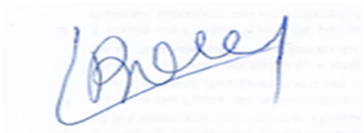
Lex petrolea, Arbitration and other Alternative Dispute Resolution Mechanisms in oil and gas investment contracts: a critical analysis.

Volume I of I

Submitted by Louise Bouvery, to the University of Exeter as a thesis for the degree of Doctor of Philosophy in Law, November 2020.

I certify that all material in this thesis which is not my own work has been identified and that any material that has previously been submitted and approved for the award of a degree by this or any other University has been acknowledged.

(Signature)…….  ……

ABSTRACT

The oil and gas industry is one of the most investor-State dispute intensive. Numerous disputes necessarily entail a dispute resolution mechanism. In oil and gas investment contracts, parties provide for arbitration, in order to avoid risks pertaining to national courts. Arbitration is an ADRM, and arbitral awards benefit from international recognition and enforcement before national courts. Arbitration is however a last resort mechanism: parties refer their dispute to arbitration when their relationship is severed without hope to mend it. It has become a heavy dispute resolution mechanism, whose procedure generally lasts years and generates high costs. Considering the long span of oil and gas investment contracts, preserving the relationship between the investor and the Host State is crucial, and arbitration does not appear as the best solution. Disputes should therefore be evacuated as swiftly as possible, resorting to arbitration as a last chance mechanism. Yet, the large number of arbitrations demonstrates that oil and gas investment contracts do not present the necessary and efficient mechanisms to solve the disputes before the contractual relationship is ruined.

The insertion of an efficient MTDR clause, with well-interacting ADRMs, would provide the parties with the means to solve their disputes early, protect their relationship and filter disputes as to granting access to arbitration to the most complex disputes only. The MTDR clause proposed will comprise ADRMs already existing in actual contracts and therefore supported by practice. The clause will be supplemented by a DB clause, an ADRM borrowed from the construction industry which has a proven efficacy. Finally, the clause will not be complete without inserting and recognising specific contract clauses, force majeure and stabilisation clauses, which are not ADRMs per se but have been elevated to a dispute prevention and resolution level by industry and arbitral practice, i.e. *lex petrolea*.

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LIST OF ABBREVIATIONS

AAA	American Arbitration Association
ADR	Alternative Dispute Resolution
ADRM	Alternative Dispute Resolution Mechanism
AIPN	Association of International Petroleum Negotiators
BIT	Bilateral Investment Treaty
CDB	Combined Dispute Boards
CIArb	Chartered Institute of Arbitrators
DAB	Dispute Adjudication Board
DB	Dispute Board
DPM	Dispute Prevention Mechanism
DRB	Dispute Review Board
EEZ	Exclusive Economic Zone
EFZ	Exclusive Fishery Zone
FIDIC	Fédération Internationale des Ingénieurs Conseils
HKIA	Hong Kong International Arbitration
IBA	International Bar Association
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution
ICJ	International Court of Justice
ICSID	International Center for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IMO	International Maritime Organisation
IOC	International Oil Company
ITLOS	International Tribunal for the Law of the Sea
JBA	Joint Bidding Agreement
JDZ	Joint Development Zone

JOA	Joint Operating Agreement
JOC	Joint Operating Committee
LCIA	London Court of International Arbitration
MIT	Multilateral Investment Treaty
MTDR	Multi-Tiered Dispute Resolution
New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NOC	National Oil Company
ODR	Online Dispute Resolution
PCA	Permanent Court of Arbitration
PSA – PSC	Production Sharing Agreement – Contract
RSA – RSC	Risk Sharing Agreement – Contract
SCC	Stockholm Chamber of Commerce
SED	Sole Expert Determination
SIAC	Singapore International Arbitration Centre
TAC	Technical Advisory Committee
UN Charter	Charter of the United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea

1. CHAPTER 1. INTRODUCTION

1.1. General introduction

Oil and gas projects can be complex and challenging for investors. The regulatory framework applicable to their investment will depend on the country in which they decide to operate.[1] The oil and gas industry is also highly specific due to the number of actors involved and the different contracts concluded in order for petroleum operations to be undertaken. This is due to the fact that oil and gas operations require an agreement between a State and an investor, by which the State authorises the investor to realise the operations against a share or property in the oil and gas produced. This first contractual grid is completed by agreements between the investor and subcontractors and evolves within the larger realm of public international law and the relations between sovereign States.

Oil and gas are natural resources, and the world's leading sources of energy, accounting for nearly 55% of all energy consumption.[2] They are used to heat and light houses and schools, transport people and goods throughout the world. Such commodities are therefore highly needed and can generate colossal amounts of revenues for states. The current rules of public international law provide that a state has unlimited rights and power on its territory and of the resources laying therein.[3] Resultantly, the physical control over a territory makes exploitation of natural resources, including oil and gas, possible.[4] Hence states wage war or annex parts of resource-rich neighbouring countries in order to access the resources.[5] Oil and gas can spur conflicts, and their duration is often closely linked to the existence of natural resources.[6]

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[1] David Perks, *Oil & Gas 2012* (Sweet and Maxwell International Series 2012) Foreword.
[2] Energy Institute website <https://www.energyinst.org/exploring-energy/topic/oil-and-gas>.
[3] Marco Pertile, 'On the Financing of Civil Wars through Natural Resources: Is There a Duty of Vigilance for Third States on the Activities of Trans-National Corporations?' in Francesca Romanin Jacur, Angelica Bonfanti and Francesco Seatzu (eds) *Natural Resources Grabbing: An International Law Perspective* (Brill Nijhoff 2016) 384.
[4] Marco Pertile, 'The Changing Environment and Emerging Resource Conflicts' in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 1087.
[5] Pertile (n 4) 1087-1088.
[6] Michael Ross, 'A Closer Look at Oil, Diamonds, and Civil War' (2006) 9 Ann Rev Polit Sci 265, 282; Marco Pertile, 'The Changing Environment and Emerging Resource Conflicts' in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 1094.

Instability in a region, due to intrastate or interstate conflicts, will lead to price volatility of oil and gas.[7] In turn, the investments in the region could be affected, to the point of losing them totally. International investments depend greatly on the surrounding political climate. However, besides politically based disputes, conflicts can be triggered on economic aspects only, as the relationship between the investor and the state is firstly commercial.

For all these reasons, the oil and gas industry is one of the most investor-State dispute intensive industries.[8] According to the data of the International Center for Settlement of Investment Disputes (hereafter ICSID), since 2010, the oil, gas and mining industry was the largest provider of arbitral cases. And since 1996, 26% of all cases introduced before ICSID concerned this industry.[9]

Numerous disputes necessarily entail a dispute resolution mechanism, either provided for in the contracts, or in a higher international norm (such as a Bilateral Investment Treaty). In the case of a State versus State dispute, parties can wage war, or resort to international tribunals, such as the International Court of Justice, or the International Tribunal for the Law of the Sea, when the dispute concerns maritime territories.

Nevertheless, this choice is not available for disputes involving a state and an investor.[10]

In case of a dispute, parties usually present their claims before national courts and judges. Yet, this option may not be the best-suited for investor-State disputes. National courts have the disadvantage of their qualification: they are national, in other words, state courts. An investor intending a legal action against a foreign State before its own courts has little chances of success.[11] Firstly,

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[7] A F M Maniruzzaman, 'The Issue of Resource Nationalism: Risk Engineering and Dispute Management in the Oil and Gas Industry' (2009) 5(1) Tex J Oil Gas & Energy L 79, 81.

[8] Mohammad Alramahi, 'Dispute Resolution in Oil and Gas Contracts' (2011) 3 IELR 78.

[9] The ICSID Caseload – Statistics, available at <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics>; The ICSID Caseload – Statistics (Issue 2020-2), available at <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics>.

[10] Anthony Connerty, 'Dispute Resolution in the Oil and Gas Industries' (2002) 20(2) J Energy & Nat Resources L 144, 149.

[11] August Reinish and Loretta Malintoppi, 'Methods of Dispute Resolution' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds) *The Oxford Handbook of International Investment Law* (Oxford University Press 2012) 692.

difficulties can arise when the State acts commercially and in the exercise of their sovereignty. In these instances, national jurisdictions may consider the State to have sovereign immunity, and the case will be dismissed.[12] Secondly, disputes involving the State are likely to spark political issues and debates, rendering them impossible to settle judicially.[13] Thirdly, the impartiality and neutrality of national courts in resolving investor-State disputes has been questioned.[14] Investors may fear that state courts will set aside or dismiss their claims, without applying the usual standards of scrutiny. Similarly, the processes of witness presentation and collection of evidence may be hindered. But even in countries where judges' competence and integrity are ascertained, national procedural laws and a complex legal system support the choice of alternative means of dispute resolution.[15]

It is in this context that parties to investment contracts, i.e. States and investors, have decided to resort to new systems of dispute resolution. In opposition to litigation, investors and States have inserted arbitration clauses. These provisions allow them to access an arbitral tribunal, whose members are not under the influence of the state or the investor. Before an arbitral tribunal, states are as likely as investors to win their case.[16] Furthermore, arbitration presents the advantage of a flexible procedure, where parties can choose the place of the procedure, the language and the rules applicable to their dispute. In addition, arbitration is globally recognised and enforceable, thanks to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter the New York Convention).[17] Concluded in 1958, the New York Convention now counts 166 States parties. The New York Convention gives the recognition and enforcement of foreign arbitral awards as a principle.[18]

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[12] Reinish, Malintoppi (n 11) 696-697.
[13] Reinish, Malintoppi (n 11) 697.
[14] John P Bowman, 'Dispute Resolution Planning for the Oil and Gas Industry' (2001) 16(2) ICSID Review 332, 335; Connerty (n 10) 148; Maniruzzaman, 'The Issue of Resource Nationalism' (n 7) 93.
[15] Guy Robin, 'The Advantages and Disadvantages of International Commercial Arbitration' (2014) 2014(2) International Business Law Journal 131, 132-133.
[16] Rachel L Wellhausen, 'Recent Trends in Investor-State Dispute Settlement' (2016) 7 Journal of International Dispute Settlement 117, 117.
[17] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 (New York Convention). Regarding the State Parties to the Convention: New York Arbitration Convention website, <https://www.newyorkconvention.org/countries>.
[18] New York Convention Article III.

Recognition and enforcement can be refused only on specific grounds, pertaining to the non-respect of basic procedural rules and of the due process of law.[19] For instance, a national court can refuse enforcement of an arbitral award if one of the parties was not given proper notice of the arbitration proceedings, or if the composition of the arbitral tribunal was made contrary to the agreement of the parties or the law of the seat of the arbitration.[20]
This wide recognition of arbitration has made it the most used dispute resolution mechanism in investment contracts and more so, in oil and gas investment contracts.[21]

However, arbitration is commonly considered a last resort mechanism: parties refer their dispute to arbitration when their relationship is severed without hope to mend it. This facet of arbitration is further evidenced by the time and costs associated with the procedure. Arbitration can therefore be counterproductive considering the aims of parties to oil and gas investment contracts. These contracts are indeed long-term, spanning over the course of 25 years to half a century. Both the State and investor favour long lasting relationships.[22] Dispute resolution processes must take into account these specificities and the fact that parties do not want to halt or disrupt their activities. The most efficient way to evacuate disputes as quickly as possible, without affecting oil and gas operations, is to undertake dispute planning.[23]

Dispute management and planning means providing for a complete dispute resolution process in the contract. It is more economic and participates to risk management, and as a result permits the parties to gain control over the dispute resolution system.[24] In other words, providing for an efficient method of dispute resolution in the investment contract allows to save time and money, whilst limiting the risks of uncontrolled disputes. Dispute management is essential for viable relationships in the oil and gas industry, protecting the long-term investment on both commercial and political plans.[25]

[19] New York Convention Article V.
[20] New York Convention, Article V, 1. b) and d).
[21] Alramahi (n 8).
[22] Alramahi (n 8).
[23] Bowman (n 14) 333.
[24] Bowman (n 14) 333.
[25] Maniruzzaman, 'The Issue of Resource Nationalism' (n 7) 90.

Due to the final and last-resort character of the two pre-exposed methods of dispute resolution, and the *de facto* exclusion of litigation for neutrality concerns, parties had to find new mechanisms for resolving their disputes, without endangering their contractual relationship.

A solution has been found in the use of Alternative Dispute Resolution Mechanisms (hereafter ADRMs). ADRMs encompass all dispute resolution methods outside litigation, although there is divergence on this point. Doctrine is divided on whether to include arbitration or not in ADRMs. This is mainly due to the arbitration procedure and the nature of the decision issued, that is final and binding.[26] The position held in this thesis is that arbitration classifies itself as an ADRM, in line with the dominant position on this matter.[27]

Provisions for ADRMs in oil and gas contracts stem from the North American practice.[28] It is now common to find ADRMs alongside arbitration in oil and gas investment contracts, as dispute resolution mechanisms and dispute prevention mechanisms. This interaction of different dispute resolution mechanisms is known as multi-tiered or multi-step dispute resolution clause.

The source of ADRMs is plural. Some emerge from the general contractual practice, such as negotiation. Others derive directly from the oil and gas industry practice, for instance Sole Expert Determination (hereafter SED), which has become an unavoidable staple in oil and gas investment contracts. These are however not the only sources of ADRMs and dispute resolution mechanisms in oil and gas investment contracts. ADRMs can be contractual mechanisms, clauses and contracts, which gained their Alternative Dispute Resolution qualification through arbitral practice and awards. This thesis will demonstrate that it is the case of force majeure clauses, Joint Development Zones and stabilisation clauses.

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[26] Connerty (n 10) 153.

[27] John Tackaberry and Arthur Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, vol 1 (Fourth Edition, Sweet and Maxwell 2003) para 2-001; John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law*: *Institutions and Procedures*, (Oxford University Press 2000), 6.

[28] Jean R Sternlight, 'Is Binding Arbitration a Form of ADR?: An Argument That the Term "ADR" Has Begun to Outlive Its Usefulness' (2000) 1 Journal of Dispute Resolution 97, 99; Connerty (n 10) 153.

In the oil and gas industry, a denomination has emerged to gather all these different sources: *Lex Petrolea*.[29] *Lex Petrolea* must be understood as analogous to *Lex Mercatoria*, and therefore as a customary system of rules applicable to the oil and gas industry specifically.

This thesis will explore, analyse and criticise the different systems of dispute resolution of oil and gas investment contracts. It will survey contractual ADRMs that are found in these contracts, which have been designed to solve disputes. This is the case of negotiation, SED and arbitration. More importantly, the thesis will ascertain other mechanisms which are not traditionally included in the classification of ADRMs but have been elevated to this qualification by the *lex petrolea*.

1.2. Aims, objectives and results of the thesis

The aim of this thesis is two-fold. Firstly, the thesis will present and discuss the different ADRMs used in oil and gas investment contracts. It will determine the dispute resolution framework currently used in these contracts, by assessing the clauses inserted by the parties. On this point, the thesis will document and analyse SED clauses and arbitration clauses in seven oil and gas investment contracts of countries of the Mediterranean region. Indeed, these two clauses have become essential dispute resolution mechanisms in oil and gas investment contracts, largely due to their adjudicative character. The thesis does not stop there however. It will also, from a prior determination of the nature of *lex petrolea*, present contractual mechanisms that have been elevated to ADRMs via the *lex petrolea*, be it the practice of arbitral tribunals, the contractual practice of the industry, or international courts. The thesis aims to offer to these contractual mechanisms, such as force majeure clause, Joint Development Zones, stabilisation clauses and Technical Advisory Committees (hereafter TACs) clause, a new position in the larger classification of ADRMs. The thesis supports the view that the conception of ADRMs has to be enlarged, in order to encompass all mechanisms helping parties to investment contracts to solve their disputes.

[29] Doak Bishop, 'International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea' (1998) 23 Yearbook of Commercial Arbitration 1131

Secondly, the thesis questions the efficacy of the dispute resolution system of oil and gas investment contracts. The oil and gas industry, indeed, remains one of the largest providers of disputes and arbitrations between investors and States. This assertion begs questioning the functioning and efficacy of the dispute resolution framework of investment contracts in the industry. Parties have inserted ADRMs as a prior step to arbitration, but the sheer number of disputes and arbitration registered with ICSID evidences a lack in the dispute resolution system. Efficiency of the pre-arbitration ADRMs would entail that less disputes are resolved by arbitration. Reducing the number of arbitrations can be achieved by using ADRMs better adapted to the disputes of the industry, by implementing mechanisms that interact well together and that favour early settlement of the disputes. It can also be achieved by inserting, in line with the concept of dispute management, Dispute Prevention Mechanisms (hereafter DPMs). In light of this, the thesis proposes the creation of a new classification of ADRMs: "Unconventional" ADRMs. They are opposed to "traditional" ADRMs, such as negotiation, mediation and conciliation, as they are contractual mechanisms presenting a double role of dispute resolution and dispute prevention. The thesis will go further in asserting that arbitration in general, and more so some sub-categories of arbitration (i.e. emergency arbitrator, expedited procedure and online arbitration), also feature the early settlement and dispute prevention facets of "unconventional" ADRMs.

Based on these two axes of research, the thesis offers a new system of dispute resolution for oil and gas investment contracts. This dispute resolution framework takes the form of a multi-tiered dispute resolution clause, composed of ADRMs trusted by the industry and already implemented in a majority of contracts. However, in order to be as effective as possible, the multi-tiered dispute resolution clause will be flexible, adapted to the two phases of operations of oil and gas investment contracts. As a result, the thesis proposes a dispute resolution clause for the exploration phase, composed of a TAC, a SED and an arbitration clauses. On the other hand, the multi-tiered clause for the exploitation phase is a two steps clause, featuring a Dispute Board clause, an "unconventional" ADRM borrowed from the construction industry, and an arbitration clause as a final and binding mechanism.

1.3. Methodology

In legal literature regarding the methodologies for legal research, it is often considered necessary to try to distinguish doctrinal from non- doctrinal legal research, even though this distinction obscures the fact that much legal research falls somewhere between these two categories. Nevertheless, the distinction points up the extent to which doctrine (legal concepts of all types, whether from statutes, cases, administra- tive rules, etc.) dominates the legal scholar's research.[30]

Doctrinal study involves understanding, assimilating, and accepting given concepts which are particular to the discipline of law.[31] The term 'doctrinal research' needs clarification. The word 'doctrine' is derived from the Latin noun 'doctrina' which means instruction, knowledge or learning. The doctrine in question includes legal concepts and principles of all types — cases, statutes, and rules. Doctrine reflects a synthesis of various rules, principles, norms, interpretive guidelines and values. It explains, makes coherent or justifies a segment of the law as part of a larger system of law. Doctrines can be more or less abstract, binding or nonbinding. Historically, law was passed on from lawyer to lawyer as a set of doctrines, in much the same way as happened with the clergy. Legal training developed in the middle ages within a religious rhetorical tradition, with the monasteries existing as centres of learning.[32] The term 'doctrinal' is also closely linked with the doctrine of precedent — legal rules take on the quality of being doctrinal because they are not just casual or convenient norms, but because they are meant to be rules which apply consistently and which evolve organically and slowly. It follows that doctrinal research is research into the law and legal concepts. This method of research was the dominant influence in 19th and 20th century views of law and legal scholarship and it tends to dominate legal research design.[33]

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[30] Ernest Jones, 'Some Current Trends in Legal Research' (1962) 15(2) Journal of Legal Education 121, 129

[31] Anthony Bradney, 'Law as a Parasitic Discipline' (1998) 25(1) Journal of Law and Society 71, 77.

[32] J M Kelly, *A Short History of Western Legal Theory* (Clarendon Press, 1992) 89.

[33] Terry Hutchinson, Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) Deakin Law Review 83, 83-85.

This thesis adopts a doctrinal research methodology regarding the impact and effects of *lex petrolea* on the development of ADRMs in the oil and gas industry and oil and gas investment contracts. To do so, the thesis relies on an extensive study of arbitral awards and International Court of Justice (hereafter ICJ) cases. All the awards studied are publicly available from the ICSID website. The awards and ICJ's cases discussed and used in the thesis concern the oil and gas industry. However, when decisions did not exist in the field, the scope of research was enlarged. Cases and awards from different industries and sectors are therefore cited and parallels are drawn with the oil and gas field. The thesis found also guidance in other primary legal resources, such as International and Bilateral Investment Treaties, the Energy Charter Treaty, the United Nations Convention on the Law of the Sea, the United Nations Charter, and regional agreements.

Contemporary comparative law limits the context to the function of the law. When comparing legal systems and not just legal rules, comparatists should grasp their legal styles. This concept of style encompasses much more than the word would appear to suggest: including history, mode of thought, institutions, legal sources, ideology. Along similar lines, very many broader approaches to comparative law have been advocated in an attempt to move away from a "law as rules" concept by using key concepts such as "tradition", "mentality" and "culture". Adopting such an approach means that law, and the understanding of law, involves much more than the mere reading of statutory rules and judicial decisions. In other words, law cannot be understood unless it is placed in a broad historical, socio-economic, psychological and ideological context.[34] This research does so by bringing in customs, sector practice and the study of ADR methods and material before drawing conclusions.In the context of contractual practice as it is the subject of this thesis, doctrinal research is not sufficient to ascertain the conduct of the parties and the reception of arbitral awards by the oil and gas industry.[35] Therefore, in order to truly reflect the position of oil and gas actors on dispute resolution mechanism in the sector, this thesis uses comparative analysis.
Comparative law forces us to reflect upon legal systems and pose the question: what exactly determines law, what is essential to law and what is not? In order to

[34] Mark Van Hoecke and Mark Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47(3) The International and Comparative Law Quarterly 495, 495-498.
[35] Bradney (n 31) 73.

compare legal systems we have to know what it is that causes a number of legally relevant elements to form a "legal system". If we want to bring together some "similar" legal systems and distinguish them from other, "different" ones, we have to know which kind of similarities and differences may be considered to be paradigmatical to legal systems and which ones are only casual, and of secondary importance.[36] In addition, legal cultures and sectoral influences and customary practices are to be taken into consideration. Legal culture is defined as a specific way in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts. The concept of law as culture emphasises that law is more than just a set of rules or concepts. It is also a social practice within a legal community. It is this social practice which is determining the actual meaning of the rules and concepts, their weight, their implementation and it allows the better formulation of comparative studies.[37]

In order to be able to make comparisons, all research in comparative law has to start with the reconstruction of the legal landscape under consideration. A better insight into the doctrinal activity would thus be useful for comparatists. However, legal doctrine is not only important for comparison with comparative law as a discipline, it is at least as important as a part of the research object of comparative law. Comparatists know that it is impossible to limit oneself to statutory rules when comparing the law of two legal systems. This is clearly impossible when one of the compared legal orders does not have statutory rules in the area under consideration, but only customary law or case law. Yet even as regards codified legal systems it is now generally accepted that the meaning and the scope of statutory rules may considerably change through their interpretation by judges when adjudicating the law. Having a correct view about legal regulation in some legal order means knowing its statutory rules, its court decisions and, in some cases, its customary rules, and, as is becoming apparent, a capacity to appreciate the important differences which stem from legal culture. Legal doctrine forms an essential part of any full legal system. It allows the development of the conceptual framework of the legal order and its legal methodology.[38]

[36] Van Hoecke and Warrington (n 34) 495-498.
[37] Van Hoecke and Warrington (n 34) 495-498.
[38] Van Hoecke and Warrington (n 34) 495-498.

This thesis compares and incorporates clauses of investment contracts of countries of the Mediterranean region. These contracts are: the Albanian Petroleum Agreement for the Development and Production of Petroleum in Gorisht-Kocul Field;[39] the Model Exploration and Production Sharing Contract of the Republic of Cyprus;[40] the Greek Model Lease Agreement;[41] the Lebanese Exploration and Production Agreement for Petroleum Activities in Block 4;[42] the Libyan Model Exploration and Production Sharing Agreement;[43] the Syrian Contract for the Exploration, Development and Production of Petroleum between the Government of the Syrian Arab Republic and Syrian Petroleum Company and Loon Energy, Inc for the Lattakia Block;[44] and the Tunisian and Libyan Exploration and Production Sharing Agreement between Joint Exploration Exploitation and Petroleum Services Company and Canadian Superior Energy Inc for the "7th of November" Block (August 2008).[45] All these contracts are, as for arbitral awards, publicly available. The focus on the Mediterranean region is justified by the presence of hydrocarbons and the propensity for disputes, both at a State versus State and at a State versus investor level. Secondly, the region is rich of different legal cultures and different types of investment contracts. Resultantly, it was assumed in this thesis that an ADRM or dispute resolution/prevention mechanism found in different contracts could be considered as accepted in common oil and gas practice. Finally, the focus on the

[39] Petroleum Agreement for the Development and Production of Petroleum in Gorisht-Kocul Field between Albpetrol Sh.A. and Stream Oil & Gas Limited (2007) https://www.resourcecontracts.org/contract/ocds-591adf-4847279287/view#/ (the Albanian contract) – Appendix 1.

[40] Model Exploration and Production Sharing Contract of the Republic of Cyprus (2012) https://www.resourcecontracts.org/contract/ocds-591adf-1348839751/view#/ (the Cypriot contract)- Appendix 2.

[41] Model Lease Agreement between the Hellenic Hydrocarbon Resources Management S.A. (HHRM SA) and companies […] for granting rights for exploration and exploitation of hydrocarbons at the offshore area of Block […] (2017) https://www.greekhydrocarbons.gr/en/Ionian_en.html (the Greek contract) - Appendix 3.

[42] Exploration and Production Agreement for Petroleum Activities in Block 4 between the Republic of Lebanon and Total E&P Liban SAL and Eni Lebanon B.V. and Novatek Lebanon SAL (2018) https://www.resourcecontracts.org/countries/lb (the Lebanese contract) - Appendix 4.

[43] Exploration and Production Sharing Agreement of the Republic of Libya https://www.resourcecontracts.org/contract/ocds-591adf-9619723902/view#/ (the Libyan contract) – Appendix 5.

[44] Contract for the Exploration, Development and Production of Petroleum between the Government of the Syrian Arab Republic and Syrian Petroleum Company and Loon Energy Inc. (Lattakia Contract) (2007) https://www.resourcecontracts.org/contract/ocds-591adf-1212784561/view#/ (the Syrian contract) – Appendix 6.

[45] Exploration and Production Sharing Agreement between Joint Exploration Exploitation and Petroleum Services Company and Canadian Superior Energy Inc for the "7th of November Block" (2008) https://www.resourcecontracts.org/contract/ocds-591adf-2175879797/view#/pdf (the Tunisian/Libyan contract) - Appendix 7.

Mediterranean region was strengthened through a 14-month internship at the Hellenic Hydrocarbon Resources Management (HHRM SA) in Athens, Greece. HHRM SA is the Greek national company responsible for signing oil and gas lease agreements with investors and controlling the oil and gas operations on the Hellenic territory. The internship played a key-role in accessing documentation and insights from the oil and gas practice. The empirical analysis and approach adopted in this thesis is evidenced by the analysis of secondary data, i.e. data already existing at the HHRM SA and the conclusions drawn were based on this data. Such data analysis was already approved by the Ethics Committee at the University of Exeter. No new data was generated, but the analysis conducted was enough to allow us to draw the necessary conclusions.

In addition, the thesis uses and compares arbitration rules (namely the ICSID Convention and Arbitration Rules; the UNCITRAL Arbitration Rules; and the International Chamber of Commerce Arbitration Rules). The comparison and analysis of these rules was conducted in order to document advantages and disadvantages of arbitration as an ADRM, and the reason for resorting to arbitral institutions.

1.4. Originality and importance of the thesis

The thesis is an original contribution to the academic literature on dispute resolution, more specifically on the oil and gas field. It gives a global assessment of the dispute resolution framework in oil and gas investment contracts, based on doctrinal, comparative and empirical approach as to represent as well as possible the position of practice in this regard. Furthermore, the thesis links in a creative manner the concepts of dispute resolution and *lex petrolea*.

The thesis provides a new classification of ADRMs, creating the two sub-categories of “traditional” ADRMs and “unconventional” ADRM. This new classification is based on the needs of the oil and gas industry, which requires mechanisms resolving and preventing disputes, as to protect the necessarily long-term relationship between the State and the investor. “Unconventional” ADRMs, such as TACs, SED and Dispute Boards have to be favoured as they feature these two facets of dispute prevention and dispute resolution.

The thesis offers an in-depth analysis of the different methods of dispute resolution of oil and gas investment contracts and a solution to reduce the number of arbitrations in the sector. The rationale behind reducing the number of arbitrations is two pronged. Firstly, it allows States and investors to maintain and uphold their contractual relationship and permits oil and gas operations to not be disturbed and be completed. Secondly, decreasing the number of arbitrations will enhance the arbitration process. Arbitration is now considered a lengthy and costly process and regarded as a new form of litigation (see Chapter 6). This is partly due to the legalistic approach and the application of court processes to the arbitration system. However, the case load of arbitral institutions and arbitrators is also responsible for delays and long procedures. The multi-tiered dispute resolution clause proposed in this thesis tackles both of these issues. The clause is based on mechanisms already used by the industry, present in nearly all investment contracts analysed for the purposes of the thesis. It is therefore unlikely that parties to these contracts will be reluctant to apply them.
In order to build this multi-tiered dispute resolution clause, the thesis undertook a comparison of investment contracts of countries of the Mediterranean region. The research realised allowed to draw conclusions as to the nature of the contractual practice in the oil and gas industry, and to identify some weaknesses in the dispute resolution process. In light of this, the thesis decided to incorporate a new ADRM from the construction industry. Regarding the implementation of Dispute Boards as an ADRMs in oil and gas investment contracts, literature is scarce. The thesis is therefore the first research work considering extensively the incorporation of Dispute Boards and the benefits it could bring to the oil and gas sector.

Furthermore, the thesis presents a new reading of contractual clauses, namely Joint Development Zones, force majeure clause and stabilisation clauses. This new approach is based on *lex petrolea*. *Lex petrolea* as a legal concept has not been much covered in the literature. The thesis first gives a definition of *lex petrolea* and assesses its sources. Secondly, the thesis proceeds in examining contractual mechanisms in light of *lex petrolea*. The mechanisms covered are

dispute management mechanisms.[46] However, the thesis argues that the *lex petrolea* has elevated these clauses to an ADRM level, and for stabilisation clauses, to an "unconventional" ADRM. This interpretation of *lex petrolea* is innovative.

[46] Maniruzzaman, 'The Issue of Resource Nationalism' (n 7) 87.

2. CHAPTER 2. ELEMENTS OF DEFINITION

2.1. Introduction

This chapter aims to provide introductory notions and elements to the thesis, before developing the main theme of the thesis that is the use of Alternative Dispute Resolution Mechanisms in oil and gas investment contracts, as emerging from the *lex petrolea* and other sources.

In order to grasp the functioning of oil and gas investment contracts, as well as the use of ADRMs in the industry, the chapter will first provide an analysis of the concept of *lex petrolea*, which will then be used and referred to in the thesis. The chapter will then provide is present and explain the different types of oil and gas contracts, be them investment – the contracts concluded between an investor and the Host Government –; contracts concluded between States only; and contracts concluded among private parties, namely investors and subcontractors. The following section will consider the notion of ADRM, its legal basis and the reasons for resorting to them in oil and gas investment contracts. It will also present the innovative distinction between "traditional" and "unconventional" ADRMs and state the grounds for excluding the former from the subject of this thesis. Finally, the chapter will expose a specific system of dispute resolution between States: the diplomatic route.

2.2. The *lex petrolea*

The first reference to *lex petrolea* is in the case of *Government of the State of Kuwait v The American Independent Oil Company* (hereafter *Kuwait v Aminoil*).[47] Before defining the subject of *lex petrolea* itself, it seems appropriate to first explain the factual background of the dispute.

[47] *Kuwait v American Independent Oil Company (Aminoil)* [1982] (1982) 21(5) ILM 976; (1984) 9 Yearbook Commercial Arbitration 71 (*Kuwait v Aminoil*); Bishop 'The Development of a Lex Petrolea' (n 29).

2.2.1. The announcement of *lex petrolea*: the *Kuwait v Aminoil* award

In 1948, the Government of the State of Kuwait (hereafter Kuwait) granted a 60-year oil concession to Aminoil, an American company, providing a fixed royalty for every ton of oil recovered for the concession's price. The agreement contained also a stabilisation clause, imposing on Kuwait to respect said agreement in its original terms, with interdiction to annul or amend it unilaterally. The anticipated termination of the contract by Kuwait was only possible in 3 cases: if Aminoil didn't fulfil its obligation, if the royalties were not paid or if the dispositions relating to arbitration were not respected.[48]
In 1961, the parties added a 50/50 profit sharing arrangement to the fixed-royalty system, and in 1973, agreed again on an increase of Kuwait's revenue. Albeit never ratified by the Kuwaiti Parliament, the parties expressed their decision to apply the changes in a separate letter, as if the new agreement had been ratified. But a last request of Kuwait on increasing its 'take' under the 'Abu Dhabi formula' faced Aminoil's opposition and in 1977, Kuwait nationalised the concession with an envisaged payment of 'fair' compensation.[49]

It is on these grounds that Aminoil decided to commence an arbitration (based on a separated arbitration agreement) in order to contest i) the nationalisation as contrary to the stabilisation clause; ii) the 1973 Agreement and iii) the 'Abu Dhabi formula'. In this respect, Aminoil claimed around US$ 3 billion in damages, representing largely lost profits until 2008. In its counterclaim, Kuwait asked for the sums due under the 1973 Agreement and the 'Abu Dhabi formula'.

In the award issued in 1982, the Tribunal found that both the 1973 Agreement and the 'Abu Dhabi formula' were valid and applicable to the concession. This compensation was calculated by the Tribunal and resulted in US$ 83 million, once Aminoil's debt to Kuwait was deducted.

[48] Geneviève Bastid-Burdeau, 'Droit international et contrats d'États — La sentence Aminoil contre Koweit du 24 mars 1982' (1982) 28 Annuaire français de droit international 454, 455.
[49] Martin Hunter and Anthony C Sinclair, 'Aminoil Revisited: Reflections on a Story of Changing Circumstances' in Todd Weiler (ed) *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May Ltd 2005) 353: The 'Abu Dhabi formula' is the result of the meeting in November 1974 in Abu Dhabi of three Gulf States, during which they decided to increase royalties to 20 per cent and income tax to 85 per cent of posted prices. This resolution was then adopted by OPEC a month later (in December 1974)

The reference to *lex petrolea* was made by Kuwait regarding the calculation of costs and losses for the compensation.

Aminoil proposed two methods of losses' calculation, one projecting the expected profits forwards, to what should have been the natural termination of the concession (2008), and then bringing it to the present value by means of discounting[50]; the other one based on a limited period in the event where the Tribunal might not allow the claim based on the natural termination of the contract.
Kuwait refused these models of compensation determination, arguing that the compensation should be limited to the 'net book value' of Aminoil's fixed assets. Kuwait relied on the fact that during the 1970's nationalisations of oil concessions in the Middle East, it was the method used for the calculation of compensation. Therefore, in Kuwait's opinion, this method had gained '*an international and customary character, specific to the oil industry*' and hence '*generated a customary rule valid for the oil industry – a lex petrolea that was in some sort a particular branch of a general universal lex mercatoria*'.[51]

Lex petrolea was hence seen by Kuwait as a subdivision of *lex mercatoria*. Thus, to honour this first reference to *lex petrolea*, its structure will be followed and *lex mercatoria* will be explained prior to *lex petrolea*.

2.2.2. The ties with the *lex mercatoria*

2.2.2.1. Attempts to define the *lex mercatoria*

The *lex mercatoria* refers to the old Law of Merchants, the set of rules and practices used by merchants in medieval times and later as an alternative to the national laws of that era (municipal laws), less developed and efficient.[52]

[50] R Young and W L Owen, 'Valuation Aspects of the Aminoil Award' in Richard B Lillich (ed) *The Valuation of Nationalized Property in International Law* vol IV (University Press of Virginia 1972) 15-16.
[51] *Kuwait v Aminoil* (n 47); Bishop 'The Development of a Lex Petrolea' (n 29) 1131.
[52] Bruce L Benson, 'Law Merchant' in P Newman (ed), *Palgrave Dictionary of Economics and the Law* (Macmillan 1998) 500–08.

The use of the Latin term to describe this new generation of the Merchant Law comes from the French École de Dijon but a generally agreed definition has not yet been found.[53] However one can have a glimpse of the general meaning with the two following, developed in the 1980's:

> "A set of principles, and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law"[54]

> "A single autonomous body of law created by the international business community"[55]

These definitions have been chosen as they provide both the sources of the *lex mercatoria* (i.e. the principles and customary rules), and its normative value. The *lex mercatoria* must be understood as a-national. This term, developed by Fouchard in the 1960's, describes the character of *lex mercatoria* as a set of rules independent of any national legal system, whether regarding its value or content.[56] Thus, the *lex mercatoria* can be seen as a third legal order, combining the characteristics of both national and international law.[57]

In the first definition the sources of the *lex mercatoria* are principles and customary rules arising from international trade practice and framework. Both of these primary sources have been the subject of various controversies and questions that will not be addressed here.[58] Those sources are however primary, created by gathering rules from different and narrow sources. The primary sources can therefore be understood as a conceptual dichotomy, picking rules applicable to the international trade from several defined and known sources in order to form the *lex mercatoria*. A compilation of all the sources of the *lex mercatoria* seems impossible to achieve, as it takes roots from international trade

[53] Jack P Gibbs, 'Norms: The Problem of Definition and Classification' (1965) 70(5) The American Journal of Sociology 586.
[54] Berthold Goldman, 'The Applicable Law: General Principles of Law – the Lex Mercatoria' in Julian Lew (ed) *Contemporary Problems in International Arbitration* (1987) 116
[55] Bernardo M Cremades and Steven L Plehn, 'The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions' (1984) 2(3) Boston Univ ILJ 317, 324.
[56] Philippe Fouchard, *L'Arbitrage commercial international* (Dalloz 1965).
[57] Abul F M Maniruzzaman, 'The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration' (1999) 14 Am U Int'l L Rev 657.
[58] Michael Mustill, 'The New Lex Mercatoria: The First Twenty-Five Years' in Ian Brownlie and Maarten Bos *Liber Amicorum for Lord Wilberforce* (OUP 1987), reproduced in (1988) 4(2) Arbitration International 86, 87-88.

practice. However, the following elements have been considered being the major sources of *lex mercatoria*: Public International Law; Uniform Laws; The General Principles of Law; The Rules of International Organisations; Customs and Usages; Standard Form Contracts; Reporting on Arbitral Tribunals.[59]

2.2.2.2. The debate around the *lex mercatoria*

There is no consensus on the notion, extent and normative value of *lex mercatoria*. It is sometimes the mere existence of the *lex* as a law, and therefore its definition as a legal system which is challenged, or its enforceability, or even its sources. If the *lex mercatoria* may sometimes seem for the parties to an international contract as the best alternative to a single national law, some doubts arise as to its coherency and predictability, consequence of the very little amount of published arbitral awards that deal with this issue. From there flows the question of the enforceability of such awards before national courts.[60] Other authors considered that the development of *lex mercatoria* may threaten the international legal order, by diminishing the effectiveness of the States' legal order.[61]

Overall, no general acceptation of what is the *lex mercatoria* has been reached yet, making it difficult to be consistently applicable and recognised, as no one can definitively assert its content. Furthermore, as a subset of *lex mercatoria*, it was certain that these issues will also concern *lex petrolea*.

2.2.3. The notion of *lex petrolea*

2.2.3.1. The sources of the *lex petrolea*

The original reference to *lex petrolea* arose in the case *Kuwait v Aminoil* from 1982. The literature was at first mainly oriented towards the development of *lex petrolea* as emerging from international arbitration and dispute resolution.[62] The

[59] Ole Lando, 'The Lex Mercatoria in International Commercial Arbitration' (1985) 34(4) ICQL 747, 766; Mustill (n 58) 87-88.
[60] David W Rivkin, 'Enforceability of Arbitral Awards Based on Lex Mercatoria' (1993) 9(1) Arbitration International 67.
[61] Jacques Bégnin, 'Le développement de la *lex mercatoria* menace-t-il l'ordre juridique international ?' (1985) 30 McGill Law Journal 478.
[62] Bishop 'The Development of a Lex Petrolea' (n 29).

first doctrinal study and authority on *lex petrolea* dates from 1998.[63] The gap between the first reference to *lex petrolea* and the first article may demonstrate some reluctance of the oil and gas industry to even recognise the existence of *lex petrolea*. This sixteen-years gap also evidences that reflexion on the subject of *lex petrolea* remains quite recent. In this founding article, published arbitration awards of the oil and gas field were analysed in order to determine a pattern in the dispute resolution and in the ruling of arbitrators, which could be considered as the beginnings of a *lex petrolea*. However, given the few awards issued at the time of the article, it would be incorrect to jump to the conclusion that arbitral tribunals have created a whole new *lex specialis* applicable to the oil and gas domain, the *lex petrolea*. Nevertheless, it was believed that these first manifestations would grow into something more mature and defined that could be then called truly *lex petrolea*.[64]

In 2011, the analysis undertaken in 1998 was continued and enriched with new cases, focused on the international exploration and production industry.[65] As for the first one, this questioning on *lex petrolea* was solely based on arbitral awards. Even though the study was limited to published arbitral awards, the spectrum of disputes addressed, covering questions of, among others, the violation of the host state law, the nature of oil and gas agreements, the State responsibility for conduct of a national oil company (under international and domestic law), the conduct of petroleum operations, contractual notions (force majeure, frustration, repudiation), as well as nationalisations, and the applicable remedies, was wide enough to characterise the rulings issued as *lex petrolea*.[66]

These two studies rely on international arbitration awards as the main source of *lex petrolea*, if not the only one. However, arbitral awards and case law are part of a wider range of sources. Arbitral awards constitute the practice of arbitrators. To them must be added the practice of contracts' drafters, at the inception of operations. The petroleum legislation of governments and the business' contractual practice, crystallised in its model contracts such as the ones

[63] Bishop 'The Development of a Lex Petrolea' (n 29).
[64] Bishop 'The Development of a Lex Petrolea' (n 29).
[65] Thomas C C Childs, 'Update on *Lex Petrolea*: The continuing development of customary law relating to international oil and gas exploration and production' (2011) 4(3) Journal of World Energy Law and Business 214.
[66] Childs (n 65) 259.

developed by the AIPN, have also to be taken into account.[67] Indeed disputes, and therefore the processes to settle them, are the starting point of *lex petrolea*, because this is where contracts, national and international legislation, i.e. treaties are "tested and interpreted".[68] As the question of international arbitration and case law being a source of *lex petrolea* has already been ascertained, this innovative approach must be analysed.[69] It does not only give an extensive and comprehensive panorama of the different oil and gas disputes, it also tackles a specific array of disputes that have not been particularly explained or mentioned: international oil and gas commercial disputes. These disputes are peculiar in the sense that the way they have been settled, through arbitration, is confidential for the most part. Hence it is difficult to determine what are the trends in the dispute resolution process and therefore to have a clear idea of how *lex petrolea* is created through these cases. We therefore have to rely on the industry's business practices and international oil and gas agreements to establish the *lex petrolea* in this area. The rationale behind the study of model contracts as source of *lex petrolea* is the peer-reviewed and documented system of such contracts, making them credible and reliable for the arbitrators when they need to confirm how international oil and gas agreements are used and interpreted. Indeed, arbitrators will look at the international oil and gas contract, the applicable law, the facts but also at practice and therefore at model contracts, which are the most thorough that can be found. Hence, model contracts can be understood as a source of *lex petrolea*.

