p 268.
[36] A.F.M. Maniruzzaman,'(note 14), p.119-121.
[37] A.F.M. Maniruzzaman, '(note 14), p.132-133.
[38] Since the 1960s, modern concession has replaced the traditional form of concession along with some other types of agreements. The main characteristics of modern concession or license agreement are the reduction in period of time and a significant increase in royalty payments and other sources of revenue such as taxation and bonuses. (Derived from: Centre for Economic and Management, *Oil and Gas Exploration and Production: Reserves, Costs, Contracts* (TECHNIP 2004), p. 193-198.

resources of the Region.[39] This attitude is quite similar to Kazakhstan, where the most favorable contractual form adopted is PSC and there is possibility for Kazakh government to sign concession which is allowed by Kazakh civil code.[40] One might argue that the choice of contractual system would entirely depend on the skills of the host government in negotiations and the maturity of fiscal and legal framework of the government. Thus, although the KRG has the right to choose it contractual form, it cannot use this right without return to the other party. This may be considered a legal obstacle before the host government even if circumstance change as the KRG's model of PSCs has not adopted any provision allowing renegotiation. However, In Bolivia, the Government passed Hydrocarbon Law Number 3058 in 2006; this law repealed the 1996 Hydrocarbon Law which had privatized the sector, moving control over resources back to the State. Control over resources was thus transferred to the State agency, Yacimientos Petroliferos Fiscales Bolivianos.[41] Nonetheless, foreign companies are likely to continue to play a role in the future as well given the lack of national expertise. Accordingly, although the 2006 law cancelled contracts, it also directed the negotiating of new ones but on terms more favourable to the government, including higher tax and royalty rates.[42] Therefore, it can be said that having a clear provision concerning renegotiation is encouraged in order to clarify the details of all procedures. In the absence of such clause, parties have to seek for alternatives; these alternatives will be explained in the second part.

II. Legal safeguards for the parties in the absence of renegotiation clause

Parties to oil and gas agreements may encounter circumstances for which there is no contractual clause in the agreement providing for renegotiation. Here some other clauses may have an efficient role for both host government and foreign companies such as applicable law, hardship clause and force majeure.

A. The failure of the renegotiation process: before going to the circumstances when the parties have to recourse to other legal tools to renegotiate their contracts due to the lack of adaptation provision, here the brief argument will be indicated regarding the failure of the renegotiation process. In this case, most of the time the disputes between the parties will be solved by arbitration. The arbitrator shall determine whether and to what extent the events alleged by one of the parties meet the conditions set forth in the agreement for such renegotiation. In this regard, Bernardini has indicated three alternative solutions to be open regarding the consequences depending also upon the parties 'claims before the arbitrator:

(i) The arbitrator may invite the parties to attempt to negotiate once again the terms of a revised agreement based on their findings.

(ii) If such an attempt is unsuccessful, or in its absence, the arbitrator may determine that only the parties are entitled to proceed to the revision of the agreement, in which case they may either declare that the latter is to continue or may declare its termination should it be found that the other party failed to act in good faith during the negotiation phase, in which case compensation may in addition be awarded to the aggrieved party.

(iii) The arbitrator may proceed to determine the manner in which the terms of the agreement should be revised in order to comply with the parties' objective of

[39] Article 39 of the Kurdistan Petroleum Law 2007.

[40] Bantekas and others, (note 26), p. 12-14.

[41] M. V. Vargas, "Bolivia's New Contract Terms: Operating Under the Nationalization Regime", Oil, Gas & Energy Law Intelligence, 2007, at p.2-3.

[42] Michael Likosky, 'Contracting and regulatory issues in the oil and gas and metallic minerals industries' Transnational Corporations,(2009) Vol. 18, No. 1, p7-15.

restoring the contractual equilibrium and shall issue an award effectuating such a revision. [43] These are solutions for the failure of renegotiation; however the following parts will indicate other clauses in the absence of adaptation clause.