Besides model contracts, oil and gas investment contracts were elevated as a source of *lex petrolea* through the prism of internationalisation of these contracts.[70] The specificities of the oil and gas field led to an internationalisation of the contracts, and especially host Government contracts. Internationalisation

[67] The Association of International Petroleum Negotiators (AIPN) has developed several model contracts for the exploration and exploitation of oil and gas, such as the revised Joint Operating Agreement of 2012, the Farmout Agreement of 2004 and the Unitisation and Unit Operating Agreement of 2006. The association conducts regularly drafting committees in order to improve older versions of contracts or create new ones. More information can be found at https://www.aipn.org; A Timothy Martin, 'Lex Petrolea in International Law' in R King (ed), *Dispute Resolution in the Energy Sector: A Practitioner's Handbook* (Globe Law and Business 2012) 1.
[68] Martin, 'Lex Petrolea in International Law' (n 67) 2.
[69] Martin, 'Lex Petrolea in International Law' (n 67) 1.
[70] K Talus, S Looper and S Otillar, 'Lex Petrolea and the internationalization of petroleum agreements: focus on Host Government Contracts' (2012) 5(3) Journal of World Energy Law and Business 181.

of investment contracts is quite similar to the phenomenon of standardisation and the development of Model Contracts within the industry's business practice as discussed above. The only difference is that the internationalisation concerns the parcels' leases granted by the host Country for the exploration and the exploitation of its natural resources. Not all countries use the same contracts and the basic categorisation of concessions, production-sharing agreements, service agreements and participation agreements does not give justice to the true extent and multiplicity of investment contracts.[71] Notwithstanding with this diversity, some international trends and similarities may be seen among the different contracts. Indeed, Host countries, influenced by international institutions such as the World Bank, private actors and previous contracts, tend to adapt their contracts and implement new clauses.[72] These clauses, if found to be useful and efficient, will then be used in almost all the different investment contracts, leading to an internationalisation and in some way, a narrow standardisation.[73] This internationalised contract structure can therefore be considered as an authority and source of *lex petrolea*, by becoming a practice followed by host Governments.

Internationalisation can also take the form of a de-nationalisation.[74] Under de-nationalisation, it is understood the insertion by IOCs (mostly) of references to international law or general principles of law, in order to escape the sole application of the national law of the host State.[75] Reference to international law, and *by extenso* of *lex petrolea* in investment contracts participates to the creation of a new set of rules, providing for regulatory neutrality.[76] De-nationalisation can be done through the implementation of stabilisation, arbitration and choice of law clauses.[77] The wish for de-nationalisation of IOCs has led to a generalisation of these clauses in investment contracts, therefore leading the internationalisation aforementioned and the partial standardisation of investment contracts.

[71] Talus, Looper and Otillar (n 70) 186.
[72] Talus, Looper and Otillar (n 70) 191; Carmen Otero García-Castrillón, 'Reflections on the law applicable to international oil contracts' (2013) 6(2) Journal of World Energy Law and Business 129, 140-141.
[73] Talus, Looper and Otillar (n 70) 192.
[74] Luis Enrique Cuervo, 'The Alien Tort Statute, Corporate Accountability, and the New Lex Petrolea' (2006) 19(2) Tulane Environmental Law Journal 151, 209.
[75] Cuervo (n 74) 209; García-Castrillón (n 72) 137.
[76] García-Castrillón (n 72) 137.
[77] Cuervo (n 74) 209.

Hence, three different sources of *lex petrolea* have been discovered throughout the study of this emerging *lex specialis*: international arbitration, model contracts of the industry's business practice and investment contracts through the process of internationalisation.

Another source was also considered: the "publication of doctrinal codifications of rules potentially applicable to oil and gas contracts".[78] Doctrinal codifications refer to the movement of codification of contractual principles, led by the UNIDROIT Principles of International Commercial Contracts and the Lando Principles of European Contract Law. Both of those codifications provide that their rules apply when chosen by the parties or if the parties have agreed that their contract will be governed by "'the lex mercatoria' or the like". As *lex petrolea* is understood as a subdivision of *lex mercatoria*, the codified principles are therefore applicable to the *lex petrolea*. But this last addition of doctrinal codification does not constitute a consensus. In other works the last source of *lex petrolea* is the national petroleum laws.[79]

This opposition is interesting but maybe too European and civil law focused, as opposed to truly international. Indeed, the aforesaid principles are still scarcely used in international arbitration, rendering them inappropriate as sources of *lex petrolea*, as *lex petrolea* is inherently destined to be applied in the field of international arbitration.[80]

The content of *lex petrolea* and its sources have not been ascertained, but based on the existing literature, *lex petrolea* is the aggregation of national petroleum laws, the contracts, the customs and practices of the oil and gas industry, the international arbitration awards and principles of international law.[81]

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[78] Alfredo De Jesús O, 'The Prodigious Story of the *Lex Petrolea* and the Rhinoceros. Philosophical Aspects of the Transnational Legal Order of the Petroleum Society' (2012) 1(1) TPLI Series on Transnational Petroleum Law 1, 23.

[79] Nima Mersardi Tabari, *Lex Petrolea and International Investment Law: Law and Practice in the Persian Gulf* (Informa Law, 2016).

[80] Benoit Le Bars, 'Investment Arbitration Tribunals: Beyond the Civil-Common Law Dichotomy' (2017) 83(4) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 459, 464.

[81] Tabari (n 79) 130-ff; Mary B Ayad, 'The Vienna Convention as Authority for the Use of Precedent as Customary Practice in International Arbitrations of Oil Concessions and Investment Disputes in North Africa and the Gulf States; or a Lex Mercatoria for a Lex Petrolea' (2013) 14 The Journal of World Investment and Trade 918, 940.

Hence, the conclusion is that there are five different sources of *lex petrolea*, but did not find any definition of *lex petrolea* on the way, barely a mere description of its link to the *lex mercatoria*.[82] The absence of *lex petrolea*'s definition is only one of the main criticisms made against *lex petrolea*.

2.2.3.2. The debate on *lex petrolea*

The lack of a proper definition is one of the main reproaches that has been made against *lex petrolea*.[83] This absence is particularly flagrant in the first works on *lex petrolea*. They rely on the existence of *lex petrolea* without defining it at any point, although an attempt is provided at the conclusion of one of the articles: "[the published arbitral awards] address a sufficiently wide range of issues to create a '*lex petrolea*' *or customary law comprising legal rules adapted to the industry's nature and specificities*." (emphasis added).[84]

A second definition was attempted, in which *lex petrolea* was said to be the "norms or principles of law of particular relevance and application to the international petroleum industry, developed through the usage and practices of the industry to meet its needs and specificities and which attain their legitimacy as 'law' through their acceptance by the industry and the decisions of international arbitral tribunals".[85]

According to the first definition, *lex petrolea* would be a customary law, composed of customary rules or customs which are defined, according to Article 38(1)(b) of the Statute of the International Court of Justice as a general practice accepted as law.[86] According to the second, arbitral awards, by accepting and ruling on the

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[82] Djakhongir Saidov, 'The Standardisation of Oil And Gas Law: Transnational Layers Of Governance', (2017) CML Working Paper Series 4, available <http://law.nus.edu.sg/cml/wps.html>

[83] Terence Daintith, 'Against 'lex petrolea'' (2017) 10 Journal of World Energy Law and Business 1, 4.

[84] Childs (n 65) 259 (emphasis added).

[85] Alexandra Wawryk, 'Petroleum Regulation in an International Context: The Universality of Petroleum Regulation and the Concept of Lex Petrolea' in T Hunter (ed) *Regulation of the Upstream Sector: A Comparative Study of Licensing and Concession Systems* (Edward Elgar 2015) 35.

[86] Niels Petersen, 'Customary Law without Custom - Rules, Principles, and the Role of State Practice in International Norm Creation' (2008) 23(2) American University International Law Review 275, 276.

usages and practices of the petroleum field, give them the force of "law". In other words, both definitions establish the same facts: *lex petrolea* is a customary law, which rules are given the force of law through their recognition and development before arbitral tribunals. Customary law has been considered, since ancient Egypt, as a valid and legitimate source of law, and as such authoritative and binding.[87]

However, with regards to *lex petrolea*, the major issue with the conception of *lex petrolea* as a customary law relies on the fact that there is no evidence that the different rules it is composed of are actually followed as law, nor have any binding character.[88] This is especially true for the rules emerging from international arbitration awards. Indeed, arbitration is characterised by the absence of rule of precedent, meaning that arbitrators don't have to follow or abide by previous arbitral decisions involving similar facts or issues.[89] It is one of the reasons why parties decide to refer to arbitration, but also the *raison d'être* of arbitration.[90]

The question as to whether international arbitration practice should develop a method of precedential binding is not the subject of this thesis, although it can be rightfully argued that a greater consistency within the arbitral decisions would result in the establishment of substantive law due to the emergence of a certain degree of certainty in the scope and content of some legal rules.[91]

The reason for having a sceptical, or critical opinion on the creation of rules from arbitral awards participating to the growth of *lex petrolea* relies on the lack of consistency in the awards, when tribunals are facing a same issue.[92]

This was also the position of the *Romak* Tribunal who stated that

> "…even presuming that relevant principles could be distilled from prior arbitral awards (which has proven difficult with respect of many of the decisions cited by the Parties in these proceedings), they cannot be deemed to constitute the expression of a general consensus of the

[87] Ayad (n 81) 924-926.
[88] Daintith (n 83) 5.
[89] *Black's Law Dictionary* (7th edn, 1999), 1195: defining precedent as '[a] decided case that furnishes a basis for determining later cases involving similar facts or issues; [s]ee stare decisis'. *See ibid.* p. 1414, explaining that the doctrine of precedent requires 'a court to follow earlier judicial decisions when the same points arise again in litigation'.
[90] Andrew Schotter, 'The Effects of Precedent on Arbitration' (1978) 22(4) Journal of Conflict Resolution 659, 660 and 668.
[91] Irene M Ten Cate, 'The Costs of Consistency: Precedent in Investment Treaty Arbitration' (2013) 51 Colum J Transnat'l L 418, 420.
[92] Saidov (n 82) 5.

> international community, and much less a formal source of international law".[93]

All of this constitutes the absence of consensus, of global agreement that prevents the arbitral decisions issued in the oil and gas field to become a recognised law. As opposed to the *lex sportiva* for instance, which benefits from consistent arbitral awards on similar facts and issues and can be said to form a coherent corpus of law.[94]

Hence, no real binding rules have emerged from the arbitral awards rendered in the oil and gas field, but some trends do exist. The position of an arbitral tribunal in one particular case can influence the followings, and even if arbitrators are not bound by those decisions, reference to awards are found in memoranda of counsels and arbitrators' awards.[95]

The lack of binding character of the rules composing *lex petrolea* concerns most of its sources: the contracts for instance. Host government contracts, although internationalised, are only binding on the parties. Arbitrators can rely on the contract but cannot add an obligation, a clause, where the parties have chosen not to, on the basis that the provision is internationalised and therefore should be in every contract. The same can be developed about model contracts. Indeed, model contracts can be used without alterations or only as a framework, within which parties create new obligations or new rights. In the latter case, arbitrators are bound by the parties' autonomy, the parties' choice, and not by the model contract. Finally, the two sources from which binding rules are issued are the customs and practices of the oil and gas field, and the national petroleum laws which have a binding character by essence.[96]

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[93] *Romak S.A. (Switzerland) v. The Republic of Uzbekistan* (*Award*) [2009] PCA Case No AA280, para 170.
[94] Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 23(3) Arbitration International 357, 365.
[95] Martin, 'Lex Petrolea in International Law' (n 67) 2.
[96] Statute of the International Court of Justice (adopted 26 June 1945) 33 UNTS 993, Article 38(1)(b).

2.2.4. Conclusion

In summary, it is difficult to consider the *lex petrolea* as a proper law when the main criterion of the law, i.e. its binding character, is not truly present. Notwithstanding the above remark, however, does not imply that the *lex petrolea* does not exist, quite the contrary. *Lex petrolea*, and likewise *lex mercatoria*, should be understood as concepts rather than as genuine bodies of law or strict legal systems.[97] Indeed, *lex petrolea* is applied by arbitrators in order to determine the issue of the dispute. They use *lex petrolea*, its principles and rules, on their own volition, to get an outcome fitting the needs of companies and States. The point of *lex petrolea* is that it is a fluid concept, able to be adapted, transformed and changed throughout the evolution of the field itself. *Lex petrolea* is an integral source of the law applicable to oil and gas disputes.[98] Therefore the question to make it a petrified, rigid legal system would deprive the *lex petrolea* from its most interesting character: its plasticity. The thesis hence abides by the "soft" conception of *lex petrolea*.[99] This means that *lex petrolea* must be understood more as a corpus of principles applicable to the oil and gas industry, to supplement existing rules or palliate the lack thereof. The binding character of its rules is not automatic and will depend on the sources from which they emerge, and of the nature the industry and its actors want to give them. However, the absence of a bindingness does not prevent *lex petrolea* to be creator of generally accepted practices, that can then be found and reproduced until gaining industry's recognition and pretend to the qualification of custom of the field. This particular element will be demonstrated regarding oil and gas contract clauses that have been elevated to ADRMs by *lex petrolea*.[100] Furthermore, the effect of *lex petrolea* on the dispute resolution system of oil and gas investment contracts is visible when they are compared and analysed.[101]

The problem of the lack of definition finds its answer and solution in this character.[102] A general, complete and exhaustive list of the sources, and hence

[97] Rivkin (n 60) 67; Andreas F Lowenfeld, 'Lex Mercatoria: an Arbitrator's View' (1990) 6(2) Arbitration International 133, 143; Emmanuel Gaillard, 'Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules' (1995) 10(2) ICSID Review 208.
[98] Tabari (n 79) 131.
[99] Daintith (n 83) 9.
[100] See Chapters 2 and 3.
[101] See Chapters 4 and 5.
[102] Daintith (n 83) 1.

a descriptive definition, are impossible if we want to keep *lex petrolea* as open as possible in order to embrace all the upcoming changes and make it the most beneficial for the oil and gas field and its actors. It is true that just as nature, lawyers abhor a vacuum, but flexibility is needed, and should the oil and gas field not want flexibility, they would not use arbitration, or Alternative Dispute Resolution Mechanisms and Alternative ADRMs. Flexibility does not mean uncertainty.[103] In his article, entitled 'The Prodigious Story of the *Lex Petrolea* and the Rhinoceros. Philosophical Aspects of the Transnational Legal Order of the Petroleum Society' De Jesus enunciates that the creation of law through bodies other than States and nations (and the acknowledgment of this creation) was the new paradigm.[104] Perhaps the recognition of the need for flexibility, and the fact that as other scientific subjects, law is an evolving process, is the new shift in paradigms. We cannot know everything, and more so, we cannot predict everything but recognising this does not make law uncertain, it fosters improvement and further interpretation by courts and arbitral tribunals, hence contributing to the evolution of the law.[105]

In addition to create and apply international rules adapted to the petroleum sector, *lex petrolea* has greatly impacted international public and private law.[106] The influence is not limited to substantial rules and concerns procedural elements as well. As a result, *lex petrolea* provides for an independent system of Alternative Dispute Resolution Mechanisms (hereafter ADRMs) and legal protection, specifically designed to address the disputes of the oil and gas sector.[107]
This thesis, based on the definition and sources of *lex petrolea*, will determine the nature of these ADRMs and their impact on oil and gas investment contracts.

[103] Postulate attributed to Aristotle, taking its origin in his demonstration in *Physics*, Book IV, section 8.
[104] De Jesús O (n 78) 12-13.
[105] In the Apology, Plato's Socrates says that his knowledge is a recognition of the fact that he does not know anything, and by acknowledging it, he knows something. He is wise because he appreciates his own shortcomings. A lot more recently, and in another field, when Dmitri Mendeleev published his periodic table in 1869 (the first globally recognised), he deliberately left gaps within his table, predicting that then-unknown elements will be discovered later. His predictions were proved mostly correct and still, some other elements were found.
[106] Martin, 'Lex Petrolea in International Law' (n 67) 14.
[107] Tabari (n 79) 145

2.3. Oil and gas contracts: an overview

2.3.1. Host Government contracts: the notion of oil and gas investment contracts

Host Government Contracts constitute the cornerstone of all oil and gas operations. Indeed, it is through this contract that the State, owner of the natural resources in the subsoil, gives his consent and power to the International Oil Company (hereafter IOC) to exploit the subsoil. These contracts have evolved since the beginning of the oil and gas industry. The norms only fifty years ago have now changed. Therefore the three main host Government contracts types, i.e. investment contracts, will be studied in the following sections, in order to give a comprehensive overview of these agreements.

2.3.1.1. Concession Agreements

In the beginning of the 20th century, concession agreements constituted the most common host Government contract. Today, they are one of the three basic types of agreements governing the petroleum operation, alongside Production Sharing Agreements (PSA) and Risk Service Agreements (RSA), which later developed in accordance with the emergence of the principle of permanent sovereignty.[108] Before going through the main features of concession agreements, the evolution of these contracts needs to be undertaken.

Concessions agreement have evolved since their inception at the beginning of the 1900's. A distinction will therefore be made between "old concessions" and "new concessions", the latter being the modern version of the contract as existing nowadays.

An example of the old concession agreements is the one concluded between Persia (now Iran) and W.K. D'Arcy in 1901.[109] This contract and others from that

[108] Kamal Hossain, Subrata Roy Chowdury, *Permanent Sovereignty over Natural Resources, Principle and Practice* (Frances Pinter 1984) ISBN: 0-86187-302-5; Claude Duval and others, *International Petroleum Exploration and Exploitation Agreements: Legal, Economic and Policy Aspects* (Second Edition, Barrows 2009) 57.

[109] Doak Bishop, James Crawford and Michael Reisman (eds), *Foreign Investment Disputes: Cases, Materials And Commentary* (Kluwer Law International 2005) 216; Duval and others (n 108) 59; Talus, Looper and Otillar (n 70) 181.

era had only simple characteristics. First of all, the area covered by the agreement was extremely large, sometimes encompassing the entirety of the host Government territory and without any possibility to reduce the area, whereby the concessionaire did not undertake the exploration and production operations.[110] Indeed the concessionaire was offered a choice to engage in those activities but kept also all power over all the operations. The old concession agreements were also concluded for a long period: thus the concession granted by the Government of Kuwait to Aminoil in 1948 was supposed to last for sixty years (this particular case will be studied in the next section on *lex petrolea*).[111] Another example – although its duration is shorter – is that of the three concession agreements concluded between Libya and the Libyan American Oil Company (Liamco) in 1955 for 50 years.[112] Furthermore, the contemplated financial benefits for the host Government were extremely limited and consisted in royalties indexed on the volume and production, but not on the price of the produced oil.[113]

Therefore, an inequity arises from these concession agreements, incompatible with the idea of State's sovereignty. Developing countries especially started creating new contractual schemes and frameworks. Still, concession agreements have been kept in several countries, but their main features have inevitably evolved.

The modern or new concession agreements are limited with regards to the duration, concession area, financial benefits and powers of the concessionaire. Furthermore, the terms of the contract are not only agreed by the parties but also regulated by the host Government's national laws, which can provide the standard terms. IOCs have therefore little power to negotiate: it is a "take it or leave it" deal, supporting the striking change in the balance of powers between

[110] D'Arcy's concession covered 500,000 square miles, and the one granted 32 years later, in 1933, by Saudi Arabia to Socal about 360,000 square miles. See for the former Talus, Looper and Otillar (n 70) 181; and for the latter Daniel Yergin, *The Prize: The Epic Quest for Oil, Money & Power* (Simon and Schuster 2009) ISBN: 978-I-84737-646-6, 274
[111] Pierre-Yves Tschanz, 'The Contributions of the Aminoil Award to the Law of State Contracts' (1984) 18(2) The International Lawyer 245, 246.
[112] Patrick Rambaud, 'Un arbitrage pétrolier : la Sentence Liamco' (1980) 26 Annuaire français de droit international 274, 275.
[113] Duval and others (n 108) 59-ff.

the IOCs and the host Governments and avoiding any throwback to the old days of concession agreements.[114]

Since the 1970's, a large number of countries have resorted to concession agreements as their International Petroleum Agreement (IPA).[115] These modern concessions agreements are characterised, as the old ones, by the fact that the IOC, against payment of an initial consideration, has an exclusive right to explore and exploit the resources within the area of the concession at its own risks, but has also a property right over all the oil or gas produced.[116] Ownership rights on the resources *in situ* (in the ground) are less common today, as most host Governments will consider them "inalienable" and part of the State's property until the complete production. Because the IOC exploits the subsoil at its own risks and expenses, all the equipment and installations remain its property during the life of the concession but can be transferred at no costs to the host Government at the expiration of the contract. Finally, host Governments have a greater decision power in new concession agreements and they often impose obligations to the IOCs in regards to local employment training and technology transfer.[117]

2.3.1.2. Production Sharing Agreements

Production Sharing Agreements (PSAs) are quite new in the legal scenery of oil and gas, even though they were already used since the 1950's. Designed at first to protect vulnerable countries from almighty IOCs, PSAs are now a means for IOCs to reduce political risks inherent in petroleum operations.[118] A PSA is a contract by which the host Government authorise the IOC to explore and exploit the subsoil in a defined area and period of time.[119] From this definition, concession agreements and PSA seem broadly alike, but they highly differ when

[114] Jubilee Easo, 'Petroleum contracts: licences, concessions, production-sharing agreements and service contracts', in Geoffrey Picton-Turbervill (ed), *Oil and Gas, A Practitioner Handbook* (Second Edition, Globe Law and Business 2014) ISBN: 9781909416239, 14.
[115] For example Angola, the United Kingdom, France, Morocco, Norway… Duval and others (n 108) 63.
[116] Non-exclusive concessions exist too but are generally called reconnaissance or prospecting permits and are only delivered in order to conduct pre-exploration operations such as seismic tests: Duval and others (n 108).
[117] Easo (n 114) 15.
[118] Timothy Fenton Krysiek, 'Agreements from Another Era Production Sharing Agreements in Putin's Russia, 2000-2007' (2007) WP 34 Oxford Institute for Energy Studies.
[119] Easo (n 114) 15.

looking at the legal nature and the rights arising from them. These differences can be reduced to two points.

First and foremost, the IOC under a PSA is considered as a contractor and not as a concessionaire, chosen by the host Government (directly or through its National Oil Company) to conduct the production operation during the time provided in the PSA. Hence, the difference with concession agreements is quite clear: the IOC has an obligation to perform the operations, not a right.[120]

Furthermore, the IOC party to a PSA has no ownership rights over the oil or the gas produced. The production belongs to the host Government (or its NOC), except for a certain share corresponding to the payment to the IOC for the operations undertaken. However, as in concession agreements, the IOC party to a PSA has to develop and conduct the exploration and exploitation operations at its own risks and expenses. This means that the contractor (the IOC) under the PSA will have to recover its own costs through the share of the petroleum produced before making benefits out of it, and, being liable to undertake the operations, he cannot decide to stop them as he could do in a concession agreement.[121]

2.3.1.3. Risk Service Agreements

Risk Service Agreements or Contracts (RSA or RSC) are the nowadays common denomination of service agreements, developed in the 1950's and 1960's by host Governments in opposition with concession agreements and PSAs as the latter seem to transfer ownership of crude oil to IOCs.[122]

Through these contracts, the host Government (and/or its NOC) hires the services of the IOC to conduct the exploration and production operations at its own risks and expenses. The IOC is therefore considered as a contractor of the host Government and/or the NOC, as in any PSA. The main difference with PSA lies in the rights transferred to the IOC: in RSAs, the IOC has no mining or mineral

[120] Duval and others (n 108) 69-ff.

[121] The division of hydrocarbons in PSA is an important issue, depending on the balance of powers between the State and the IOC, but also on the production expectations of the field, the size of the conceded area… A general division follows most of the time this pattern: 10 to 15% of the petroleum produced are reserved for the State as a royalty payment. Then as described above, a share of the production is recovered by the IOC as cost hydrocarbons. Finally, the remaining part is considered as "profit hydrocarbons" to be shared among the parties to the PSA. Easo (n 114) 17.

[122] Duval and others (n 108) 85-ff.

rights (unlike concession agreements) but also no ownership over the petroleum produced.[123] Indeed, the IOC is only reimbursed for its costs and paid for its services if there is a commercial production, by the payment of a *service fee*, the amount of which depends on a previously agreed formula, during the performance of the contract. The payment is therefore made in cash, and not in kind, as opposed to in the case of PSAs.[124]

2.3.2. Contracts involving two States (and more)

Petroleum contracts involving two States (or more) will be developed further in the next chapter, as they concern more the question of diplomacy and transnational cooperation rather than any commercial agreement.[125] Yet, in order to fully understand the wide range of contracts that can be encountered in the oil and gas field, a short overview of the conventions and of the relevant treaties, (rather than the contracts) will be conducted.

Created over centuries of sedimentation, oil and gas reservoirs do not respect States' borders, whether on land (on-shore boundaries) or maritime (off-shore boundaries). It is therefore likely to find them underlying in several countries, and this fact on its own is leading to the possibility of even more possibilities of likely arising disputes and claims for ownership over those resources. But the emergence of disputes means also the impossibility for the different States to proceed to the exploitation of the subsoil until their settlement, as no IOC will ever take the risk to apply for an authorisation.[126] Hence, they often decide to conclude agreements for a joint development of the resources. Agreements for off-shore joint exploitation are also regulated by the Convention on the Law of the Sea of 1982 (entered into force in 1994), which imposes to coastal States the obligation to first try to reach an agreement and provides guidelines for delimitation and

[123] Anthony Jennings, *Oil and Gas Production Contracts* (Second Edition, Sweet and Maxwell, 2008) para 1-022.
[124] However, some RSAs provide for payment in kind, the amount of the service fee being translated into an amount of oil, under a buy-back clause as in the Iranian RSA. Duval and others (n 108) 85-ff; Easo (n 114) 17.
[125] Chapter 2 (Boundary and Delimitation Disputes).
[126] Bernard Taverne, Petroleum, *Industry and Governments, A study of the Involvement of Industry and Governments in Exploring for and Producing Petroleum* (Third Edition, Kluwer Law International 2013) ISBN:978-90-411-4563-5, 341.

conditions for a claim over resources to be acceptable.[127] However, disputes over off-shore jurisdiction are rarely settled through boundary or interstate joint development agreements.[128] But apart from maritime agreements, States can also enter into inter-state agreements for the exploitation of underlying on-shore reservoir, called unitisation agreements.[129]

Interstate agreements are therefore not commercial agreements but constitute the first step to the exploitation of the subsoil, hence also the importance to raise their existence.

2.3.3. Contracts involving companies only

Once IOCs have been granted the authorisation to exploit a delimited area, whether by concluding a concession agreement, a PSA or an RSA, they subsequently enter into new agreements for specific operations with companies specialised in such operations. For the purposes of this research, these companies will be referred to as sub-contractors (in opposition to the role of contractor of the IOC in PSAs and RSAs). Moreover, given the costs induced in oil and gas operations, IOCs resort very often to consortiums in order to be able to finance the whole process.

2.3.3.1. Contracts concluded with sub-contractors

These contracts arising during the development and production phase, for technical undertakings, are also known as operational contracts and incorporate construction and service contracts.[130] Those contracts are multiple and cover all aspects of oil and gas operations, from magneto telluric surveys, aerial pictures, unexploded objects mapping (UXO mapping) to geophysical and geological analysis of samples. However, it can be said that those contracts can be concluded at any time by the IOC. IOCs enter into these contracts because sub-contractors are specialised in the operation required and therefore possess the technical support (machines, specialised and trained teams) and the knowledge.

[127] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) (UNCLOS)
[128] Taverne (n 126) 343.
[129] Taverne (n 126) 343.
[130] Jennings (n 123) para 3-001.

To give an overview of the types of contracts entered with subcontractors, these are grouped in five categories: Drilling and Well Service Agreements, Seismic Contracts, Construction Contracts (for the construction of Floating Production, Storage and Offloading units or "FPSOs"), Equipment and Facilities Contracts, and Transportation and Processing Contracts.[131]

2.3.3.2. Formation of consortiums

As discussed above, oil and gas operations are extremely costly for the IOC who has been granted authorisation to exploit, for, in all of the three types of host Government contracts studied, the IOC has to explore and produce at its own risks and costs. Hence, IOCs try to form consortiums in order to exploit jointly the resources, in an attempt to share risks and costs. The main types of Joint Agreements will be thus outlined.

2.3.3.2.1. Joint Bidding Agreements

Joint Bidding Agreements (JBA) are entered into even before the attribution of the exploitation authorisation, during the phase preceding the attribution of the area when this attribution is conducted through competing bids. By entering into these agreements, IOCs join their expertise but also their financial ability and stability, specific technical knowledge, in order to appear as the best bidding team and hence be awarded the exploitation authorisation. Furthermore, JBAs allow the parties to share the costs related to the application and bidding process. A JBA will be followed by a Joint Operating Agreement and hence sets out in advance some of the features of the upcoming JBA, such as the percentage of the costs of the operation of each party to the JBA, and its similar part of the (most generally) crude oil or natural gas produced. JBAs are especially designed to manage the highly competitive bidding phase but are also extremely useful as they force the parties to negotiate upfront the key elements of the exploitation phase itself.[132]

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[131] Tim Boykett and others, *Oil Contracts How to read and understand them* (Open Oil 2012) ISBN: 5800086962958, 18; A Timothy Martin, 'Dispute resolution in the international energy sector: an overview' (2011) 4(4) Journal of World Energy Law and Business 332, 335.

[132] Kevin Atkins, Charez Golvala, 'Joint bidding and operating agreements' in Geoffrey Picton-Turbervill (ed), *Oil and Gas, A Practitioner Handbook* (Second Edition, Globe Law and Business, 2014) ISBN: 9781909416239

2.3.3.2.2. Joint Operating Agreements

Investors who are successful after a bidding process or who have been granted an exploration and exploitation authorisation may want to form a consortium in order to share the onus of the risks and costs associated with the production of petroleum. The investors involved in the first Joint Operating Agreements (JOA) were only IOCs, as those had been developed by the Royal Dutch/Shell and BP companies for operating the exploitation authorisations granted by Nigeria.[133] However, host Governments saw then the opportunity to gain supervision and input in the operations and decided to participate in such consortiums themselves or via their NOCs. Albeit host Government and NOCs are almost always parties to JOAs today, the choice has been made here to treat these contracts as they were initially, only for questions of categorisations, as the host Government or its NOC will act as any of the other parties to the JOA.[134] The purpose of such consortiums is to provide a contractual framework for the joint development and exploitation of the allocated area.[135] The parties to the JOA will set out the share of the costs and risks they are willing to bear, and will receive in exchange the same share of the petroleum produced (or the same share of the service fee if the host Government contract is a Risk Service Agreement). Because the different investors act as a group, an operator will be designated in the JOA and will be in charge of undertaking all the joint operations in behalf of all participants. Moreover, in order for the non-operating parties (i.e. the parties who are not bearing costs and risks associated with the operations, such as the host Government or the NOC) to maintain control over the process and the exploitation, an Operating Committee is created, with defined powers and duties and in which will seat representatives of all the parties.

[133] Taverne (n 126) 362, para 11.3.1. These agreements were previously referred to as Joint Venture, which is actually a general denomination for the creation of consortiums.
[134] Duval and others (n 108) 285: The main difference between the Host Government or its NOC and the other investors is the moment when they actually join the JOA. Thus IOCs and other private investors will be parties to the JOA at its inception, when the Host Government or its NOC will only join the consortium once a commercial discovery would have been made by the initial parties. Moreover, Host Government and NOC become non-operating parties, meaning that they are not investing in the operations' activities.
[135] Duval and others (n 108) 285.

2.3.3.2.3. Unitisation Agreements

Unitisation Agreements can be described as a simplified form of JOAs, as they regulate the joint operation and development of a petroleum reservoir underlying two or more parcels granted to different exploiters, through the creation of a single unit encompassing the whole reservoir.[136] The main purpose of such agreements is to undertake a joint exploitation of the straddling reservoir for the common benefit of all the parties involved, in reducing the detrimental competition caused by the rule of capture.[137] The rule of capture has been developed in the United States at the time of the first drillings. According to this rule, the producer of the oil is entitled to the whole production, even though it can be proven that part of this production comes from a part of the reservoir underlying another licence.[138] By joining their production's means, the parties to an unitisation agreement will share the costs, the risks and the profits (the amount of petroleum produced) in proportion to their respective share in the unit.[139]

2.3.4. Conclusion

The range of contracts developed above is only an overview of the multitude of contractual relationships that can be created throughout the process of an oil and gas project. For instance, the sale and acquisition of petroleum assets, such as Farm-out Agreements have not been studied, nor decommissioning security agreements. This description of petroleum contracts was an occasion to give a glimpse into the intricate mix of contracts necessary for oil and gas operations, but also to ascertain the different levels of regulations having to be amicably combined.

Deciding what type of contract, especially regarding the host Government contract, is the most suitable, cannot have a straightforward answer. Indeed, the oil and gas field is characterised by the convergence of opposite and sometimes conflicting interests. As discussed above, host Governments have been trying to

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[136] Jacqueline Lang Weaver, David F Asmus, 'Unitizing Oil and Gas Fields around the World: A Comparative Analysis of National Laws and Private Contracts' (2006) 28 Hous J Int'l L 3.
[137] Greg Gordon, John Patterson, *Oil and Gas Law, Current Practice and Emerging Trends* (Dundee University Press 2007) 305.
[138] Robert E Hardwicke, 'The Rule of Capture and Its Implications as Applied to Oil and Gas' (1935) 13 Tex L Rev 391, 393; Bruce M Kramer, Owen L Anderson, 'The Rule of Capture - An Oil and Gas Perspective' (2005) 35 Envtl L 899.
[139] Taverne (n 126) 378, para 11.4.1.

retain ownership of their resources and to increase their revenues from the production, by abandoning the "old concessions" models for PSA and RSA, more respectful of their ownership. On the other hand, IOCs that have undertaken the operations are willing for the most revenues in order to meet their investments and costs. Furthermore, IOCs are no longer dominant in the contractual negotiations with the States. The rise of national sovereignty and the limited reservoirs have given to host Governments a strong bargaining power, characterised by a "take it or leave it" deal policy, also implemented in their own national rules, as means to guarantee the continuous ownership on the natural resources.[140]

The conclusion of a Joint Operating Agreement (JOA) is however considered necessary by the practice as to reduce and tackle the issues arising out of all petroleum operations. Hence, the absence of JOAs concluded for petroleum operations is rarely the decision of the parties, but mostly the result of their failure to agree on one.[141] Another argument in favour of the conclusion of JOAs can be found in the development and expansion of Model Forms of JOAs by the different Associations dedicated to petroleum operations. The first Model Form for JOAs emerged from the American Association of Petroleum Landsmen (hereafter AAPL) and created the basis for the expansion of those contracts in other Petroleum Associations, as they were shortly endorsed by the industry.[142] The popularity and consequently the importance of JOAs in the oil and gas industry is supported by the constant update of those Model Contracts and also by the establishment of an international Model Form for JOAs, which was lastly revised in 2012 and designed for international jurisdictions.[143] Therefore, the spread of JOAs – also referred to as a sub-part of Joint Ventures – and their continuous reforms and upgrades must be considered as a statement of their necessity in oil

[140] A Timothy Martin and J Jay Park, 'Global petroleum industry model contracts revisited: Higher, faster, stronger' (2010) 3(1) 4, 7.
[141] Patrick W Gray, 'Joint Operating Agreement Issues' (1998) 45 Ann Inst on Min L 137, 137.
[142] Alexander J Black and Hew R Dundas, 'Joint Operating Agreements: An International Comparison from Petroleum Law' (1992) 8(1) J Nat Resources & Envtl L 49, 50-51. Other Model Form for JOAs were subsequently developed by other petroleum associations such as the Canadian Association of Petroleum Landsmen (CAPL) in 1969 and the UK Offshore Operators Association (UKOOA) which supervised the drafting of a first Model Form in 1976.
[143] Michael D Josephson, 'How Far Does the CAPL Travel – A Comparative Overview of the CAPL Model Form Operating Procedure and the AIPN Model Form International Operating Agreement' (2003) 41 Alta L Rev 1. This Model Form is the result of the work of the Association of International Petroleum Negotiators (AIPN). The previous Model Form dates back to 2002.

and gas, partly due to the capital intensive character of the field.[144] As briefly outlined previously, JOAs are principally concluded for two major purposes. The first is to determine and settle the basis for sharing rights and liabilities among the parties. The second is to create a legal framework for the regulation and the control of the petroleum operations with the designation of an operator, executing its duties under the supervision of a Joint Operating Committee.[145] The former function of JOAs, i.e. the sharing of costs and risks among the venture partners, although of great importance, has been largely studied and covered in academic literature.[146] However, the role of the Joint Operating Agreement as a Risk Management and Negotiation tool has not had the same exposure. It will be developed here that JOAs can be considered to some extent as Alternative Dispute Prevention and Resolution Mechanisms, on two points.

The first point stems from the Joint Operating Committee and its' role as a discussion pool throughout the exploration and exploitation of the resources. The few literature on the subject may be partly explained by the (quite) new increase of and plead for the implementation of clauses providing for their creation. It has been argued in a recent publication that the revised form for the AAPL JOA should include provisions for an Operating Committee.[147] It is held that a periodical meeting among all the parties to the petroleum operations, non-operators and operator, would benefit from discussions on the different issues raised at this occasion, being also a means to analyse the projects.[148] As aforementioned, the Operating Committee works as a pool in which are sat the different parties to the JOA or their representatives. The main functions and attributions of the Joint Operating Committee (hereafter JOC) are normally

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[144] G M D Bean, *Fiduciary Obligations and Joint Ventures* (Oxford 1995) 3-4; Mary Sabina Peters and Manu Kumar, 'Why International Oil Companies Choose to Enter into Joint Operating Agreement' (2012) 53(2) Acta Jur Hng 175, 176.

[145] Ernest E Smith and others, *International Petroleum Transactions* (Third Edition, Rocky Mountain Mineral Law Foundation 2010) 539.

[146] Walter J Mead, 'The Competitive Significance of Joint Ventures' (1967) 12 Antitrust Bull 819: Sharing risks and costs is one of the major purposes of JOAs (and more generally Joint Ventures). There are two other possible economic justifications for joint ventures: absolute capital requirements, precluding sole investors to undertake the large scale production; and when the investment (and the technological outcomes for instance) will benefit the whole field, industry, rather than the investing firm. Taverne (n 126) 363, para 11.3.1.: Regarding the oil and gas industry specifically, there are three other reasons to enter a JOA: a) to improve the chance to be successful in a bidding procedure, b) to obtain a participating interest in a licence already awarded to another company, and c) to benefit from the superior technology, knowledge or experience of another IOC.

[147] John S Lowe, 'Some Recurring Issues in Operating Agreements and What AAPL's Drafting Committee Might Do About Them' (2014) 60 Rocky Mt Min L Inst 27-1.

[148] Lowe (n 147) 27-1.

drafted in the JOA but are not always the same as parties, even when using Model Forms, can decide to amend certain terms.[149] Nonetheless, the role of the JOC can be summarised as a periodic Control Board assessing the actions taken by the Operator and as a Decision Board for the operations to be undertaken. Furthermore, the equality of all members of the JOC is recognised, guaranteeing the equivalent weight of all votes according to their respective participating interest, and the concerted character of all decisions.[150] Therefore, the implementation of a JOC within a JOA has to be construed as a cyclic negotiation phase, during which the parties discuss and raise concerns or advice on the operations. JOC's clauses in JOAs are thus analogous to negotiation clauses, except that negotiations in JOCs may commence even in the absence of any issue or dispute. Hence the need to address JOCs as Dispute Prevention Mechanisms (DPMs) and to consider them as part of the array of tools available to the Oil and Gas industry to prevent or resolve their disputes. However, as in any negotiation, a consensus is not always reachable, and some parties could block the continuation of the project either by refusing new exploration operations or the budget allocated for such operations (Authorisations for Expenditures or AFE).[151] It is on this basis that specific provisions have been introduced in JOAs in order to avoid deadlock, which are Sole Risk and Non-Consent clauses, forming my second argument in support of the role of JOAs as a DPM and ADR.[152]

These clauses do not have the same purpose. Sole Risk clauses are used to alleviate the blockage of situations induced by the voting threshold provided in the JOA. Sole Risk clauses allow a party (or more) to the JOA to undertake at its own risks – hence the name – an operation that did not obtain the number of votes required to be pursued. Non-Consent clauses are slightly different as they intervene when an operation has been agreed upon by the JOC, but the party who voted against chooses to withdraw from it, for financial reasons for instance.[153] Therefore, Non-Consent clauses permit for a party to withdraw for a specific operation without having to leave the JOA nor having to put forward costs

[149] A Timothy Martin, 'Model Contracts: A Survey of the Global Petroleum Industry' (2004) 22(3) J Energy & Nat Resources L 281, 282.
[150] Black and Dundas (n 142) 64; Taverne (n 126) 370.
[151] Black and Dundas (n 142) 62.
[152] Peter Roberts, *Oil and Gas Contracts Principles and Practice* (Sweet & Maxwell 2016) 55-56: Deadlock can arise when unanimous voting mechanism is provided for in the JOA or when the voting pass mark is not reached.
[153] Roberts (n 152) 55-6.

that would jeopardise its future in the consortium. Non-Consent clauses have to be understood as DPMs as they reduce the risk of a party default and/or bankruptcy in the future, events that would likely result in a deadlock and if not completely stop, delay the operations. On the other hand, Sole Risk clauses have an ADR role as they are activated once a dispute arose, i.e. when the voting pass mark for an operation has not been reached. Both clauses provide for the parties means to overcome a dispute in a peaceful and non-conflicting way, without affecting the continuity and the success of the operations.

JOAs have therefore two roles in the context of disputes in the oil and gas field. Firstly, they act as Dispute Prevention Mechanisms, by managing possible future defaults in payment through the inclusion of Non-Consent clauses. Secondly, JOAs must be construed as Alternative Dispute Resolution Mechanisms as well when providing for Sole Risks clauses, as they allow the continuity of operations once a dispute regarding this continuance has arisen. This dual role of JOAs is particularly demonstrated by the JOCs: acting principally as a DPM, they include ADR characters by creating a cyclic negotiation. JOCs are therefore at the cross-roads between ADRM and DPM. The creation of JOAs is hence a crucial tool in the Dispute Resolution and Prevention scheme, allowing all the parties to the operation to be involved, as opposed to pure contractual ADRM, concerning and binding only the parties to the contract in which the ADRM clause is contained.
The generalisation of JOAs and therefore JOCs is due to the practice of host Governments and IOCs, hence of practice. Using JOAs alongside the investment contract has almost become a rule, from which parties only depart when they have been unable to agree on the terms of the JOA. Because they emerge from industry practice, it can be said that JOAs are the product of *lex petrolea*. Furthermore, the dual role of JOCs, as an ADRM and a DPM, allows to reach another conclusion that is practice, and therefore *lex petrolea*, have created a new method of dispute resolution.

2.4. Dispute resolution in the oil and gas industry and the need for Alternative Dispute Resolution

2.4.1. The legal basis for Alternative Dispute Resolution

Dispute resolution in oil and gas contracts is driven by two major principles, recognised in international and national laws and in the two major law families, i.e. that of common law and continental law: the principle of party autonomy and the principle of "*pacta sunt servanda"*.

Party autonomy is a choice of law and choice of court doctrine allowing parties to choose the law applicable to the contract and the forum, the competent jurisdiction to settle the dispute if arising.[154] Party autonomy is the 'external' aspect of the larger principle of freedom of contract, entitling the parties to contract on any matter they wish within the limits of the law.[155] Party autonomy in multistate contracts is today an evidence, adopted almost everywhere.[156]

Pacta sunt servanda, perhaps the oldest principle of international law, takes its roots in Roman and religious laws and translates in agreements have to be kept. Albeit ancient principle associated with the principle of sanctity of contract, it still rules the relationships among parties to an agreement, whether individuals or States.[157] The prominent role of *pacta sunt servanda* in oil and gas is due to the fact that petroleum operations are construed as international investments and

[154] Mo Zhang, 'Party autonomy and beyond: an international perspective of contractual choice of law' (2006) 20(2) Emory Int'l L Rev 511.
[155] G H L Fridman, 'Freedom of Contract', (1967) 2 Ottawa L Rev 1; Symeon C Symeonides, 'Party Autonomy and the Lex Limitativa' in *Essays in honour of Spyridon Vl. Vrellis* (Nomikē Vivliothēkē 2014) 909, 912. ISBN: 978-960-562-281-7
[156] Abul F M Maniruzzaman, 'International Commercial Arbitration : The Conflict of Laws Issues in Determining the Applicable Substantive Law in the Context of Investment Agreements' (1993) 40(2) Netherlands International Law Review 201, 203. Only Ecuador, Paraguay and Guinea-Conakry have not abided by this doctrine, which is understandable regarding the two first countries. Indeed, both of them are Latin American countries, where the influence of the Bustamante Code, reluctant to this idea, is still important.
[157] Vienna Convention on the Law of Treaties (adopted 23 May 1969) (1990) United Nations Treaty Series 332, Article 26: "*Every treaty in force is binding on the parties to it and must be performed by them in good faith*"; Malcom N Shaw, *International Law* (Eight Edition, Cambridge University Press 2017) ISBN: 978-1-316-63853-8, 685; Martin Dixon, Robert McCorquodale and Sarah Williams, *Cases and Materials on International Law* (5th edition, Oxford University Press 2011) ISBN: 978-0199562718; Malcom P Sharp, 'Pacta Sunt Servanda' (1941) 41(5) Columbia Law Review 783; J H Gebhardt, 'Pacta Sunt Servanda' (1947) 10(2) The Modern Law Review 159; Hans Wehberg, 'Pacta Sunt Servanda' (1959) 53(4) The American Journal of International Law 775.

regulated by international laws and treaties, such as Bilateral Investment Treaties (BITs), for which *pacta sunt servanda* is at core.

Read together, party autonomy and *pacta sunt servanda* give the basis of any contractual relationship in the contemporary world: parties are free to conclude agreements, but this freedom finds its own limit in the binding force of the contract entered into. Relying on these two principles, parties can contract on any matter they wish, within the boundaries of legality but will have to abide by the obligations set out in said contract. It is on these grounds that arbitration and more generally Alternative Dispute Resolution (ADR) are founded.[158]

Thanks to the party autonomy's doctrine of choice of court, parties to a contract can decide not to go to national courts to see their dispute resolved but to have their conflict settled through ADR. The choice of court clause therefore has a positive aspect (i.e. the possibilities for the parties to decide before what court they want to appear), and a negative aspect, being the right for the parties to not go before national courts and submit their dispute to ADR.

Those two principles are of critical importance in oil and gas because parties have resorted to arbitration and Alternative Dispute Resolution Mechanisms to solve their disputes because they provide for both neutrality and flexibility. Moreover, oil and gas disputes between the IOC and a subcontractor are extremely technical and qualified professionals are needed. One cannot assume that a national judge will be fluent in technical language or proficient in drilling operations. Finally, ADR ensures to the parties the confidentiality of the proceedings and the dispute itself if they wish.[159]

The election of an ADRM can be found in the contract concluded with the host Government or in Bilateral Investment Treaties, sometimes implemented in the host Government contract by mean of an umbrella clause. ADR can be provided or authorised by national law, which will be the law of the host Government

[158] Alan Redfern and others, *Law and Practice of International Commercial Arbitration* (4th ed, Sweet and Maxwell 2004) para 1-11.
[159] Russel on Arbitration (24th ed, Sweet and Maxwell 2015) paras 1-022 to 1-028; Redfern and others (n 158) para 1.94 and ff.

contract, also called the *lex contractus*;[160] and/or provided for by international law, when the parties are relying on the Bilateral Investment Treaty. Therefore, the limits to ADR lay in both systems of law. Regarding the former the limits lay in the doctrines of arbitrability and *lex limitativa* that permit arbitration or ADR within the limits of the law.[161] Regarding the latter, the limits lay in the application of *pacta sunt servanda*, by imposing to the IOC the obligation to exhaust local remedies before proceeding to arbitration.[162]

The shape of dispute resolution in the oil and gas field is closely tied to the principles of *pacta sunt servanda* and party autonomy, allowing the parties to choose ADR to solve their disputes and to compel them to this decision. The attraction of the petroleum industry towards ADR is due to its neutrality, flexibility and confidentiality, in order to avoid partial and inefficient national courts. The need for ADR in oil and gas is also linked to the peculiar legal framework of the field, with manifold layers of contracts, intertwined with international treaties. Moreover, and directly connected to the contractual architecture, the multiplicity of disputes is at the core of the need for ADR.

2.4.2. The need for appropriate Dispute Resolution Mechanisms in oil and gas: the proliferation of disputes and actors

The interest of studying the types of disputes relies on the peculiar legal architecture of the oil and gas industry. The intersection of several types of contracts – either investment contracts like host Government contracts or commercial as those concluded with subcontractors – with international treaties

[160] In addition to the substantive law regulating the core of the dispute, i.e. the merits, another layer of rules exists for the arbitral proceedings, called the *lex arbitri*. In the event where neither the *lex contractus* nor the *lex arbitri* are provided in the contract, ie previously elected by the parties, it is the arbitrators' duty to determine such laws. The arbitral tribunal is free to apply any rules of conflict of laws to determine the law applicable to the merits in the absence of any choice by the parties. Hence arbitrators can decide to apply the rule of conflict of laws of the *lex loci delicti* (the law of the place where the delict happened) or analyse the contract in order to find links with a particular legal system. Arbitrators can also retain the rules of conflicts of law of the *lex fori* (the law of the seat of the arbitration). On the latter option, see Frédéric Eisemann, 'La «lex fori» de l'arbitrage commercial international' (1977) Travaux du Comité français de droit international privé 189.

[161] Symeonides (n 155) 912: Arbitration and ADR are limited by mandatory rules, rules of public policy enacted by the States: those rules limit the party's autonomy by reducing the scope of ADR and arbitration to certain matters only. Hence, they restrict the arbitrability of certain matters (i.e. the possibility to arbitrate). These compulsory rules of public policy form the lex limitativa that needs to be ascertained in multi-party contracts.

[162] Collier and Lowe (n 27) 7.

is the perfect context for numerous conflicting relationships. This study is also a means to introduce the diversity of ADR in the field, as the choice for either of them is closely related to a specific type of dispute.[163]

With regards to the classification of contracts realised in section 2.3. of this chapter, three major types of disputes can be determined: disputes among States, between a State and an IOC, and between companies (between an IOC and a sub-contractor or between members of a consortium).[164]

2.4.2.1. Disputes between states

State versus State disputes will often cover issues of boundary delimitation (maritime or on-shore) or petroleum transport by cross-border pipelines. Although petroleum, and especially crude oil, can be transported by tankers, this type of transport is unlikely to be affected by international State disputes, but more by national and individual threats such as terrorism or piracy.[165] The reason for such inter-State disputes relies on the fact that petroleum resources are unevenly dispersed across the globe and their growing need despite their finite character exacerbates the tensions. The fight over ownership of resources is the basis for boundaries disputes, such as the one opposing Greece and Turkey in the East Mediterranean Basin, or the Nigeria-Cameroon boundary disputes (both land and maritime) in the Bakassi Peninsula leading to military operations, loss of lives and displacement of populations.[166] Therefore these disputes involve States and their populations, and ongoing conflicts are a serious impediment to Oil and Gas productions. Regarding pipelines, their need is increasing in order to cope with the growing demand in petroleum resources around the world, especially in developing economies of Asia, known for having the smallest proved reserves of

[163] Connerty (n 10) 144.
[164] This classification was relying on the work of Martin, 'Dispute Resolution in the International Energy Sector' (n 131).
[165] Thomas J Dimitroff, 'Cross-Border Oil and Gas Pipeline Risk and Sustainable Mitigations' (2014) 7(4) J World Energy Law Bus 287.
[166] Andrew Filis and Rafael Leal-Arcas, 'Legal Aspects of Inter-State Maritime Delimitation in the Eastern Mediterranean Basin' (2013) 11(3) OGEL 1; E L Wifa, M K Amakoromo and I Johnson Ogbo, 'Turning Towards A Joint Development Agreement in The Midst of Disputes and Uncertainties Over International Maritime Boundaries: Nigeria-Cameroon Dispute as A Case Study' (2017) 15(1) OGEL 1; Obasesam Okoi, 'Why Nations Fight: The Causes of the Nigeria–Cameroon Bakassi Peninsula Conflict' (2016) 9(1) African Security 42.

oil.[167] The development of transportation to these areas is becoming an urge but is facing difficulties in its implementation, largely related to political conflicts and economic issues among the States crossed by the pipeline.[168] As for boundaries disputes, transportation disputes are keen to involve populations and evolve in generalised conflicts in the region concerned, preventing any petroleum operation during this period. Disputes among States will be studied in the second chapter of this research work. This choice stems from their particularities. States' disputes are solved by the intervention of international public law tools and by the involvement of the international community. Although ADRMs are used to reach an agreement, they are not analogous to the contractual ADRMs encountered in oil and gas contracts as they are not the parties' choice.

2.4.2.2. Disputes between an investor and a state: investment disputes

The second type of disputes encountered in the oil and gas field concerns State and IOCs parties to a host Government contract. They are the focus of the thesis. Also called investor-state or state investment disputes, they commonly arise when the Host Government makes unilateral changes and amendments to the original agreement, resulting in expropriation or increase in taxes or royalties.[169] Disputes will be solved depending on the terms of the host Government contract or of the applicable Bilateral Investment Treaty if any. They have to be solved in a time efficient manner, as they paralyse all the petroleum operations, but still ensuring utmost impartiality.

2.4.2.3. Disputes between private parties

Finally, the last category of disputes involves only companies, either part of a consortium or between an IOC and a subcontractor. Disputes emerging between an IOC and a subcontractor have for characteristic an important technical aspect, requiring a real expertise in their resolution. They also call for a fast outcome, since they may stop the exploration or the production and induce important losses

[167] International Energy Agency, World Energy Outlook 2017, 14 and 43, available at <https://www.iea.org/reports/world-energy-outlook-2017>
[168] Paul J Stevens, 'Cross-Border Oil and Gas Pipelines: Problems and Prospects' (2006) 4(4) OGEL 1, 10.
[169] Martin, 'Dispute Resolution in the International Energy Sector' (n 131) 334-335.

or even a breach of contract from the IOC if the operations were said to be realised in a defined time-frame within the host Government contract. Disputes arise as well between IOCs and NOCs and concern value extraction and value sharing, the NOC trying to reduce the share of the IOCs in order to bumping up the State's profits.[170] Even though NOCs are the emanation of the State and therefore disputes involving them could be treated as State/Company disputes, their functioning and role lead them to this present category. At last, the existence of consortiums and conflicting interests within it offer a fertile ground for disputes, which will be settled according to the terms of the Joint Venture Agreement, hence involving only contractual provisions.

Therefore, in addition to the inherent complexity of the oil and gas field due to the different layers of contracts, disputes are also creating an intricate grid of relationships, one leading to another and possibly jeopardising the whole petroleum operation. The inception of a boundary dispute over an underlying reservoir of oil between two States once an host Government contract has already been concluded with an IOC could block the project. Similarly, the delay in a seismic survey may induce a breach of the host Government contract, leading to its termination and financial losses for the IOC. However, oil and gas actors value their relationships, are aware of the financial commitments and appreciate the consequences the withdrawal of one party from the project may have. Hence, they tend to find new ways to solve their disputes, in order to uphold the operations: such ways are encapsulated in the concept of ADR.

2.4.3. The notion of Alternative Dispute Resolution Mechanisms

The originality of this research works stems from its largely empirically based research and the study of international oil and gas investment contracts, as part of *lex petrolea*, in order to determine the most used and appropriate ADRMs for these contracts.

[170] Nick Prowse, Philip Rocher, Edward Walshe, Sherina Petit, 'NOCs and IOCs: resolving tensions' (2009) 8 I E L R, 285-287.

ADR, and by extension ADRM, does not have a generally agreed definition, nor a global acceptance of its content.[171] The position held in this thesis is that ADRM encompasses all dispute resolution mechanisms outside litigation, including arbitration.[172]

Regarding ADRMs, excluding arbitration, this thesis will oppose two types of ADRMs: traditional and unconventional. Traditional ADRMs must be understood as the well-known dispute resolution methods, such as negotiation, mediation and conciliation procedures. They are traditional because they have been largely studied, in general and more specifically in the oil and gas sector. Unconventional ADRMs, on the other hand, present the particularity of having been limitedly approached by literature, especially with regards to oil and gas contracts. Furthermore, unconventional ADRMs are more than simple dispute resolution mechanisms: they are also Dispute Prevention Mechanisms. This two-pronged role of unconventional ADRMs should render them unavoidable in oil and gas investment contracts, a sector characterised by its dispute-intensive nature.

To these two sub-types of ADRM, arbitration, owing to its characteristics, will be studied and approached separately, despite being an unavoidable step in the global dispute resolution process in oil and gas investment contracts.

2.4.3.1. Traditional ADRMs

The group of traditional ADRMs is composed of consensual ADRMs. Consensual ADRMs mean that a settlement, a decision on the dispute will only be reached if the parties come to an agreement. Traditional ADRMs include negotiation, mediation and conciliation. In these dispute resolution methods, the outcome of the dispute is left to the willingness of the parties. If a third-party neutral is involved, such as a mediator or a conciliator, it is only to help the parties reach an agreement or compromise. The third-party neutral has no coercive power over the parties.

[171] Susan Blake, Julie Browne and Stuart Sime, *A practical Approach to Alternative Dispute Resolution* (Third Edition, Oxford University Press 2014); Henry Brown and Arthur Marriott, *ADR: Principles and Practice* (Third Edition, Sweet and Maxwell 2011).
[172] Tackaberry and Marriott (n 27) para 2-001; Collier and Lowe (n 27) 6; Sternlight (n 28) 99.

Negotiations may be the easiest dispute resolution mechanism. It involves direct discussions between the parties, and solely among them.[173] It is an extremely flexible method, and the absence of third-party neutral makes it a cheap ADRM, with a high cost-efficiency ratio.[174] However, the lack of structure necessarily entails good behaviour and communication between the parties. In a situation of deadlock, with adversarial relationships, negotiations have little chance of being efficient.

Mediation and conciliation are to be treated together. They resemble negotiation, at the exception that a third-party is involved in the dispute resolution process in order to help the parties reach an agreement.[175] Both depend on the participation of the parties, as neither the mediator nor the conciliator can force the parties into an agreement.[176] The mediator or conciliator will held several meetings with the parties, identifying the problems at stake and exploring possible proposals to solve the dispute.[177]

Mediation and conciliation can be held ad hoc or under institutional rules. As such, the International Chamber of Commerce (hereafter ICC), the International Centre for the Settlement of Investment Disputes (hereafter ICSID) and the United Nations Commission on International Trade Law (hereafter UNCITRAL) propose mediation and conciliation rules.

Traditional mechanisms are excluded from the scope of this work for two reasons. Firstly, they have been largely studied, both in relation with oil and gas disputes and outside of this field. Secondly, and this reason is of greater importance, mediation and conciliation clauses are not provided for in oil and gas investment contracts.[178] This assertion is further supported by the absence of mediation/conciliation clauses in any of the contracts studied in the scope of the thesis. The absence of mediation and conciliation clauses will be further explained in chapter 7 of this work. This disinterest of practice for mediation and conciliation procedure is further evidenced by the little use made of institutional

[173] Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Bloomsbury, 2017), para 1.12.
[174] Kajkowska (n 173) para 1.12.
[175] Kajkowska (n 173) para 1.18.
[176] Kajkowska (n 173) para 1.20.
[177] Connerty (n 10) 155
[178] Maniruzzaman 'The Issue of Resource Nationalism' (n 7) 94.

conciliation and mediation rules. For instance, the conciliation facilities of ICSID have only been used 13 times since their inception in 1968.[179] The lack of support for mediation in investment contracts could be explained by the collaborative character of the mechanism, relying solely on the willingness of the parties to participate and their willingness to reach a compromise.[180] Furthermore, the quality of the parties, a State and an investor, renders the process more difficult than between States or companies only.[181] However, out of all disputes reaching arbitration, around a third of them (30%) are settled before the issuance of the award.[182] Such a high number of settlements would suggest that parties could have resorted to mediation/conciliation before arbitration. It could also mean that parties do not need mediation or conciliation to settle their disputes.[183]
Notwithstanding the above, the thesis has chosen to exclude these methods of dispute resolution, based on their absence in oil and gas investment contracts, and therefore their absence from commonly accepted practice in the industry.

2.4.3.2. Unconventional ADRMs

The focus of this research work will be on Unconventional ADRMs. This class of ADRMs encompasses Technical Advisory Committees (hereafter TAC), Sole Expert Determination (hereafter SED) and Disputes Boards (hereafter DBs).

The denomination of “unconventional” is two-pronged. Firstly, unconventional ADRMs have a double role, a dual nature. As opposed to traditional mechanisms, unconventional ADRMs are also Dispute Prevention Mechanisms. This means that their insertion in the contract and their proceedings lead to a decrease in the number of disputes. Secondly, their unconventionality stems from their lack of recognition in the oil and gas sector. Unconventional ADRMs are either not considered ADRMs – this is the case of TACs – or their efficiency is limited through ill drafted clauses and lack of general recognition of their efficiency

[179] Susan D Franck, 'Integrating Investment Treaty Conflict and Dispute Systems Design' (2007) 92(1) Minn L Rev 161, 210; Antonio R Parra, ‘The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes’ (2007) 22(1) ICSID Review 55, 59.
[180] Stephen M Schwebel, ‘Is Mediation of Foreign Investment Disputes Plausible?’ (2007) 22(2) ICSID Review 237, 237.
[181] Schwebel (n 180) 241; see Chapter 2. Section 2.5.
[182] Schwebel (n 180) 240; Wellhausen (n 16) 118; see also Chapter 6 of the thesis.
[183] Schwebel (n 180) 240.

(SED), or finally because they have not yet been implemented in oil and gas investment contracts (DBs).
Chapter 5 will assess these three mechanisms, namely TAC, SED and DB, and demonstrate their usefulness and reliability as efficient ADRMs for oil and gas investment contracts.

2.4.3.3. Arbitration

The last dispute resolution mechanism to be found in oil and gas investment contracts is arbitration. The choice of arbitration was mandated by the need for neutral and impartial forums for the resolution of investment disputes and international recognition of the decision issued. The alternative were the national courts of the host State.

The development of arbitration in oil and gas investment contracts has led to a generalisation of arbitration clauses and as a result, a multiplication of non-functional arbitration agreements. Furthermore, this extensive resort to arbitration has impacted the procedure in its main characteristics, i.e. a time and cost-effective dispute resolution system.

Nevertheless, arbitration remains an unavoidable ADRM, owing to its international recognition and enforcement (Chapter 6).

2.5. The diplomatic route

Non-adjudicatory dispute resolution mechanisms for the settlement of disputes among States are called diplomatic means (or political means) in international public law.[184] They include negotiation, mediation, conciliation, and any other non-binding ADRM. They are opposed to the legal means, which are binding peaceful dispute resolution mechanisms, such as arbitration and judicial settlement.[185] Diplomatic means are characterised by a necessary cooperation between the disputant States because they retain the control of the procedure

[184] Anne Peters, 'International Dispute Settlement: A Network of Cooperational Duties' (2003) 14(1) EJIL 1, 4.
[185] J G Merrills, *International Dispute Settlement* (6th ed, Cambridge University Press 2017) ISBN 978-1-316-61573-7, 88.

and the outcome. They are able to accept or reject any proposition and settlement.[186] The UN Charter gives a non-exclusive list of diplomatic means in its Article 33.1., which are also referred to in the UNCLOS.[187] They are "negotiation, enquiry, mediation, conciliation […], resort to regional agencies or arrangements, or other peaceful means of their own choice". Diplomatic means are not specific to the UN Charter and the UNCLOS. The requirement to use peaceful dispute settlement mechanisms is spread in international laws and regulations, as evidenced in several (if not all) BITs.

However, none of the aforementioned texts provide for an exhaustive list of diplomatic means. The choice made in this section is to present firstly diplomatic means without third-party intervention (i.e. negotiation and consultation), and secondly international third-party intervention (i.e. inquiry, mediation, consultation, good offices, resort to regional and international organisations). This choice stems from the blurred definitions between the different third-party interventions mechanisms, which impose to study them as a whole process. A conclusion will be drawn upon the interest to either link both set of diplomatic ADRMs in a dispute resolution clause and the usefulness of keeping floating/fluid ADRMs as to better suit the dispute at stake.

2.5.1. International negotiations and consultations

Negotiation is the most common diplomatic dispute resolution mechanism. It is characterised by the absence of third-party, which means the outcome lies solely in the hands of the disputing States.[188] Diplomatic negotiations are similar to private negotiations. The use of negotiations can be mandatory, i.e. compelled by an international or bilateral agreement, or stems from the States' willingness, as evidenced in the recent ICJ case *Obligation to negotiate access to the Pacific Ocean* (*Bolivia v Chile*).[189] In this case, the Court recalls that in order for an

[186] Peters (n 184) 9; Merrills (n 185) 88.
[187] United Nations, Charter of the United Nations (1945) 1 UNTS 26, art 33.1; UNCLOS arts 279-285.
[188] Peters (n 184) 4; Shaw (n 157) 767.
[189] Shaw (n 157) 768. See for mandatory negotiations in bilateral agreements: Agreement on the Promotion and the Reciprocal Protection of Investments between the Council of Ministers of the Republic of Albania and the Government of the Republic of Cyprus (2010), art 10; Agreement between the Government of the Hellenic Republic and the Government of the Republic of Azerbaijan on the Promotion and Reciprocal Protection of Investments (2004) art 9 "negotiations through diplomatic channel"; Agreement between the Lebanese Republic and the Hellenic Republic on the Promotion and Reciprocal Protection of Investments (1997) art 8.1.; Agreement on the Promotion and the Reciprocal Protection of Investments between the Government of the

obligation to negotiate to arise, "the terms used by the parties, the subject-matter and the conditions of the negotiations must demonstrate an intention of the parties to be legally bound".[190] When mandatory, negotiations have to be pursued in good faith and with the objective to reach an agreement.[191] Although reaching an agreement is not an obligation, negotiations must reveal that serious efforts have been made to settle the dispute.[192] Mandatory negotiations may prevent parties to progress to another dispute resolution mechanism. For instance, Article 6, paragraph 1 on the Statute of the International Court of Justice and Article 60, paragraph 1, of the 1975 Statute provide that the Court has jurisdiction regarding disputes on the interpretation or application of the Treaty and the Statute if such disputes cannot be settled through direct negotiations.[193] This compulsory step can also be found in BITs, such as the one concluded between the Republic of Albania and the Republic of Cyprus.[194] This BIT provides in its article 10.1. that disputes regarding the interpretation or the application of the treaty should be primarily settled through diplomatic channels, understanding negotiations as per article 10.2. of the treaty. A situation of deadlock could therefore arise in the event where the negotiations are not conclusive and an agreement is not reached. This is especially true when international and bilateral agreements do not provide for a timeframe at the end of which the dispute is deemed unsolvable through negotiations. The arbitral tribunals have developed case law on this particular point. The Arbitral Tribunal for the German External Debt (case No. 1) considered that the Parties did not have to present formal expression of their unsuccessful negotiations to establish the Tribunal's competence. Unsuccessful negotiations should be assumed when further diplomatic exchanges will not permit the settlement of the dispute.[195] A similar position was held in *Barbados v Trinidad*

Republic of Cyprus and the Great Socialist People's Libyan Arab Jamahiriya (2004) art 9.1. The mentioned BITs are available on http://investmentpolicyhub.unctad.org.
Obligation to negotiate access to the Pacific Ocean (Bolivia v Chile) (Judgement) [2018] Rep 592, paras 175 and 176

[190] *Obligation to negotiate access to the Pacific Ocean* (n 189) *(Bolivia v Chile)* para 91

[191] Shaw (n 157) 768; *North Sea Continental Shelf cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Judgment) [1969] ICJ Rep 3 para 85 a); *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) [2010] ICJ Rep 14, para 145-8.

[192] Arbitral Tribunal for German External Debts (Judgment) [1980] 19(6) ILM 1357; Shaw (n 157) 769.

[193] *Pulp Mills* (n 191).

[194] Agreement on the Promotion and the Reciprocal Protection of Investments between the Council of Ministers of the Republic of Albania and the Government of the Republic of Cyprus (2010)

[195] German External Debts (n 192) (Award) [1958] 424.

and Tobago in relation with Article 283(1) of the UNCLOS which requires parties to exchange views and try to settle the dispute through negotiations (or other diplomatic means).[196] In this case, the Tribunal considered that given the numerous attempts of failed negotiations during several years, no further exchanges should be necessary.

Apart from negotiations, States can also resort to consultations. Consultations consist for a State to address its intentions to another State in relation with an upcoming action or decision that may harm this second State. The particularity of consultations is that discussions between States are engaged before any action is taken. This mechanism is therefore entirely based on co-operation.[197] Although this method of dispute resolution is not provided in Article 33 of the UN Charter, several international and bilateral agreements refer to it. This is the case of the ASEAN Charter, the WTO Understanding for the settlement of disputes and the newly ratified USMCA treaty.[198] Such provisions are also common in bilateral investment treaties. However, the fact that consultations are undertaken before the emergence of a dispute may challenge the characterisation of dispute resolution mechanism. As stated by Malcom Shaw, "the mechanisms dealing with the peaceful settlement of disputes require in the first instance the existence of a dispute".[199] Because consultations intervene before any action and are a co-operative mechanism to prevent prospective disputes, they should be considered as Dispute Resolution Mechanisms.[200] In the event where consultations are undertaken after the emergence of a dispute, they would also be an Alternative Dispute Resolution Mechanism.

[196] *Barbados v Republic of Trinidad and Tobago* (Award) [2006] PCA Case no 2004-02.
[197] Merrills (n 185) 2-3.
[198] Association of Southeast Asian Nations (ASEAN), Charter of the Association of Southeast Asian Nations (entered into force on 15 December 2008), Article 22.1.; World Trade Organisation, Final Act (1994) Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 4; United States-Mexico-Canada Agreement (entered into force on 1 July 2020), Article 31.4.
[199] Shaw (n 157) 765.
[200] Merrills (n 185) 7.

2.5.2. Diplomatic third-party intervention

The settlement of a dispute by the parties only is limited to their willingness and efforts in negotiating or consulting. Other dispute resolution mechanisms involving third-party assistance or intervention, which were long existing in some communities, were introduced for diplomatic dispute resolution.[201] Third party intervention has been defined as "any action taken by an actor that is not a direct party to the crisis, that is designed to reduce or remove one or more of the problems if the bargaining relationship and, therefore, to facilitate the termination of the crisis itself".[202] For inter-State disputes these actions are inquiry, good offices, mediation and conciliation.[203] The actors have been referred to as conflict management agents.[204] These agents can be international organisations such as the United Nations, regional organisations (ASEAN for instance), Non-Governmental Organisations (NGOs), representatives of States, individuals and even private companies.[205] Inquiry is analogous to fact-finding.[206] It is a first step in third-party intervention, by which a commission is created in order to ascertain and elucidate the disputed facts.[207]

Good offices, mediation and conciliation are often studied together because the line of delimitation between them is blurred.[208] This is due to the fact that the role undertaken by the third-party may evolve alongside the evolution of the conflict.[209] The interdependency of the concepts is also a result of a lack of consistency in the tasks assigned to each mechanism and the interchangeable use of each denomination.[210] This section will therefore try to give an adequate

[201] Aaron T Wolf, 'Indigenous Approaches to Water Conflict Negotiations and Implications for International Waters' (2000) 5 International Negotiation 357, 366-9.
[202] Oran R Young, *The Intermediaries: Third Parties in International Crises* (Princeton University Press 1967) 34; Jonathan Wilkenfeld and Michael Brecher, 'International Crises, 1945-1975: The UN Dimension' (1984) 28(1) International Studies Quaterly 45, 46.
[203] Jacob Bercovitch, 'Third Parties in Conflict Management: The Structure and Conditions of Effective Mediation in International Relations' (1985) 40(4) International Journal 736, 738.
[204] William J Dixon, 'Third-party techniques for preventing conflict escalation and promoting peaceful settlement' (1996) 50(4) International Organisation 653, 654.
[205] Dixon (n 204) 653; Bercovitch (n 203) 738.
[206] Peters (n 184) 5.
[207] The Hague Convention for the Pacific Settlement of International Disputes [1907] UKTS 6, Article 9 (the Hague Convention).
[208] Peters (n 184) 6-7; Shaw (n 157) 770; Merrills (n 185) 27.
[209] Dixon (n 204) 665-666; Yoshifumi Tanaka, *The Peaceful Settlement of International Disputes* (Cambridge University Press 2018), ISBN: 978-1-316-61588-1, 43.
[210] Ronald J Fischer, 'Methods of Third-Party Intervention' in *Berghof Handbook for Conflict Transformation* (Berghof Research Center for Constructive Conflict Management 2001) 10. See also William Zartman and Saadia Touval, 'International Mediation: Conflict Resolution and Power Politics' (1985) 41(2) Journal of Social Issues 27, 31. See also for the interchangeable aspect of the terms: Young n 202) 52.

definition of each term and the general obligations associated with each mechanism.

Good offices "consist in a third party–Government, international organization, individual–attempting to bring conflicting parties to a negotiating table without interfering in the negotiation themselves".[211] Third-parties providing good offices will help bring the parties together by providing them with a channel of communication, such as inviting them to undertake meetings with their representatives.[212] Good offices rely on the disputing parties' willingness as for every diplomatic dispute resolution mechanism.[213] However, the right to offer good offices "can never be regarded as an unfriendly act".[214] Good offices are not explicitly named in Article 33.1. of the UN Charter 1945. However, a reference to them can be understood from "resort to international agencies". This role was undertaken by regional agencies during the Cold War, when members were afraid of their partiality. Their role was then extended at the end of the war and the involvement of regional agencies shifted towards mediation.[215]

Mediation in international conflicts has been highly discussed and covered by literature.[216] As aforementioned, the difference between good offices, mediation and conciliation is thin and mediation has sometimes been defined in relation with the two other mechanisms.[217] A recent definition manages to give the extent of the functions and tasks undertaken in a mediation process for international conflicts. Mediation is a process by which "a third-party actively assists two or more parties in dispute, with their consent, to develop a mutually acceptable solution in the settlement of an international dispute by offering its own proposal".[218] Good offices and mediation differ on the extent of the involvement of the third-party. In mediations, the third-party is proposing a settlement method

[211] B G Ramcharan, 'The Good Offices of the United Nations Secretary-General in the Field of Human Rights' (1982) 76(1) The American Journal of International Law 130, 131.
[212] Tanaka (n 209) 43-44.
[213] Tanaka (n 209) 43-44.
[214] The Hague Convention art 3.
[215] Thi Hai Yen Nguyen, 'Beyond Good Offices? The Role of Regional Organizations in Conflict Resolution' (2002) 55(2) Journal of International Affairs 463, 464-465.
[216] Among others: Zartman and Touval (n 210) 27; Bercovitch (n 203) 736; Jacob Bercovitch and J Rubin (eds) *Mediation in international relations* (Macmillan 1994)
[217] Zartman and Touval (n 210) 31-32.
[218] Tanaka (n 209) 45.

or as the ICJ formulated it, “bring[ing] together the viewpoints of the States concerned by making specific proposals to them”.[219]

Although commonly used in international dispute resolution, mediation is facing several limitations.[220] Firstly, and as for all diplomatic dispute resolution mechanisms, mediation relies on parties’ willingness. They have to agree to enter in the mediation process and the mediator’s proposals are not binding.[221] It has also been argued that mediation was effective for short-term peace but may also inhibit long-term peace and increase the long-term probability of crisis recurrence. This is partly due to the fact that the involvement of the third-party may create artificial incentives for the parties to settle their dispute. These incentives will however fade alongside the disappearance of the mediator. This argument however does not undermine the success of mediation but outlines another issue in international conflicts which is conflict management after conflict resolution.[222] This particular point needs to be kept in mind when addressing other types of disputes with different parties, as the same methods are used.

Conciliation is the last diplomatic dispute resolution mechanism to be studied in this section. Once again, the difference between this method and mediation is thin. However, conciliation may be understood as an institutionalised mediation, incorporating elements of the inquiry process.[223] A conciliator has a two-fold role. He needs to ascertain the facts object of the dispute and facilitate the settlement of such dispute by presenting an acceptable solution for the parties.[224] Conciliation can be optional or compulsory, but in both case the proposal is not binding unless the parties agree.[225]

It can be seen from the above developments that diplomatic dispute resolution mechanisms are close to ADRM used in private and public/private contracts.

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[219] *Border and Transborder Armed Actions* (*Nicaragua v Honduras*) (Judgement) [1988] ICJ Rep 99, para 75.
[220] See for instance the list of mediations given in Zartman and Touval (n 210) 27; Merrills (n 185) 27 and ff.
[221] Tanaka (n 209) 51.
[222] Kyle Beardsley, ‘Agreement without Peace? International Mediation and Time Inconsistency Problems’ (2008) 52(4) American Journal of Political Science 723.
[223] Tanaka (n 209) 65; Merrills (n 185) 63.
[224] Institute of International Law, Regulations on the Procedure of International Conciliation (1961), Article 1.
[225] Tanaka (n 209) 65.

However, the definition of the different terms and their use is generally more fluid in international conflicts' settings. The role of a conflict management agent will evolve alongside the evolution of the conflict. A third party can start as a good office provider and may shift to a mediator position. Such movement is hardly conceivable in private and private/public disputes, where the role of the third-party is closely defined and monitored. This difference could be explained by the fact that diplomatic dispute resolution mechanisms are here to promote peaceful resolution of dispute and prevent war. This imperious goal allows some leeway in the execution of the ADRM. Apart from this point, the systems and concepts used are very similar in both fields, in their extent and the limitations they are facing. A crucial argument outlined in relation to mediation must be recalled here. Dispute resolution mechanisms, and especially non-adjudicative ones such as mediation, are effective for short-term peace and agreement but do not prevent conflicts to re-emerge once the third party's office is terminated. The conservation of peace therefore relies on conflict management methods.

3. CHAPTER 3. BOUNDARY AND DELIMITATION DISPUTES

3.1. Introduction

Oil and gas exploration and production processes require territorial stability, and IOCs and international investors rely on states to ensure this stability. This chapter will therefore explore the different means by which states either create, enhance, stabilise or settle territorial stability. The first section will consider the Law of the Sea and Maritime Agreements. A dedicated section on the International Law of the Sea is explained by the existence of the United Nations Convention on the Law of the Sea (hereafter UNCLOS) which encompasses and partly codifies numerous aspects of the International Law of the Sea, including the creation of specific maritime areas and the settlement of disputes (3.2.1.). The UNCLOS is not the sole instrument on the Law of the Sea, hence maritime agreements will also be studied with a particular attention to the oil and gas sector (3.2.2.). The UNCLOS gave rise to new concepts in relation to the use of the sea by States and the final sub-section aims to present these systems (3.2.3.).

The second section will discuss the agreements concluded by states in relation with their boundary delimitations. This section will provide the opportunity to review the rules used in specific boundaries' conflicts in order to assess their effectiveness and impact on following and related disputes.

Finally, the third section will be focused on the relationship between states and IOCs when the oil and gas exploration and production is affected by boundaries' delimitation. The section will therefore address the protection given to the IOCs in the host Government contract through force majeure clauses (3.4.1.) and the obligation for the IOC to assist the Government in its boundary issue (3.4.2.). It will then consider operations undertaken in unlimited waters (3.4.3.) and Joint Development Zones (3.4.4). The research work of sections 2 and 3 will help defining the prospective issues arising in disputed delimitations' areas and Joint Development Zones, and the available mechanisms to settle and prevent these issues (3.4.5.).

3.2. The Law of the Sea and Maritime Agreements

This section will discuss the emergence and extent of the international law of the sea, with a special focus on UNCLOS (3.2.1.). It will then explain the importance

of international and bilateral maritime agreements with regards to the exploration and production of oil and gas (3.2.2.). Finally, the section will present the theoretical framework of Exclusive Economic Zones, Joint Development Zones and International Waters (3.2.3.).

3.2.1. The International Law of the Sea

The Law of the Sea is a crucial part of international law, developed since the seventeenth century, as evidenced in the work of Grotius.[226] The contemporary law of the sea started to emerge in 1958, as the outcome of the First United Nations Conference on the Law of the Sea.[227] This first Conference led to the creation and adoption of four Conventions: the Convention on the Continental Shelf;[228] the Convention on Fishing and Conservation of the Living Resources of the High Seas;[229] the Convention on the High Seas;[230] and the Convention on the Territorial Sea and the Contiguous Zone.[231] It is worth noting that dispute resolution mechanisms were also envisaged during the 1958 Conference. An Optional Protocol provided for the compulsory settlement of disputes.[232] This Protocol poses as principle the resort to the International Court of Justice for any dispute related to the interpretation or application of any of the aforementioned 1958 Conventions.[233] However, the Parties may choose to resort to an arbitral tribunal or to a conciliation procedure.[234] The existence of ADRMs for international law of the sea's disputes is not surprising, knowing that the first case evidencing arbitration as a viable alternative to war was directly linked to the law of the sea.[235]

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[226] P Chandrasekhara Rao and Philippe Gautier, *The International Tribunal for the Law of the Sea* (Edward Elgar Publishing 2018) para 1.001 ISBN: 978-1-78643-300-8, citing 'Mare Liberum' (The freedom of the seas).
[227] Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (2nd edition, Hart Publishing 2018) ISBN: 978-1-78225-684-7, 6-7.
[228] Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 United Nations Treaty Series 311.
[229] Convention on Fishing and Conservation of the Living Resources of the High Seas (adopted 29 April 1958, entered into force 20 March 1966) 599 United Nations Treaty Series 285.
[230] Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 United Nations Treaty Series 82.
[231] Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 United Nations Treaty Series 205.
[232] Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (adopted 29 April 1958, entered into force 30 September 1962) 450 United Nations Treaty Series 169.
[233] Ibid Article 1.
[234] Ibid Articles 3 and 4.
[235] The Alabama Claims arbitration (1872), cited in Chandrasekhara Rao and Gautier (n 226) para 1.002.

The penetration of ADRMs in the international law of the sea is even more prominent in its most recent developments. In 1982, the United Nations Third Conference on the Law of the Sea presented and issued a new convention, encompassing the 1958's ones and developing new concepts and rules. Due to its large scope, the United Nations Convention on the Law of the Sea is sometimes qualified of the 'constitution of the oceans'.[236] Although the UNCLOS has codified pre-existing rules, it is not simply a compilation.[237] Throughout its 320 articles and nine annexes, the UNCLOS has developed and regulated the legal regime of, for instance, the Exclusive Economic Zones and of the Area ("the 'seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction', subject to an additional Agreement for its implementation in 1994).[238] These two parts are especially important regarding the exploration and production of oil and gas as they regulate the operations which can take place in these zones. The UNCLOS has also implemented a detailed system of dispute settlement methods. Modelled on the UN Charter of 1945, the UNCLOS dispute resolution system imposes on States to resort to peaceful means, either diplomatic or adjudicative.[239] ADRMs are hence entrenched in the international law of the sea, alongside the resort to the International Tribunal for the Law of the Sea (ITLOS) created by the UNCLOS.[240] The UNCLOS and the 1994 Agreement are not the only multilateral treaties regulating the law of the sea. Several other instruments addressed specific matters which are only covered in the general parts of the Convention. Similarly, bilateral and international maritime treaties are concluded under the auspices of international organisations, such as the International Maritime Organisation (for matters related to shipping).[241] These treaties are the object of the next sub-section, with a special focus on the agreements concluded with regards to the exploitation of offshore petroleum resources.

[236] Rothwell and Stephens (n 227) 1; Chandrasekhara Rao and Gautier (n 226) para 1.015, citing Tommy T B Koh, 'A Constitution for the Oceans', in *The Law of the Sea: United Nations Convention on the Law of the Sea* (New York, St Martin's Press 1983), <www.un.org/Depts/los>
[237] Rothwell and Stephens (n 227) 23.
[238] Chandrasekhara Rao and Gautier (n 226) para 1.015. See UNCLOS part V and part XI; Agreement relating to the Implementation of Part XI of the UN Convention on the Law of the Sea of 10 December 1982 (adopted 17 August 1994).
[239] Chandrasekhara Rao and Gautier (n 226) para 1.022.
[240] Chandrasekhara Rao and Gautier (n 226) para 2.001.
[241] Chandrasekhara Rao and Gautier (n 226) paras 1.019 and 1.020.

3.2.2. International Agreements related to the exploitation of petroleum fields in maritime zones (offshore exploitation)

The overarching aspect of the UNCLOs has had effects on the development of international agreements regulating the exploitation of oil and gas in maritime zones. By creating new areas (such as JDZ, the Area and EEZ) and developing rules for petroleum operations for each of them, the UNCLOS is the applicable law for these operations in maritime zones.[242] As such, the Arctic not being a land mass, is governed by the UNCLOS, and so is its exploitation.[243] However, in addition to the large scope of the UNCLOS, several international agreements were concluded for specific matters, especially pollution, which affected the marine exploitation of oil and gas. For instance, the Antarctic Treaty was concluded in 1959 to ensure the scientific exploration and the peaceful use of the Antarctic.[244] In 1991, the Protocol on Environmental Protection to the Antarctic Treaty added new environmental requirements to the Treaty. Since then, the exploitation of mineral resources in Antarctic is formally prohibited.[245] Off-shore petroleum exploitation is also limited and regulated for environmental reasons by international and regional agreements. International agreements include those developed by the International Maritime Organisation (IMO). The first convention was the International Convention for the Prevention of Pollution from Ships of 1973 (MARPOL) and the 1996 London Protocol to the Convention on the Prevention of Marine Pollution by Dumping of wastes and other matters (the 1996 London Protocol). These two conventions are specific to the dumping of wastes and/during the decommissioning of offshore platforms and by ships. They provide rules to prevent pollution during these operations intervening at the end of the chain of production (midstream for shipping and end of the exploitation for decommissioning) but do not concern the exploration and production phases.[246] Other international conventions concern oil pollution from ships especially. These

[242] UNCLOS, Annex III on Basic Conditions of Prospecting, Exploration and Exploitation; Annex IV on the Statute of the Enterprise (for the Area exploitation) arts 150 to 155.
[243] Smith and others (n 145) 158-159.
[244] The Antarctic Treaty (adopted 1 December 1959)
[245] Protocol on Environmental Protection to the Antarctic Treaty (adopted 4 October 1991, entry into force 1998).
[246] International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1984) art (3)(b)(ii); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (adopted 1972, entered into force 1975) (London Convention); Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (adopted 1996, entered into force 24 March 2006) (London Protocol) art 1.4.3.

conventions are the 1969 International Convention on Civil Liability for Oil Pollution Damage (the 1969 Liability Convention) and the International Convention on the Establishment of an International Fund for Compensation for Oil Damage (the 1971 Fund Convention), both administered by the IMO.[247] Another convention, specifically focused on civil liability resulting from oil pollution damage directly resulting from petroleum exploration and exploitation was adopted in 1977 but unfortunately never entered into force.[248]

The aforementioned instruments are only an extract of the different international conventions and agreements protecting the environment in relation to oil and gas operations, and still, none of them is exclusively dedicated to regulating offshore oil and gas production and development.[249] They demonstrate not only the fragmentation of the international regime applicable to oil and gas operations, but also its incompleteness due to the failure of the international community to develop a binding convention.[250] This has led to the development of regional agreements.[251] Such agreements are, among others, the Convention for the Protection of the Marine Environment of the North-East Atlantic (the OSPAR Convention), signed in 1992, which provides specific provisions regarding the pollution arising from offshore sources;[252] the Convention on the Protection of the Marine Environment of the Baltic Sea Area (the Helsinki Convention) – which is analogous to the OSPAR Convention but applicable to the Baltic Sea;[253] and the EU Directive on safety of offshore oil and gas operations of June 2013.[254] The latter aims to provide a uniform framework within the European Union in order to ensure the safety, health and environmental standards of offshore oil and gas

[247] Smith and others (n 145) 848-849.
[248] Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources (adopted 1 May 1977, not entered into force); see also Julien Rochette and others, 'Seeing beyond the horizon for deepwater oil and gas: strengthening the international regulation of offshore exploration and exploitation' (2014) 1 IDDRI 21.
[249] Sandra Kloff and Clive Wicks, 'Environmental Management of offshore oil development and maritime oil transport, A background document for stakeholders of the West African Eco Region' (2004) 48.
[250] Julien Rochette, Glen Wright, 'Strengthening the international regulation of offshore oil and gas activities' (2015) Institut du développement durable et des relations internationales 1.
[251] Rochette and Wright (n 250) 2.
[252] Convention for the Protection of the Marine Environment of the North-East Atlantic (adopted 1992) art 5 and annex III.
[253] Convention on the Protection of the Marine Environment of the Baltic Sea Area (adopted 1992, entered into force 17 January 2000) art 12.
[254] European Parliament and Council Directive 2013/30/EU on safety of offshore oil and gas operations and amending Directive 2004/35/EC [2013] OJ L 178/66.

exploitation.[255] The impetus for developing a comprehensive regulatory system for such activities is directly linked to the infamous accident in the Gulf of Mexico in 2010 which caused the death of 11 people and bore disastrous economic and environmental consequences after the explosion of the Deepwater Horizon platform.[256] However, one could regret the shift from a regulation to a directive, as the former would have secured a harmonised set of rules for offshore operations.[257] Another regret is expressed by the European Commission and concerns the several exemptions for the transposition of the Directive, which may alter its main purpose of general legal framework guaranteeing the safety of offshore petroleum operations.[258] Despite these two points, the EU Directive is still a progress as it sets out best standards for offshore activities.