B. Applicable law: the applicable law to the contract can play an important role. The applicable law determines the situations under which a party is entitled to change the contract. Moreover, when a dispute is presented for arbitration, arbitrators will apply the applicable law that governs the contract. Thus, if parties to oil and gas agreements experience a situation where there is no contractual term which provides for renegotiation but it is argued that there is an obligation to renegotiate under the general law, then those parties should know that much will depend on the applicable law.[44]. This issue is depending on the legal system, whether it is common law or civil law legal system. In this part, the common law legal system is not discussed rather the light will be shed on the Iraqi legal system which is a civil law country, more specifically on the Kurdistan oil and gas law 2007. In this regard, the KRG's Oil and Gas Law which is a private law and applicable on all petroleum operations has not stated any provision regarding the applicable law.[45] Therefore, in this situation the KRG's production sharing agreements shall be examined. There is no doubt that applicable law is resorted when the parties demand renegotiate the agreed contract in order to amend the content of their contract. The absence of this provision means there is a dispute arouse between the parties which has been stated in the KRG's PSCs models as follows: “For the purpose of this article 42.1, "dispute" shall mean any dispute, controversy and claim (of any and every kind or type, whether based on contract, tort statute, regulation or otherwise) arising out of, relating to, or connected with this contract or the operations carried out under this contract, including without limitation any dispute as the construction, existence, validity, interpretation, enforceability, breach or termination of this contract which arises between the parties (or between any one or more entities constituting the contractor and the Government)”[46]. Further, any dispute shall be governed by English law together with any relevant rules, customs and practices of international law.[47] Under English law, the general pattern is that the contract is absolute and there is no duty on the parties to renegotiate the terms of the contract or modify it despite the change in circumstances.[48] However, the English court in a number of cases has recognized the right of the parties under the concept of “frustration” when the obligations of the parties become almost impossible physically or legally.[49] Nonetheless, this situation cannot be resorted widely as Goode has stated “the English doctrine of frustration as currently applied is too strict and narrow to produce that degree of adjustment which the commercial community would regard as fair".[50] Thus, it can be said that the applicable choice in the absence of renegotiation clause is a weak option for the KRG in order to amend the concluded agreement in time of the change in circumstances.

[43] Bernardini, (note 12), p. 106-107.
[44] Talal Abdulla Al-Emadi, 'the renegotiation clause in Petroleum International Joint venture agreement' Paper Number 04/2012(June 2012) p.17-23.
[45] Article 2 of the Kurdistan Petroleum Law 2007.
[46] Article 42 first of the KRG PSCs.
[47] Article 43 of the KRG PSCs.
[48] R Goode*, Commercial Law*, 2nd edn (London, Penguin Books, 1995), p. 139-140.
[49] Wolfgang. Peter and Others, *Arbitration and Renegotiation of International Investment Agreements* (Kluwer Law International1995), p.12-15.
[50] R Goode*,* (note 48), p.143.

C. Hardship clause and force majeure

I. Hardship clause: By reviewing the KRG's oil and gas law 2007, no provision can be found on hardship clause, neither on the KRG's production sharing agreement's model. Hence, only force majeure will be discussed here.

II. Force majeure clause: force majeure is utilized to reduce the damage that may cause one of the parties because the contract is to be fulfilled in a circumstance that is different from the situation when the contract was signed. Article 40(2) of the KRG's model of PSC states that: "For the purpose of this Contract, "Force Majeure" means any event that is unforeseeable, insurmountable and irresistible, not due to any error or omission by the contractor but due to circumstances beyond its control, which prevents or impedes execution of all or part of its obligations under this Contract….." Berger had compared the difference in handling imbalance business interest problem in the case of contact without and with renegotiation clauses. In cases where there is no express renegotiation clause, investors frequently rely on either a force majeure clause included in the contract or the hardship concept of international contract law. Berger further indicated that the arbitration agreement is required in order to put renegotiation clauses into full function. The arbitration power shall be given to the tribunal to solve the problem. In the meantime there is a clear definition in the contract about the trigger event during the negotiation and the procedure of the renegotiation.[51] The purpose here is to see to what extent these clauses may be used by the party insisting on renegotiation to trigger the renegotiation process. If the performance of the contract becomes impossible, a force majeure clause would provide for the termination of the agreement. Thus, the main target of this provision is not to adapt or change the contract, but rather to end the contract and burden the parties of the contract an obligation different from the one in the time of concluding the contract. However, some scholars have indicated that the meaning of force majeure clause is wider and it can be resorted to initiate the alternation in some terms of the agreement. They further argue that most of the time renegotiation process is a inevitable subsequences of force majeure clause. Moreover, it might be utilized to strengthen the relationships between the parties instead of terminating the contract which might leave a harsher impact. The KRG's contracts have adopted the way that the parties can use this clause to adapt the content of the contract when it articulates "In such event the Contractor shall promptly notify the Government in writing and take all reasonably appropriate measures to perform its obligations under this Contract to the extent possible…." [52] The crucial issues here is the possibility of resorting to force majeure by the KRG while the events might be caused by the KRG's interference in contract performance; such as the application of new regulation or the conflict between the federal government and the KRG if this dispute have negative impact on the financial interests of oil companies. In C. Czarnikow v. Rolimpex case, the dispute was aroused between Rolimpex, a polish state company and a private company on sugar supply contract when Rolimpex refused to fulfill its obligation of supplying sugar as the polish government banned sugar export. The House of Lords had decided on favor of Rolimpex Company On The Basis Of Force Majeure as it insisted that Rolimex is different from polish government.[53] However, the KRG is entered into the PSCs with oil companies directly as the KRG has not established its own oil