It is also worth noting that the aforementioned agreements, conventions and directive are part of the international rationale on the limitation of climate change and CO2 emissions, addressed in the 1992 United Nations Framework Convention on Climate Change and the Kyoto Protocol of 1997.[259] The United Nations Parties have since met every year to define and re-assess the environmental goals. However, the agreements following the conferences, although legally binding, are only setting out general objectives rather than strict rules. Moreover, these objectives are not specific to oil and gas production, offshore or onshore, but tend to address all causes of climate change and CO2 emissions. As a consequence, the UN Convention and subsequent Protocols and Agreements reinforce the view that oil and gas offshore activities and their impact are not regulated under a comprehensive international legal framework.

A call for a regulatory system for pollution induced by offshore drilling and seabed mineral resources' exploitation is not new, and stems from the development of

[255] Claire Dupont and others, 'Final Report on Safety of offshore exploration and exploitation activities in the Mediterranean: creating synergies between the forthcoming EU Regulation and the Protocol to the Barcelona Convention' (2013) Milieu Ltd for DG Environment of the European Commission, 7.
[256] EU Directive 2013/30/EU, (4) and (5).
[257] European Economic and Social Committee Opinion 2012/C 143/20 on the 'Proposal for a Regulation of the European Parliament and of the Council on safety of offshore oil and gas prospection, exploration and production activities' [2012] OJ C 143/107, 4.2 and 4.3.
[258] EU Directive 2013/30/EU (Statement by the Commission) arts 20 and 41 3) and 5).
[259] Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 United Nations Treaty Series 162.

deep and ultra-deep drilling in order to meet the increasing demand in energy.[260] These operations are conducted all over the globe and on all oceans, and all would benefit from a harmonised system. Indeed, ecological effects and consequences do not know boundaries, as evidenced in the early arbitral decision of the *Train Smelter* case of 1941.[261]

The implementation of general guidelines and liability rules for the transport of oil by tanker seems to have been fruitful as shown in the figure below:

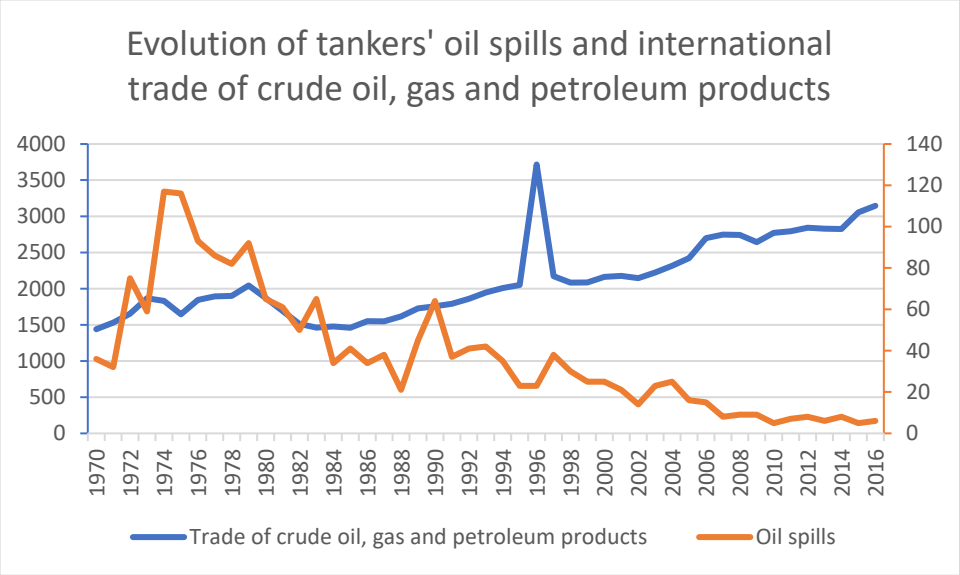

Figure 1: Evolution of tankers' oil spills and international trade of crude oil, gas and petroleum products (expressed in millions of metric cubes).

Sources: Data for tankers' oil spills are from the ITOPF Oil Tanker Spill Statistics 2017.

Data for the trade of crude oil, gas and petroleum products are from the UNCTAD: http://unctadstat.unctad.org/wds/TableViewer/tableView.aspx?ReportId=32363

[260] Melissa B Cates, 'Offshore Oil Platforms Which Pollute the Marine Environment: A Proposal for an International Treaty Imposing Strict Liability' (1984) 21 San Diego L Rev 691, on an international convention on liability for pollution; see also Hon Justice Steven Rares, 'An International Convention on Off-shore Hydrocarbon Leaks?' (2012) 26 A&NZ Mar LJ; Rochette and Wright (n 250) 32.

[261] Elena M. McCarthy, 'International Regulation Of Transboundary Pollutants: The Emerging Challenge Of Ocean Noise (2001) 6 Ocean & Coastal L J, 258 <http://digitalcommons.mainelaw.maine.edu/oclj/vol6/iss2/2>; *Trail Smelter Arbitration* (United Sates v Canada) [1941] 3 UN Rep Awards 1905

Oil spills from tankers have been steadily decreasing, with the biggest decrease operating between 1970 and 1990: the average number of oil spills in during the 70's decade was 78.8. During the following decade, it decreased by almost half (45.4).[262] The late 70's and beginning of the 80's were the inception of international regulation of oil transport by tankers, with the implementation of the MARPOL Convention (1973) and the UNCLOS (1982), and this may be one of the reasons of such decrease.

On the contrary, oil spills directly resulting from offshore exploitation do not present the same steady decrease. The figures presented by the Health and Safety Executive (HSE) in the report on offshore hydrocarbon release accidents show a tendency to a decreasing number of hydrocarbon release, but these figures need to be nuanced. Firstly, the reported accidents only concern offshore exploitation under the United Kingdom licence system. Secondly, the information were supplied by offshore operators on a voluntary basis and therefore the figures may not reflect the exact number of hydrocarbon releases.

[262] ITOPF Oil Tanker Spill Statistics 2017 <http://www.itopf.org/knowledge-resources/data-statistics/statistics/>

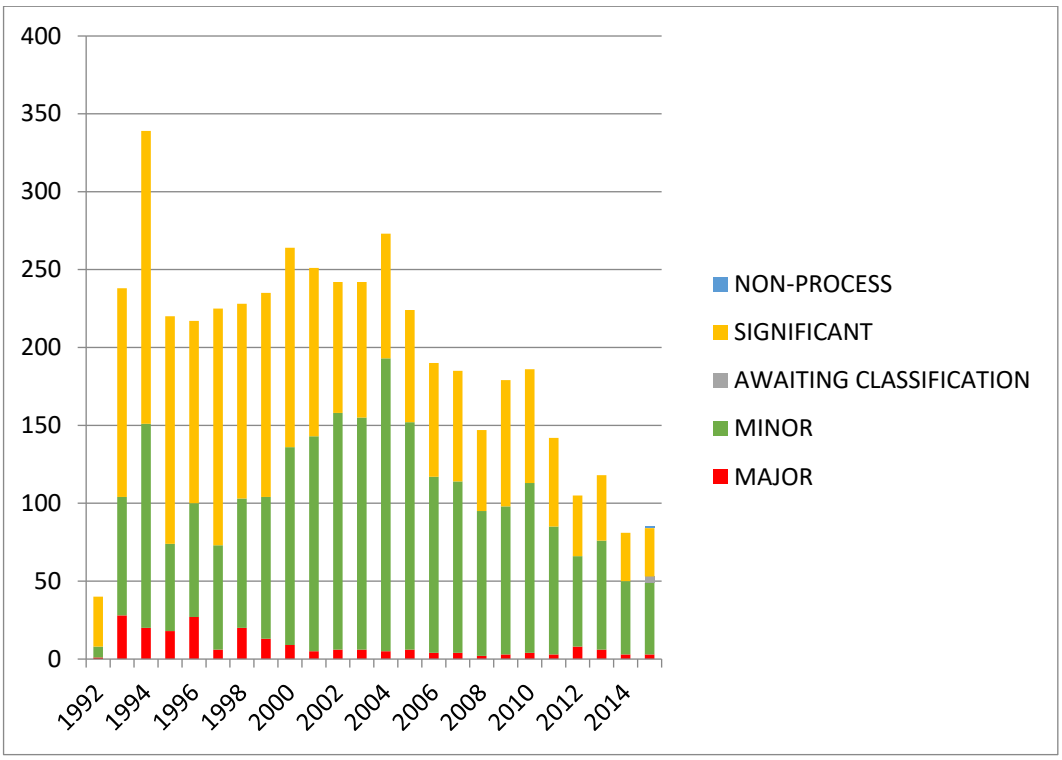

Figure 2: Number of accidental offshore hydrocarbon releases from 1992 to 2015. (Source: Health and Safety Executive, Offshore Hydrocarbon Releases, 1992-2015, accessible at http://www.hse.gov.uk/offshore/statistics.html

The unstable decrease of offshore hydrocarbons releases is further supported by the Offshore Statistics & Regulatory Activity Reports of 2016 and 2017 issued by HSE. In 2016, there were 104 releases and in 2017, 110.[263] The fluctuation of the numbers is also outlined by the writers of the reports.

The above figures and data would therefore support the implementation of general mandatory rules for offshore exploitation, and in order to effectively compensate and settle the damage due to the releases, a civil liability agreement as well. This development could be collaboratively supervised by the United Nations Environment Program, as for the different regional sea agreements.[264] In the absence of such international agreements, the settlement of disputes will have to rely on national laws. This firstly prevents a harmonised dispute settlement system outside of the national courts of the State affected by the offshore exploitation. Secondly, national laws are somewhat limited in the

[263] Health and Safety Executive, 'Offshore Statistics & Regulatory Activity Reports' (2016 and 2017) <http://www.hse.gov.uk/offshore/statistics.htm>
[264] Rothwell and Stephens (n 227) 372.

protection they offer for transnational damage. The lack of general regulation would perpetuate the laborious dispute resolution system highlighted with the Ixtoc I oil spill. On June 1978, the exploratory well drilled in the Gulf of Mexico by the Mexican oil company Petroleos Mexicanos (PEMEX) started to lose drilling mud and the attempts to seal the well resulted in an increase of pressure in the drill pipe and ultimately in its blowout. The platform exploded and allowed one of the largest hydrocarbons release in history.[265] The incident then involved several lawsuits and the United States, strongly affected by the spill, were not able to sue Mexico, although PEMEX acted under its authority.[266] Such a scenario is obviously unsustainable, especially if we consider the increase in the number of offshore platforms and exploitation sites and the limited reduction of offshore hydrocarbon releases.

3.2.3. Exclusive Economic Zones, the Area, and Joint Development Zones: the theoretical framework

Exclusive Economic Zones (EEZ), Joint Development Zones (JDZ), the Area and the High Seas are all, fully or partially, regulated by the UNCLOS 1982. These specific maritime zones will be studied in relation to the exploitation of resources, referred to in the UNCLOS as “non-living resources” and “mineral resources”.[267]

The implementation of the EEZ in the UNCLOS is the recognition of claims made in the 50’s and 60’s by different States, in which they firstly asserted their right to an exclusive zone, and then extended beyond the territorial sea zone when the latter was established in the 1958 Convention on the Territorial Sea and the Contiguous Zone.[268] This 1958 Convention does not provide a fixed nautical miles limit to the territorial sea but rather a geographical determination of its extent.[269] The normal baseline for measuring the breadth of the territorial sea hence is “the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State” and its outer end is “the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea”.[270] A general limit expressed in nautical miles could

[265] Arne Jernelöv and Olof Lindén, ‘Ixtoc I: A Case Study of the World's Largest Oil Spill’ (1981) 10(6) Ambio 299.
[266] Cates (n 260) 692-693.
[267] UNCLOS arts 56, 57 (for EEZ), 82 (for continental shelf) and 133 (for the Area).
[268] Convention on the Territorial Sea and the Contiguous Zone.
[269] Rothwell and Stephens (n 227) 67
[270] Convention on the Territorial Sea and the Contiguous Zone, arts 3 and 6

however be found in Article 24, which states that the outer limit of the contiguous zone is 12 nm from the baseline used for the determination of the territorial sea.[271] The territorial sea would therefore be limited to 12 nm in any case, and this distance was kept by the UNCLOS in 1982.[272]

Iceland for instance started claiming an Exclusive Fishery Zone (EFZ) of 3 nautical miles (nm) in 1948, before the 1958 Convention.[273] Once the principle of the territorial sea was accepted, Iceland regularly expanded it up to 200 nm in 1975. Iceland's increasing claims over its neighbouring sea were a protective measure of its fishing stocks. Due to the lack of a large and general exclusive zone and the depletion of their own fishing resources, foreign vessels and especially British trawlers would fish in proximity of Iceland's coastlines and presumably alter the Icelandic's stocks. The gradually increasing claims led to three fishing wars between the Icelandic and British authorities known as the Cod Wars (1958-1961; 1972-1973; 1975-1976).[274] The continued refusal of the United Kingdom and Germany to recognise Iceland's EFZ led to a decision of the International Court of Justice in 1974, acknowledging the accordance of such exclusive zones with international customary law. The *Fisheries Jurisdiction* case paved the way to a wider acceptance of exclusive zones.[275] In 1982, the UNCLOS established the Exclusive Economic Zone, which extends to 200 nm and is the adjacent continuation of the territorial sea.[276] This choice was based on the largest claims made by coastal States but also because most living and non-living resources are within this 200 nm distance from the coasts.[277] As per the name, the rights and jurisdiction granted to coastal States over their EEZ are exclusive and encompass living and non-living resources in the seabed and its subsoil and

[271] Convention on the Territorial Sea and the Contiguous Zone, art 24; Rothwell and Stephens (n 227) 67.
[272] Rothwell and Stephens (n 227) 67 and 72.
[273] Rothwell and Stephens (n 227) 86.
[274] The National Archives, 'The Cabinet Papers The Cod Wars' <http://www.nationalarchives.gov.uk/cabinetpapers/themes/cod-wars.htm> accessed on 4/12/2018
[275] Rothwell and Stephens (n 227) 86.
[276] UNCLOS arts 55 and 57; Gemma Andreone, 'The Exclusive Economic Zone' in Donald R Rothwell and others (eds), *The Oxford Handbook on the Law of the Sea* (Oxford University Press 2015) 162.
[277] Rothwell and Stephens (n 227) 87; Ann L. Hollick, 'The Origins of 200-Mile Offshore Zones' (1977) 71(3) The American Journal of International Law 494, 494 footnotes 2 and 3. Countries which had claimed 200 nm zones, either for exclusive purposes or fisheries only were, among others: the United States, France, Guatemala, Germany, Norway (EFZ); Argentina, Brazil, Ecuador, Somalia (EEZ).

in the waters *per se*.[278] Oil and gas exploration in the EEZ is then the sole attribute of the coastal State and is not subject to any limitation, whether regarding the conservation or the judicious use of the resources.[279]

However, States' rights on their EEZ can be affected for two reasons. Firstly, EEZs of two or more coastal States can overlap. Secondly, oil and gas reservoirs can straddle two or more EEZs. In these instances, States will have to reach an agreement and decide to exploit the reservoir jointly by creating Joint Development Zones (see subsection 3.4.4.). EEZs have also to be considered jointly with the continental shelf, which is the seabed and subsoil prolongation of the land territory, beyond the territorial sea. The continental shelf outer limit either corresponds to the outer edge of the continental margin or to a distance of 200 nm from the coast baseline, without ever exceed a total distance 350 nm.[280] A State wishing to extend its continental shelf limit beyond 200 nm shall submit its outer limit proposal to the Commission on the Limits of the Continental Shelf. It is only after the recommendations of the Commission are followed and implemented that the extended continental shelf limit will become binding and final.[281] Outside this specific procedure, the continental shelf breadth is therefore aligned on the EEZ, and so are their legal regimes as both grant exclusive rights to coastal States for the exploration and exploitation of the seabed and subsoil.[282]

The Area is defined in Article 1 of the UNCLOS as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction". The Area therefore starts and stops at the outer ends of coastal States' EEZs and/or continental shelves. The Area is regulated under Part XI of the UNCLOS. Part XI states that the Area and its resources are the "common heritage of mankind".[283] Following this principle, States cannot exercise sovereign powers and appropriate for themselves part of the Area and its resources.[284] The exploration and exploitation of the Area's resources is under the supervision of an independent authority, the International Seabed Authority, created by the UNCLOS. However, the resources susceptible to be exploited are defined by the UNCLOS as "all solid, liquid or

[278] UNCLOS art 56.
[279] Rothwell and Stephens (n 227) 93.
[280] UNCLOS arts 77(1) and (6).
[281] UNCLOS art 77(8).
[282] Rothwell and Stephens (n 227) 92.
[283] UNCLOS art 136.
[284] UNCLOS art 137.

gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules".[285] More specifically, marine mineral resources are distinct from the energy resources, "such as oil, gas or gas hydrates".[286] It stems from these definitions that oil and gas are excluded from the exploitable and recoverable resources of the Area and therefore cannot be subject to any production within this zone. As this research work is focused on the dispute resolution mechanisms in oil and gas investment contracts, the legal regime and specificities of mineral resources' extraction in the Area will not be studied.

An interesting focus is Joint Development Zones. These Zones are analogous to Unitisation agreements, but at an international level, rather than national. JDZ are not specifically regulated by the UNCLOS and were used long before the ratification of the Convention. The first Joint Development Agreement was concluded between Bahrain and Saudi Arabia in 1958 and provided that the exploitation of the joint zone would be undertaken by Saudi Arabia and that the revenue would be equally shared (50/50).[287] JDZs are created by an agreement between two or more States for a common exploitation of hydrocarbon resources straddling their territories or an area claimed by them.[288] These agreements rely solely on the States' willingness to conclude them, and there are no mandatory provisions to be included or specific regulations to follow.[289] Although not directly provided for in the UNCLOS, Articles 74 and 83 create an incentive for States to develop such zones. On the basis of international cooperation, they consider that JDZs concluded in disputed zones such as overlapping EEZ and continental shelves are "without prejudice to the final delimitation".[290] The interaction of EEZ, continental shelves and JDZ will be further studied in sub-section 3.4.3.

[285] UNCLOS art 133.
[286] Sven Petersen, 'Marine Mineral Resources' in Jan Harff, Martin Meschede, Sven Petersen, Jörn Thiede (eds) *Encyclopaedia of Marine Geosciences* (Springer 2015) ISBN 978-94-007-6237-4, 1.
[287] Rothwell and Stephens (n 227) 314
[288] Vasco Becker-Weinberg, *Joint Development of Hydrocarbons Deposits in the Law of the Sea* (Springer 2014) ISBN: 978-3-662-43570-0, 6-7.
[289] Becker-Weinberg (n 288) 7.
[290] UNCLOS arts 74(3) (EEZ) and 83(4) (continental shelf).

3.3. The protection of States' territories and resources

In order for States to protect their territory and the resources therein, the respect of their territorial integrity is necessary. As aforementioned in section 3.2 of this chapter, the UN Convention on the Law of the Sea (UNCLOS) has created and codified international rules on the delimitation of maritime territories. This is especially true regarding the EEZ, territorial sea and continental shelf legal regimes and delimitation rules attached to them. However, the UNCLOS provisions cannot apply perfectly to all geographical areas, and in some regions, the zones provided for in the UNCLOS may overlap and create disputes. Diplomatic settlement of States' disputes was covered in chapter 2, section 2.5. This section will approach the specific question of boundary disputes and how States resolve them, besides diplomatic settlement. The aim of this section and its subsections is not to provide an exhaustive list of the different agreements concluded but rather to attempt an overview of different agreements and delimitation disputes which have created and established principles for such delimitation, and to assess their impact on oil and gas investment contracts and *lex petrolea*.

3.3.1. The conclusion of boundary agreements

The necessity for a clear delimitation of a state's boundaries stems from the principle that states have sovereignty over their territory. Sovereignty also entails ownership of the airspace and the subsoil and establishes the existence of patrimonial rights over the resources of this territory.[291] As a means to protect the integrity of their territories and their ownership on the resources, states have concluded boundary treaties with their neighbours. These treaties, also called boundary agreements, provide for the delimitation of the outer limits of neighbouring states.[292] The use of treaties, or other binding instruments for delimitation is crucial.[293] Firstly, treaties are binding on the states' parties under

[291] James Crawford, *Brownlie's Principles of Public International Law* (8th edition, Oxford University Press 2012) 203 and ff; see as well for instance UNCLOS arts 2, 56, 57, and 77. See also Brian Taylor Sumner, 'Territorial Disputes at the International Court of Justice' (2004) 53(6) Duke Law Journal 1779, 1779; Robert McCorquodale, 'International Law, Boundaries and Imagination', in D Miller and S Hashmi (eds), *Boundaries and Justice* (2001), reproduced in Dixonand others (n 157) 238.
[292] Smith and others (n 145) 83.
[293] Organisation for Security and Co-operation in Europe (OSCE), Booklet on Applied Issues in International Land Boundary Delimitation/Demarcation Practices (2011) <https://www.osce.org/secretariat/85263?download=true> (OSCE Booklet)

the principle of *pacta sunt servanda*, embodied in the Vienna Convention on the Law of Treaties.[294] The Vienna Convention also imposes on states to solve their disputes arising out of the delimitation treaty by following the peaceful means of dispute settlement provided for in the UN Charter 1945.[295] The binding effect of treaties is therefore guaranteed and regulated. Secondly, boundary treaties create a territorial regime, valid *erga omnes* and binding even after the disappearance of the treaty.[296] This approach, based on the need for stable boundaries, makes boundary treaties a very reliable source to assess delimitations.[297] Regarding maritime delimitation, since the entry into force of the UNCLOS, states would normally determine their maritime territory using its provisions. However, even before UNCLOS – and still even today in certain areas – states would conclude maritime boundary agreements.[298] This is for instance the case of the USA, who are not part to the UNCLOS. The USA have hence continued to resort to maritime agreements with neighbouring states, such as the treaty concluded with the Government of Niue in 1997.[299] It is worth noting that boundary treaties and agreements are not final with regards to hydrocarbon exploitation. The delimitation agreement for the continental shelf in the Bay of Biscay concluded by Spain and France provides for a mineral resource clause.[300] These clauses create a negotiation right for the creation of JDZs or other joint development agreements in the event of resources straddling the boundary line.[301] A similar clause can be found in the Timor Sea Treaty signed in 2018 by Australia and Timor Leste.[302]

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[294] Vienna Convention art 26.
[295] Vienna Convention art 65.3; Charter of the United Nations art 33.1.
[296] Shaw (n 157) 367.
[297] Shaw (n 157) 367.
[298] See for instance the Treaty on Maritime Delimitation (signed December 2014) (Fiji-Tuvalu-France) http://thecommonwealth.org/media/news/agreement-reached-between-fiji-tuvalu-and-france-maritime-boundaries; or the Agreement regarding the Establishment of a Maritime Boundary between France and Jersey (signed 4 July 2000) (France-United Kingdom) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/273230/6138.pdf
[299] Treaty on the Delimitation of a Maritime Boundary 1997) (United States of America-Government of Niue), available at https://www.state.gov/documents/organization/125430.pdf, 8
[300] Convention between France and Spain on the delimitation of the territorial sea and the contiguous zone in the Bay of Biscay (1974)
[301] Becker-Weinberg (n 288) 49-50.
[302] Treaty between Australia and the Democratic Republic of Timor-Leste establishing their Maritime boundaries in the Timor Sea (2018) art 8.

While the boundaries of most European states have been defined by ancient treaties, the boundaries of previously colonised countries result from the administrative delimitations operated by the colonizing countries. It is also the case for countries that used to be part of the USSR.[303] The reliance on colonial delimitation is especially true in Africa, where the Organisation of African Unity declared in 1964 the recognition and respect by member states of such boundaries.[304] However, the issue is that administrative boundaries were not defined regarding the populations, tribe and ethnicities, ultimately leading today to contestations of such delimitations.[305] Despite these ill-defined delimitations, the doctrinal approach of the International Court of Justice (ICJ) is the conservation of the administrative delimitations, on the basis of the *uti possidetis* principle.[306]

Uti possidetis emerges from Latin America, when at the time of independence of Spanish-colonised countries, the boundaries defined by Spain were said to remain.[307] *Uti possidetis* has then been defined by the ICJ in *Burkina Faso v Republic of Mali* as a general principle or default rule of international law.[308] As explained by the Court, the reliance on this principle stems from the willingness to secure the respect of the boundaries at the moment of independence.[309] According to the Court, the abidance with of this principle is necessary for the stability and therefore the survival of newly independent countries, despite its evident contradiction with the right of people to self-determination.[310] Hence the latter has to be implemented and exercised within the limits of *uti possidetis*.[311]

However, *uti possidetis* is not absolute and accepts two exceptions.

Firstly, the concerned states can all together decide to re-determine their boundaries.[312] Such re-delimitation involves the resort to peaceful means of

[303] Shaw (n 157) 392-393; Crawford (n 291) 238 and ff.
[304] Shaw (n 157) 391-392.
[305] Crawford (n 291) 239.
[306] Shaw (n 157) 392.
[307] Shaw (n 157) 392.
[308] *Frontier Dispute (Burkina Faso v Republic of Mali)* (Judgment) [1986] ICJ Rep 554; Shaw (n 157) 392-393; Crawford (n 291) 239.
[309] *Frontier Dispute* (n 308) 566.
[310] *Frontier Dispute* (n 308) 567.
[311] *Frontier Dispute* (n 308) 567.
[312] Shaw (n 157) 393; Arbitration Commission for Yugoslavia, Opinions 2 and 3, cited in Alain Pellet, 'The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples' (1992) 3 EJIL 178,180; see also Matthew C R Craven, 'The European

dispute resolution, such as the ones referred to in the UN Charter and the UNCLOS, to reach a new delimitation agreement.[313] States can negotiate among themselves, or require the intermediary of third-parties, but the emphasis must firstly be put on non-adjudicative means, i.e. diplomatic means.[314] Third-parties who have proven effectiveness are Joint Boundary Commissions and Bilateral Expert Working Groups.[315] These entities, composed of members and experts from all sides of the dispute, ensure co-operation by acting as a pool of discussion and by conducting field-work.[316] Their role is similar to a fact-finding assembly or panel or even closer to Technical Advisory Committees (TACs) as all parties are equally represented (to be developed in Chapter 5). But contrary to TACs which are dissolved once the petroleum project ends, Joint Boundary Commissions do not cease to exist, and their permanency has been praised.[317] The International Boundary Commission for the Canada-USA boundary (IBC), composed of two commissioners, one Canadian, one American, was made permanent in 1925. This enhanced co-operation allows each side of the border to unilaterally replace or repair boundary pillars for instance. Moreover, the IBC, due to its long-lasting existence, has managed to solve most of the border disputes without referring to other authorities.[318] A similar permanent commission would also be the final stage in the boundary definition system of Ukraine, in order to maintain the boundaries but also discuss possible revisions of the agreements.[319] Apart from Joint Commissions and Expert Working Groups, States may start dispute resolution mechanisms under the auspices of an international organisation. This was the case of the dispute over maritime delimitation between Australia and Timor-Leste. The dispute was settled by conciliation under the Permanent Court of Arbitration supervision and resulted in a new agreement signed by both parties in 2018.[320] Some institutions may also provide good offices, such as the UN

Community Arbitration Commission on Yugoslavia' (1996) 66(1) British Yearbook of International Law 333 <https://doi.org/10.1093/bybil/66.1.333>, 386.

[313] Charter of the United Nations art 33.1; UNCLOS art 279.

[314] See for instance: 'Caspian Sea nations agree a deal ending years of dispute' (Centre for Borders Research, University of Warwick, 14 August 2018) <https://www.dur.ac.uk/ibru/news/boundary_news/?itemno=35421&rehref=%2Fibru%2Fnews%2F&resubj=Boundary+news+Headlines>

[315] OSCE Booklet (n 293) 11, 16 and 17.

[316] OSCE Booklet (n 293) 11.

[317] OSCE Booklet (n 293) 12.

[318] OSCE Booklet (n 293) 21-22.

[319] OSCE Booklet (n 293) 19.

[320] 'Australia and Timor-Leste sign historic maritime treaty to define border' (Centre for Borders Research, University of Warwick, 12 March 2018) <https://www.dur.ac.uk/ibru/news/boundary_news/?itemno=33983&rehref=%2Fibru%2Fnews%

Cartographic Section for technical assistance, who helped the determination of the Iraq-Kuwait boundary and is facilitating the demarcation of the Cameroon-Nigeria boundary following the ICJ judgment of 2002. Other institutions are the IGN FI, a French State company involved in the Qatar-Saudi Arabia delimitation. The technical support of these institutions allows the accurate mapping of the boundaries, using satellite imageries less-developed countries may not be able to access[321] However, in the instance where non-adjudicative mechanisms are not successful, the parties may refer their dispute to arbitration or to the ICJ, following the conclusion of a *compromise*.[322]

The second exception to the application of *uti possidetis* is when the boundaries are inexistent, or unclear.[323] The lack of clarity of boundaries can stems from imprecise statements in the boundary treaty. It can also result from the adjunction to the treaty of inaccurate maps or the drawing of a map inconsistent with the provisions of the agreement, or when the whole agreement is negotiated on a flawed representation of the territory.[324] As per the failure of diplomatic means, the absence or impreciseness of boundaries open to the parties the access to an adjudicative resolution of their dispute.[325]

Observing and analysing the adjudicative settlement of boundary disputes is of critical importance, for two reasons. Firstly, arbitration awards are one of the elements of *lex petrolea*. *Lex petrolea* evolves with the arbitration awards, and so are the different ADRMs emerging from *lex petrolea*. Secondly, ICJ judgements, although not technically part of *lex petrolea*, create precedent in international law. Judgements are binding on the parties, which means that their implementation and the delimitation of the boundary must follow the judgement. This character

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2F&resubj=Boundary+news+Headlines> accessed 8 December 2018; Permanent Court of Arbitration 'Report and Recommendations of the Compulsory Conciliation Commission Between Timor-Leste and Australia on the Timor Sea' (2018) PCA Case no 2016-10.

[321] OSCE Booklet (n 293) 22-25.

[322] Sumner (n 291) 1781.

[323] Shaw (n 157) 393; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (Judgment) [1992] ICJ Rep 559, para 333; *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (Judgment) [2012] ICJ Rep 624, para 57.

[324] Guenter Weissberg, 'Maps as Evidence in International Boundary Disputes: A Reappraisal' (1963) 57(4) The American Journal of International Law 781, 781.

[325] It is worth noting that despite the large progress in mapping thanks to satellite and aerial surveys, mistakes are still existing: 'Myanmar claims Bangladesh Island of St Martin's as their own in online maps' (Centre for Borders Research, University of Warwick, 16 October 2018) <https://www.dur.ac.uk/ibru/news/boundary_news/?itemno=35964&rehref=%2Fibru%2Fnews%2F&resubj=Boundary+news+Headlines> accessed 8 December 2018

permits the following conclusions: as the ICJ creates precedent, the concerned states will implement the outcome of the decision as to solve their dispute. Other states may also follow their example, by inserting the rules emerging from the judgment in their national petroleum laws, or in the Host Government contracts themselves. Hence ICJ judgements participate indirectly to the building of a comprehensive *lex petrolea*. Also, ICJ judgements may act as a deterrent for parties to resort to adjudicative dispute settlement mechanisms. It can result from the aforementioned implementation of previous rulings in their national laws, or from the expectation of a judgement similar to the precedent. This idea of consistency is indeed expressed in the case of *Jan Mayen* of 1993.[326] In this case, the ICJ states that any adjudicatory body dealing with the delimitation of a boundary should consult the 'circumstances of the case', but also previous cases and states' practices, in order to 'achieve consistency and a degree of predictability'.[327] Hence states would tend to reach an agreement through diplomatic means rather than submitting to courts disputes of the same nature. Thus, the ICJ's judgements can be considered as presenting an element of Dispute Prevention Mechanism (DPM).

3.3.2. Maritime delimitation

The practice of the ICJ, the ITLOS and arbitral tribunals in maritime delimitation cases has greatly impacted the development of *lex petrolea*, as their decisions directly involved oil and gas concessions.

The principle followed by the aforementioned adjudicatory bodies when delimitating a maritime boundary is to follow an equidistant line unless specific circumstances, when the zones to delimit are opposite or adjacent. This rule was first enunciated in the Convention on Territorial and Contiguous Zone and the Convention on the Continental Shelf, and was then integrated in the UNCLOS for the delimitation of the territorial sea only.[328] Regarding the delimitation of the EEZ and the continental shelf, the UNCLOS provides that the delimitation must be operated through an international agreement as to achieve an "equitable

[326] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* (Judgment) [1993] ICJ Rep 38.
[327] *Maritime Delimitation in the Area between Greenland and Jan Mayen* (n 326) para 58 quoting for the second part *Libya/Malta* (Judgment) [1985] ICJ Rep 39, para 45.
[328] Convention on the Territorial Sea and the Contiguous art 12; Convention on the Continental Shelf arts 6.1. and 2; UNCLOS art 15.

solution".[329] Apart from this requirement, the UNCLOS does not present any technical rules on maritime delimitation. A first interpretation of the rule of equidistance of the 1958 Convention on the Continental Shelf was given in the ICJ case of *North Continental Shelf*, in which the Court was determining the limit of the continental shelves of Germany, Denmark and Norway.[330] In its judgement, the Court considered that beyond the rule set out in article 6 of the 1958 Convention on the Continental Shelf, maritime delimitation following the equidistance line should also be done in accordance with equitable principles and take into account "all relevant circumstances".[331] With this case, the Court developed the delimitation system set out in the 1958 Convention and expanded it with principles of equity.

This particular emphasis on an "equitable solution" was noted and further explained by the ICJ in the *Tunisia v Libya* case.[332] In this case, the ICJ had to determine the limits of the continental shelf between Libya and Tunisia. When proceeding to the delimitation, the Court relied on the draft of the UNCLOS and especially the draft of the future Article 83.[333] It held that the rules for delimitating the continental shelf have to result in an equitable result.[334]

The equidistance/equitable solution approach was then kept by the ICJ for the delimitation of continental shelves, despite the implementation of the UNCLOS and the disappearance of the equidistance line from the continental shelf's provisions. This approach was clearly embodied by the ICJ in the case *Jan Mayen*, in which the Court explained a two-step system for delimitation. First, a median provisional line is drawn, and then adjusted if special circumstances require to do so.[335] The system was used in several ICJ cases, such as *Qatar v Bahrein* or *Cameroon v Nigeria*, and in arbitral awards as *Newfoundland and Labrador and Nova Scotia*, *Barbados v Trinidad and Tobago* and *Guyana v*

[329] UNCLOS arts 74.1. and 83.1.
[330] *North Sea Continental Shelf* (n 191).
[331] *North Sea Continental Shelf* (n 191) para 101. (C)(1).
[332] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 18.
[333] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n 332) para 49-50. The draft of Article 83(1) was "The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution", and therefore analogous with the current Article 83(1) of UNCLOS.
[334] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n 332) para 50
[335] *Maritime Delimitation in the Area between Greenland and Jan Mayen* (n 326) para 51.

Suriname.[336] This two-steps approach was again refined in a three-stage mechanism in the ICJ case of *Romania v Ukraine*.[337] It creates as a last step the verification of a certain proportionality of the delimited areas.[338]

The *Tunisia v Libya* case presents another point crucial for oil and gas concessions in disputed maritime areas. Although partly relying on the draft of Article 83(1) of the UNCLOS which put the emphasis on an equitable delimitation, the ICJ recalled that an equitable solution would necessarily require taking into account the particular relevant circumstances of the case.[339] Libya proposed several particular and relevant circumstances that should be taken into account by the judges when altering the equidistant line of delimitation. Some of these circumstances related to the geographical and geological aspect of the shelf and the coasts of the states, but two were directly involving the oil and gas industry. Libya hence proposed to observe the existence of legislative acts on both sides, relating to petroleum concessions; and the existence of petroleum fields and wells in the area.[340] The Court considered that the numerous Petroleum laws taken by the parties, as well as the long-lasting respect of a *de facto* delimitation line in granting oil and gas concessions, had to be interpreted as a relevant circumstance.[341] The Court organised this particular circumstance in the category of "conduct of the parties", in which falls fishing areas and agreements.[342]

The "conduct of the parties" or *modus vivendi* with regards to hydrocarbons exploitation was thoroughly explicated and weighted by the ICJ in the *Gulf of Maine* case.[343] In this case, the Court had to delimit a single maritime boundary, applying to the continental shelf and the superjacent waters between Canada and the USA in the Gulf of Maine.[344] Canada claimed that the conduct of both parties

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[336] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Merits) [2001] ICJ Rep 40, para 230; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (Judgment) [2002] ICJ Rep 303, para 290; *Newfoundland and Labrador and Nova Scotia* (Award of the Tribunal in the Second Phase) [2002] para 2-28; *Barbados v Trinidad and Tobago* (196) para 242; *Guyana v Suriname* (Award of the Arbitral Tribunal) [2007] < https://pca-cpa.org/en/cases/9/>.
[337] *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (Judgment) [2009] ICJ Rep 61.
[338] *Maritime Delimitation in the Black Sea* (n 337) paras 120-122.
[339] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n 332) para 72.
[340] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n 332) para 77.
[341] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n 332) paras 96 and 133(C)(2).
[342] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n 332) paras 117-118.
[343] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Judgment) [1984] ICJ Rep 246.
[344] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (n 343) para 161.

regarding the allocation of hydrocarbon concessions in the disputed area had to be taken into account in drawing the delimitation line. Canada contended that concessions for the exploration of the subsoil had been granted by both states following the strict equidistant line between them. In its opinion and with regards to the *Tunisia v Libya* case, such concessions should be taken into account as a special circumstance in the drawing of the delimitation line.[345] The Court refused this argument on several grounds.

Firstly, the ICJ outlined a major difference between the *Tunisia v Libya* case and the Gulf of Maine in question. The Court explained that in *Tunisia v Libya*, the states actually pursued the pre-existing conduct of the colonizing countries (i.e. France and Italy) when they became independent and started granting concessions.[346] On the contrary, the Court noted that in the case of *Gulf of Maine*, Canada and the USA began granting concessions from the mid-sixties only and respected the equidistance line until 1972. This lapse of time was not sufficient to constitute a *modus vivendi*, and hence a special circumstance.[347] The ICJ continued to develop this approach in several cases, narrowing the requirement until the case of *Libya v Malta.*[348] In this case the Court expressed the necessity of an agreement or acquiescence between the parties in order to consider oil and gas concessions as a *modus vivendi* and as a relevant circumstance capable of modifying the equidistance line[349]. This position has since been followed by the ICJ and arbitral tribunals in cases where hydrocarbon concessions were involved.[350]

As a second argument in the *Gulf of Maine* case, the ICJ stated that when delimiting a single maritime boundary, simplification is necessary. Indeed, whereas the continental shelf boundary may be tortuous as to follow the

[345] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (n 343) para 149.
[346] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (n 343) para 150.
[347] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (n 343) paras 61 and 151.
[348] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n 332) para 13.
[349] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (n 332) para 25
[350] *Land and Maritime Boundary between Cameroon and Nigeria* (n 336) 303-304; *Newfoundland and Labrador and Nova Scotia* (n 336) para 3.5; *Barbados v Trinidad and Tobago* (n 196) para 364; *Guyana v Suriname* (n 336) para 390; *Maritime Delimitation in the Black Sea* (n 337) para 197.

resources' reservoirs, a similar delimitation of the superjacent waters would be impractical, inappropriate and without much justification with regards to fishing.[351]

Thirdly and finally, the ICJ noted that the principally disputed area (i.e. Georges Bank) had been divided as to leave exploitable resources on either side of the boundary. These resources had been prospected in the past and the parties were said free to pursue their activities. But more importantly, the Court weighed on the parties the increased need for cooperation in hydrocarbon exploitation, now that the delimitation line has been drawn. The Court seems to put forward the creation of joint-developing zones for the exploitation of petroleum resources, as means to "ensure the positive development of [the] activities in the important domains concerned".[352] The position of the Court is therefore close to the one adopted by states in delimitating treaties providing for re-negotiation clauses in the event of boundary-straddling hydrocarbon discoveries. Adjudicatory delimitation should therefore not preclude the states to enter into joint-developing agreements, but more so give them an un-disputed area over which they can exercise or attribute their exploitation rights.

The non-acceptance of hydrocarbon concessions as a relevant circumstance in maritime delimitation is understandable in terms of equity. However, this approach bears consequences for the contractors and the grantees of such concessions. The loss of ownership on the oil and gas field immediately endangers the IOC and its concession, who could face expropriation or the termination of its contract. In this scope, the creation of JDZs in delimited and resource-rich areas may constitute an appropriate solution. These consequences, as well as their prospective solutions will be the subject of section 3 of this chapter.