[51] Berger, K. P., (note 32), p. 1346-1378.
[52] Article 40(1) of the KRG's PSCs.
[53] C.Czarnikow v. Rolimpex case, available at <http://www.uniset.ca/other/cs3/1979AC351.html> accessed on 23 Oct 2015.

enterprise decided in its petroleum regulation. Nonetheless, even in case of having national oil companies or any other governmental petroleum enterprise, the companies cannot be seen as separate from government as expressed by Professor Karl-Heinz by saying that "the starting point will have to be the principle that the separation between the state enterprise and the state is respected and that therefore normally acts of public authority by the state have to be accepted as an excusing case of force majeure … If the contract itself stipulates that the state enterprise is to be considered responsible for certain acts of state, no force majeure can be claimed if such an act of state then actually occurs."[54] In the KRG's PSCs there is a clear provision states clearly on the rights of the parties to recourse to force majeure clause when the circumstance resulting from the act or orders of government.[55]

Conclusion

There are many contractual clauses enforced by the parties of both national and international agreements. The Kurdistan Regional Government has concluded many international petroleum contracts with foreign companies for the E&P. Renegotiation clause is one of the vital clause utilized in order to cope the changes in circumstances that has a negative impact on the financial burden of one party of the contract. Having this condition allows the parties to make changes throughout renegotiating or terminating some terms of the contract partly or entirely. However, there are occasions where this clause cannot be found in petroleum contracts as the case of the KRG's production sharing contracts. This paper shed lights on the significant of having such provision in petroleum agreements in general and in particular circumstances when the parties have to depend on alternatives for safeguarding their rights under the contract. It argued that in the absent of this clause, parties can rely on other contractual clause such as freezing, hardship or force majeure clause. Nonetheless, this is not the way in the KRG's production sharing contracts. There are not any provisions in the Kurdistan's regulation concerning hardship and renegotiation clause. The only clauses that can provide a safeguard to the companies under the contracts in the KRG are stabilization and force major clause. The latter can be used to alter the terms of the agreement in the absence of renegotiation.

[54] K. Böckstiegel, The Legal Rules Applicable in International Commercial Arbitration Involving States or State-Controlled Enterprises, in International Arbitration: 60 Years of ICC: A Look at the Future 117 (ICC ed., 1984), p.46

[55] Article 40(2)(G), of the KRG's PSCs.

Recommendations

- The paper has recommended that the KRG has to adopt some articles in its regulation to allow renegotiate the concluded contracts; as petroleum industry has not developed due to the recentness of this industry and the possibility of choosing another contractual form in the coming era. This can be done either through oil and gas law or in signed production sharing agreements with multinational oil companies.
- The KRG has adopted stabilization clause in its production sharing agreements with international petroleum corporation. Thus, the KRG is not able to change any term without the consent of the other party. Furthermore, if the KRG initiate to change some elements of the contracts unilaterally, there might be huge compensation forced under international law as ramifications for damages inflicted to foreign companies.
- The Kurdistan region has to deal with this issue carefully because of the recentness of petroleum industry and to not behave in a way that worries foreign investors.
- The KRG has to settle all legal disputes with the federal government, particularly in terms of the relevant authority to sign agreements or represent before international arbitrators in case of disputes with international oil corporations.

Bibliography

Regulations

- Bolivian Hydrocarbon Law 1996.
- Egypt-Egyptian-General Petroleum Corporation/ESSO: Concession Agreement for Petroleum Exploration and Production 12/14/74: Article XVI Rules and Regulations (b).
- The KRG's model of PSCs.
- The Kurdistan Oil and Gas Law 2007, No.28.