3.3.3. Land delimitation

As per maritime delimitation, the ICJ has developed rules for the delimitation of land boundaries. Claims regarding land delimitation may arise out of nine grounds which are: treaty law; geography; economy; culture; effective control; history; *uti possidetis*; elitism; and ideology.[353] It can be observed that none of

[351] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (n 343) para 202-203.
[352] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (n 343) para 239-240.
[353] Sumner (n 291) 1782-1792

these categories involve hydrocarbon directly, as opposed to the jurisprudence in maritime delimitations. However, out of these different categories, three can be linked to claims for obtaining hydrocarbon-rich territories, although certain claims based on the other categories may be used to indirectly pursue this goal. Economic claims rely on the principle that the territory is necessary to the development of the state, which would most definitely be a hydrocarbon-rich area or a petroleum field. Claims relying on effective control involve the consideration of the actual control by a state in a particular area.[354] Such control can be determined through the grant of specific concessions and licences for the exploitation of the land's resources.[355] Nevertheless, effective control would only be successful in the absence of a legal title over the territory by the opposing state.[356] Finally, a state could claim the ownership of a territory in order to exploit its resources by evoking elitism. A successful elitist claim has to demonstrate that the state is the most technically and technologically able to develop the resources of the territory.[357]

The position of the ICJ regarding these categories of claim follows a certain hierarchy, and only treaty law, *uti possidetis* and effective control, in this order, have been positively considered by the Court in land delimitation disputes.[358] The economic argument has even been rejected strongly by the Court in *Land, Island and Maritime Frontier Dispute*, opposing El Salvador and Honduras.[359] The ICJ considered that economic considerations such as the unequal distribution of natural resources should be given less relevance in determining land frontier than for maritime delimitation, following its position in *Tunisia v Libya*.[360] The presence of natural resources or oil and gas concessions as basis for a land claim would therefore seem preposterous in light of this decision. This would explain the scarce use of this criteria to determine the sovereignty and ownership over a territory. To date, the ICJ considered once, and among other evidence, the existence of oil and gas concessions as an indication of a title on a land. In *Land*

[354] Sumner (n 291) 1784-5.
[355] Sumner (n 291) 1787-8; see also *Frontier Dispute (Burkina Faso/Republic of Mali)* (n 308) para 78, in which Benin granted licences for grazing and other exploitation on the disputed territory.
[356] *Frontier Dispute (Burkina Faso/Republic of Mali)* (n 308) para 63.
[357] Sumner (n 291) 1791.
[358] Sumner (n 291) 1811-12.
[359] *Land, Island and Maritime Frontier Dispute* (n 323).
[360] *Land, Island and Maritime Frontier Dispute* (n 323) para 49.

and Maritime Boundary between Cameroon and Nigeria, the Court observed the geographical pattern of the oil concessions granted by Cameroon in the Bakassy Peninsula to determine the existence of Cameroon's title over this region.[361]

Land and maritime delimitation cases share a general refusal of the ICJ and arbitral tribunals to take into account the existence of oil and gas concessions when determining boundaries between states. This statement calls for two observations. This refusal is understandable as, except in very specific instances such as the *Cameroon and Nigeria* or *Tunisia v Libya* cases, oil and gas concessions do not indicate ownership or title over the land or the seabed. On the contrary, in disputed areas, the chances for concessions granted without rights are high. Furthermore, as explained in the *Gulf of Maine* case, which can be applied to land delimitation to some extent, taking into account natural resources in delimitating the boundaries would end in complicated and intricate lines. Such an approach is not appropriate nor sustainable as the most complicated a boundary is, the greater the risk to violate it is.

However, the position of the ICJ and arbitral tribunals has for consequence the loss of ownership of concessions by states and therefore by the grantees. In these situations, the IOC may lose its investment as the concession could be annulled by the state getting the sovereignty over the territory. Although it has been highly recommended to IOCs to not undertake exploitation in disputed areas, claims related to delimitation may arise at any moment of the performance of the contract.[362] Hence, the utmost necessity to provide for the IOC's protection in oil and gas investment contracts in the event of a boundary delimitation dispute. This protection can be offered through several contractual clauses, or the involvement of the IOC at an early stage of the dispute in order to avoid an adjudicatory resolution of said dispute. The continuation of the exploitation may also be guaranteed by the creation of Joint Development Zones (JDZs), albeit the technical aspects of their implementation can remain problematic.

[361] *Land and Maritime Boundary between Cameroon and Nigeria* (n 336) paras 215 and 223.
[362] F N N Botchway, 'The Context of Trans-Boundary Energy Resource Exploitation: the Environment, the State and the Methods' (2004) 2(3) OGEL, 2.

3.4. The protection of the IOC in boundary disputes

The stability of the host countries' boundaries is or should be a main concern for IOCs when assessing a prospective exploration and exploitation concession.[363] However, it has been demonstrated on several occasions that possible boundary disputes did not preclude the IOCs to invest and exploit petroleum resources. For instance, the dispute over the sovereignty on the Bakassi Peninsula between Cameroon and Nigeria, adjudicated in 2002 by the ICJ, started in the sixties at the time of their independence. Such an on-going dispute did not prevent several IOCs, including Elf-Aquitaine, to undertake operations on both side of the disputed border.[364] The IOCs' behaviour may be explained by two aforementioned reasons. Firstly the doctrine of *uti possidetis* largely followed by the ICJ allows IOCs to rely on broadly defined land boundaries and assures a certain stability and consistency as to the re-delimitation by the courts.[365] Secondly, the implementation of the UNCLOS as well as the coherent jurisprudence of the ICJ and arbitral tribunals with regards to maritime delimitation provides for predictability in the settlement of such disputes.[366]

3.4.1. The host Government contract terms: the force majeure clause

An IOC may find itself involved in a boundary dispute after being granted exploration and exploitation rights in the disputed area. Such rights are vested in the host Government contract, which would to some extent offer protection to the IOC. The most evident provision providing for this protection is the force majeure clause. Force majeure arises from French doctrine as a system somewhat akin to English law frustration, but contrary to frustration, under force majeure, the contract is not automatically brought to an end. It allows a party to be excused to perform its duties if an unforeseeable event arises, precluding the party to effectively undertake its obligations under the contract.[367] The conditions and

[363] Mark W. Janis, *An introduction to International Law* (2nd edition, Little Brown & Co Law & Business 1993), 176-77, reproduced in Smith and others (n 145) 74-75; see also Mhairi Main Garcia, 'Boundary delimitation and hydrocarbon resources' in Geoffrey Picton-Turbervill (ed), *Oil and Gas A Practical Handbook* (2nd Edition, Globe Law and Business 2014) 57-58.
[364] Jedrzej Georges Frynas, 'Foreign investment and international boundary disputes in Africa: Evidence from the oil industry' (2009) 9 African Study Centre Occasional Papers Series <https://www.researchgate.net/publication/267832398>, 7.
[365] Frynas (n 364) 10.
[366] Frynas (n 364) 16.
[367] Ewan McKendrick (ed), *Goode on Commercial Law*, (4th edition, Penguin 2010), 150

requirements for force majeure to be effective will normally be provided in the contract, although the unforeseeable and unpreventable characters of the event will always be essential components.[368]

The use of the force majeure clause by an IOC has been recognised in the oil and gas industry as a means for the IOC to escape from boundary disputes. In the arbitral case of *Guyana v Suriname*, in its submissions, Guyana explains that Esso, the contractor of the concerned concessions, invoked the force majeure clause in the concession contract to stop its activities after being informed by the Surinamese national oil company (Staastolie) that it was operating in Surinamese waters.[369] However, the opposite has also been ruled. In RSM v Grenada, the arbitral tribunal considered that the force majeure clause imposed on the investor to assist the State in resolving its maritime boundary with its neighbours, Venezuela and Trinidad and Tobago.[370] The tribunal held in this case that RSM had breached its obligation to 'take all reasonable steps to remove the cause' of any force majeure. An IOC, in application of this *lex petrolea* rule, could be bound to provide assistance to the State in its boundary dispute.[371] Nevertheless, the facts of the case seem to have compelled such an interpretation of the clause.[372] Indeed, RSM had engaged in direct unilateral negotiations with Venezuela against Grenada's instructions, and pursued unauthorized legal proceedings on behalf of Grenada against Trinidad and Tobago before ICSID and the ITLOS.[373] It is therefore likely that an arbitral tribunal will consider the facts at hand, and interpret them in light of the drafting of the force majeure clause.

Most host Government contracts will include a force majeure clause, but their drafting varies greatly. The force majeure clause in the Model Lease Agreement of Greece reads as follow:

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[368] McKendrick (n 367) (150; Article 1218 French Civil Code: « Il y a force majeure en matière contractuelle lorsqu'un événement échappant au contrôle du débiteur, qui ne pouvait être raisonnablement prévu lors de la conclusion du contrat et dont les effets ne peuvent être évités par des mesures appropriées, empêche l'exécution de son obligation par le débiteur. », which translates in there is force majeure when an event, uncontrollable by one party, which could not be reasonably foreseen at the conclusion of the contract and whose effects cannot be prevented by appropriate methods, preclude the execution of the contract by the said party. (own translation)
[369] *Guyana v Suriname* (n 336) para 152.
[370] *RSM Production Corporation v Grenada* (Award) [2009] ICSID Case No ARB/05/14 (*RSM v Grenada*); Childs (n 65) 249.
[371] Childs (n 65) 249.
[372] *RSM v Grenada* (n 370) paras 287, 298-309 and 310-330.
[373] *RSM v Grenada* (n 370) paras 298-309 and 310-330; Childs (n 65) 249.

> '"Force Majeure" means any event beyond the reasonable control of the Party claiming to be affected by it and not caused or contributed to by such Party and shall include, but shall not be limited to, acts of God, epidemics, earthquakes, fires, floods, explosions, strikes, lockouts, wars and state of war, revolutions, civil commotions, insurrections, mutinies and **acts of the State or of any foreign government**. Force Majeure shall not excuse the failure to pay any sum when due hereunder and a lack of funds shall not constitute Force Majeure.' (emphasis added)[374]

The Petroleum Agreement of Lebanon provides a force majeure clause too in its Article 29:

> 29.2. Without limitation to the generality of the foregoing, Events of Force Majeure shall include natural phenomena or calamities including but not limited to, epidemics, earthquakes, storms, lightning, floods, fires, blowouts, **wars declared or undeclared, transboundary hostility** […]. (emphasis added)[375]

Another example of a force majeure clause exists in the Cypriot Model Contract, at Article 33:

> 33.1. For purposes of this Contract, cases of Force Majeure are considered to include all events which are unforeseeable, irresistible and beyond the control of the Party which invokes it, such as earthquake, riot, **insurrection, civil disturbances, acts of war or acts attributable to war.** The intent of the Parties is that the term Force Majeure shall be interpreted in accordance with the principles and practice of international law. (emphasis added)[376]

These three contracts establish detailed force majeure clauses, including territorial claims of foreign government over the exploited area. This means that the IOC could invoke force majeure to suspend its obligations of exploration and exploitation in the event of a boundary dispute brought by another state. However, the resort to force majeure and its effectiveness are limited to the contractual terms. The lack of protection may therefore derive from the drafting of the clause itself. The reference to 'the principles and practice of international law' in the Cypriot contract restrains even more the certainty and reliability of such

[374] Greek contract (n 41) art 26.2.
[375] Lebanese contract (n 42) art 29.
[376] Cypriot contract (n 40) art 33.

clause. Indeed, these principles and practice are always evolving, with the work of international tribunals and arbitral tribunals.

The Cypriot contract imposes an unforeseeable, insurmountable and irresistible event. These criteria would not encompass a known or expected boundary dispute.[377] The limited scope of force majeure clauses offers little protection to the IOC as it could be argued that boundary disputes in certain areas may always be expected or possible, and therefore foreseeable.[378] On this point, the arbitral tribunal in *RSM v Central African Republic* gave explanations.[379] In this case, the tribunal considered that, although the political situation of the country was already unstable when the contract was signed, the further deterioration of the climate could not have been foreseen. As a result, the security situation in the Central African Republic consisted in a force majeure event under the terms of the contract.[380] This arbitral award, considered part of *lex petrolea*, hence softens the conditions of declaration of a force majeure event.[381] An investor who has contracted with a politically unstable State will not be automatically precluded from using the force majeure clause if the situation deteriorates.

The extent of the protection offered to the IOC is restricted as well. Most clauses only provide for a time extension of the contractual exploitation period that has been hindered by the force majeure event, and rarely the option to terminate the contract if the event is persisting after a certain period of time. The IOC is deemed to return to its obligations once the force majeure event disappears. However, not all obligations are suspended during the force majeure event. Payments are still due and the absence of reference to minimum work obligations seem to exclude them from the suspension scope.[382] Moreover, force majeure clauses often require the IOC to mitigate the effect of the event. On the specific requirement of mitigation, rules are to be found in *lex petrolea* again.[383] Although it is admitted that the obligation to mitigate applies to the party invoking the

[377] Smith and others (n 145) 82.
[378] Duval and others (n 108) 326.
[379] *RSM Production Corporation v Central African Republic* (Excerpts of the Award) [2011] ICSID Case No ARB/07/2 (*RSM v CAR*).
[380] Childs (n 65) 248.
[381] Childs (n 65) 248.
[382] Smith and others (n 145) 82.
[383] Childs (n 65) 249.

clause, the arbitral tribunal in *RSM v CAR* held that the other party has an implied obligation to cooperate in the implementation of the necessary measures.[384]

It can be understood from the above that force majeure clauses, although useful as they prevent the imposition of penalties from non-completion of work obligations, do not provide a satisfactory protection of the IOC. Firstly, host Government contracts only propose an extension of the timeframe allocated for the completion of the operations, but still require the payment of any contractually agreed funds. However, in the event of a long-lasting force majeure event, the income of the IOC, if based on production as it is in PSAs, will most definitely be inexistent as production cannot be undertaken. It would therefore seem appropriate to suspend all obligations in the case of such events. Furthermore, the drafting of force majeure clauses is problematic *per se* and the events included in their provisions are either incomplete, excluding or vague. It has been argued that host Government contracts should include compensation clauses in order to better take into account the impact of a boundary dispute, especially to include the loss of jurisdiction on the contract area by the host Government.[385]

3.4.2. The assistance to the state by the IOC

Besides their obligation to mitigate (and sometimes assist the state in) the boundary dispute when recognised as a force majeure event, IOCs have the opportunity to be involved in the dispute resolution process by assisting the states.

The assistance provided by IOCs can be financial, technological or logistical, but has to be limited to a support role as the boundary dispute is primarily between the states.[386] During non-adjudicative stages of dispute resolution (i.e. diplomatic route), the IOC can offer good offices to the states or render available technological data such as satellite and aerial surveys of the disputed area, which may not be accessible to the states due to their cost.[387] Furthermore, IOC may

[384] (*RSM v CAR*) (n 379); Childs (n 65) 248.
[385] Main Garcia (n 363) 58; Smith and others (n 145) 82.
[386] Martin Pratt and Derek Smith, 'How to Deal with Maritime Boundary Uncertainty in Oil and Gas Exploration and Production Areas' AIPN, reproduced in Smith and others (n 145) 83; Main Garcia (n 363) 60
[387] Hoon Lee and Sara McLaughlin Mitchell, 'Foreign Direct Investment and Territorial Disputes' (2012) 56(4) Journal of Conflict Resolution 675 DOI: 10.1177/0022002712438348, 677.

provide financial and economic forecasts to the host Government.[388] These audits may create an incentive for the state to pursue non-adjudicative methods of dispute resolution and reach an agreement with its counterparty. In the event where diplomatic means are unsuccessful and the resort to adjudication is inevitable, the IOC could bring legal assistance to the host Government. This legal assistance could be coupled with a financial assistance through the funding of the proceedings by the IOC. This method, known as third-party funding, has gained much attention in the last few years and is directly linked to the increasing costs of international arbitration.[389] Although third-party funding seems more common in investment arbitration and commercial arbitration, its use should not be limited to these areas, as long as the IOC does not take a major role in the dispute resolution.

3.4.3. The creation of Joint Development Zones

Joint Development Zones are highly encouraged for the exploitation of oil and gas reservoirs in disputed areas. The UNCLOS advises states to enter into provisional agreements regarding the disputed areas, either EEZs or continental shelves, during the adjudicative period.[390] The UNCLOS had furthermore implemented an incentive for states to enter these arrangements as their existence will not be taken into account for the delimitation.[391] JDZs have also been put forward by the ICJ and arbitral tribunals, even before the entry into force of the UNCLOS. The ICJ the *Gulf of Maine* case outlined the importance of collaboration of the USA and Canada in developing jointly the new delimited maritime area, rich in hydrocarbons.[392] Similarly, the arbitral tribunal in *Guyana v Suriname* recalled the importance of JDZs as a cooperative tool for an efficient utilisation of the resources.[393] JDZs can therefore be used as provisional measures, before a final agreement following an adjudicative delimitation, but also as a definitive measure for reservoirs straddling boundaries, delimited or not. Several boundary treaties provide for the creation of JDZs if a straddling reservoir

[388] Pratt and Smith (n 386) reproduced in Smith and others (n 145) 83.
[389] Edouard Bertrand, 'Brave New World of Arbitration: Third-Party Funding' (2011) 29 ASA Bull 607; Eric de Brabandere, Julia Lepeltak, 'Third-Party Funding in International Investment Arbitration' (2012) 27(2) ICSID Review 379.
[390] UNCLOS arts 74.3 and 83.3.
[391] UNCLOS arts 74.3 and 83.3.
[392] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (n 343) paras 239-240.
[393] *Guyana v Suriname* (n 336) 460-463.

is found across the agreed boundary.[394] The plasticity of JDZs stems from its nature of inter-state agreements. States can include all provisions in their agreements, as long as they abide by international law and treaties. It is necessary to note that although the literature on JDZs is largely focused on offshore exploitation, due to the provisions of the UNCLOS, states are not prevented to enter such agreements in land boundary delimitations. As for maritime delimitation, the mere existence of petroleum concessions is not considered by the ICJ or arbitral tribunals when drawing the boundary line.

The multifaceted aspect of JDZs could be a reason for its lack of definition, or rather lack of general definition of the term joint development. The arbitral tribunal in *Guyana v Suriname* defined joint development as 'the cooperation between States with regards to exploration for and exploitation of certain deposits, fields or accumulations of non-living resources which either extend across a boundary or lie in an area of overlapping claims'.[395] However, the more recent literature tends to oppose JDZs and transnational unitisation, the former being conditioned to the existence of a reservoir straddling a disputed boundary or an area where claims overlap.[396] The distinction between joint development and unitisation can also be found in the arbitral award *Eritrea v Yemen* on maritime delimitation.[397] The main difference lies in the agreement itself. Unitisation agreements provide for the development of a petroleum reservoir as a single unit. In order to achieve this aim, a particular vehicle is created by the concerned states and one operator emerges through the establishment of a consortium or JOA. Transnational unitisation agreements are complete and detailed as they set out the technical functioning and operating framework of the common reservoir. On the contrary, JDZs are general contracts concluded by states only, by which they agree to share the resources of the reservoir and to develop them jointly while waiting the resolution of their dispute.[398] JDZs aim to be provisional agreements pending the

[394] See chapter 2, section 2.1.
[395] *Guyana v Suriname* (n 336) para 462, quoting Rainer Lagoni, 'Report on Joint Development of Non-living Resources in the Exclusive Economic Zone' (1988) ILA Report of the Sixty-Third Conference 509, 511-512.
[396] Smith and others (n 145) 170; Main Garcia (n 363) 51; Duval and others (n 108) 208-209; Rothwell and Stephens (n 227) 313; Ibrahim F I Shihata and William T Onorato, 'The Joint Development of International Petroleum Resources in Undefined and Disputed Areas' (1996) 11(2) ICSID Review 299, 300; Becker-Weinberg (n 288) 18-19; Yusuf Mohammad Yusuf, 'Is joint development a panacea for maritime boundary disputes and for the exploitation of offshore transboundary petroleum deposits?' (2009) 4 IELR 130; Taverne (n 126) 343.
[397] *Eritrea v Yemen* (Second Arbitral Award – Maritime Delimitation) [1996] 27 para 86.
[398] Becker-Weinberg (n 288) 18-19.

boundary delimitation. The JDZs emerging from Joint Development Agreements (JDAs) benefit from an autonomous status, as the sovereignty over the specific area results from the states' agreement and not the delimitation.[399] As such, the states will share between them and their contractors the profits and costs of the operations on a pre-determined basis.[400] The first JDZ concluded between Saudi Arabia and Bahrain provided Saudi Arabia had the full control over exploration and exploitation, and the revenues were shared equally between both countries (50/50).[401] The agreement will also provide for the legal and fiscal regime, as well as the geographical delimitation of the JDZ.[402]

Despite these conceptual disagreements, JDZs are an example of states' cooperation in an ambit to mitigate or resolve disputes. They create, as per JOAs, a discussion pool for a technical and practical issue. This role is even more accrued and fundamental as oil and gas deposits are often the reason behind boundary disputes.[403] JDZs may also be seen as dispute facilitators in the sense that the discussion pool formed participate to the peaceful and diplomatic dispute resolution process. Furthermore, the implementation of a JDZs early in the boundary dispute may also facilitate the implementation of the delimitation judgement or award if non-adjudicative methods were unsuccessful. If the boundary is said to cross the reservoir, then future exploration and exploitation is not endangered as the framework is already existing. JDZs in these instances can shift from a provisional to a permanent structure as part of the boundary settlement or evolve into a more defined system such as transboundary unitisation.[404] JDZs participate to the protection of the IOC when a boundary dispute arises, as the contractor will not be forced to stop its operations but will rather have to implement and continue them under the supervision of the neighbouring states or the joint authority created.

Nevertheless, JDZs and cooperation are not a mandatory requirement as a dispute management mechanism in boundary issues. The emphasis of the ICJ,

[399] Duval and others (n 108) 215.
[400] Smith and others (n 145) 171.
[401] Rothwell and Stephens (n 227) 314.
[402] Ana E Bastida and others, 'Cross-Border Unitization and Joint Development Agreements: An International Law Perspective' (2007) 29 Hous J Int'l L 355, 371-72.
[403] Jan Paulsson, 'Boundary Disputes into the Twenty-First Century: Why, How… And Who?' (2001) 95 American Society of International Law) 122, 123.
[404] Duval and others (n 108) 209; Bastida and others (n 402) 371.

arbitral tribunals and the UNCLOS on their conclusion relies on the general rule that states must cooperate and solve their dispute by peaceful means.

3.4.4. Prospective problems in delimited and/or disputed areas and in Joint Development Zones

The creation of a JDZs may be a lengthy process as it requires cooperation from both states. During this period, disputing states can continue their exploration and exploitation activities, but offshore operations must be conducted without 'jeopardiz[ing] or hamper[ing] the reaching of the final agreement', i.e. the delimitation agreement.[405] This obligation has been interpreted by the ICJ and arbitral tribunals, firstly in the *Aegean Sea* case.[406] In this case, Turkey started seismic exploration operations in the disputed area.[407] The Court considered that these operations do not fall under the provisions of the UNCLOS as they are not threatening the integrity of the soil, subsoil or natural resources therein.[408] The distinction therefore relies on the alteration of the marine environment. Activities such as seismic surveys are not seen as endangering the resources, and hence can be conducted unilaterally. On the contrary activities relating to the exploration and the exploitation of the petroleum reservoir would fall within the acts jeopardising or hampering a final agreement on the boundary.[409] It must be understood that exploitation operations *per se* cannot lawfully be undertaken in disputed areas outside of a JDZ, but apart from compensation after the delimitation, no legal remedies are available.[410] However, political means are. In May 2014, China started drilling operations in a maritime area disputed with Vietnam. As part of exploratory operations, drilling is likely to alter the resources and therefore should not be carried out unilaterally. This was the position of Vietnam, but China continued its operations. This conduct had for consequence the burst of large riots in Vietnam, as well as the involvement of foreign states. These events led to the withdrawal of the rig by China in July 2014, and a subsequent offer to conduct joint drilling with the neighbouring states.[411] The lack

[405] UNCLOS arts 74.3 and 83.3
[406] *Aegean Sea Continental Shelf (Greece v Turkey)* (Interim Protection Order) [1976] ICJ Rep 3.
[407] *Aegean Sea Continental Shelf* (n 406) para 26.
[408] *Aegean Sea Continental Shelf* (n 406) para 30.
[409] *Guyana v Suriname* (n 336) paras 466-467
[410] Marianthi Pappa, 'Private Oil Companies Operating in Contested Waters and International Law of the Sea: A Peculiar Relationship' (2017) OGEL 1.
[411] Constantinos Yiallourides, 'Oil and Gas Development in Disputed Waters Under UNCLOS' (2016) 5(1) UCL Journal of Law and Jurisprudence 59, 82-83.

of legal remedies for operations altering the resources undertaken in disputed areas threatens the peaceful settlement of disputes. Although the protests were limited to Vietnam in this instance, non-cooperation in petroleum operations may lead to more serious consequences. As the resort to the ICJ or arbitral tribunals in these cases is a too long process, it could be advised to go further than the distinction operated in the *Aegean Sea* and *Guyana v Suriname* cases, and provide for the interdiction to undertake certain operations in order to prevent dangerous outburst of violence in disputed areas.

Another issue arising in disputed waters is the use of military force to dissuade the disputing state to undertake offshore activities, when these are not of a nature susceptible to alter the resources. This problem was raised in the case of *Philippines v China*.[412] In this case, China contended having historic rights over the Nansha Islands and the adjacent waters of these islands, which include a petroleum field, Reed Bank.[413] The Philippines who also claimed sovereignty on this area, awarded several petroleum concessions to IOCs.[414] In 2011, China sent two marine surveillance vessels to follow a seismic survey vessel operating in the disputed area. The Chinese vessels ordered the seismic vessel to stop all activities and leave the area, instructions the seismic vessel complied with.[415] The tribunal found that the disputed area belonged to the Philippines.[416] With regards to the military incursion of Chinese vessels and the work interruption resulting thereof, the tribunal considered that these actions amounted to a breach of the sovereign rights of the Philippines over its continental shelf under Article 77 of the UNCLOS. The arbitral took this stand because the parties had agreed to resolve their dispute by negotiations and peaceful means, and the military involvement of China went against this agreement.[417]

Regarding JDZs, the main problem that may arise would be a disagreement between the states, precluding the JDA to be pursued. In such instance, the IOCs would have to cease their operations. In order for them to be protected against any payment or lateness due to the dispute over the JDZ or the exploitation of

[412] *The South China Sea Arbitration (Republic of Philippines v People's Republic of China)* (Award) [2016] PCA Case No 2013-19 <https://pcacases.com/web/sendAttach/2086>
[413] *The South China Sea Arbitration* (n 412) paras 652 and ff.
[414] *The South China Sea Arbitration* (n 412) paras 652 and ff.
[415] *The South China Sea Arbitration* (n 412) para 656.
[416] *The South China Sea Arbitration* (n 412) para 695.
[417] *The South China Sea Arbitration* (n 412) para 708.

the resources, the Host Government contracts should include a force majeure clause or a compensation clause. Force majeure clause may however be considered ineffective with regards to the unforeseeable character of the dispute. Indeed, JDZs are established within a disputed area, in the context of a boundary dispute. Another dispute on the JDZ itself may not be seen as absolutely unforeseeable.

Finally, disputes may arise in the near future in areas that are now delimited. Climate change and global warming have induced an increase of the sea levels measured 3.2 millimetres (mm) per year since 1993, and the projections for the overall rise of sea levels portray an increase of 0.18 to 0.59 centimetres (cm) in 2100.[418] This increase will affect all countries and will more than likely reshape both maritime and land boundaries. Indeed, baselines used to delimitate the territorial seas, the EEZs and the continental shelves could be pushed landwards, and the outward delimitation of these areas will have to be re-evaluated.[419] As such, petroleum operations taking place within a coastal state's continental shelf may well find themselves outside of this area in the high seas where coastal states do not have sovereign rights over the resources.[420] In addition, islands which give entitlement to a territorial sea to the coastal state may be flooded or rendered inhabitable. As a consequence, the rights vested in the islands will disappear and with them the exclusive maritime areas they created.[421] The uncertainty of these boundaries which have sometimes only been delimited after long negotiations or adjudicative methods will certainly trigger conflicts and enact new boundary disputes.[422] As such, a swift resort and implementation of efficient ADRMs, such as JDZs and force majeure clauses, could help mitigate the risks, if not preventing them.

[418] National Aeronautics and Space Administration (NASA) <https://climate.nasa.gov/vital-signs/sea-level/> Last accessed on 18/12/2018; Jonathan Lusthaus, 'Shifting Sands: Sea Level Rise, Maritime Boundaries and Inter-state Conflict' (2010) 30(2) Politics 113, 114.
[419] Lusthaus (n 418) 114.
[420] Charles Di Leva, Sachiko Morita, 'Maritime Rights of Coastal States and Climate Change: Should States Adapt to Submerged Boundaries?' (2008) 5 Law and Development Working Paper Series, 20 <http://documents.worldbank.org/curated/en/461271468138869143/Maritime-rights-of-coastal-states-and-climate-change-should-states-adapt-to-submerged-boundaries>
[421] Lusthaus (n 418) 114.
[422] Lusthaus (n 418) 115.

4. CHAPTER 4. THE QUEST FOR STABILITY: STABILISATION CLAUSES AS AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM

4.1. Introduction

Oil and gas operations, either exploration, production, or both, require an agreement between the investor and the State for the exploitation of the subsoil. This agreement often takes the form of a concession, a licence or a production sharing contract, among others. The parties' relationship is hence protected under the contract. However, States benefit from another protection emanating from the United Nations. According to the Treaty on Permanent Sovereignty, States have a permanent sovereignty over their territory and their resources.[423] Consequently, the Treaty recognises the right for States to nationalise and expropriate investments. This right is however limited and expropriations must meet criteria for them not to be unlawful. These conditions are found in most Bilateral Investment Treaties (BITs) and Multilateral Investment Treaties (MITs) and aim to provide an equal protection of both States and investors in the exploitation of natural resources.

Despite these guarantees, investors wish to maintain and uphold legal stability for their investment. As seen in chapter 1, the main source of conflicts and disputes in oil and gas investment contracts is changes in the legal framework. The insertion of stabilisation clauses in investment contracts, in addition to other ADRM clauses, is the preferred mechanism to ensure the stability of the law. Stabilisation clauses are contractual clauses in which the State binds itself to maintain the legal framework of the contract, either by not changing the law or negotiating the changes with the investor. As such, stabilisation clauses are a risk-management tool in the eyes of investors.

These are hoped to intervene as a deterrent to changes in the legislation of the host state. Moreover, and in correlation with BIT protection, they allow to overcome a lack in jurisdiction clauses in the investment contract. This chapter aims to demonstrate that despite the mythical aspect of stability, stabilisation clauses do limit the intervention of the state and its possible nefarious actions

[423] United Nations General Assembly, Resolution 1803 (XVII) Permanent Sovereignty over Natural Resources (14 December 1962)

towards the investor. Furthermore, the scarcity of arbitral cases involving stabilisation clauses does act in favour of the view that these clauses act as a deterrent to initiate disputes. As such, these clauses do more than stabilising the legal framework of the contract: they work as ADR clauses.

This chapter also aims to demonstrate the two-pronged role of stabilisation clauses as a risk-management tool and as an Alternative Dispute Resolution Mechanism, emerging from the *lex petrolea*. To this end, the study will focus on the interaction between stabilisation clauses and BIT/contractual standards of protection. The chapter will analyse arbitral cases and their rulings regarding the recognition and the compensation offered to investors when there is a breach of a stabilisation clause. This analysis will determine general principles and rules of compensation and ascertain the effectiveness of stabilisation clauses. The chapter, in giving a streamline study of stabilisation clauses through case law and arbitral practice, will demonstrate the role of *lex petrolea* in elevating contractual clauses to Unconventional ADRM level, adapted to oil and gas operations.

4.2. Stabilisation clauses: definitions and distinctions

Stabilisation clauses are risk-management mechanisms as they provide some guarantees to the investor regarding the stability of the legal framework surrounding the investment contract.[424] Widely discussed in the 1970's and 1980's following a wave of nationalisations, they are of no less importance today.[425] Stabilisation clauses are found in all types of oil and gas investment contracts, either Production Sharing Contracts, Licences, Concessions and concern matters as diverse as general stabilisation, tax stabilisation and economic stabilisation. Different types of clauses therefore fall within the appellation stabilisation clause. As such must be distinguished freezing clauses and adaptation/renegotiation clauses, also sometimes referred to as classic and modern stabilisation clauses.[426] Freezing clauses limit the state's ability to amend or modify the law applicable to the investment contract, at any level. The law of

[424] J Nna Emeka, 'Anchoring Stabilizing Clauses in International Petroleum Contracts' (2008) 42 Int'l Law 1317, 1317

[425] Thomas W Waelde, George Ndi, 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation' (1995) 31 Tex Int'l L J 215, 216

[426] A F M Maniruzzaman, 'International Energy Contracts and Cross-Border Pipeline Projects: Stabilization, Renegotiation and Economic Balancing in Changed Circumstances - Some Recent Trends' (2006) 4(4) OGEL, 1

the contract is hence frozen from the time of its conclusion.[427] On the other hand, adaptation/renegotiation clauses render possible amendments to the law applicable to the contract, if the parties agree to it or if certain circumstances arise. Modifications of the legal framework are not excluded but must be mutually agreed upon. An interesting point to be noted with regards to adaptation/renegotiation clauses is that they involve an Alternative Dispute Resolution Mechanism. Indeed, they impose negotiation between the parties before amending the law and can be seen as an ADRM. Their role is therefore dual. They are a risk-management tool oriented towards the stabilisation of the legal framework of the contract. They are also an ADRM, whose aim is to limit and reduce disputes through non-adversarial means.

The inclusion of the latter in the category of stabilisation clauses has been debated in the past, but the leading opinion is that all must be considered stabilisation clauses.[428] This position is also the one held in this chapter. Indeed, in the event where the renegotiation or adaptation clause is unsuccessful, i.e. the parties do not agree on a revision of the legal framework, the consequences and effects are the same as the ones emerging from a breach of a freezing clause. If the state amends the law applicable to the contract in spite of an agreement, the adaptation/renegotiation clause will be breached and the parties will seek damages and compensation before the chosen dispute resolution forum. The effects being the same, both types of stabilisation clauses will be studied together. Similarly, tax stabilisation clauses, economic stabilisation clauses and general stabilisation clauses will be treated under the general appellation of stabilisation clauses. They each compose a sub-part of stabilisation clauses but the general rules developed for stabilisation clauses are applicable to them.

[427] Stephan Kinsella, Noah D Rubins, *International Investment, Political Risk, and Dispute Resolution: A Practitioner's Guide* (Oceana Publications, 2nd ed 2008), 50

[428] Wolfgang Peter, 'Stabilization Clauses in State Contracts' (1998) 8 Int'l Bus L J 875, 875; Lorenzo Cotula, 'Reconciling regulatory stability and evolution of environ- mental standards in investment contracts: Towards a rethink of stabilization clauses' (2008) 1 JWELB 158; AFM Maniruzzaman, 'The pursuit of stability in international energy investment contracts: A critical appraisal of the emerging trends' (2008) 1(2) Journal of World Energy Law & Business 121; Frank Alexander, 'Comment on articles on stabilization by Piero Bernardini, Lorenzo Cotula and AFM Maniruzzaman' (2009) 2(3) Journal of World Energy Law & Business 243.

4.3. Stabilisation clauses and expropriation

4.3.1. The impact of stabilisation clauses on the legality of expropriations

The right of states to expropriate is unanimously accepted in international law. As such, Bilateral Investment Treaties (BITs) and Multilateral Investment Treaties (MITs) only provide for criteria to be respected when states expropriate.[429] There are three conditions to meet to guarantee the lawfulness of the expropriation. The first is that the expropriation must serve a public purpose. The second is that the measure must not be either arbitrary not discriminatory. The third imposes prompt, adequate and appropriate compensation paid to the investor expropriated.[430] Despite these criteria, the question arose as to whether the insertion of a freezing or intangibility clause in the investment contract would render expropriation unlawful. Some authors have considered that the existence of a stabilisation clause imposes on the state the obligation to obtain consent of the investor before expropriating.[431] However this position has been criticised for conflicting with the absolute nature of the state's permanent sovereignty over its territory, wealth and natural resources.[432] The extent and the effectiveness of stabilisation clauses with regards to expropriation were left to arbitral tribunals to decide. The extent of protection given by stabilisation clauses was discussed in three different arbitrations involving the Libyan state.[433] However, no consensus arose from these cases. In all three cases, the dispute concerned the nationalisation of an area exploited by an investor under a concession agreement, by a change of the Libyan legislation.[434] The concessions provided an arbitration clause (Clause 28) and a clause providing that the legal regime of

[429] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Second Edition, Oxford University Press 2012), 98.
[430] Dolzer and Schreuer (n 429) 99-100.
[431] Prosper Weil, 'Problemes Relatifs aux Contrats Passes entre un Etat et un Particulier' (1969) 128 RADI 101, cited in Eduardo Jimenez de Arechaga, 'State Responsibility for the Nationalization of Foreign Owned Property' (1978) 11(2) New York University Journal of International Law and Politics 179, 191.
[432] Jimenez de Arechaga (n 431) 192.
[433] *BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic* (Award) [1973; 1974] 53 ILR 297 (*BP v Libya*); *Award on the Merits in Dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic* [1977] (1978) 17(1) ILM 1 (*Texaco v Libya*); *Award in Dispute between Libyan American Oil Company (LIAMCO) and the Government of the Libyan Arab Republic Relating to Petroleum Concessions* [1977] (1981) 20 ILM 1 (*LIAMCO v Libya*)
[434] Margarita T B Coale, 'Stabilization Clauses in International Petroleum Transactions' (2002) 30(2) Denv J Int'l L & Pol'y 217, 230

the concession and of the rights attached thereto shall remain unchanged during the fifty years of the concession (Clause 16).[435] The arbitration clause also contained a choice of law clause, which established as the law applicable to the contract Libyan law when in accordance with principles of international law, and in case of discrepancies and lacking, general principles of law.[436] In the *BP v Libya award*, the Tribunal considered that the nationalisation constituted a breach of contract.[437] The reasoning is two-pronged. The Tribunal firstly asserted, although without reference to the stabilisation clause, that the nationalisation amounted in the complete repudiation of the agreement.[438] Secondly, it held that the nationalisation violated public international law because the expropriation was arbitrary and discriminatory, relying on extraneous political reasons and was not monetarily compensated after two years.[439] It can be understood that, according to the Tribunal, the Libyan Government had contractually limited its right to expropriate without a public interest purpose.[440]

In the case of *Texaco Overseas and California Asiatic Oil Company v Libya*, the sole arbitrator reached a different solution.[441] Although the award recognised the right for a State to nationalise,[442] it also asserted that this right can be limited when the contract concluded is internationalised, either by virtue of a stabilisation clause or if placed under the jurisdiction of international law.[443] The Tribunal decided that the right to nationalise cannot overcome the contractual undertakings of a state in an internationalised contract containing a stabilisation clause.[444] According to this position, the insertion of a stabilisation clause in an investment contract would preclude the state to nationalise and expropriate the investor. Consequently, the existence of a stabilisation clause would automatically result in the unlawfulness of any nationalisation measures.

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[435] *BP v Libya* (n 433) 298-299. Clause 16 on the legal stability reads as follow: "the contractual rights expressly created by this concession shall not be altered except by mutual consent of the parties."
[436] *BP v Libya* (n 433) 298 and 327.
[437] *BP v Libya* (n 433) 297.
[438] Coale (n 434) 232.
[439] *BP v Libya* (n 433) 329.
[440] Coale (n 434) 232, citing Robin C A White, 'Expropriation of the Libyan Oil Concessions – Two Conflicting International Arbitrations' (1981) 30 Int'l & Comp L Q 1.
[441] *Texaco v Libya* (n 433).
[442] *Texaco v Libya* (n 433) para 59.
[443] *Texaco v Libya* (n 433) para 62.
[444] *Texaco v Libya* (n 433) para 73.

The last case involving Libya was against LIAMCO (Libyan American Oil Company).[445] Contrary to *Texaco v Libya*, the Tribunal found that nationalisation of a contract before its term is not unlawful provided the measure is not discriminatory, nor in breach of a treaty and that compensation is paid.[446] In this particular case, the sole arbitrator did not consider the nationalisation discriminatory. However, because Libya failed to give compensation, LIAMCO was entitled to claim compensation and damages.

Instead of providing a general rule of liability and compensation, the Libyan arbitrations rendered the consequences of a breach of a stabilisation clause more uncertain. All cases faced the equivalent nationalisation laws, but their interpretation was different. In *LIAMCO v Libya*, the nationalisation was not found discriminatory, as opposed to *BP v Libya*.[447] On the other hand, *Texaco v Libya* claimed that nationalisations are de facto unlawful when the contract includes a stabilisation clause. The latter position has been praised for balancing the interests of both the state and the investor, and for considering equally the doctrines of state sovereignty and *pacta sunt servanda*.[448] Due to the differences in the interpretation of stabilisation clauses, the question of compensation in case of their breach was not settled. In BP v Libya, the sole arbitrator found impossible to grant neither specific performance nor *restitutio in integrum*, and decided that the claimant could only be entitled to damages.[449] The rationale behind this decision is that the contract cannot be considered as still existing after a nationalisation. Therefore the investor should not gain from the prospective effects of the contract as if it had lasted up to its term.[450] The tribunal considered that BP could be granted damages for the wrongful act of the state, and compensation for the nationalisation.[451] However, the nature and the extent of damages was to be determined in following proceedings.[452]

[445] *LIAMCO v Libya* (n 433).
[446] *LIAMCO v Libya* (n 433) 73 and 85.
[447] Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law* (Oxford International Arbitration Series 2nd edition, Oxford University Press 2017), 56.
[448] Robert B von Mehren and P Nicholas Kourides, 'International Arbitrations between States and Foreign Private Parties: The Libyan Nationalization Cases' (1981) 75 Am J Int'l L 476, 551-552.
[449] *BP v Libya* (n 433) 354.
[450] *BP v Libya* (n 433) 353-354.
[451] *BP v Libya* (n 433) 355.
[452] *BP v Libya* (n 433) 355.

In *Texaco v Libya*, the tribunal granted *restitutio in integrum* to the investor. The sole arbitrator held that under Libyan law, *restitutio in integrum* was the appropriate remedy when the other party breaches its obligations.[453] Furthermore, the tribunal relied on the *Chorzow Factory case*[454] which recognised the legality and possibility of *restitutio in integrum* in international law in the event of an illegal act.[455]

Finally in *LIAMCO v Libya*, the arbitral tribunal adopted a view similar to the one reached in *BP v Libya*. The arbitrator refused to grant *restitutio in integrum* to the investor, on the basis that the principle is not commonly accepted in international law and the enforcement of the remedy is close to impossible.[456] The arbitral tribunal went on to accept that the investor was entitled to compensation for the nationalisation, and indemnification for premature termination of the contract. Regarding the calculation of the indemnification, the tribunal used two principles of compensation.[457] The sole arbitrator relied on the principle of "equitable compensation" to assess the damage, with the principle of "prior, adequate and effective compensation" as the highest limit. Interestingly, the arbitral tribunal granted damages covering both the *damnum emergens* and the loss of profits (*lucrum cessans*) arising out of the termination of the concession contract, and these damages were calculated using the aforementioned compensation principles.

Following the Libyan cases, the extent of protection offered by a stabilisation clause was not decided, and nor were compensation and damages. However, the lack of consensus did not preclude parties to oil and gas investment contracts – and more generally, investment contracts – to continue using such clauses.

Their legal effect was discussed in several arbitral awards, which will be studied here in order to determine a general acceptance and pattern susceptible to be coherent enough to become an element of *lex petrolea*. In this instance, the appreciation of stabilisation clauses may become a general rule of international oil and gas law and therefore applicable as a principle or as a guideline by arbitral

[453] *Texaco v Libya* (n 433) para 92.
[454] *Case concerning the Factory at Chorzów* (Germany v Poland) [1928] PCIJ Rep Series A No 17, 47
[455] *Texaco v Libya* (n 433) para 97(a).
[456] *LIAMCO v Libya* (n 433) 85.
[457] *LIAMCO v Libya* (n 433) 86.

tribunals. This determination would hence provide certainty to the parties to an international investment contract which includes a stabilisation clause.