Books

- Bernard Taverne, *Petroleum, Industry, and Governments: A Study of the Involvement of Industry and Governments in the Production and Use of Petroleum* (2nd edition, Kluwer 2008).
- Daniel Johnson, *International Petroleum Fiscal Systems and Production Sharing Contracts* (Penn Well Corporation 1994).
- Ilias Bantekas and others, *Oil and Gas Law in Kazakhstan: National and International Perspectives*, (Kluwer Law International 2004)
- J Salacuse *Making Global Deals: What Every Executive Should Know About Negotiating Abroad* (Pon Books 2002).
- R Goode*, Commercial Law*, 2nd edn (London, Penguin Books, *1995).*
- William F. Fox, *International Commercial Agreement: A Primer on Drafting, Negotiating and Resolving Disputes* (The Hague: Kluwer Law International 1998).
- Wolfgang. Peter and Others, *Arbitration and Renegotiation of International Investment Agreements* (Kluwer Law International1995).

- Zhiguo Gao, *International Petroleum Contracts: Current Trends and New Directions* (Graham & Trotman/M. Nijhoff 1994).

Journal Articles

- A.F.M. Maniruzzaman, 'The pursuit of stability in international energy investment contracts: A critical appraisal of the emerging trends' Journal of World Energy Law & Business, 2008, Vol. 1, No. 2.
- B.Piero, 'Stabilization and adaptation in oil and gas investments' Journal of World Energy Law and Business 1, No.1 2008.
- Berger, K. P., "Renegotiation and Adaptation of International Investment Contracts: The Role of contract Drafters and Arbitrators", Vanderbilt Journal of Transnational Law,(2004) 36.
- Bernardini, 'Stabilization and adaptation in oil and gas investments' Journal of World Energy Law & Business, 2008, Vol. 1, No. 1.
- Ernest E. Smith, 'From concessions to service contracts', (International Energy Law Symposium)' (1992) 27(4) Tulsa Law Journal 493.
- Hadiza Tijjani Mato, 'The Role of Stability and Renegotiation in Transnational Petroleum Agreements'(2012) Vol.5, Journal of Politics and Law.
- J Salacuse 'Renegotiation International Project Agreements' (2001) 24 FDMILJ 1319, 1321.
- Jeswald W. Salacuse, 'Renegotiating International Project Agreements' Fordham International Law Journal, (2000) Volume 24, Issue 4.
- Jose Macedo, "From Tradition to Modernity: Not Necessarily an Evolution - The Case of Stabilization and Renegotiation Clauses" Center for Energy, Petroleum and Mineral Law and Policy, Dundee University.
- John Y. Gotanda, 'Renegotiation and Adaptation Clauses in Investment Contracts, Revisited' (2003) Vanderbilt Journal of Transnational law, vol 36.
- K. Böckstiegel, The Legal Rules Applicable in International Commercial Arbitration Involving States or State-Controlled Enterprises, in International Arbitration: 60 Years of ICC: A Look at the Future 117 (ICC ed., 1984).
- Kroll, S. "The renegotiation and adaptation of investment contracts", (2004) Transnational Dispute Management, 1(3).
- Michael Likosky, 'Contracting and regulatory issues in the oil and gas and metallic minerals industries' Transnational Corporations, Vol. 18, No. 1 (April 2009).
- M. V. Vargas, "Bolivia's New Contract Terms: Operating Under the Nationalization Regime", Oil, Gas & Energy Law Intelligence, 2007
- Nicolas David, Les Clauses de stabilite dans les Contracts Petroliers, (1986) 113 J. Droit Int'l 79, p105. derived from Thomas W. Waelde & George Ndi, 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation' (1996) Texas International Law Journal Vol. 31:215.
- Nwete, "To what extent can renegotiation clauses achieve stability and flexibility in petroleum development contracts?" IELTR, (2006), 57.
- Oyewunmi Tade, 'Stabilization and Renegotiation Clauses in Production Sharing Contracts: Examining the Problems and Key Issues'(2011) International Energy Law Review.
- Robert Fabrikant, 'Production Sharing Contracts in the Indonesian Petroleum Industry.' (1975) 15 Harvard International Law Journal 303.

- Talal Abdulla Al-Emadi, 'the renegotiation clause in Petroleum International Joint venture agreement' Paper Number 04/2012(June 2012)
- Timothy Martin, ‘Dispute resolution in the international energy sector: an overview’, Journal of World Energy Law and Business, 2011, Vol. 4, No. 4.
- Yinka Omorogbe, 'The Legal Framework for the Production of Petroleum in Nigeria' Journal of Energy and Natural Resources Law, (1987) Vol 5.
- Zyad A. Al Qurashi, 'Renegotiation of international petroleum agreements' (2005) Journal of International Arbitration 22(4).