The case of *AGIP v Congo*[458] in 1979 departed from the interpretation of stabilisation clauses given in *Texaco v Libya*. In this case, Congo proceeded to general nationalisations of the oil products distribution sector. However, AGIP was not concerned by such measures as it had reached an agreement with the state, who only became a 50% shareholder. The agreement also included stabilisation clauses, by which the state undertook to 'prevent the application to the Company of future amendments of company law affecting the structure and the composition of Company bodies' and guaranteed the legal status of AGIP as a limited liability corporation.[459] However, AGIP was later nationalised without compensation.[460] In its decision, the Tribunal considered that the act of nationalisation of Congo represented, under Congolese law and the principles of international law, a violation of the contractual undertakings of the state to not change the status of AGIP.[461] However, contrary to the decision in *Texaco v Libya*, did not find that the insertion of stabilisation clauses rendered nationalisation illegal. Here, the Tribunal only decided that the nationalisation was in breach with the contract passed with the investor, and as such, compensation and damages for the loss suffered were due.[462]

AGIP v Congo gave an appreciation of stabilisation clauses closer to *BP v Libya* and *LIAMCO v Libya* but did not provide for a clear explanation of the legal value of such clauses. These necessary developments were given in the landmark case of *Kuwait v Aminoil*.[463] This case has already been discussed in Chapter 1 with regards to the development of *lex petrolea*. In this chapter, the focus will be on the extent of protection of stabilisation clauses. In 1948, Aminoil, an American company, was granted a Concession by Kuwait to explore and exploit hydrocarbons for 60 years in a Neutral Zone under the sovereignty of both Kuwait and Saudi Arabia (a Joint Development Zone).[464] The Concession Agreement included, among others, a termination clause and a stabilisation clause. The

[458] *AGIP Company v. Popular Republic of Congo* [1979] (1982) 21(4) ILM 726 (*AGIP v Congo*)
[459] *AGIP v Congo* (n 458) 727.
[460] *AGIP v Congo* (n 458) 729.
[461] *AGIP v Congo* (n 458) paras 79 and 88.
[462] *AGIP v Congo* (n 458) para 88.
[463] *Kuwait v Aminoil* (n 47).
[464] *Kuwait v Aminoil* (n 47) 989-990.

stabilisation clause (Article 17) provided that the Concession could only be annulled under the provisions of the termination clause (Article 11). Furthermore, any alteration or change to the Concession Agreement had to be agreed to by both the state and the company.[465] The Agreement was supplemented by another Agreement in 1961, and several other changes of the original Concession contract occurred until 1975. These modifications implemented new tax rates and payments to the state, while enlarging the state's right to termination of the contract. However, the stabilisation clause was not affected. After financial defaults of the company under these new provisions and negotiations between the parties, Kuwait terminated the Concession contract of Aminoil through the Decree Law No 124.[466] The Tribunal firstly considered that the termination of the contract was analogous to a nationalisation.[467] With regards to this characterisation, it decided to assess the protection offered by the unchanged stabilisation clause. The Tribunal found that stabilisation clauses could prevent nationalisations, but only if this possibility was provided for in the clause, and for a limited period. In this case, the clause being written in general terms and applicable to the 60 years of the Concession contract, Kuwait still had the right to nationalise.[468] However, the insertion of a stabilisation clause reinforces the necessary non-confiscatory character of the nationalisation and therefore the obligation to compensate the investor.[469]

The lawfulness of nationalisation measures despite the insertion of a stabilisation clause has consequences on the amount of compensation owed to the investor. This particular point will be studied in section 3.3 once the position of arbitral tribunal on stabilisation clauses' effects has been ascertained.

Kuwait v Aminoil is seen as a landmark case due to its echo in further arbitrations involving expropriation and stabilisation clauses.

The case of *Amoco v Iran* is one of these arbitrations. [470] In this case, the claimant, Amoco, entered the Khemco Agreement with Iran on 12 July 1966,

[465] *Kuwait v Aminoil* (n 47) 990-991.
[466] *Kuwait v Aminoil* (n 47) 991-2, 996-8.
[467] *Kuwait v Aminoil* (n 47) para 81(4).
[468] *Kuwait v Aminoil* (n 47) para 95.
[469] *Kuwait v Aminoil* (n 47) para 96.
[470] *Amoco International Finance Corporation v Islamic Republic of Iran* [1987] (1988) 27(5) ILM 1314 (*Amoco v Iran*).

pursuant to which the parties decided to create the joint venture company Khemco, for building, operating a plant for production and marketing of sulfur, natural gas and liquified petroleum. The claim opposing the Republic of Iran and the American oil company concerned an expropriation dispute before the US-Iran Tribunal. The tribunal had to answer whether a breach of contractual clauses could make the expropriation unlawful. The tribunal had already considered that the clauses breached by Iran were not stabilisation clauses.[471] Nevertheless, the tribunal developed its reasoning with regards to these clauses. It acknowledged the sovereign right of states to nationalise, which can hardly be restricted without a specifically worded stabilisation clause, expressly forbidding nationalisations and for a limited period of time.[472] The Tribunal strictly applied the position held in *Kuwait v Aminoil*.[473] With regards to the facts of *Amoco v Iran*, the expropriation was found to be lawful as the clauses were not stabilisation clauses, and even if they were, they did not expressly prohibit nationalisations for a limited period of time.[474]

The fact that the *Kuwait v Aminoil* ruling on stabilisation clauses was expressly relied upon by the tribunal in *Amoco v Iran* demonstrates its importance. Arbitral tribunals are not bound by precedent. They can decide to depart from previous decisions, as evidenced in the Libyan cases. However, the strict application of a rule given in an award advocates in favour of its pre-eminence.

Due to the limited number of arbitrations involving stabilisation clauses and the issue of expropriation, this interpretation of stabilisation clauses was not widely used. Nonetheless, the *Kuwait v Aminoil* case seems to have clearly defined the requirements for lawful expropriations. In the case of *LETCO v Liberia*[475] of 1986, the tribunal had to assess whether the termination by Liberia of the contract granted to LETCO was a nationalisation and, if so, its lawfulness. The tribunal recalled the necessary justifications for a nationalisation under international law, using *Kuwait v Aminoil* as a "generally accepted statement of the international law governing acts of nationalisation".[476] There was not a stabilisation clause in

[471] *Amoco v Iran* (n 470) para 173.
[472] *Amoco v Iran* (n 470) para 179.
[473] *Amoco v Iran* (n 470) para 179.
[474] *Amoco v Iran* (n 470) para 180.
[475] *Liberian Easter Timber Corporation (LETCO) v The Government of the Republic of Liberia* [1986] (1987) 26(3) ILM 647 (*LETCO v Liberia*).
[476] *LETCO v Liberia* (n 475) 665.

the concession contract at stake in *LETCO v Liberia*, but the use of *Kuwait v Aminoil* as a reference shows that its implications go beyond the sole issue of the legal extent of stabilisation clauses. The rules governing nationalisations and their lawfulness have emerged from this case. *Kuwait v Aminoil* has thus created an internationally accepted rule on the lawfulness of nationalisations and expropriations, which does not take into account the existence of stabilisation clauses, unless they clearly state the interdiction to nationalise for a limited period of time. The requirements for a lawful expropriation are therefore the ones stated in BITs or MITs and recognised as principles of international law: the expropriation has to be done for public interest; non-discriminatory; and give right to fair, just, equitable compensation. Compensation is especially outlined in *Kuwait v Aminoil*, with regards to stabilisation clauses. The tribunal, after recognising the inefficacity of general stabilisation clauses to prevent expropriations, gives them a purpose for compensation. According to the arbitrators, the insertion of stabilisation clauses supports and reinforces the need for compensation.[477] The question is therefore whether the existence of a stabilisation clause in an investment contract entails a higher compensation in case of an expropriation.

4.3.2. The standard of compensation

The compensations observed in the Libyan cases do not provide an accurate depiction of the standard that can be claim by the expropriated investor. This is due to the fact that none of these cases had the same appreciation of the impact of stabilisation clauses on expropriation measures, and therefore the compensation granted to the investor was necessarily different. The previous section has demonstrated through the study of arbitral awards that the existence of a stabilisation clause in an investment contract does not render an expropriation unlawful. The lawfulness therefore relies on the criteria of international law, being non-discriminatory measure, for public interest purposes and giving rise to compensation. Because the assertion and recognition of these criteria stem from *Kuwait v Aminoil*, the study of the standard of compensation in arbitral awards will start form this case.

[477] *Kuwait v Aminoil* (n 47) para 96.

Kuwait v Aminoil reserved a consequent part of its award to the question of the compensation due to Aminoil following the termination/nationalisation. Most of the developments concerned the method of valuation to be retained, due to the numerous changes and evolutions in the contractual relationship of the parties and the implementation of the Abu Dhabi formula. However, the arbitrators made some reference to the standard of compensation owed to investors in case of lawful nationalisation and expropriation. Following the formulation of Resolution no 1803 (XVII) of the United Nations General Assembly,[478] the tribunal considered that Aminoil was due 'appropriate compensation', a principle recognised by both international law and the legal regime of Kuwait.[479] The tribunal also outlined the difficulty to interpret the wording 'appropriate'. In its view, the appropriateness of compensation must be assessed through an enquiry of all relevant circumstances surrounding the dispute.[480] In light of this position, the arbitrators found that the stabilisation clause created legitimate expectations for the company[481] and took into account these expectations when deciding the amount of compensation.[482] Unfortunately, the arbitrators did not explain their understanding of legitimate expectations nor the amount of compensation attached to their breach. The discretionary inclusion of the breach of the stabilisation clause in the calculation (and hence the breach of the legitimate expectations) seems to stem from the willingness of the arbitrators to not deprive stabilisation clauses from any effect.[483]

The consequence of stabilisation clauses on the quantum of compensation was further developed and ascertained in *Amoco v Iran*.[484] Although the tribunal did not retain the qualification of stabilisation clauses, this case unfolds the rationale behind the payment of compensation in case of nationalisations and expropriations. The arbitrators distinguished between lawful and unlawful expropriation, following again the position in *Kuwait v Aminoil*.[485] The tribunal

[478] UNGA Res 1803 (n 423).
[479] *Kuwait v Aminoil* (n 47) para 143.
[480] *Kuwait v Aminoil* (n 47) para 144.
[481] *Kuwait v Aminoil* (n 47) para 159.
[482] *Kuwait v Aminoil* (n 47) para 178(3).
[483] *Kuwait v Aminoil* (n 47) para 159: "whereas the contract of concession did not forbid nationalisation, the stabilisation clauses inserted in it were nevertheless not devoid of all consequence, for they prohibited any measures that would have had a confiscatory character".
[484] *Amoco v Iran* (n 470).
[485] *Amoco v Iran* (n 470) para 192, citing *Kuwait v Aminoil* (n 47) para 138.

relied on the *Chorzów Factory* case[486] of 1928 to explain the amount of compensation due in case of expropriation.[487]

The *Chorzów Factory* case was decided by the Permanent Court of International Justice in 1928. On March 1915, the Chancellor of the German Empire, on behalf of the German Reich, and a German company, Bayerische Stickstoffwerke AG, concluded a contract by which the company undertook to build and operate a nitrate factory in Chorzów (Poland, at the time Upper Silesia). The building site of the factory was bought on behalf of the Reich. In 1919, a new company, Oberschlesische Stickstoffwerke AG was established and was transferred all assets of the German Reich in relation to the Chorzów factory. The newly established company was registered in 1920 as the owner of the site.[488] On 1st July 1922, after the independence of Poland following the Versailles Treaty of 1919, the Polish Court of Huta Krolewska declared the landowner registration null and void, and ordered the pre-existing position to be restored.[489] The Polish Court also decided that the property rights of the land should be registered in the name of the Polish Treasury. Then, on 3rd July 1922, the factory was seized by Polish officials, including all assets attached therein.[490] The Court held, facing the issue of an expropriation of an investor by Poland, that *restitutio in integrum*, meaning a full compensation of all the damages suffered by the entity expropriated, was only due for unlawful expropriations.[491] Inversely, lawful compensation has to be compensated using the principles of "fair compensation" or "the just price of what was expropriated".[492]

This view was the one of the tribunal in *Amoco v Iran*.[493] But then, while assessing the appropriate calculation method for the compensation (Discounted Cash Flow or net book value), the arbitrators considered the question of legitimate expectations.[494] The tribunal refused the payment of lost profits created after the expropriation as legitimate expectations, as it was lawful according to principles

[486] *Case concerning the Factory at Chorzów* [1928] (n 454).
[487] *Amoco v Iran* (n 470) para 193.
[488] *Case concerning the Factory at Chorzów* (Germany v Poland) (Claim for Indemnity) (Jurisdiction) [1927] PCIJ Rep Series A No 9, 9.
[489] *Case concerning the Factory at Chorzów* [1927] (n 488) 10.
[490] *Case concerning the Factory at Chorzów* [1927] (n 488) 10.
[491] *Case concerning the Factory at Chorzów* [1928] (n 454) 47.
[492] *Case concerning the Factory at Chorzów* [1928] (n 454) 46.
[493] *Amoco v Iran* (n 470) para 253.
[494] *Amoco v Iran* (n 470) paras 250 and 254.

of international law.[495] However, it embodied and upheld the ruling in *Kuwait v Aminoil* by recognising the importance of legitimate expectations in deciding the amount of compensation. The arbitrators recalled that the legitimate expectations of the parties in *Kuwait v Aminoil* were based on their contractual undertakings, i.e. the stabilisation clause. But despite the absence of such clause in this case, they agreed to interpret the legitimate expectations of the parties from "*the history of the concern and from its various components, as well as from the terms of the Khemco Agreement*".[496] The tribunal, in light of the lack of materials provided by the parties, deferred the study of these elements and with it the calculation of the compensation to a separate award.[497]

Amoco v Iran is crucial as it generally recognised the existence of legitimate expectations, even without a stabilisation clause, and include them in the amount of compensation. Hence as stabilisation clauses create *de facto* legitimate expectations, they give rise to a higher amount of compensation.

4.3.3. Stabilisation clauses and indirect expropriation

Indirect expropriation can be defined as measures which do not constitute an expropriation per se, but amount to it in their effects.[498] This concept has gradually replaced direct expropriations in modern disputes.[499] Indirect expropriation can also be referred to as creeping,[500] *de facto*, constructive expropriation.[501] This wording highlights the special character of indirect expropriation: the consequences of the measures equal to an expropriation, not the measures themselves. As such, the measures do not need to be a nationalisation legislation or regulation.[502] Indirect expropriation was recognised from the 1980's in the Restatement (Third) of the Foreign Relations Law of the United States,[503] in which States were liable not only for direct takings of property,

[495] *Amoco v Iran* (n 470) para 253.
[496] *Amoco v Iran* (n 470) para 265.
[497] *Amoco v Iran* (n 470) paras 266 and 1390 para 341(c).
[498] Sebastián López Escarcena, *Indirect expropriation in international law* (Edward Elgar Publishing, 2014), 6
[499] López Escarcena (n 498) 6.
[500] *Generation Ukraine Inc v Ukraine (Award)* [2003] ICSID Case No ARB/00/9, para 20.22
[501] López Escarcena (n 498) 6.
[502] López Escarcena (n 498) 6.
[503] American Law Institute, Restatement of the Law The Foreign Relations Law of the United States (adopted 14 May 1986) (American Law Institute Publishers, 1987)

but also for all actions having the effect of taking the property.[504] It is now often embodied in BITs under the Expropriation headings, which include expropriation "either directly or indirectly, through measures tantamount to expropriation or nationalisation (hereinafter referred to as "expropriation")".[505] Would fall under the protection of tantamount clauses any States' behaviour endangering the legal framework and 'favourable conditions' they agreed to create or maintain.[506]

Three doctrines coexist with regards to the appreciation of which measures are tantamount to expropriation. The first is the "sole effect doctrine" which focuses on the effect of the measure on the position of the investor. The second approach, the 'police powers doctrine', tends to balance both interests of the investor, and the host State, as well as taking into account the effects of the measure.[507] The third doctrine, the "proportionality doctrine" emerging from the European Court of Human Rights (ECHR) case of *James v the United Kingdom*,[508] was at times applied in arbitral cases to determine the expropriatory character of a measure.[509] None of these schools of thought has distinguished itself from the others in investment arbitration, and no clear definition of indirect expropriation can be found.[510] Despite this lack of uniformity on the definition or the appreciation of the concept, the illegality of indirect expropriation can be safely assumed. Indeed, as per numerous BITs or MITs and as previously presented, expropriation is legal when three to four conditions are met: the measure must not be discriminatory, it must be for public purposes, and the State must provide compensation. The fourth condition sometimes added is a requirement that the measures respect the due process of law/are not arbitrary.[511] In the case of indirect expropriations, no

[504] Rudolf Dolzer and Felix Bloch, 'Indirect Expropriation: Conceptual Realignments?' (2003) 5(3) International Law Forum du droit international 155, 157.
[505] Agreement Between the Government of the United Mexican States and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments (2000), Art 5; W Michael Reisman and Robert D Sloane, 'Indirect Expropriation and its Valuation in the BIT Generation' (2004) 1002 Yale Law School Faculty Scholarship 115, 118.
[506] Reisman and Sloane (n 505) 119.
[507] Sean Corrigan, 'Drawing the Line: the Impact of Arbitral Decisions on Indirect Expropriation in Canadian International Investment Agreements' (2018) 18 Asper Review of International Business and Trade Law 1, 11; Dolzer and Bloch (n 504) 158.
[508] *James v United Kingdom* (1986) 8 EHRR 123
[509] Pascale Accaoui Lorfing and Maria Beatriz Burghetto, 'The Evolution and Current Status of the Concept of Indirect Expropriation in Investment Treaties and Arbitration' (2018) 6(2) Indian Journal of Arbitration Law 98, 120-121
[510] Dolzer and Bloch (n 504) 163.
[511] López Escarcena (n 498) 112.

compensation has been envisaged by the State as it did not consider the measures to be expropriatory.[512]

The determination of the expropriatory character of a measure arose in *Burlington v Ecuador*, on taxation matters.[513] In this case, Burlington had acquired interests in Production Sharing Contracts for two blocks in 2001. Between 2001 and 2008, the barrel of crude oil increased from USD 20 to USD 120. The prices then dropped close to their 2001 price in late 2008 and stabilised around USD 70 in 2009. Ecuador invited Burlington to renegotiate the terms of the PSCs from 2005, as to increase the State's participation to 50%. Following Burlington's refusal to amend the terms of the PSCs in view of the oil prices, Ecuador passed a bill (Law 42) which enacted a 50% tax on extraordinary revenues.[514] The oil revenues were extraordinary as soon as they exceeded the statutory reference oil price at the time of the execution of the contract, i.e. the 2001 prices. In 2007, the tax rate of Law 42 was increased to 99%. After negotiations, the operator of the PSCs, Perenco, signed a Transitory Agreement which provided for a higher reference price and a 70% tax rate, and which would transform the PSCs into Service Contracts. However, Burlington refused the shift towards Service Contracts. The arbitral proceedings were commenced in this context, Burlington alleging the unlawfulness of the tax on extraordinary revenues and considering it expropriatory.[515] The tribunal, in its decision on liability, firstly recognised the power of the state to edict tax measures but provided two limits to this power. Taxation cannot be discriminatory nor confiscatory.[516] But beyond this aspect of unlawfulness of taxation, the expropriatory character has to be interpreted with regards to the existence of a substantial deprivation.[517] A substantial deprivation has to be understood as a loss of economic value or viability, which can be expressed as an incapacity to make a commercial return. The deprivation test has to be applied to the investment as a whole, and it has to be demonstrated

[512] Reisman and Sloane (n 505) 124; López Escarcena (n 498) 7.
[513] *Burlington Resources Inc v Republic of Ecuador (Decision on Reconsideration and Award)* [2017] ICSID Case No ARB/08/5 (*Burlington v Ecuador*).
[514] Law No 2006-42 amending the Hydrocarbons Law (Law 42)
[515] *Burlington v Ecuador* (n 513) paras 23-ff.
[516] *Burlington v Ecuador* (n 513) paras 391-393.
[517] *Burlington v Ecuador* (n 513) para 396.

that the measure has deprived the investment to generate profit in the future.[518] In other terms, the deprivation has to be permanent.[519]

The Tribunal did not provide a ruling on indirect expropriation, as it found that one of the state's measure amounted to direct expropriation, rendering the former ground moot.

In the case of *Burlington v Ecuador*,[520] the PSCs also contained a tax absorption clause which in Burlington's opinion would render Law 42 expropriatory.[521] In its analysis, the Tribunal concluded that Ecuador indeed breached the tax absorption clause by enacting Law 42 and by failing to implement a correction factor as per provided in the clause. Although the mere breach of the clause does not amount to an expropriation, it is however a relevant element to be taken into consideration when appreciating the expropriatory character of the measures.[522] The position of the Tribunal in *Burlington v Ecuador* can be seen as a further expression in support of the jurisprudence developed in *Kuwait v Aminoil*. Indeed, the mere breach of a stabilisation clause, in this case a tax absorption clause, is not sufficient to characterise a measure as expropriatory. The ever-lasting reappearance of the *Kuwait v Aminoil* jurisprudence must be taken as evidence of the development of the *lex petrolea*. More than a body of doctrinal opinions and views, *lex petrolea* is a stable set of rules, at least in the matter of stabilisation clauses and breaches of treaties.

4.3.4. Discussion

The scarcity of arbitral awards dealing with expropriations and breach of stabilisation clauses prevents to unconditionally assert the extent of protection and compensation granted in these cases. Some arbitral awards were confronted to similar facts, but the question of the compensation attached to the breach of the stabilisation clause was disregarded. For instance, arbitral tribunals may not have admitted that the taking amounted to an expropriation and therefore the

[518] *Burlington v Ecuador* (n 513) paras 397-399.
[519] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic (Decision on Liability)* (2010) ICSID Case No ARB/03/19 (Vivendi v Argentine), para 134; *Occidental Exploration and Production Company v Republic of Ecuador (Final Award)* [2004] LCIA Case No UN3467 (Occidental v Ecuador), para 89.
[520] *Burlington v Ecuador* (n 513).
[521] *Burlington v Ecuador* (n 513) para 403.
[522] *Burlington v Ecuador* (n 513) para 419.

effect of stabilisation clauses was irrelevant.[523] Another point of contention lies in the fact that some arbitrators do not share the interpretation of *Aminoil* and *Amoco* cases. In its concurring opinion to the *Arco v Iran* partial award, the arbitral judge Brower considered that the breach of the stabilisation clause by Iran should amount to an unlawful expropriation.[524] He departed from the decision of *Kuwait v Aminoil* based on the fact that the concession agreement was concluded for 20 years only (as opposed to 60 years in *Aminoil*) and that the nationalisation was undertaken in 1973, at a time where such measures could have been avoided.[525] Therefore, according to Brower, the conditions set out in *Aminoil* (clear wording and limited period of time) did not in this case exist and the stabilisation clause should be understood as preventing expropriation measures. He relied on the dissenting opinion of Gerald Fitzmaurice,[526] one of the arbitrators in *Kuwait v Aminoil* to support his argument. Fitzmaurice indeed departed from the majority in the *Aminoil* arbitration, and especially on the question of stabilisation clauses. The arbitrator firstly questioned the rationale behind the interpretation of the stabilisation clause.[527] He considered that nationalisations could not be said to be excluded only due to the general wording of the clause.[528] He expressed the view that the mere limitation of the effect of stabilisation clauses to confiscatory measures (i.e. expropriations without compensation) cannot be sustained as the clause expressly mentioned the prohibition of termination before the term of the concession.[529] Moreover, nationalisations are *per se* confiscatory as they result in the taking of an investors' property.[530] Finally, the arbitrator contended that this interpretation of stabilisation clauses went against the will of the parties. By inserting a stabilisation clause in an investment contract, the protected party is not seeking a certain amount of compensation and damages in case of expropriation but intends to be guarded against such measures.[531]

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[523] *Arco Iran, Inc. and Atreco, Inc. v. Government of the Islamic Republic of Iran and National Iranian Oil Company (Partial Award)* [1987] IUSCT Case No 81 (*Arco v Iran*), para 130; *Phillips Petroleum Company Iran v. The Islamic Republic of Iran, the National Iranian Oil Company (Award)* [1989] IUSCT Case No 39 (*Phillips Petroleum v Iran*), para 109.
[524] *Arco v Iran*, Concurring Opinion of Judge Brower, para 16.
[525] *Arco v Iran*, Concurring Opinion of Judge Brower (n 525) para 14.
[526] *Kuwait v American Independent Oil Company (Aminoil)* Separate Opinion of Sir G Fitzmaurice [1982] (1982) 21(5) ILM 976, 1043.
[527] *Kuwait v Aminoil* (Separate Opinion of Sir G Fitzmaurice) (n 526) para 23.
[528] *Kuwait v Aminoil* (Separate Opinion of Sir G Fitzmaurice) (n 526) para 23.
[529] *Kuwait v Aminoil* (Separate Opinion of Sir G Fitzmaurice) (n 526) para 24.
[530] *Kuwait v Aminoil* (Separate Opinion of Sir G Fitzmaurice) (n 526) para 26.
[531] *Kuwait v Aminoil* (Separate Opinion of Sir G Fitzmaurice) (n 526) para 26.

The effect of stabilisation clauses with regards to expropriation is still unsettled today.[532] However, it would seem reasonable to retain the interpretation of the *Kuwait v Aminoil* award for two reasons. Firstly, *Kuwait v Aminoil* can be seen as a seminal case.[533] It was heavily commented and cited in the few arbitral awards tackling the issue of stabilisation clauses with regards to expropriation measures.[534] Secondly, such an interpretation would go in the sense of principles of international law. The numerous Bilateral Investment Treaties and the several Multilateral Treaties recognise the right for a State to take expropriatory measures against the payment of compensation to the investor. The measures have meet three to four conditions (non-discriminatory; for a public purpose; and at times under due process of law). [535] The same right is provided in the United Nations General Assembly (UNGA) Resolution 1803 (XVII), but the only condition is the payment of compensation.[536] If these conditions are met, the taking is lawful. Assimilating a contractual provision to an internationally recognised condition for the lawfulness of expropriation has to be seen as giving an excessive value to this provision.[537] The position of *Kuwait v Aminoil*, limiting the scope of stabilisation clauses, seems therefore the most able to balance both the rights of the state and the investor. The ruling in *Kuwait v Aminoil* is also sound in terms of compensation, as it still recognises an effect to stabilisation clauses. As they created expectations for the investor, and these have been breached, compensation has to reflect such breach.[538] Rejecting a higher amount of compensation in the case of a breach a stabilisation clause would be problematic for two reasons. First, such a decision would contravene to the globally accepted principle of reparation and damages for breach of contract. Secondly, it would entirely deprive stabilisation clauses of legal value, when their wording is not specific enough to prohibit expropriations. There would therefore be no interest for the investor to negotiate the insertion of stabilisation clauses in their contracts. Another reason in favour of a limited acceptation of stabilisation clauses lies in

[532] Marboe (n 447) 73; A F M Maniruzzaman, 'Damages for Breach of Stabilisation Clauses in International Investment Law: Where Do We Stand Today?' (2007) 11 and 12 IELTR 246, 247.
[533] Peter D Cameron, 'Reflections on sovereignty Over Natural Resources and the Enforcement of Stabilization Clauses' (2013) Yearbook on International Investment Law and Policy 311, 333.
[534] *LETCO v Liberia* (n 475) 665; *Amoco v Iran* (n 470) para 192; indirectly cited see *Phillips Petroleum v Iran* (n 523) para 109.
[535] Energy Charter Treaty (1998) art 13.
[536] UNGA Res 1803 (n 423) para 4.
[537] Jimenez de Arechaga (n 431) 191.
[538] Maniruzzaman, 'Damages for Breach of Stabilisation Clauses' (n 532) 247; Jimenez de Arechaga (n 431) 191-192.

the fact that investors are protected under other principles of international law, such as Fair and Equitable Treatment.[539]

4.4. Stabilisation clauses and Fair and Equitable Treatment

4.4.1. The notion of FET

The Fair and Equitable Treatment (hereafter FET) is an international law principle and standard embodied in most BITs and MITs.[540] It is the treaty provision used the most in international arbitration, and with the most success.[541] This success can be explained because the conditions of the FET standard are not strict, as opposed to expropriation's criteria. It can therefore allow compensation where a claim for expropriation would have failed.[542]

The FET standard is merely defined in BITs and MITs. For instance, the France-Argentine BIT only provides that the Parties have to offer a fair and equitable treatment to investors of each Parties, according to the principles of international law.[543] The Greece-Jordan BIT gives more details on the extent of protection to be given to the investments under the FET standard:

> "Investments by investors of a Contracting Party shall, at all times be accorded fair and equitable treatment […]. Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal, in its territory of investments by investors of the other Contracting Party, is not in any way impaired by unjustifiable or discriminatory measures".[544]

The FET standard in the UK-Lebanon BIT is similar to the Greece-Jordan one.[545] Nevertheless, there is not a further explanation of the acts and actions considered as unjustifiable or discriminatory measures. The same issue can be found in

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[539] *Sempra Energy International v Argentine Republic (Award)* [2007] ICSID Case No ARB/02/16 (*Sempra v Argentine*), para 281.
[540] Dolzer and Schreuer (n 429) 133.
[541] Dolzer and Schreuer (n 429) 130.
[542] Dolzer and Schreuer (n 429) 132, citing PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey (Award) (2007) ICSID Case No. ARB/02/5, para 238
[543] Accord entre le Gouvernement de la République Française et le Gouvernement de la République Argentine sur l'encouragement et la protection réciproques des investissements (signed in 1991, entry into force 1993), art 3.
[544] Agreement between the Government of the Hellenic Republic and the Hashemite Kingdom of Jordan on the Promotion and Reciprocal Protection of Investments (2005), art 2.
[545] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Lebanese Republic for the Promotion and Protection of Investments [signed in 1999, entry into force 2001] (2002) 3 UKTS, art 2.

multilateral treaties, such as the Energy Charter Treaty[546] and the NAFTA[547]. This lack of clear delimitation of the FET standard led arbitral tribunals and courts to determine the level of protection owed to foreign investors. The interpretation of the term started with the entry into force of NAFTA, as the standard was not used before this point despite its preponderance in investment treaties.[548] The main issue to which the tribunals were confronted was whether the FET standard was analogous to the minimum treatment standard.[549] The minimum treatment standard must be understood as the rules to be observed at all times by states when treating with aliens.[550] It refers to the minimum obligations of the state towards the aliens, and hence, the minimum amount of protection to be given to alien investors.[551] Some tribunals interpreted the requirement of fair and equitable treatment under Article 1105(1) of NAFTA as surpassing the minimum treatment standard. As such, the tribunal in *Metalclad v Mexico* recognised that principles of transparency and predictability were protected under the FET standard.[552] But the freedom of interpretation left to tribunals was short-lived. In 2001, one year after the *Metalclad v Mexico* award, a NAFTA Free Trade Commission (FTC) interpreted officially the provisions of Article 1105(1).[553] It decided that the FET standard was analogous to the customary international law minimum standard, and therefore could not be extended beyond this threshold of protection.[554] It can be noted that this official interpretation has been implemented in the new Free Trade Agreement between the United States, Mexico and Canada signed in November 2018 (the USMCA), which will ultimately replace NAFTA.[555] However, the Commission interpretation is limited to the NAFTA

[546] Energy Charter Treaty (n 535) art 10(1): Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment."
[547] North American Free Trade Agreement (NAFTA) (entry into force 1994), art 1105.1: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."
[548] M Sornarajah, *The International Law on Foreign Investment* (2nd ed, Cambridge University Press 2004), 333, citing Stephen Vasciannie, 'The Fair and Equitable Standard in International Investment Law and Practice' (1999) 70 BYIL 99, 162.
[549] Sornarajah (n 548) 333.
[550] Rudolf Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties (2005) 39(1) International Lawyer 87, 92
[551] Dolzer (n 550) 93; *L F H Neer and Pauline Neer v United Mexican States* (1926) 4 Rep of Int'l Arb Awards 60.
[552] *Metalclad Corporation v The United Mexican States* (Award) [2000], 27 paras 99 and 101.
[553] Dolzer and Schreuer (n 429) 136.
[554] Dolzer and Schreuer (n 429) 136.
[555] United States-Mexico-Canada Agreement (USMCA) (2020), art 14.6.1

context and has not been followed by arbitral tribunals with regards to other treaties.[556]

In investment arbitration, the disassociation of the FET standard and the minimum treatment standard has been rapidly embodied by the tribunals. While there was at a time some divergences as to whether the two principles were similar,[557] the arbitral tribunal in *Biwater v Tanzania*[558] seems to have provided a generally accepted interpretation. The tribunal considered that the interpretation of the FET standard had to be exercised with regards to the particular wording of the BIT provision.[559] The use of the term "fair and equitable treatment" instead of "minimum treatment standard" has to be understood as the willingness of the parties to differentiate both standards.[560] The tribunal observed that the FET standard was composed of different elements outlined in previous arbitrations as means to determine factual situations.[561] The tribunal then considered the components appropriate and applicable to the case at hand.[562] It can be concluded that a clear determination of all the conducts corresponding to a breach of the FET standard is near impossible as it depends on the facts of the case. Moreover, although the FET standard is autonomous from other customary international law standards, it still relies on principles of international law. Such principles are meant to evolve, and with them the acceptation of states' conducts. However, *Biwater v Tanzania* proposed a categorisation of the elements relevant to the case. These categories were protection of legitimate expectations; good faith; and transparency, consistency, non-discrimination.[563]

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[556] Dolzer and Schreuer (n 429) 137.
[557] See in favour of the assimilation: *Alex Genin, Eastern Credit Limited, Inc and A.S. Baltoil v The Republic of Estonia* (Award) [2001] ICSID Case No ARB/99/2 (*Genin v Estonia*), para 367; *Siemens AG v The Argentine Republic* (Award) [2007] ICSID Case No ARB/02/8 (*Siemens v Argentine*), para 291; against the assimilation: *Saluka Investments BV v The Czech Republic* (Partial Award) [2006] PCA 2001-04 (*Saluka v Czech Republic*), paras 286-295; *Azurix Corp v The Argentine Republic* (Award) [2006] ICSID Case No ARB/01/12 (*Azurix v Argentine*), para 361
[558] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (Award) [2008] (*Biwater v Tanzania*).
[559] *Biwater v Tanzania* (n 558) para 591.
[560] *Biwater v Tanzania* (n 558) para 591, citing Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6(3) Journal of World Investment and Trade 357, 360. C. Schreuer has then consistently held the same opinion: Christoph Schreuer, 'Fair and Equitable Treatment (FET): Interactions with other Standards' (2007) 4(5) TDM, 7; Dolzer and Schreuer (n 429) 134.
[561] *Biwater v Tanzania* (n 558) para 602.
[562] *Biwater v Tanzania* (n 558) para 602.
[563] *Biwater v Tanzania* (n 558) para 602.

The first category is of paramount importance with regards to stabilisation clauses. When assessing the legal value of stabilisation clauses, the arbitral tribunal in *Kuwait v Aminoil* recognised that these clauses created legitimate expectations for the investor, and therefore the breach of such expectations should be compensated.[564] It is interesting to note that the protection of legitimate expectations is a trans-standard obligation under international law and the law of treaties. Legitimate expectations are guaranteed under both expropriation provisions and the FET standard. The relationship between stabilisation clauses and the FET standard is the subject of the next section. However, it can already be seen that the protection given to legitimate expectations under the FET standard is higher than under the rules governing expropriation. Under the latter, the breach of legitimate expectations only gives rise to an increase in the amount of compensation. Whereas the FET standard safeguards its respect.

4.4.2. Breach of stabilisation clauses as a breach of the FET: the concept of legitimate expectations

The concept of legitimate expectations as part of the rights protected under the FET standard appears to emerge from the case of *CME v Czech Republic*.[565] In this case, the arbitral tribunal held that Czech Republic had breach its obligation to provide for fair and equitable treatment under the Netherlands-Slovak Republic and Czech Republic BIT, by annihilating the arrangements upon which the investor had relied on to invest.[566] It is interesting to see that the breach of representations made by the host State also survived the Free Trade Commission's interpretation in NAFTA-based disputes. In *Waste Management v Mexico* (II),[567] the tribunal collected the position of previous tribunals on the content of the FET standard as to present behaviours and actions that may constitute a breach of this standard. It then adds that the breach of representations previously made to the investor are a relevant factor in the application of the FET standard.[568] However, the breach of representations in *Waste Management II* does not seem to amount to a breach of the FET standard,

[564] *Kuwait v Aminoil* (n 47) para 159.
[565] *CME Czech Republic B.V. v Czech Republic* (Partial Award) [2001] UNCITRAL (*CME v Czech Republic*).
[566] *CME v Czech Republic* (n 565) para 611.
[567] *Waste Management Inc v The United Mexican States* [2004] ICSID Case No ARB(AF)/00/3 (*Waste Management v United Mexican States*).
[568] *Waste Management v United Mexican States* (n 567) para 98.

contrary to *CME v Czech Republic*. It is rather presented as an additional element in determining the breach of FET. Two views are therefore opposed. One considering the breach of representations as a violation of the FET standard, the other as a proving element that the action is contrary to the standard. In BIT and MIT-based investment arbitrations, the first view has prevailed.

In *Tecmed v Mexico*,[569] the arbitral tribunal aimed to provide a general explanation of the fair and equitable treatment. FET is intrinsically linked to the principle of good faith, as recognised in international law. As a consequence, the FET standard imposes on states to not attain to the basic expectations of the foreign investor, on which it relied to undertake its investment.[570] The foreign investor must be able to assess the rules applicable to its investment and to foresee actions of the state with regards to its investment. The conduct of the state must therefore be stable, foreseeable and transparent.[571] The recognition of the investor's legitimate expectations was further refined and explained in the case of *Saluka v Czech Republic*.[572] The tribunal gave a new dimension to legitimate expectations by characterising them as the dominant element of the fair and equitable treatment standard.[573] The protection of legitimate expectations of the investors stems from the very nature of bilateral investment treaties. These instruments have for aim the protection and recognition of foreign investments. Although they do not impose on states the obligation to 'stimulate' foreign investments on their territory, the value given to investment treaties' provisions must prevent states from deterring such investments.[574] BITs therefore strive to provide for a balance in the state and foreign investors rights and obligations. As the state is the party retaining regulatory power, BITs' provisions have to accommodate this power with the rights granted at the time of the investment to the investors.[575] However, and as stated, it is a balance that needs to be achieved and not all rights can or ought to be protected under the FET standard. This position can be understood from the characterisation of the expectations, as 'legitimate' or 'basic', and from the conditions to be met in order to reach the

[569] *Tecnicas Medioambientales Tecmed SA v The United Mexican States* [2003] ICSID case ARB(AF)/00/2 (*Tecmed v United Mexican States*).
[570] *Tecmed v United Mexican States* (n 569) paras 153-154.
[571] *Tecmed v United Mexican States* (n 569) paras 154.
[572] *Saluka v Czech Republic* (n 557).
[573] *Saluka v Czech Republic* (n 557) para 302.
[574] *Saluka v Czech Republic* (n 557) paras 301-302.
[575] *Saluka v Czech Republic* (n 557) para 306.

threshold of legitimacy. As such, the foreign investor's expectations have to be assessed according to the circumstances of the case. In line with the aim of a balanced protection, an expectation that the legal framework surrounding the investment will remain unchanged is not legitimate, nor basic.[576] On the contrary, the threshold of legitimacy is reached if the state's right to regulate was exercised in an unreasonable, unfair, discriminatory or inconsistent way.[577]

With regards to stabilisation clauses, the question is whether an alteration of the legal framework surrounding the investment automatically amounts to a breach of the FET standard. An answer to this question can be found in *Parkerings v Lithuania*,[578] by pursuing an *a contrario* reasoning. In this case, Parkerings alleged a breach of its legitimate expectations by the state, and hence a breach of the FET standard. The claimant contended that it was legitimately expecting the state to maintain a stable and predictable legal framework. To this allegation, Lithuania replied that none of the state's entities made representations expressing or implying a guarantee of the stability of the legal regime to induce an investment from the claimant. It further noted the absence of a stabilisation clause in the investment contract.[579] The tribunal recalled the basis for a breach of the FET standard. There is breach of the FET standard "when the investor is deprived of its legitimate expectation that the conditions existing at the time of the Agreement would remain unchanged".[580] The expectations are legitimate when the investor was given explicit guarantee or implicit representations on the stability of the legal framework and relied on these representations to make its investment.[581] However, the balance of rights and powers of each party has to be respected. The State retains its regulatory and legislative power and can exercise it at its own discretion. As stated by the tribunal, the exercise of this power is not objectionable unless there is an agreement in the form of a stabilisation clause. In the absence of such clause, the change in regulation has to be fair, reasonable or equitable in order to comply with the FET standard.[582]

[576] *Saluka v Czech Republic* (n 557) para 305.
[577] *Saluka v Czech Republic* (n 557) para 307.
[578] *Parkerings-Compagniet AS v Republic of Lithuania* (Award) (2007) ICSID case No ARB/05/8 (Parkerings v Lithuania).
[579] *Parkerings v Lithuania* (n 578) paras 322-324.
[580] *Parkerings v Lithuania* (n 578) para 330.
[581] *Parkerings v Lithuania* (n 578) paras 331.
[582] *Parkerings v Lithuania* (n 578) paras 332-333.

By following the tribunal position and pursuing an *a contrario* reasoning, a stabilisation clause creates legitimate expectations;[583] hence the breach of the clause systematically amounts to a violation of the FET. There is no need for a further assessment of the measures taken by the state, i.e. to verify whether the change in the legal framework is fair or reasonable. Stabilisation clauses do not prevent changes in the legislation but allow the foreign investor to seek protection and compensation under the FET standard. The link between stabilisation clauses and legitimate expectations was finally given in *Micula v Romania*.[584] In this case, the tribunal explicitly stated that stabilisation clauses give rise to a "legitimate expectation of stability".[585] The reasoning only assumed in *Parkerings v Lithuania* is here clearly enunciated.[586] By inserting a stabilisation clause in the contract, the state creates legitimate expectations in favour of the investor that the legal and regulatory framework applicable to the contract will not be altered. Consequently, changing the law will amount to a breach of the stabilisation clause, hence of the FET standard.

The principle of "stabilisation clause equals legitimate expectations", as expressed in *Micula v Romania* has not been reiterated *per se*. However, the interpretation of the arbitrators in *Parkerings v Lithuania* gives a substantive effectiveness to stabilisation clauses, which has then been upheld in several cases.[587] This accuracy in arbitral tribunals' awards confirms the legal value of stabilisation clauses with regards to the FET standard. The breach of stabilisation provisions amounts to a breach of legitimate expectations of the investor, and therefore to a violation of the FET standard. This violation entitles the investor to claim compensation. The repetition of this pattern allows to consider the legal

[583] K Gehne, R Brillo, 'Stabilisation Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment' (2017) 143 Beiträge zum Transnationalen Wirtschaftsrecht, 21 and 28

[584] *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L v Romania* (Award) (2013) ICSID Case No ARB/05/20 (*Micula v Romania*).

[585] *Micula v Romania* (n 584) para 666.

[586] *Parkerings v Lithuania* (n 578).

[587] *Total S.A. v Argentine Republic* (Award) (2013) ICSID Case No. ARB/04/1 (*Total v Argentine*), para 117; *Bogdanov and Bogdanova v Moldova* (Award) (2013) SCC Arbitration No. V 091/2012, para 116 (*Bogdanov v Moldova*); *AES Summit Generation Limited, AES-Tisza Erömü KFT v Republic of Hungary* (Award) (2010) ICSID case No ARB/07/22, para 9.3.25 (*AES v Hungary*); *El Paso Energy International Company v The Argentine Republic* (Award) (2011) ICSID Case No ARB/03/15 para 368 (*El Paso v Argentine*); *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019, para 468; *Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina Socieddad Anonima v The Argentine Republic* (Decision on Jurisdiction and Liability) (2013) ICSID Case No. ARB/04/16 (*Mobil Exploration v Argentine*), para 951

value given to stabilisation clauses as a 'precedent' and therefore as an internationally agreed position on stabilisation clauses. Furthermore, most of these awards were issued in the oil and gas field. Such consistency creates an international customary rule applicable to the oil and gas field, and therefore a part of *lex petrolea*.

Any other reading of the effectiveness of stabilisation clauses with regards to the FET standard would compromise the international and arbitral practice's stance of legitimate expectations.

Nonetheless, the legal value of a rule shall not be solely apprehended through the spectrum of its acceptation or recognition, but also through its effects. The breach of the stabilisation clause amounts to a breach of the FET standard, and hence opens right to compensation. The effectiveness of stabilisation clauses has to be evaluated with regards to the amount of compensation due to the investor.

4.4.3. The compensation due for breach of the FET standard

As for the content of the FET standard, the determination of compensation for breach of the standard is problematic. Save for the general requirement made to states to provide fair and equitable treatment to foreign investments, BITs and MITs do not expand on the specificities of such treatment. Hence the principles ruling compensation for breach of the FET standard have been left to the interpretation of arbitral tribunals.

International practice and arbitral tribunals have upheld as principle of reparation the ruling made by the Permanent Court of International Justice in the *Chorzow Factory Case*. This principle is the following: "*reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.*"[588] The standard of reparation is full compensation for the loss suffered. It is also the interpretation of the International Law Commission Articles on State Responsibility for Internationally Wrongful Acts.[589] In line with the obiter in the

[588] *Case concerning the Factory at Chorzów* [1928] (n 454) 47.
[589] International Law Commission, 'Responsibility of States for Internationally Wrongful Acts' (2001) 2(2) Yearbook of the International Law Commission, Art 31: "*1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful*

Chorzow Factory Case,[590] the International Law Commission states restitution as first remedy, or compensation if restitution is impossible.[591] Arbitral tribunals have also followed this approached and considered full compensation as the most appropriate standard of reparation for breaches of treaties other than expropriation, especially when the breach strongly impeded the investment.[592] This position is understandable as restitution seems impossible in most of the cases. If the breach of treaty cannot be characterised as an expropriation, either direct, indirect, lawful or unlawful, then the property still belongs to the investor and there is nothing to be restored. Furthermore, restitution is hardly enforceable in the event the state refuses to comply with an arbitral award.[593] However, rules on the amount of compensation to be paid or the standard of calculation are largely defined.[594] The International Law Commission includes in the compensation to be paid any damage that can be financially assessable, as well as loss of profits when established.[595]

Another question arising out of the standard of reparation is the possibility of cumulating the protection of the FET standard with other treaty provisions, and especially expropriation. This cumulative protection can be assessed through an analysis of arbitral awards.

In *CME v Czech Republic*, which has been previously studied in relation with the development of the FET standard, the arbitral tribunal faced several allegation of treaty breaches, including expropriation and breach of the FET. The tribunal found these claims founded and recognised the unlawfulness of the expropriation, as well as the breach of the FET, based on the same facts.[596] Both claims were welcomed and assessed by the Tribunal. But when determining the rules applicable to the reparation, the tribunal relied only on Article V of the BIT (relating to expropriation) and on rules of international law, to decide that the

act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."

[590] *Case concerning the Factory at Chorzów* [1928] (n 454) 47-48.

[591] Responsibility of States for Internationally Wrongful Acts (n 589) arts 34, 35 and 36.

[592] *Sempra v Argentine* (n 539) para 403; *Azurix v Argentine* (n 557) para 315 ; *Teinver S.A., Transportes de Cercanias S.A., Autobuses Urbanos del Sur S.A. v Argentine Republic* (Award) (2017) ICSID Case No. ARB/09/1 (*Teinver v Argentine*), para 1092.

[593] *Teinver v Argentine* (n 592) para 1093.

[594] Marboe (n 447) 86.

[595] Responsibility of States for Internationally Wrongful Acts (n 589) art 36.

[596] *CME v Czech Republic* (n 565) paras 609, 610 and 611.

Respondent was under the obligation to make full reparation.[597] As such, although both violations of the treaty were duly noted by the tribunal, the reparation was strictly based on the calculation methods applicable to unlawful expropriation.

The second case is *Funnekotter v Zimbabwe*. [598] In this case, the tribunal decided that the expropriation suffered by the claimant was unlawful, but contrary to *CME v Czech Republic*, refused to pursue and assess the further alleged breaches of treaty.[599] A similar position, based on analogous facts, was held in *Caratube v Kazakhstan* almost ten years later. [600] In this case, the tribunal decided not to treat the investor's other claims, including the alleged violation of the FET standard. This decision was made in agreement with the claimant who, in its own terms, only put forward the other treaty violations claims "out of an abundance of caution and exhaustiveness".[601]

An explanation of the rulings in *Caratube v Kazakhstan* and *Funnekotter v Zimbabwe* can be found in two recent awards, in which the tribunals had to consider similar treaty claims (expropriation and further violations of treaty provisions, including FET). In *Quiborax v Bolivia*,[602] the tribunal concluded that the expropriation suffered by the investor was unlawful.[603] When arriving to the investors' other claims, it declared that it will assess them for the sake of completeness, but the establishment of any further violation of the treaty, including breach of the FET, would be ineffective on the amount of compensation they are entitled to receive.[604]

Finally, the tribunal in *Up v Hungary* confirmed the position held in *Quiborax v Bolivia* but refused to rule on the treaty violations claims in addition to expropriation, for reasons of procedural economy.[605] Following the recognition of

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[597] *CME v Czech Republic* (n 565) para 615.
[598] *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe* (Award) [2009] ICSID Case No ARB/05/6 (*Funnekotter v Zimbabwe*).
[599] *Funnekotter v Zimbabwe* (n 598) para 98.
[600] *Caratube International Oil Company LL and Mr. Devincci Salah Hourani v Repubic of Kazakhstan* (Award) [2017] ICSID Case No ARB/13/13 (*Caratube v Kazakhstan*)
[601] *Caratube v Kazakhstan* (n 600) para 948.
[602] *Quiborax SA and Non Metallic Minerals SA v Plurinational State of Bolivia* (Award) [2015] ICSID Case No ARB/06/2 (*Quiborax v Bolivia*).
[603] *Quiborax v Bolivia* (n 602) para 256.
[604] *Quiborax v Bolivia* (n 602) para 299.
[605] *UP and CD Holding Internationale v Hungary* (Award) [2018] ICSID Case No ARB/13/35 (*Up v Hungary*).

an unlawful expropriation of the claimant, the tribunal did not consider necessary to analyse the other treaty violation claims as they will not lead to any more damages.[606]

It stems from these cases that compensation for unlawful expropriation and for breach of the FET standard cannot be cumulative. This is sensible considering that full compensation is due to the investor in case of an unlawful expropriation. The full reparation principle refers to the global value of the property and assets expropriated, including foreseeable profits and loss profits when assessable. Therefore, in case of an unlawful expropriation, the investor is entitled to the full value of its investment. The addition of another breach of treaty such as FET standard, whose realm of protection is narrower, will not be able to expand the amount of compensation as the full reparation is the highest possible.

Despite these findings, a distinction has to be drawn with expropriation unlawful only for non-payment of compensation, i.e. when all the other conditions have been met. This was illustrated in *Rusoro v Venezuela*.[607] In the Award, the arbitral tribunal established the unlawfulness of the expropriation, but only due to the fact that the Respondent failed to provide compensation to the investor. All the other criteria (non-discrimination, for public purposes and in due process of law) were met. Consequently, the reparation owed to the investor was "adequate compensation", 'based on the genuine value of the investment" expropriated.'.[608] The tribunal, despite having already noted the unlawfulness of the expropriation, went on considering whether there was a violation of the FET as well.

In *Rusoro v Venezuela*, the amount of reparation was different from the previous cases because the expropriation was not completely unlawful. All the conditions, except the payment of compensation, were met. Hence the compensation due to the investor was the one owed in cases of lawful expropriation, i.e. a just, adequate compensation. Because just compensation does not reach the same amounts as full compensation, additional treaty claims and their attached standards of reparation can be added to the global amount due. A similar approach was followed in *South Silver Limited v Bolivia*, which was facing

[606] *Up v Hungary* (n 605) para 493.
[607] *Rusoro Mining Limited v The Bolivarian Republic of Venezuela* (Award) [2016] ICSID Case No ARB(AF)/12/5 (*Rusoro v Venezuela*).
[608] *Rusoro v Venezuela* (n 607) paras 410 and 646.

comparable claims.[609] The tribunal found that the expropriation was unlawful in that compensation had not been paid and agreed to consider the subsequent treaty claims of the investor.[610] However, in both cases, the claims for breach of the FET standard were dismissed.

The recent cases of *Rusoro v Venezuela* and *South Silver Limited v Bolivia* could be seen as a confirmation of the much older *Kuwait v Aminoil* and *Amoco v Iran* cases. They both reiterate the right to a higher amount of compensation in case of a lawful expropriation but in breach of legitimate expectations. Although both cases did not find breach of FET standard, it can be assumed that, had the claims been supported, the tribunals would have granted reparation for the breach of FET in addition to the just and adequate compensation. *Rusoro v Venezuela* and *South Silver Limited v Bolivia* are an affirmation of *Kuwait v Aminoil* and *Amoco v Iran* because both earlier cases recognised the effectiveness of stabilisation clauses with regards to the amount of reparation/compensation due in case of a lawful expropriation, but in breach of a stabilisation clause. This right to a higher amount of reparation was not clearly legally based, but rather expressed as a principle. Through the cases of *Rusoro v Venezuela* and *South Silver Limited v Bolivia* this general principle of higher compensation can be linked to the FET standard. Instead of being sanctioned under a general principle of contractual malpractice, the breach of a stabilisation clause, under contemporary international law, induces a breach of legitimate expectations, therefore protected by the FET standard. This continuous acceptance of *Kuwait v Aminoil* and *Amoco v Iran* reinforces the impact of these cases on international and arbitral practice. Their rulings are still actual, despite laying on different legal grounds, making them an unquestionable part of *lex petrolea*.[611]

4.5. Stabilisation clauses and breach of contract

Stabilisation clauses are contractual clauses. As such, their breach amounts to a breach of contract and have to be treated according to the provisions of this contract.[612] Most contracts provide for a choice of law provision, which

[609] *South American Silver Limited (Bermuda) v The Plurinational State of Bolivia* (Award) [2018] PCA Case No 2013-15 (*South Silver Limited v Bolivia*)
[610] *South Silver Limited v Bolivia* (n 609) para 610
[611] Cameron (n 533) 344.
[612] Marboe (n 447) para 3.80.

determines the law applicable to the contract. They may also include jurisdiction clauses, giving competence to national courts for contractual disputes. Herein lie some difficulty for investors. A combination of both clauses would not affect the amount of compensation owed to the investor for the breach of contract,[613] but will impose to resort to national courts instead of an arbitral tribunal. This limitation in the *forum* choice, coupled with the risks inherent to it (lack of neutrality and impartiality) have led to new interpretations of stabilisation clauses and investment treaties. The aim was to elevate a breach of stabilisation clause (a breach of contract) to a breach of treaty, in order to benefit from the dispute resolution clause and forum of the treaty. Specific means and constructions were necessary as mere breaches of contracts cannot amount to a breach of international law or breach of treaty.[614]

The elevation was first attempted by considering stabilisation clauses as an internationalisation criterion. According to its proponents, the theory was that the insertion of a stabilisation clause in a contract between a State and an investor would render the contract 'internationalised' and the law applicable to the contract would be international law.[615] The choice of law clause inserted in the contract would therefore be disregarded. As a further consequence, the dispute resolution mechanisms existing in international law would apply, as opposed to those provided in the contract. Through this construction, a breach of the contract would amount to a breach of international law, and as such, of treaty. Yet, this legal construction was not widely accepted.

Other means to 'internationalise' the contract and escape the choice of law and jurisdiction clauses inserted in the contract have therefore been pursued, among which the notion of 'umbrella clauses'.

Umbrella clauses are means to blur the distinction between breach of contract and breach of treaty, by internationalising the contract and its provisions. Umbrella clauses are found in international treaties, either multilateral or bilateral, such as BIT.

[613] Marboe (n 447) paras 3.182 and 3.183.
[614] *Vivendi v Argentine* (n 519).
[615] Jimenez de Arechaga (n 431) 192.

The name of these treaty clauses comes from their large scope, encompassing all undertakings, contracts and obligations of the host State towards investors, and bringing them under the protection of the treaty.[616] According to the German approach, the consequence of this overarching clause is that investment contracts, such as oil and gas exploration and production contracts, fall within the ambit of an international treaty. Any breach of the contract would therefore amount to a breach of treaty and benefit from the dispute resolution clause provided in it. [617] Yet, this approach was questioned by the arbitral tribunal in *SGS v Pakistan*.[618] In this case, SGS brought a claim before an ICSID tribunal under the umbrella clause provided in the Swiss Confederation and the Islamic Republic of Pakistan BIT. However, as Pakistan contended, the contract concluded between the parties already provided an arbitration clause that should not be disregarded. The tribunal refused to interpret the umbrella clause as means to elevate claims solely grounded on breach of contract, especially when a valid forum selection clause exists.[619] The tribunal considered that the wording of the umbrella clause was too wide, and consequences such as the ones sought by SGS would denature the clause from its primary intent.[620] The tribunal found three reasons to dismiss the German approach, prevailing until then.[621] Firstly, reasoning like SGS would elevate all the contracts involving the State and a Swiss investor, including unilateral commitments taken by the State. Every breach of these undertakings by the State would amount to a breach of treaty. Secondly, using an umbrella clause to claim a breach of treaty would diminish the legal value of the other treaty standards, such as lawful expropriation and FET. Indeed, the latter require meeting a high threshold of proof, whereas the umbrella clause would be effective as long as the State breaches one of its contractual obligations. Finally, granting access to the dispute resolution system of the BIT through an umbrella clause would nullify the negotiated dispute resolution clause of the parties. A general acceptance of umbrella clauses would systematically offer to the investor, and the investor only, a second dispute resolution mechanism, different from the one provided in the contract.[622]

[616] Dolzer and Schreuer (n 429) 166-167.
[617] Dolzer and Schreuer (n 429) 168.
[618] *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan (Decision of the Tribunal on Objections to Jurisdiction)* [2003] ICSID Case No. ARB/01/13 (*SGS v Pakistan*).
[619] *SGS v Pakistan* (n 618) para 165.
[620] *SGS v Pakistan* (n 618) para 166.
[621] Dolzer and Schreuer (n 429) 168.
[622] *SGS v Pakistan* (n 618) para 168.

Nevertheless, the Tribunal did not reject umbrella clauses altogether and considered instances in which they could apply. These instances need to be, in the words of the Tribunal, exceptional. The list given by the Tribunal, albeit an example, is limited to cases where the investor would be denied its right to resort to arbitration, as per provided in the contract.[623] Through this non-exhaustive list, the Tribunal upholds the primacy of negotiated dispute resolution clauses over BIT dispute resolution systems.

The case of *SGS v Pakistan* was discussed and the reasoning partially dismissed in a subsequent award involving the same claimant, SGS, and a different State. In *SGS v Philippines*,[624] the umbrella clause invoked by the claimant was more detailed than the one used in *SGS v Pakistan*.[625] Nonetheless, the ruling in *SGS v Pakistan* was deemed unconvincing for several reasons.[626] The tribunal in *SGS v Philippines* disagreed especially on the issue of large-scale internationalisation of contracts feared in *SGS v Pakistan*. On that point, *SGS v Philippines* noted that, in the specific context of the umbrella clause in the Swiss-Philippines, the law pertaining the contractual issues at stake was not internationalised. The breach is still submitted to the law of the contract. Rather, the umbrella clause ensures the performance of these obligations by sanctioning the failure as a breach of the BIT.[627] However, the tribunal confirmed the primacy of negotiated dispute resolution clauses over BIT dispute resolution clauses, unless there are peculiar reasons precluding the investor to resort to this chosen forum.[628] *SGS v Philippines* is interesting in that it mellows the position previously expressed in *SGS v Pakistan*.

Umbrella clauses can be used to internationalise a contract claim, and hence benefit from the dispute resolution clause of the relevant treaty. However, resorting to this specific dispute resolution system is limited to instances where there is no jurisdiction clause in the contract or when the exercise of such clause is impossible. Umbrella clauses therefore act as a subsidiary dispute resolution

[623] *SGS v Pakistan* (n 618) para 172.
[624] *SGS Société Générale de Surveillance S.A. v Republic of the Philippines (Decision of the Tribunal on Objections to Jurisdiction)* [2004] ICSID Case No ARB/02/6 (*SGS v Philippines*).
[625] *SGS v Philippines* (n 624) para 119.
[626] *SGS v Philippines* (n 624) para 125.
[627] *SGS v Philippines* (n 624) para 128.
[628] *SGS v Philippines* (n 624) paras 138 and 154.

mechanism, whose actual application realm is limited by the contractual choices of the parties.

The application of umbrella clauses to disputes has been further refined in *Sempra v Argentine*.[629] In this case, the Tribunal draws a distinction between the breaches of contract entailing a breach of an umbrella clause, and therefore amounting to a breach of treaty; and breaches of contract which remain simply contractual misconduct. According to the arbitral tribunal, breaches of contract will be considered as a breach of treaty if the breach involves a conduct that only a State could have. This is opposed to breaches of contract that could have been performed by any party, such as the non-payment of an invoice for instance.[630] It stems from this rule that the breach of a stabilisation clause would amount to a breach of treaty.[631] In order to breach a stabilisation clause, the law applicable to the contract must be changed, repealed or amended. Such actions can only be taken by a sovereign State.

This distinction was much needed with regards to the consequences it opens. A breach of contract elevated to a breach of treaty will allow the investor to change the forum and benefit sometimes from another dispute resolution mechanism. As such, a breach of a stabilisation clause which ought to be brought before national courts or a specific arbitral tribunal can be presented before the forum provided in the treaty breached.

Moreover, the internationalisation of a breach of a stabilisation clause has impacts with regards to the compensation due to the investor. Under a 'normal' breach of contract, the competent forum will apply the law of the contract. However, national laws do not always provide for a full compensation principle for breach of the contract.[632] On the contrary, if the breach of the contract is elevated to a breach of treaty, principles of international law will apply to the compensation system. And as aforementioned in relation to FET breaches, the standard of compensation in international law is that of full compensation.[633]

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[629] *Sempra v Argentine* (n 539).
[630] *Sempra v Argentine* (n 539) para 311.
[631] *Sempra v Argentine* (n 539) para 313.
[632] Marboe (n 447) para 3.182.
[633] *Case concerning the Factory at Chorzów* [1928] (n 454); Responsibility of States for Internationally Wrongful Acts (n 589) arts 34, 35 and 36.

The distinction operated in *Sempra v Argentine* not only elevated breaches of stabilisation clauses to a breach of treaty, but also introduced the concept of umbrella clauses as a stabilisation mechanism per se. An umbrella clause whose scope is narrowed enough to be applicable as per the ruling in *SGS v Philippines* would encompass breaches of contract due to a change in legislation, even in the absence of a stabilisation clause. Through the application of an umbrella clause, the host State could be required to perform its obligations as agreed in the contract, without the need for a stabilisation clause.[634] Although the use of an umbrella clause as a stabilisation mechanism is possible, it cannot replace stabilisation clauses entirely.

Firstly, not all BITs and multilateral investment treaties provide for an umbrella clause. Secondly, even when such clauses exist, they are not always applicable. This is evidenced in *SGS v Pakistan*, *Noble Ventures v Romania*[635] or *Salini v Jordan*,[636] in order for an umbrella clause to be applicable, the tribunals have to establish that the Contracting Parties to the treaty had the intent to englobe contractual commitments in the scope of the treaty. This interpretation is made in accordance with Article 31 of the Vienna Convention of the Law of Treaties. Consequently, an umbrella clause whose wording is too wide to be interpreted as embracing contractual commitments by the State will not be given effect. The umbrella clause can also be ineffective as an exception. This can be seen in *AES v Hungary*.[637] In this case, the claimant asked for the application of the umbrella clause provided in Articles 26 and 10(1) of the Energy Charter Treaty. However, the treaty expressly excludes Hungary from the countries where the umbrella clause is invokable.[638] The application of the clause can also be refused on the grounds of privity of contract, as highlighted in *Burlington v Ecuador*.[639] In this case, the tribunal rejected the application of the umbrella clause because it had to be interpreted as protecting direct investments only, as opposed to indirect

[634] Campbell McLachlan, Laurence Shore, Matthew Weiniger, *International Investment Arbitration Substantive Principles* (Oxford International Arbitration Series, Oxford University Press 2010), para 4.114.
[635] *Noble Ventures, Inc v Romania (Award)* [2005] ICSID Case No ARB/01/11 (*Noble Ventures v Romania*).
[636] *Salini Costruttori S.p.A. and Italstrade S.p.A. v The Hashemite Kingdom of Jordan (Decision on Jurisdiction)* [2004] ICSID Case No ARB/02/13 (*Salini v Jordan*).
[637] *AES v Hungary* (n 587).
[638] *AES v Hungary* (n 587) paras 9.3.1.-9.3.5.
[639] *Burlington v Ecuador* (n 513).

investments.[640] This question also arises when the investor has not contracted with the host State directly but with a state entity or a territorial institution.[641] Finally, with regards to the cases of *SGS v Pakistan* and *SGS v Philippines*, the effectiveness of an umbrella clause may also be prevented if there is already a dispute resolution clause in the contract. It stems from these cases that the dispute resolution provision in the contract will only be superseded by the treaty dispute resolution clause if the former has been rendered ineffective.

The use of umbrella clauses as a stabilisation mechanism is in principle possible, but its application is subject to several limitations and conditions which ultimately do not give certainty to the parties, as opposed to a stabilisation clause. However, this system is useful in instances where the host State refused to insert a stabilisation clause in the investment contract. Nevertheless, the application of an umbrella clause in presence of a stabilisation clause in a contract is not redundant. In the event of a breach of a stabilisation clause by the State, applying an umbrella clause will elevate the breach of the stabilisation clause to the level of a breach of treaty and may allow the parties to benefit from the dispute resolution clause of the treaty. The umbrella clause, in conjunction with the stabilisation clause, will indirectly work as a choice of jurisdiction clause and therefore as an ADRM clause.

4.6. Conclusion

Absolute stability in investment contracts is unreachable. The right of host States to nationalise alien properties has been long recognised and upheld, as part of their sovereign power. However, techniques have been developed to guarantee that breaches of stability commitments are sanctioned, and that the investor is granted a rightful amount of compensation. The insertion of stabilisation clause in the contract is part of these mechanisms. The study of arbitral awards in this chapter has demonstrated the recognition and effect given by these tribunals to stabilisation clauses, especially in relation to the Fair and Equitable Treatment standard of bilateral and multilateral investment treaties. The FET standard is a provision of treaties which protects investors from unfair, unequitable and unreasonable actions from the State. This include protecting the legitimate

[640] *Burlington v Ecuador* (n 513) para 218.
[641] Dolzer and Schreuer (n 429) 175.

expectations of the investor, especially with regards to the regulatory framework of the contract. The cases of *Micula v Romania* and *Parkerings v Lithuania* have established the equivalence between stabilisation clauses and legitimate expectations. Investors are considered to have legitimate and reasonable expectations that the regulatory framework of the contract will not be affected, or only to a limited extent, when there exists a stabilisation clause in the contract.

A breach of a stabilisation clause will always amount to a breach of contract, and always to a breach of treaty, either on the grounds of FET, breach of the umbrella clause or creeping expropriation. This section ascertained the standards of compensation owed in case of a breach of stabilisation clause, amounting to a breach of treaty. A higher compensation for expropriation, when legal, and for all other breaches, full compensation. These principles are deeply entrenched in international law, practice and arbitration, and have emerged from the oil and gas field at first. They are followed consistently by arbitral tribunals in cases involving oil and gas contracts, which make them a crucial part of *lex petrolea*. The assertation, which had been discussed since the first pieces of literature on *lex petrolea*, is here fully ascertained.[642]

The almost customary character of these principles can be discerned from the limited amount of cases available in the oil and gas field involving stabilisation clauses. Yet, this is not due to the fact that these clauses are not used. On the contrary, evidence suggest that they are still at the forefront of negotiations and largely included in investment contracts. For instance, the Petroleum Agreement of Albania provides for a stabilisation clause, which reads as follow:

> 18.3 If, as a result of any change in the laws, rules and regulations of Albania, any right or benefit granted (or which is intended to be granted) to Contractor under this Agreement or the License Agreement is infringed in some way, a greater obligation or responsibility shall be imposed onto Contractor or, in whatever other way the economic benefits accruing to Contractor from this Agreement or the License Agreement are negatively influenced by any change in the laws, rules and regulations of Albania, and such an event is not provided for herein, the Parties will immediately amend this Agreement and License Agreement, and Albpetrol, AKBN and the Ministry will

[642] Bishop (n 29); Childs (n 65); John P Bowman, 'Lex petrolea: Sources and Successes of International Petroleum Law' (2015) 39 Texas State Bar Oil, Gas & Energy Res L Sec Rep 81, 94.

> immediately undertake other necessary actions to eliminate the negative economic effect on the Contractor.[643]

Another stabilisation can be found in the Petroleum Agreement of Syria:

> 18.1 CONTRACTOR and Operating Company shall be subject to all laws and regulations of local application in force in the S.A.R. provided that CONTRACTOR and Operating Company shall not be subject to any laws, regulations or modifications thereof which are contrary to or inconsistent with the provisions of this Contract.[644]

It would therefore mean that the only cases reaching the arbitration stage are cases and contracts which do not feature stabilisation clauses. This is also supported by the fact that disputes in the oil and gas field are often due to changes in the laws or regulations by the State. Hence it can be said that, although stabilisation clauses are not dispute resolution mechanisms per se like mediation or expert determination, they still act as such because they allow solving the dispute prior resorting to arbitration. In this regard, it could even be argued that stabilisation clauses are a pre-ADRM mechanism, impacting the way disputes will be dealt with. Indeed, the confirmation that any breach of a stabilisation clause will give rise to compensation would lead parties, and especially the host State, to negotiate or settle the dispute as the outcome is highly predictable.[645] Consequently, the established precedents destroy the incentive for parties to arbitrate their dispute.[646]

Stabilisation clauses are not a panacea in guaranteeing the stability of the law applicable to the contract but the stable jurisprudence surrounding the notion makes them effective. Furthermore, the established precedents allow to state that despite some previous assertions, new methods of dispute resolution have emerged from *lex petrolea*.[647]

[643] Albanian contract (n 39) art 18.3.
[644] Syrian contract (n 44) art 18.1.
[645] Andrew Schotter (n 90) 660.
[646] Andrew Schotter (n 90) 660.
[647] Daintith (n 83) 11.

5. CHAPTER 5. THE USE OF UNCONVENTIONAL ADRMS: TECHNICAL ADVISORY COMMITTEES, SOLE EXPERT DETERMINATION AND DISPUTE BOARDS

5.1. Introduction

The use of Alternative Dispute Resolution Mechanisms (ADRMs or ADRM) in oil and gas contracts is not new, nor rare. The choice of out-of-court dispute resolution stems from the international character of the contracts, involving a Host State and generally one or several foreign investors. In an attempt to guarantee and ensure neutrality of the dispute resolution process, parties have started resorting to arbitration instead of the national courts of the Host State. However, arbitration is often a last resort dispute resolution mechanism, stopping the performance of the contract or actioned at its end. Oil and gas investment contracts, either upstream, midstream or downstream, are long-term contracts and therefore prone to the development of many small or medium sized disputes arising during the performance of the contract but not endangering the contractual relationship to the point of having to cancel it.[648] Parties have hence sought dispute resolution mechanisms able to be activated during the performance of the contract, in order to avoid interruption of the contract and the "explosion" of many small disagreements and issues elevated to a dispute at the end of the contract.

ADRMs are of many sorts, and the term encompasses negotiation, mediation, conciliation which are collaborative processes, to mini-trials and expert determination as part of several adjudicative systems. They are a conscious contractual choice of the parties to solve their dispute out of court and out of arbitration. ADRMs are implemented in contracts as an alternative to arbitration, meaning that the parties hope to solve their dispute through these methods. However, they may also act as a step prior to arbitration and as a result act as a filter. Will only be allowed to arbitration the disputes that could not be solved through the ADRMs.

[648] Michael Polkinghorne, Matthew Secomb, 'Drafting Oil and Gas Dispute Resolution Clauses: (it's always) time to think more creatively' (2011) 9(5) OGEL 1, 2.

The difference between 'traditional' and 'unconventional' ADRMs was exposed in Chapter 2, but the main tenants of this distinction will be discussed again. ADRM stands for Alternative Dispute Resolution Mechanism, in other word, a system that allows to solve disputes. It is argued that some ADRMs, namely Technical Advisory Committees (TAC), Sole Expert Determination (SED) and Dispute Boards (DB) present another facet, distinguishing them from "traditional" ADRMs, that is their Dispute Prevention character. On the contrary, traditional ADRMs, such as mediation, conciliation or arbitration, are only activated once the dispute has arisen. This assertion is widely recognised for DBs, whose belonging within the ADRM category is even refused by part of the doctrine on that specific point.[649] Regarding TACs, the Dispute Prevention facet is directly linked, as for DBs, to the discussion forum they create in their implementation. The unconventionality of TACs also results from the fact that they have not yet been considered as an ADRM, but only as a technical tool for oil and gas exploration and exploitation operations. Section 5.2. of the chapter will demonstrate that TACs must now be seen as an "unconventional" ADRM too. The Dispute Prevention character of SED can also be found in DBs and stems from the involvement of a highly skilled and professional individual, chosen by both parties to settle their dispute. Albeit at first sight an adjudicative mechanism, the collaborative aspect of SED throughout the procedure evidences this Dispute Prevention element. Unconventional ADRMs impose on the parties to collaborate and to expose their disagreements, before the issue can be considered a dispute.

Due to the limited literature on the subject of unconventional ADRMs in oil and gas investment contracts, this section will be mainly focused on contracts, especially of the East Mediterranean Region.[650] The choice of these contracts is

[649] Kathleen M J Harmon, 'Resolution of construction disputes: A review of current methodologies' (2003) 3(4) *Leadership and Management in Engineering* 187, 196; Roxene M Thompson, Michael C Vorster and James P Groton, 'Innovations to Manage Disputes: DRB and NEC' (2000) 16(5) J Manage Eng 51, 52

[650] The following contracts will be studied: the Albanian Petroleum Agreement for the Development and Production of Petroleum in Gorisht-Kocul Field; the Model Exploration and Production Sharing Contract of the Republic of Cyprus; the Greek Model Lease Agreement; the Lebanese Exploration and Production Agreement for Petroleum Activities in Block 4; the Libyan Model Exploration and Production Sharing Agreement; the Syrian Contract for the Exploration, Development and Production of Petroleum between the Government of the Syrian Arab Republic and Syrian Petroleum Company and Loon Energy, Inc for the Lattakia Block; and the Tunisian and Libyan Exploration and Production Sharing Agreement between Joint Exploration Exploitation and Petroleum Services Company and Canadian Superior Energy Inc for the "7th of November" Block (August 2008)

based partly on the availability of the contracts, but also because the East Mediterranean is an oil and gas exploiting region featuring countries with different legal concepts and cultures. Studying and comparing these contracts will allow a general overview and understanding of the clauses and the reasons for their implementation in the contracts. Moreover, this choice was strengthened by a research internship/stay at the Hellenic Hydrocarbon Resources Management (HHRM) in Athens, Greece, from April 2019 to June 2020, during which the practical implications of ADRM clauses in the concession contracts were observed. The contracts will be analysed and compared, with an aim to determine the most accurate and adequate clause for each of the unconventional ADRM (i.e. Technical Advisory Committees; Sole Expert Determination and Dispute Boards). Also, comparisons will be drawn with construction contracts, especially in the context of Dispute Boards, as these are the contracts in which Dispute Boards were first implemented and therefore the nexus of literature. Dispute Boards will be the subject of the last section, as they are not yet common in oil and gas contracts and could be considered as a step forward in the creation in an adequate dispute resolution mechanism.

5.2. Technical Advisory Committees

Technical Advisory Committees (hereafter “TACs” or “TAC”) are a specific type of committees, implemented at the start of the contract in order to present and if the case arises, resolve disputes relating to technical aspects of the oil and gas exploration and exploitation.

Although their first aim is to address and discuss technical aspects of the oil and gas exploration/exploitation, TACs can also be used as a Dispute Prevention and Dispute Resolution Mechanism. This sub-section will demonstrate this particular facet of TACs. To this end, the structure and functioning of TAC will be presented, through an empirical study of some oil and gas investment contracts of the Mediterranean Region.[651]

It must be noted that there is no consistency in the name of committees in the different concession contracts. If some may designate them as Technical

[651] The relevant clauses are reproduced in the text for clarity purposes, but each contract cited can also be found in the appendices of the thesis.

Advisory Committees, others may use different wording such as Management Committee or Coordination Committee, Exploration Advisory Committee or Advisory Committee. However, and despite this difference in wording, all the studied clauses in this chapter concern Technical Advisory Committees as the functioning and the role of each of these Committees are the same.

5.2.1. Roles, aims and duties

As mentioned, their varied appellation may give the false impression that TACs are not common in oil and gas investment contracts. But when focusing on the duties of the Committees in each contract, it appears that they all fulfil the same role.

The description of the exact role and duties of a TAC depends on the contract. Some have chosen to be very extensive with exhaustive list powers, when others offer a general definition of the tasks assigned to the TAC. In this regard, the TAC clauses of the Greek Model Lease Agreement (*Greek TAC clause*) and the Albanian License Agreement for the Gorisht-Kocul field (*Albanian TAC clause*) can be compared.

Greek TAC clause:

> 4.4 Without prejudice to the rights and obligations of the Lessee in relation to the management of the Petroleum Operations, the advisory functions of the Technical Advisory Committee shall be the following:
> (a) Annual Work Programme and Budget: save where a proposed Annual Work Programme and Budget is deemed to have been approved by the Lessor pursuant to Article 5.1 and subject to Article 5.2, to review the Annual Work Programme and Budget submitted by the Lessee and consider proposals for the revision of specific features thereof submitted by the Lessor;
> (b) Appraisal Programme: to review any Appraisal Programme submitted by the Lessee to the Lessor and to observe the implementation of the work conducted thereunder and inform the Lessor about the progress of the said works;
> (c) Development and Production Programme: to review any Development and Production Programme submitted by the Lessee to the Lessor in connection with a Discovery of commercially exploitable Hydrocarbons;[652]

[652] Greek contract (n 41) art 4.4.

Albanian TAC clause:

> 5.1.5 The Advisory Committee shall have the following functions and responsibilities under this Agreement:
>
> 5.1.5.1 to provide the opportunity for and to encourage the exchange of information, views, ideas and suggestions regarding plans, performance and results obtained under the Agreement;
>
> 5.1.5.2 to review principles established by Contractor from time to time governing various aspects or activities of the Petroleum Operations and to propose, for this purpose, procedures and guidelines as it may deem necessary;
>
> 5.1.5.3 to review and approve Annual Programs and Budgets proposed by Contractor for the Development and Production Period, and propose revisions in accordance with Article 8.3;
>
> 5.1.5.4 to review Annual Programs and Budgets proposed by Contractor for the Evaluation Period and any New Evaluation Period;
>
> 5.1.5.5 to review and approve Development and Production Areas and the Development Plan that Contractor, on behalf of the Parties, plans to propose to AKBN for its approval;
>
> 5.1.5.6 to cooperate towards implementation of the Annual Programs and Budgets and Development Plan; and
>
> 5.1.5.7 such other functions as entrusted to it by the Parties.[653]

It stems from the wording of both clauses that TACs have a double role of review and appraisal. Their missions include to review and comment, if need be, all the programmes and budget of the IOC for the exploration and the production of hydrocarbons. More generally, the TAC will ensure that the IOC presents its Work Programme and Budget for the upcoming year and months, and that it complies with it. Then, at the production stage, the TAC is entrusted with the review and approval of the Development and Production plan. This is the mission of review and assessment of the programmes. In the event that compliance with the programmes is impossible, the TAC will have the additional role of a discussion forum to expose and present the reasons why the works could not be undertaken, and to find solutions through collaboration.

[653] Albanian contract (n 39) art 5.1.5.

TACs have the important duty to review the Work Programme and the Budget allocated to the programme. The general work programme and budget to be performed/spent during the performance of the contract are already provided for in the contract. However, the contractor must provide to the NOC or the host State the works and the budget it proposes each year. The submission of the programmes guarantees that the contractor is complying with the Minimum Work Obligations under the contract, as well as the Minimum Work Expenditures. The Minimum Work Obligations (MWO) are often defined in the contract and have to be performed according to the exploration schedule, divided itself in two to three stages.[654] For instance, the First Exploration Phase may require the IOC to perform acquisition of new seismic data in the concession area, to pursue geological works and study as well as reprocessing the existing seismic data. Upon accomplishment of these works, the contractor will be allowed to proceed to the second stage of the Exploration Phase. The second stage may consist in further geological works, and/or in the design, studies and spudding of the first exploration well. At the end of the last Exploration Phase, the contractor will have to take the decision of "drilling or dropping". In other words, based on the studies realised and the expected reserves, the contractor must decide whether it continues with the Production Phase, or abandons the project. Each stage of the Exploration Phase has a fixed timeline, agreed by the parties, to complete the Minimum Work Obligations. Depending on the contract, the global Exploration Phase lasts between five and seven years, each phase having to be completed in two to three years.[655] The schedule is strict, although extensions can be granted.[656]

The TAC also allows the host State or NOC to follow closely the advancement of the exploration operations, and if need be, question the appropriateness of undertaking certain works at certain periods. Finally, it participates to the main role of "discussion pool" of the TAC. The non-adversarial, collaborative aspect of the TAC can be appreciated through the wording of the clauses. The TAC members can "propose", they "cooperate". The representatives of the host State/NOC can submit "proposals". This non-coercive wording demonstrates the

[654] Greek contract (n 41) art 2.1.; Lebanese contract (n 42) art 7.2.; Tunisia/Libya contract (n 45) art 12.2.
[655] Lebanese contract (n 42) art 7.1; Syrian contract (n 44) art 4.1.
[656] Greek contract (n 41) art 2.2.; Lebanese contract (n 42) art 7.1.

collaborative facet of the TAC, further evidenced by the main duty of “review” of the TAC.

The missions of the TAC also include the close monitoring of petroleum operations that is offered to both parties when a TAC clause is implementing in a contract. In the absence of a TAC, it can be assumed that the Annual Work Programmes and Annual Budget will be submitted to the competent authorities, which in return would be able to present observations. However, the review and discussion of the works already undertaken would not exist. The host State/NOC would have to rely solely on the yearly documents submitted by the contractor, which are not final as they only constitute programmes or goals that the contractor wishes to reach within the year. On the other hand, without the input of the host State/NOC, the contractor may not be aware of specificities in the region on which the host State or NOC may pre-emptively act upon.

The missions of the TAC evidence the role it holds as a Dispute Prevention Mechanism, as well as a Dispute Resolution Mechanism. The principle of a dispute preventive body stems from the wording used as well as the duty to review the programmes presented by the contractor. Parties are invited to present their opinions and discuss the works to be undertaken.

5.2.2. The functioning of the TACs

Each contract setting out a TAC will decide the functioning of the Committee, from the number of members, the quorum to be reached and the voting methods.

5.2.2.1. The members

The first TAC clause to be examined is extracted from the Greek Model Lease Agreement for granting rights for exploration and exploitation of hydrocarbons (hereafter the *Greek TAC clause*). The functioning of the TAC in this contract is set as follow:

> 4.1 The Lessor and the Lessee shall, within five (5) calendar days of the Effective Date, establish a committee to be known as the Technical Advisory Committee which shall consist of:
> (a) a chairperson and two other persons appointed by the Lessor; and
> (b) three other persons appointed by the Lessee.
>
> 4.2 Either the Lessor or the Lessee may appoint by notice in writing any person respectively appointed by them to act in the place of any member of the Technical Advisory Committee during his absence or incapacity to act as a member of the Technical Advisory Committee.
>
> 4.3 When such alternate member acts in the place of any member, he shall have the powers and perform the duties of such member.[657]

According to the *Greek TAC clause*, the TAC is composed of six members, equally appointed by both parties to the contract. This is also the choice made by Albania in the *Albanian TAC clause*, which provides as follow:

> 5.1.2 Albpetrol and Contractor shall each appoint three (3) representatives and alternate representatives to form the Advisory Committee, and each Party shall designate one of its representatives as a chief representative. All the aforesaid representatives shall have the right to present their views on the proposals at meetings held by the Advisory Committee and cast their votes when a decision is to be made. The chairman of the Advisory Committee shall be the chief representative designated by Contractor and the vice-chairman shall be the chief representative of Albpetrol.[658]

The number of TACs' members depends on the contracts. For instance, the Libyan Contract provides for four members, two appointed by each party:

> 4.1 Appointment of Management Committee
> Petroleum Operations in the Contract Area shall be conducted under the control and supervision of a Management Committee composed of four (4) members, two (2), including the chairman, to be appointed by First Party, and two (2) to be appointed by Second Party. The Management Committee shall be formed not later than one (1) month after the Effective Date. Each Party shall notify the other of the members of the Management Committee it appoints.[659]

[657] Greek contract (n 41) art 4.1.
[658] Albanian contract (n 39) art 5.1.2.
[659] Libyan contract (n 43) art 4.1.

The important element to be retained from these clauses is that TACs are composed of representatives of each party, and in an equal number. As a result, parties are standing equally and have the same force of presence in each meeting. Furthermore, the principle of alternate representatives to palliate the absence of a permanent member guarantees that both parties are always equally represented.

According to the different clauses, there are no limitations on the people to be appointed by each party. Although it is safe to assume that the appointed representatives will be employees of each party, the loose wording of the clauses would to allow external representatives. This absence of limitation concerns the person of the representative, its qualifications. Because TACs are technical by nature, parties tend to appoint scientists, geologists, engineers as to ensure a global and effective understanding of the exploration and exploitation operations undertaken. However, parties are free to appoint lawyers, economists, market experts as TACs' members. There are solutions to involve such a variety of representatives whilst remaining within the limited numbers of members. The first one would be to invite, as attendees, and not representatives, different specialists when the TAC requires it. This is the choice made in the *Albanian TAC clause* and the *Libyan TAC clause*:

Albanian TAC clause:

> 5.1.2 […] The Parties may, according to need, designate a reasonable number of additional attendees who may attend but shall not be entitled to vote at the Advisory Committee meetings.[660]

Libyan TAC clause:

> 4.3.3 Observers from each Party may be invited to attend the meetings of the Management Committee in a non-voting capacity.[661]

[660] Albanian contract (n 39) art 5.1.2.
[661] Libyan contract (n 43) art 4.3.3.

When this option is not provided in the contract, parties could still invite attendees on an unformal basis, if the other party accepts. However, another solution would be to appoint as alternate representatives the non-scientists (lawyers, economists, policy-makers…). As such, they would intervene only when absolutely necessary and, contrary to attendees, would have a right to vote.