Cases

- C. Czarnikow v. Rolimpex case
- Wintershall, A.G. et al v. Government of Qatar case.

Web

- Ashti Hawrami, the minster of natural resources in the KRG, has claimed during the Television interview with BBC channel 2012, available at <http://www.bbc.co.uk/iplayer/episode/b01mzhk5/HARDtalk_Ashti_Hawrami_Minister_for_Natural_Resources_Kurdistan_Regional_Government/ >

Abstract

One of the major means of investor protection is inserting renegotiation clause in petroleum contracts which has in fact a mutual benefit for the parties of the transaction. Both foreign companies and host country are insisting on having the right to change some parts of the agreement in the event of a fundamental change of circumstances. Due to the long periods in petroleum contracts, various unforeseen uncertainties might occur which had not been anticipated during the initial signing of the contract; thus renegotiation talks have on numerous occasions been necessary to protect the financial interest of all parties concerned. This paper will focus on renegotiation clause in oil and gas contracts, more importantly the legal issues resulting from the lack of this provision in the agreements between the parties as the case of the Kurdistan Regional Governments' Production Sharing Contracts (PSCs). It will argue that in the absence of such condition, there are many other legal mechanisms for parties to be utilized instead such as force majeure and the hardship concept.

پوختەی تویژینەوە

یەکێک لە میکانیزمە یاساییەکانی پاراستنی وەبەرهێن بریتیە لە مەرجی دوبارە دانوستان کردنەوە لە گرێبەستە نەوتیەکاندا کە گرنگیەکی زۆری هەیە بۆ هەردوو لایەنی مامەڵە یاساییەکە. هەریەک لە کۆمپانیا بیانیەکان و ئەو دەوڵەتەش کە وەبەرهێنانەکەی تیادا ئەکرێت پێداگری دەکەن لەسەر هەبوونی مافی گۆڕانکاریکردن لە چەند بەندێکی ڕێکەوتنەکەیاندا لە ئەگەری ڕووبەڕووبوونەوەی گۆڕانکاری گەورە لە لەسەر پێگەی لایەنەکان دروست بکات. بە هۆی درێژی ماوەی گرێبەستە نەوتیەکانەوە، کۆمەڵێ ڕووداوی چاوەڕوان نەکراو لەوانەیە ڕووبدەن کە پێشبینی ڕودانیان نەکراوە لە کاتی ئیمزاکردنی گرێبەستەکەدا. ئەم هۆکارانە وادەکەن مافی دووبارە دانوستان کردنەوە گرنگیەکی زۆری هەبێ بۆ پارێزگاریکردن لە پێگە و بەرژەوەندیە داراییەکانی هەردوو لایەنی گرێبەستەکە. ئەم تویژینەوەیە تیشک دەخاتە سەر مەرجی دوبارە دانوستانکردنەوە لە گرێبەستەکانی تایبەت بە نەوت و گاز، هەروەها ئەو بابەتە یاساییانەی کە سەرچاوە دەگرن لە کاتی نەبونی ئەم مەرجە وەک ئەوەی کەلە گرێبەستە نەوتیەکانی حکومەتی هەرێمی کوردستان ڕوویداوە لەگەڵ خستنە ڕووی هەموو ئەو میکانیزمانەی کە دەکرێت بگردرێتە بەر لە لایەن لایەنەکانەوە وەک جێگرەوەیەک بۆ ئەم مەرجە.

ملخص البحث

احد اليات القانونية للحفاظ على المستثمرين هي شرط اعادة التفاوض فى العقود النفطية التى لها اهمية هامة للطرفين العلاقة القانونية. كل من الشركات الاجنبية و الدول المستثمرة فيه يصرون على وجود حق التغير فى بعض فقرات بنود المتفق عليه لاحتمال حدوث حادث يغير موقع الطرفين. بسبب طول مدة العقود النفطية, يمكن حدوث اى حادث طارىء لم ياخذ بنظر الاعتبار اثناء توقيع العقود. ولهذه الاسباب, حق اعادة التفاوض فى العقود النفطية تعتبرفقرة اساسية لحفاظ على مواقع و مصالح مالية للطرفين. هذا البحث يركز على شرط اعادة التفاوض فى العقود خاصة بالنفط و الغاز و كذلك المواضيع القانونية الذى يظهر فى حالة عدم وجود هذا الشرط كالعقود النفطية الذى ابرمت من قبل اقليم كوردستان العراق مع مناقشة كل اليات بديلة محتملة اللجوء اليه من قبل الاطراف كبديل لشرط اعادة التفاوض.