5.2.2.2. <u>The meetings</u>

In order for TACs to be effective as Dispute Prevention and Resolution Mechanisms, meetings have to be held regularly. The *Greek TAC clause* provides for instance that:

> 4.5 All meetings of the Technical Advisory Committee shall be held at such places, whether within or, with the prior approval in writing of the Lessor, outside Greece, and at such times, as may be determined unanimously by its members, but not less than one meeting during each semester, in order to inform the Lessor about the progress of the implementation of the Annual Work Programme and Budget.[662]

This frequency is also the one chosen in the *Libyan TAC clause*, and the *Albanian TAC clause*:

Libyan TAC clause:

> 4.3.1 The Management Committee shall meet at least twice per Calendar Year upon a call by the chairman giving not less than twenty (20) days' notice to the other members, or shorter notice in a case requiring urgent action. Such call shall specify the proposed time, place and agenda of the meeting.[663]

Albanian TAC clause:

> 5.1.4 The Advisory Committee shall meet at least twice each Fiscal Year […][664]

Regular and cyclical meetings ensure that all matters and possible issues are considered and settled in due time. This periodicity is one of the key aspects

[662] Greek contract (n 39) art 4.5.
[663] Libyan contract (n 43) art 4.3.1.
[664] Albanian contract (n 39) art 5.1.4.

making TACs a Dispute Prevention Mechanism. This facet is also well evidenced by the possibility for parties to call for extraordinary meetings, in addition to the scheduled ones. Extraordinary meetings allow the parties to discuss immediately any situation, difficulty regarding exploration and exploitation activities, and therefore to avoid or diffuse any conflict. Regularity is a key factor in limiting the risks of disputes occurring, due to the specificities of oil and gas investment contracts. When entering a concession or product-sharing agreement, the contractor or the consortium they have created agree to undertake a minimum of works during a specific timeframe. However, the Minimum Work Obligations are not the only obligations a contractor has to comply with. Depending on the laws of the host State, there are environmental permits, licences and authorisations to be granted by the relevant authorities. As the consequences of non-environmentally safe oil and gas operations can be disastrous, many aspects of the Minimum Works cannot be undertaken before obtaining such approvals.[665] 2-Dimension acquisition, for instance, when crossing privately owned land, may be subject to prior approval of the landowner. When environmental requirements are added to the "actual" works commitments to be performed, it is clear that the Exploration Phase involves strict compliance with the tasks assigned. However, delays can always occur and can have multiple sources. A delay in obtaining an authorisation by an administration; poor weather preventing acquisition of data or the spudding of a well for instance. Despite the unlimited categories of delays that may happen, their common element is that they occur from a single event which can have large consequences on the whole Exploration Phase. As a result, regular TAC meetings can alleviate the weight of the delays and help contractor and host State to have the Minimum Work Obligations performed in due time. For instance, in the example of a delay in obtaining an authorisation, the representatives of the Host State or the NOC may enquire the administration. Similarly, any other delay, if presented in due time can i) prepare the host State to a possible extension request and ii) will limit the risks of delays becoming actual disputes and endangering the whole oil and gas project.

[665] John P Rafferty, '9 of the Biggest Oil Spills in History' (Britannica) <https://www.britannica.com/list/9-of-the-biggest-oil-spills-in-history> accessed 20 November 2020; United States Environmental Protection Agency, 'Deepwater Horizon – BP Gulf of Mexico Oil Spill' <https://www.epa.gov/enforcement/deepwater-horizon-bp-gulf-mexico-oil-spill> accessed 20 November 2020.

5.2.2.3. Votes and quorum

In order to ensure that parties are equal beyond their number of representatives, each member of the TAC is given a right to vote. But more importantly, as to guarantee transparency and that the largest positions and opinions are shared during the meetings, a quorum has to be respected. In the *Greek TAC clause*, this quorum has been fixed at five members:

> 4.7 Five members of the Technical Advisory Committee shall form a quorum for a meeting of the committee.[666]

Some contracts, in addition to a general quorum, impose a minimum number of each party's representatives to be present. This is the case in the *Albanian TAC clause*:

> 5.1.3 In order to be valid, any decisions required to be taken by the Advisory Committee must have the affirmative vote of at least four (4) representatives present at the meeting either in person or by conference telephone, it being understood that no such decisions shall be valid unless at least two (2) representatives of both Albpetrol and Contractor are present at the meeting, either in person or by conference telephone.[667]

Even stricter is the *Libyan TAC* clause which provides for the presence of all members at each TAC meeting:

> 4.3.1 All meetings of the Management Committee shall require the presence of all members in person or through a proxy.[668]

Alongside minimum representation rules, some contracts may add that all decisions should be taken unanimously. This is for instance the case of the *Greek TAC clause* and the *Libyan TAC clause*:

Greek TAC clause:

> 4.9 All decisions of the Technical Advisory Committee shall be by unanimous vote of the members present at a meeting thereof and together forming a quorum.[669]

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[666] Greek contract (n 41) art 4.7.
[667] Albanian contract (n 39) art 5.1.3.
[668] Libyan contract (n 43) art 4.1.3.
[669] Greek contract (n 41) art 4.9.

Libyan TAC clause:

> 4.2 […] Decisions of the Management Committee shall be made by the unanimous vote of its members.[670]

Although these rules support and help the fair representation of views, ideas and positions between the contractor and the State (or its representative or its NOC), they may create a situation of deadlock. Indeed, requesting unanimity for all decisions increases the risks of disagreement and disputes. If the parties cannot reach unanimity or an agreement on a question or operations to be undertaken, what will be the next step? Some contracts provide for a tailored dispute resolution system in these situations, but others do not.

5.2.3. Dispute resolution mechanism and escalation clause

The dispute prevention/resolution aspect of the TAC results from the missions given to the TAC as well as from its functioning. This is particularly well evidenced by the *Albania TAC Clause* which provides:

> 5.1.5.1 to provide the opportunity for and to encourage the exchange of information, views, ideas and suggestions regarding plans, performance and results obtained under the Agreement;[671]

Although this particular sub-clause is only found in the Albanian Petroleum Agreement for the Gorisht-Kocul field, it represents perfectly the dispute prevention mission of the TAC. The creation of a cyclical discussion entails the parties to regularly exchange their ideas, their positions and their beliefs on the works undertaken. More importantly, allowing such discussions prevents disputes from arising as the questions and disagreements will be presented before they constitute dispute *per se*. TAC meetings are therefore a continuous negotiation process, in which parties aim to compromise and agree in order for the contract to be performed in the best conditions.

Nonetheless, disputes cannot always be avoided, and an agreement be reached. This can result from the nature of the conflict, or from the procedure before the

[670] Libyan contract (n 43) art 4.2.
[671] Albanian contract (n 39) art 5.1.5.1.

TAC and especially the voting method of the TAC. The latter, previously approached, will be now detailed.

Some TACs have implemented voting rules regarding quorum and minimum votes, such as the *Greek TAC clause* or the *Libyan TAC Clause*. These two clauses have also imposed a unanimous vote on all matters. Although this system is the most adequate to ensure that all parties agree with the decision, its efficacy is not guaranteed, especially when the TAC clause does not provide for other steps of dispute resolution. Indeed, if unanimity is not reached on a subject, it is safe to assume that this subject "mutates" from an opinion or a proposal to a dispute. From that point, parties must treat the situation accordingly. Both clauses have foreseen such situations by integrating a dispute resolution system within the TAC procedure. This dispute resolution mechanisms are as follow:

Greek TAC clause:

> 4.10 If the Technical Advisory Committee is unable to reach unanimity on any matter being considered by the committee under this Article 4, the matter shall be referred to the Lessee and the Lessor within fifteen (15) calendar days from the date of the meeting where the matter was considered. If the Parties fail to reach unanimity within thirty (30) calendar days of such referral, the matter shall be referred to a Sole Expert for determination in accordance with Article 23. Provided however that in the case of an Annual Work Programme and Budget submitted by the Lessee prior to a Discovery by the Lessee, the proposals of the Lessee, set out in the Annual Work Programme and Budget, shall be deemed to have been accepted by the Technical Advisory Committee so long as those proposals have been devised in conformity with Article 5 and are consistent with and are intended to enable the Lessee to perform its Minimum Work Program and Minimum Expenditure Obligations under Article 3.[672]

Libyan TAC Clause:

> 4.2 Decisions
> […] In case of a deadlock, the Management Committee shall refer the matter to the senior management of the Parties. In case the Parties reach an agreement, the Management Committee shall convene and adopt a decision reflecting such agreement.[673]

[672] Greek contract (n 41) art 4.10.
[673] Libyan contract (n 43) art 4.2.

It results from this clause that, in case of disagreement and if the parties cannot reach unanimity, the matter is elevated and a “conventional” negotiation process starts. In the Greek TAC clause, the negotiation intervenes between both parties, without specification of the competent people. In the Libyan TAC clause, on the other hand, it is provided that the senior management of both parties shall be involved in the resolution of the dispute. The choice of senior management presents advantages and inconvenient. The advantage is that the negotiation process will consist in people who may not be members of the TAC and as a result, bring new opinions and different perspective on the matter in order to diffuse the situation. On the contrary, non-TAC members may not have the same comprehension and knowledge of the issue, which may further accentuate the conflict. But besides the referral to senior management, the Libyan TAC clause does not provide for further dispute resolution steps within the TAC procedure. In the absence of a designated procedure, it is safe to assume that the dispute will be submitted to the dispute resolution mechanisms provided in the contract. Remains the question of when starting the “formal” dispute resolution procedure, as the clause does not impose a timeframe for the senior management to reach an agreement. The lack of schedule may entice parties to continue the negotiation process as long as necessary, but it may also solidify the dispute and decrease the chances of having it resolved quickly and in a non-adversary manner.

The *Greek TAC clause* provides a more detailed procedure for the treatment of contentious matters in the scope of the TAC. Once the matter has been identified as a dispute, the parties have from this moment 30 days to reach an agreement. At the expiration of this delay, the dispute is elevated once again and submitted to Sole Expert Determination. The determined timeframe of the dispute resolution system allows the parties to foresee the possible developments of an unresolved dispute and may incite them to find a solution at this stage. This clause demonstrates that, in the Greek Model Lease Agreement, the TAC is considered as a proper step in the dispute resolution process for the matters submitted to the TAC. The nature of the TAC is hence dual. It is a dispute prevention mechanism thanks to the cyclical meetings and the discussions arising out of them. It can also be seen, in this regard, as an anti-escalation dispute mechanism, as the parties are aware of the potential consequences of an unresolved issue at the

end of the TAC procedure. Moreover, TACs can bear characteristics of an ADRM when they create processes for the resolution of a dispute.

5.3. (Sole) Expert Determination

Sole Expert Determination (SED hereafter) is an ADRM by which the parties decide to refer their dispute to a specific person, the expert, for a final and binding decision on a matter, generally technical. The resort to experts is not specific to the oil and gas field, nor an ADRM only. Expertise can be provided by law, and experts can appear before national jurisdiction as well as arbitral tribunals. Its characterisation as an ADRM stems from the commitment, to the contract, to make of the decision of the expert a definitive and binding decision. Between the parties, the (Sole) Expert Determination should have the force of a judgement. However, as it is a contractual undertaking, breach of the decision will equal to a breach of contract, and not a non-compliance with a judgement. Parties seeking the enforcement of the expert determination will have to obtain first recognition of the breach of the determination by the other party before the competent courts, before obtaining, if continuous breach, judicial execution of the decision.

As for TAC clauses, this section will study the different Sole Expert Determination clauses of the same contracts, compare them and analyse them. A first observation is that, as opposed to TAC clauses, not all contracts provide for SED. This section will therefore be based on four SED clauses, extracted from the following contracts: the Greek Model Lease Agreement (*Greek SED clause*); the Albanian Petroleum Agreement for the Development and Production of Petroleum in Gorisht-Kocul Field (*Albanian SED clause*); the Model Exploration and Production Sharing Contract of the Republic of Cyprus (*Cypriot SED clause*); and the Lebanese Exploration and Production Agreement for Petroleum Activities in Block 4 (*Lebanese SED clause*).

5.3.1. The nomination of the Sole Expert

The specificity of SED stems from the fact that the resolution of the dispute is left to the appreciation of one expert, meaning that the parties have to agree on the person of the expert.

5.3.1.1. The qualifications of the expert

When the parties seek to have their dispute settled by a Sole Expert, they will aim to choose the most qualified person to fulfil the mission. In order to guarantee a minimum level of qualifications, oil and gas contracts may provide limitations and requirements pertaining to the person of the arbitrator. It is for instance the stance taken in the *Greek SED clause* and the *Lebanese SED clause*:

Greek SED clause:

> 23.2 (b) The Sole Expert shall be an individual qualified by education, experience, and training to determine the matter in such dispute, and shall be generally recognized by the international oil and gas industry as an expert in the field or fields of expertise relative to the dispute. No person may be appointed as an independent expert hereunder who has or may have any interest or duty which conflicts or may conflict or is or may be otherwise inconsistent with his function as a Sole Expert. No person may be appointed as a Sole Expert who is or has been a director, office holder, employee of, or adviser or consultant to, either Party or its Affiliate Enterprises.[674]

Lebanese SED clause:

> Art. 39 Sole expert
>
> […] 2. A sole expert shall be an independent and impartial physical or legal person of international standing with relevant qualifications and experience and not of the same nationality as any of the Parties, appointed pursuant to the mutual agreement of the Parties.[675]

The clauses set general qualifications requirements, relevant to the professional experience of the Sole Expert, as well as to its education and to the dispute at hand. Qualification in relation with the dispute is of utmost importance and setting in the contract specific realms of competence in which the Sole Expert can only be chosen will create issues as to its availability as well as its actual literacy on the dispute. However, the Greek Model Lease Agreement has limited the scope of competence of Sole Expert, by providing a strict definition of who can been

[674] Greek contract (n 41) art 23.2.
[675] Lebanese contract (n 42) art 39.2.

appointed as a Sole Expert in the “Definitions” part of the Lease Agreement. The clause states as follow:

> "Sole Expert" means a registered member from:
> (a) the Energy Institute of London;
> (b) the American Petroleum Institute; or
> (c) the French Institute of Petroleum (IFP Energies Nouvelles),
> provided that if, because of a conflict of interests, a Sole Expert cannot be appointed from either of the aforementioned institutes, the Lessor shall be entitled to appoint a Sole Expert from an independent, reputable petroleum institute of another member state of the European Union in which Hydrocarbons are produced.[676]

These additional restrictions could possibly be a source of conflicts and prevent the appointment of a Sole Expert in due time. Indeed, although the disputes submitted to SED tend to be of a technical nature, they could also involve legal aspects. In that regard, two options are offered to the parties. They can either try to appoint a Sole Expert fitting all conditions in the contract and who has an additional knowledge in legal matters. In this case, the appointment may suffer delays and parties take the risk of having the dispute remaining unsettled for longer than expected, increasing the risks to resort to arbitration. They can also appoint a Sole Expert according to the contract’s requirement, but without the legal background. In this instance, although the choice and nomination of the Sole Expert will be easier and faster, parties may face the problem of a dissociation of the dispute. This means that the Sole Expert will resolve one facet of the dispute, whereas the legal element will have to be submitted to another forum such as an arbitral tribunal. Dissociation of the dispute will lead to longer procedural times and as a result, a more time and cost consuming process. Furthermore, there are risks that the two forums may issue conflicting decisions. Parties will be then facing two disputes: the first one they sought to have resolved, and a second one resulting from the disagreement between the two forums.

[676] Greek contract (n 41) Definitions.

The other contracts do not provide as strict rules as the Greek Model Lease Agreement. For instance, the *Cyprus SED clause* states:

> 36.2 Expert Determination
> "In the event of failure of the Parties to reach an amicable settlement within the aforesaid period of sixty (60) days, the Parties shall, within (10) days, by mutual agreement, request an expert to provide its expert decision on the dispute."[677]

As opposed to the *Greek SED clause*, the *Cyprus SED clause* does not indicate any requirement as to the qualifications and the person of the Sole Expert. The *Albanian SED clause* has the same approach:

> 19.10 Any matter in dispute between Albpetrol and Contractor which in terms of this Agreement is to be referred to an Expert, or for any dispute relating to a failure of the Advisory Committee to approve a request or proposal of Contractor, shall be referred for determination by a sole expert.[678]

Such wording, or the one given in the *Lebanese SED clause*, may be preferred by the parties, as it gives them more freedom in the appointment of the expert. In addition, the parties are qualified professionals and know the dispute. It is safe to assume that they will, by themselves, agree and appoint a Sole Expert having the relevant qualifications and competences.

However, they may find relevant to add provisions relating to conflicts of interests in order to ensure impartiality, as they do not impose strict restrictions but keep the parties aware of the situations that may impair the impartiality and independence of the Sole Expert. Moreover, dispositions on conflicts of interests will act as a dispute prevention system and lower the risks of appeal of the determination.

[677] Cypriot contract (n 40) art 36.2.
[678] Albanian contract (n 39) art 19.10.

5.3.1.2. The acceptance of the mission

Once the parties have agreed on the person of the Sole Expert, they have to nominate them by writing, offering him the mission to solve their dispute. On this aspect of the procedure, only the *Greek SED clause* provides for a timeframe within which the Sole Expert must accept its mission:

> 23.2 (c) Upon a Sole Expert being selected under the foregoing provisions of this Article, and provided that the Parties have mutually agreed in writing the description of the Dispute and the terms of reference upon which the Sole Expert shall seek to resolve the Dispute and make its determination, the Lessor shall forthwith notify this Sole Expert of its selection by the Parties and shall request it to state within five (5) calendar days (the "Acceptance Period") whether or not it is willing and able to accept the appointment. If such Sole Expert shall be either unwilling or unable to accept such appointment, or shall not have accepted (the "Disqualified Expert") within the Acceptance Period then the Parties shall select an alternative Sole Expert within five (5) calendar days following the end of the Acceptance Period.[679]

This clause can be summarised as follow. The chosen Sole Expert will be notified by the Lessor (in the Greek Model Lease Agreement, this means the Ministry of Environment and Energy or its representative, Hellenic Hydrocarbon Resources Management). Upon notification, the Sole Expert has five days to state whether it accepts or not to resolve the dispute. If the Sole Expert does not accept, the process of nomination starts again until an available Sole Expert is found. This strict timeline features both advantage and inconvenient. On one hand, this schedule helps the procedure of SED to be expedited in a timely manner, which is one of the reasons parties decide to resort to SED. On the other hand, the five days limit associated to the restrictions on the person of the Sole Expert could render the nomination of a Sole Expert more difficult than it should be for the sake of the parties and the dispute. Nonetheless, imposing an acceptance timeline appears to be an adequate system to ensure that the procedure is kept within an effective timeframe. The resolution of the dispute in a timely manner should remain the main objective of the parties.

[679] Greek contract (n 41) art 23.2.(c).

5.3.1.3. Disagreement on the nomination between the parties

The particularity and interest of SED relies on the common choice of the Expert by the parties. SED is a collaborative mechanism transforming into adjudicative mechanism once the Sole Expert has been appointed. As any collaborative mechanism, agreement of the parties is not guaranteed and specific procedures must be provided for these events. All the SED clauses have implemented dispositions for failure to nominate a Sole Expert.

Greek SED clause:

> 23.2 (c) […] If the Parties fail to agree on the appointment of the Sole Expert within the required period, the matter shall be referred by the Parties to the President of an Institute as described in Article 23.2(a), and the process shall be repeated until a Sole Expert is so agreed or selected who accepts the appointment upon terms acceptable to all Parties.[680]

Albanian SED clause:

> 19.10 […] If Albpetrol and Contractor fail to appoint the expert within thirty (30) days after agreement on the terms of reference has been reached, either Party may apply to the International Chamber of Commerce Centre for Technical Expertise, Paris, France, for appointment of an expert in accordance with its Rules.[681]

Cypriot SED clause:

> 36.2 In the event of failure of the Parties to reach an amicable settlement within the aforesaid period of sixty (60) days, the Parties shall, within (10) days, by mutual agreement, request an expert to provide its expert decision on the dispute. Failing such agreement, any one of the Parties may request the International Centre for Technical Expertise of the International Chamber of Commerce to appoint such expert in accordance with its Rules for Technical Expertise.[682]

[680] Greek contract (n 41) art 23.2.(c).
[681] Albanian contract (n 39) 19.10.
[682] Cypriot contract (n 40) art 36.2.

Lebanese SED clause:

> Art 39.2 […] If the Parties are unable to agree on the appointment of a sole expert within twenty (20) days after a Party has received a notice of referral pursuant to this Article, the sole expert shall be appointed by the International Chamber of Commerce Centre for Expertise.[683]

Two elements must be discussed in relation to the reproduced clauses.

5.3.1.3.1. Appointment within a specific timeframe

Firstly, all SED clauses provide for a timeframe within which the parties must have reached an agreement on the Sole Expert. The period is comprised between ten days (*Cypriot SED clause*) and 30 days (*Albanian SED clause*). The *Lebanese SED clause* provides for twenty days and the *Greek SED clause* gives the parties 15 days to reach an agreement (by reference to article 23.2 (a)). A first comment is that all appointment periods are short in order for the parties to see the resolution of their dispute progress rapidly. Albeit a fast resolution of the dispute is necessary, parties should still be given enough time to try to reach an agreement on the person of the Sole Expert. In light of this, the ten days timeframe provided in the *Cypriot SED clause* may appear too short for an effective collaborative appointment, and parties should prefer a longer timeframe. However, if SED intervenes after another ADR, such as TAC or negotiation, they may have had the time to foresee that the dispute will not be resolved during the previous non-adjudicative procedure and therefore plan in advance for the SED. The choice of the schedule will hence depend on whether SED is the initial step of the dispute resolution process or not. In any case, providing a timeframe is crucial to ensure that the SED procedure will end in deadlock, without any guidance for the parties on how to exit such situation.

5.3.1.3.2. Resort to external institutions

In case of disagreement, all clauses delegate the appointment of the Sole Expert to an external institution. The *Albanian*, *Cypriot* and *Lebanese SED clauses* all refer to the Centre for Expertise of the International Chamber of Commerce. The

[683] Lebanese contract (n 42) art 39.2.

International Chamber of Commerce (*ICC* hereafter) is an ADR institution in Paris, France, providing facilities and rules for the resolution of disputes. Although it is largely known for its arbitral aspect, the ICC also caters for Expertise and Dispute Review Boards procedures. For all procedures relating to Expert determination, the ICC has issued rules, which are the ones referred to in the *Albanian* and *Cypriot SED clauses*.[684] These rules tackle different issues the parties may encounter during an Expert Determination, and the ICC has developed a set of rules specially dedicated to the "Appointment of experts and neutrals".[685]

According to these rules, the parties must submit a Request for Appointment to the Centre, stating the details of the parties as well as the whished credentials of the expert. In this regard, the Rules for the Appointment of experts and neutrals provide that parties can request certain attributes from the expert, the languages that must be used. Additionally, the parties must describe the field of activity of the expert, the work that will have to be undertaken by the expert as well as the timeframe given for completion.[686] If the Request for Appointment is made by one party only, the Centre will communicate the Request for Appointment to the other party in order to gather their comments.[687] The appointment is then made by the Centre, which will consider several elements in its decision such as the nationality of the expert, its training, experience and availability.[688]

On the other hand, the *Greek SED clause* devolves the power to appoint the expert to the President of one of the listed institutes, i.e. either the Energy Institute of London; the American Petroleum Institute; or the French Institute of Petroleum (IFP Energies Nouvelles). As opposed to the ICC's appointment, the appointment by the President of these institutes is not subject to rules or guidelines. A contract providing such alternative appointment method may be facing difficulties in the case that the relevant appointing body does not appoint a president or is in the process of changing president as the dispute resolution process could be delayed.[689] In the case of the *Greek SED clause*, because there are references to three different institutes, the risks of deadlock from this situation are low.

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[684] International Chamber of Commerce, International Centre for ADR, Expert Rules (1 February 2015) (ICC Expert Rules).
[685] ICC Expert Rules.
[686] ICC Expert Rules Article 1, 2(c).
[687] ICC Expert Rules Article 1, 4.
[688] ICC Expert Rules Article 3, 2.
[689] Clive Freedman, James Farrell, *Kendall on Expert Determination* (5th edition, Sweet and Maxwell 2015) para 9.5-4.

Besides these two systems of appointment in case of disagreement between the parties, they can also choose to delegate this power to the London Court of International Arbitration (LCIA) which does not publish rules *per se*, but has issued an example of a model clause and draft rules for parties wishing to require its services.[690] The parties or one of them must apply to the LCIA and join to the application a description of the nature and circumstances of the dispute, as well as all relevant information that may help LCIA in appointing the expert.[691] The parties, when incorporating the draft rules to their contract, or when agreeing to these rules and this method of appointment if after the conclusion of the contract, can provide for a timeframe in which the LCIA has to appoint the expert.[692]

The alternate appointment and the delegation of power to other entities is an efficient means to ensure that the resolution of the dispute is handled in a definite timeframe. Indeed, if the parties cannot agree on an expert in 15 to 30 days, there are little chances they will reach an agreement later. To lower the risk of deadlock even more, parties may choose, as in the Greek Model Lease Agreement, to list several institutions or to add the possibility of a successor organisation if the listed one happened to disappear.[693]

As time is of the essence in dispute resolution, tackling the appointment in a timely manner is key for the parties. Externalisation of the nomination in case of a conflict also protects the impartiality and neutrality of the procedure.

5.3.2. The procedure before the Sole Expert

The clauses studied in this section provide for ad hoc SED, which means they do not rely on pre-existing rules or guidelines that may have been issued by institutions. However, parties can decide to have a SED procedure following definite rules. The ICC and the LCIA for instance, in addition to the appointment rules they have drafted, can act as administrators for SED procedures.[694]

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[690] LCIA, Expert Determination, Draft Rules/Clause where the LCIA acts as appointing authority only <https://www.lcia.org/media/download.aspx?mediaId=10> (LCIA Expert Determination).
[691] LCIA Expert Determination.
[692] LCIA Expert Determination.
[693] Freedman and others (n 689) para 9.5-1.
[694] ICC Expert Rules; LCIA Expert Determination.

As a general comment, the procedure before the Sole Expert will depend on the contents of the contract. In light of this, the different procedures implemented in the studied contracts will be analysed and compared.

5.3.2.1. Scope of the mission

In order to fulfil its duty, the Sole Expert can be given an outline of the dispute, and terms of reference, a description of the scope of the expert mission. The description will help experts in accepting the mission if they consider they are competent. The terms of reference are different as they limit the action of the expert in accomplishing their determination. Only the *Greek SED clause* and the *Albanian SED clause* directly implement such requirement.

Greek SED clause:

> (c) Upon a Sole Expert being selected under the foregoing provisions of this Article, and provided that the Parties have mutually agreed in writing the description of the Dispute and the terms of reference upon which the Sole Expert shall seek to resolve the Dispute and make its determination […]
> (e) In accordance with Article 23.2(c), the terms of reference upon which the Sole Expert shall seek to resolve a Dispute shall be mutually agreed between the Parties. The parameters within which the Sole Expert shall make its determination shall be strictly within the terms of reference, agreed by the Parties.[695]

Albanian SED clause:

> The Expert shall be given terms of reference which shall be mutually agreed between the Parties.[696]

The description of the dispute and the terms of reference are a collaborative work as they are drafted by both parties. The description of the dispute consists in the i.e. Annual Work Program, Unitisation, Minimum Work Obligations and Expenditures, Valuation of Crude Oil or Gas, Price Review. They should include the contract under which the Sole Expert has been appointed as well as the letter of appointment.[697] They must be signed by all the parties and the Sole Expert.

[695] Greek contract (n 41) art 23.2.(c) and (e).
[696] Albanian contract (n 39) art 19.10.
[697] Freedman and others (n 689) para 12.5-1.

They may provide the fee and payment structure when the contract does not already state that the fees will be shared between the parties, whether the Sole expert must give reasons to its decision and set out the procedure.[698] The terms of reference must also include all issues the parties are facing in order to avoid, as previously exposed, a dissociation of the dispute and as a result a multiplication of the forums and risks of inconsistent decisions. Furthermore, a precise definition of the dispute will ensure that the Sole Expert will act within the jurisdiction conferred by the contract, where only named disputes can be referred to Expert Determination.[699] Consequently, terms of reference are specific to each dispute and must be carefully drafted in order to save time and costs.[700]

With regards to the *Cypriot SED clause*, in the absence of provisions on terms of reference, parties should still provide the Sole Expert with a copy of the contract and an appropriate description of the dispute, agreed and signed by all parties.[701] Determining the scope of the mission of the Sole expert will reduce the risks of future challenges of the determination on the grounds of lack of jurisdiction.

In addition to terms of reference or documents akin to, parties may decide to set out the SED procedure if the contract does not provide for it.

5.3.2.2. Submission of evidence and documents

In order to reach its decision, the Sole Expert may require the parties to communicate evidence and documents regarding the dispute. The right of parties to provide their opinion on the dispute as well as evidence in support of their position can be set out in the contract.[702] The SED clauses offer an array of rights and obligations in relation to submission of documents.

[698] Freedman and others (n 689) para 10.8-1.
[699] Freedman and others (n 689) para 12.5-2.
[700] Freedman and others (n 689) para 12.5-2.
[701] Freedman and others (n 689) para 12.5-1.
[702] Freedman and others (n 689) para 12.

Firstly, the *Greek SED clause* gives the possibility of submission an obligation:

> 23.2. d) For the purposes of determination by the Sole Expert of the Dispute, each Party shall submit to the other Party and to the Sole Expert within thirty (30) calendar days (the "Submissions Period") following the Sole Expert's acceptance of appointment:
> (i) a description of the Dispute;
> (ii) a statement of its position; and
> (iii)any documents supporting and/or justifying its position.
> The Sole Expert may, in its absolute discretion, consider any additional information submitted by either Party and/or any other procedural matters not specifically addressed herein.[703]

The parties are compelled to send to the Sole Expert and the other party their description of the dispute and their position on the matter. In addition to these, they must also provide any documents serving as evidence in support of their position. Besides these mandatory communications, the parties are authorised to submit additional documentations and information, but they may not be considered by the Sole Expert. Moreover, the Sole Expert is free to amend the procedure, as long as it follows and abide by the mandatory provisions of the SED clause. In light of this, the Sole Expert may hold hearings, require a visit on the site of the dispute and undertake inspections.[704] A question arises as to the wording of the clause, and the obligations it may create for the Sole Expert. The parties are required to provide three categories of documents. They can then provide additional elements and documents. According to the clause, these additional documents can be set aside by the Sole Expert, however, it is not clear whether the Sole Expert is also entitled to disregard part or whole of the mandatory documentation and therefore if it has to base its decision on the mandatory documentation.

Moreover, the distinction between additional and mandatory documents in support of the parties' position may be difficult to draw. If the clause imposes an obligation to the Sole Expert to consider all mandatory submissions when reaching its decision, parties may be tempted to include all information as part of the documents in support of their position. Hence the Sole Expert may be "flooded" by unnecessary documentation, without having the possibility to

[703] Greek contract (n 41) art 23.2.(d)
[704] Freedman and others (n 689) paras 12.4, 12.6-1 and -4.

disregard it. Furthermore, and despite the existence of a schedule, abusive communication may endanger the procedure and cause delays.

Another possibility is to consider communications as a right of the parties, but not an obligation. It is the stance taken by the *Albanian SED clause* and the *Cypriot SED clause*.

Albanian SED clause:

> 19.10. […] The Expert shall make his determination in accordance with the provisions contained herein based on the best evidence available to him. Representatives of Albpetrol and Contractor shall have the right to consult with the Expert and furnish him with data and information, provided the Expert may impose reasonable limitations on this right. Any such data and information has (*sic*) to be submitted to the other Party to the dispute at the same time. The Expert shall be free to evaluate the extent to which any data, information or other evidence is substantiated or pertinent.[705]

Cypriot SED clause:

> 36.2 […] The Parties agree to cooperate fully in the conduct of such expert determination and to provide the expert with all necessary information to make a fully informed decision in an expeditious manner.[706]

It stems from these clauses that parties are free to communicate any information they consider relevant to the dispute. The *Albanian SED clause* presents a characteristic, being the power of the Sole Expert to limit the parties' right to communicate. If the parties are entitled to "consult" with the Sole Expert and to provide documentation, the Sole Expert is also entitled to refuse them such right. It is different to the powers of the Sole Expert in the *Greek SED clause*. As aforementioned, the Sole Expert in the *Greek SED clause* is not empowered to refuse to receive documentation and can only decide to set it aside. On the contrary, the *Albanian SED clause* has provided the Sole Expert the power to impose "reasonable limitations" on the parties' communication right. Under the *Albanian SED clause*, the Sole Expert is also free to disregard any information it

[705] Albanian contract (n 39) art 19.10.
[706] Cypriot contract (n 40) art 36.2.

may not consider relevant to its determination. The freedom of the Sole Expert is also the position taken by the *Cypriot SED clause*, which does not provide much information on the procedure of submission but requires the parties to communicate any necessary information.

The *Lebanese SED clause* is interesting because the procedure of documents' submission is detailed and expresses the freedom of the Sole Expert in conducting it:

> Art. 39.3. The sole expert shall decide the manner in which any determination is made, including whether the Parties shall make oral or written submissions and arguments, and the Parties shall cooperate with the sole expert and provide such documentation and information as the sole expert may request. All correspondence, documentation and information provided by a Party to the sole expert shall be copied to the other Party, and any oral submissions to the sole expert shall be made in the presence of all Parties. The sole expert may obtain any independent professional or technical advice as the sole expert considers necessary.[707]

The clause presents mainly the same provisions as the others but adds the right for the Sole Expert to call in other experts and professionals during the procedure for the resolution of the dispute. Because the Sole Expert accepts its mission on the basis of a description of the dispute by the parties and supported by their own documentation, it may be the case that the description does not fully correspond to the reality. In this instance, the Sole Expert may have had accepted its mission without considering some aspects of the dispute in which it may not have the sufficient knowledge and competence.[708] The insertion of such provision would greatly lower the risks of a partial decision or of an error, which could lead to an appeal and the cancellation of the Sole Expert decision.

Parties are free to choose the procedure they wish to follow for SED when drafting the contract. They can leave all decisions regarding the collection of information and data to the Sole Expert or make it an obligation for the parties. However, they must be aware of risks pertaining to poorly worded clauses and the inconsistency that may result from it.

[707] Lebanese contract (n 42) art 39.3.
[708] Freedman and others (n 689) para 6.7-3

5.3.2.3. A strict timeframe as the key to efficiency

Besides the procedure regarding communication of information, the parties can provide in the contract the timeframe within which the Sole Expert has to give its decision. This is the choice made by all SED clauses studied, except the *Albanian SED clause*:

Cypriot SED clause:

> 36.2 Expert Determination
> […] The expert shall render his decision no later than one hundred and twenty (120) days after his or her appointment.[709]

Lebanese SED clause:

> Art. 39 2. […] Any sole expert appointed shall […] express an opinion on the resolution of the disagreement or to resolve the dispute […] referred to him within thirty (30) days of his appointment, but in any event within sixty (60) days of the appointment.

The *Greek SED clause* provides a time limit for both the submissions and the determination:

> 23.2. (d) For the purposes of determination by the Sole Expert of the Dispute, each Party shall submit to the other Party and to the Sole Expert within thirty (30) calendar days (the "Submissions Period") following the Sole Expert's acceptance of appointment […]
> (f) Save in the event of fraud or manifest error, the Sole Expert's determination shall be conclusive and binding on the Parties and shall be delivered within thirty (30) calendar days following the end of the Submissions Period.[710]

A Sole Expert, according to these clauses, will have to issue its decision in a specific timeframe. Keeping the procedure within strict time limits is crucial for the efficiency of the SED procedure as a whole. The choice of the *Greek SED clause* to limit in time submissions of documents is interesting and join to some extent the *Albanian SED clause*. It is possible to imagine that the “reasonable limitations” put by the Sole Expert on submissions of information under the *Albanian SED*

[709] Cypriot contract (n 40) art 36.2.
[710] Greek contract (n 41) art 23.2.(d).

clause could consist in a timeframe. Regarding the time limit for issuing the decision, two comments must be made. Firstly, the parties should be conscious of the workload required for Expert Determination and should provide an adequate time limit for the Sole Expert to correctly fulfil its mission. Secondly, the parties should consider the possibility of a late decision, issued after the deadline. Can the parties be bound by the decision, or should they restart the SED procedure from the beginning?[711] Out of the different SED clauses, the *Lebanese SED clause* and the *Greek SED clause* provide for the consequences of a late decision:

Lebanese SED clause:

> Art. 39 4. […] In the event that the sole expert fails to resolve the dispute by the deadline specified in paragraph 2 of this Article 39 where such resolution is, pursuant to the provisions of this EPA, deemed to be final and binding, any party may refer the dispute to arbitration in accordance with Article 38 of this EPA.[712]

Greek SED clause:

> 23.2. (g) If the Sole Expert dies or becomes unwilling or incapable of acting, or does not deliver the determination within the time required by this Article then:
> (i) the Parties shall promptly select a replacement Sole Expert; and
> (ii) this Article shall apply to the new Sole Expert as if he were the first Sole Expert appointed.[713]

As per the *Lebanese SED clause*, a late decision would result in a non-binding decision, as parties are allowed to resort to arbitration for the same dispute. Nonetheless, the clause presents it as a possibility by the use of “may”. This is sensible regarding the nature of SED, which relies on parties’ willingness and freedom of contract. Even if the decision is issued after the deadline, the parties may still decide to give it a final and binding force.

The *Greek SED clause*, on the other hand, penalises strictly the lateness of the decision by providing the replacement of the Sole Expert. In that case, the procedure would have to be started anew, including the appointment of the Sole

[711] Freedman and others (n 689) para 12.6-2
[712] Lebanese contract (n 42) art 39.4.
[713] Greek contract (n 41) 23.2.(g).

Expert which can be time consuming. This choice does not appear as costs and especially time saving as the *Lebanese SED clause*. It imposes a second procedure and also deprives the parties from their freedom to contract. The parties should be entitled to consider the Sole Expert decision as binding, even if late. In a scope of efficiency, it appears that the option provided in the *Lebanese SED clause* is the most adapted to the SED procedure, as a time efficient dispute resolution mechanism.

5.3.3. The decision

5.3.3.1. The principle: binding and definitive

SED is a dispute resolution mechanism sought after by parties because of its binding and final character. Although the parties are free to decide otherwise in the contract, they mostly choose this option as evidenced in the SED clauses:

Greek SED clause:

> 23.2 (f) Save in the event of fraud or manifest error, the Sole Expert's determination shall be conclusive and binding on the Parties and shall be delivered within thirty (30) calendar days following the end of the Submissions Period.[714]

Albanian SED clause:

> 19.10 […] The Expert's determination shall be final and binding upon the Parties, subject to any manifest error in his determination.[715]

Cyprus SED clause:

> Article 36.2 Expert Determination
> […] The expert's decision shall be final and binding upon the Parties unless the Parties refer the dispute to arbitration pursuant to Article 36.3 within sixty (60) days of the date on which the expert's decision is received by the Parties by double-registered letter or by courier.[716]

[714] Greek contract (n 41) 23.2.(f).
[715] Albanian contract (n 39) art 19.10.
[716] Cypriot contract (n 40) art 36.2.

Lebanese SED clause:

> Art. 39 4. Where pursuant to the provisions of this EPA, the decision of the sole expert is final and binding, such decision shall not be subject any appeal, save in cases of fraud, corruption or manifest disregard of applicable procedure of this EPA.[717]

It appears from these clauses that the biding and final character of SED is a general principle by which parties want to abide. Binding and final means that the parties agree to be contractually bound by the decision (binding) and that they rule out any recourse against the decision (final), except for the listed exceptions.[718] The extent of the finality of the decision is limited. Contrary to arbitration, SED does not benefit from an international convention on enforcement, nor has the same gravitas as a judgment or arbitral award. The decision will be binding in the same way a contract will be, which means that it will be binding between the parties only, and not directly enforceable before national courts. Because the decision is treated as a contractual bound, the enforcement will depend on the law applying to the contract and to the Sole Expert Determination, as well as the courts before which enforcement is asked.
The binding and final character is not solely applicable to the parties and is also a requirement for the Sole Expert. If the contract provides for a binding and final decision, the Sole Expert must issue a decision fitting these conditions. Its determination must be decisive and not give rise to possible challenges. The wording must be clear and unequivocal.[719] If the decision does not demonstrate these criteria, the Sole Expert determination could be challenged, but the Sole Expert as well for breach of the contract.

5.3.3.2. <u>The exceptions and appeals processes</u>

Although the principle is that the Sole Expert decision is final and binding, it appears from the clauses that there are exceptions. The *Greek SED clause* allows appeals of the decision in the cases of fraud and manifest error. The *Albanian SED clause* limits appeals to decisions demonstrating a manifest error

[717] Lebanese contract (n 42) art 39.4.
[718] Ank A Santens, 'Expert Determination Clauses in Contracts Providing for International Arbitration – What Happens when the Expert's Decision is Not Final and Binding' (2007) 23(4) Arbitration International 687, 688
[719] Freedman and others (n 689) para 15.11-1.

only. The *Lebanese SED clause*, in addition to fraud and manifest error, adds disregard of the applicable procedure of the contract to the list of exceptions. It must be noted that the understanding of the concepts of mistake and fraud depend on the courts before which the challenge is brought, and the law applicable to the contract. Before the courts of England and Wales for instance, an error is manifest when "plain and obvious" or "easily demonstrable without extensive investigation".[720] The appreciation of the right to appeal a Sole Expert determination is therefore closely linked to the forum before which it will be appealed.

Another type of exception can be found in the *Greek SED clause*, which provides:

> 23.2. (f) […] The decision of the Sole Expert may be referred to arbitration by way of appeal on a point of law, but not on a point of fact.[721]

This limitation of appeals on points of law only must be added to the previously presented restrictions on manifest error and fraud. This signifies that the manifest error will have to be an error on a point of law and not an error on a point of fact. This further limitation can be compared with some rules applicable to appeals in arbitration. The English Arbitration Act 1996 for instance, in its section 69, provides that appeals are limited to questions on a point of law.[722] By excluding points of facts from the realm of the appeal process, the *Greek SED clause* reinforce the binding and final character of SED. SED is a chosen dispute resolution method for technical issues, therefore mainly based on factual aspects. Although legal elements can be found, the main part of the determination will tend to focus on and resolve a factual dispute, hence restricting the amount of determinations that may be appealed.

Another exception to the principle of a binding and final decision can be found in the *Cypriot SED clause*. Despite providing for the final and binding character of

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[720] Freedman and others (n 689) para 14.11-2; *Galaxy Energy International Ltd v Eurobunker Spa* [2001] 2 Lloyd's Rep. 725; *IIG Capital LLC v Van Der Merwe* [2008] EWCA Civ 542, [2008] 1 FCR 633 at [33]–[35].

[721] Greek contract (n 41) art 23.2.(f).

[722] For a general discussion on section 69 of the English Arbitration Act 1996, see Noussia K, Al Muqaimi M, Bouvery L, Chen W, Nedeva S, 'Appeals in Arbitration: The Modern Function of Section 69 of the English Arbitration Act 1996' in Devenney J (ed) *Research Handbook on Transnational Commercial Law* (E Elgar, forthcoming)

the expert decision, it does not impose any restrictions on the appeal process. As a result, parties are entitled to contest and challenge the expert's decision within the sixty days it has been rendered. This unlimited right to appeal deprives the SED process from its main interest, which is the finality of the decision. Indeed, it is likely that the losing party may wish to challenge the determination made.[723] In an aim to keep SED effective, rights to appeal the decision must be as limited as possible. Otherwise SED becomes an unnecessary step in the dispute resolution process, as the parties could have directly gone to arbitration to have their dispute resolved.

A derogation to the binding and final character of the decision may be seen in the *Lebanese SED clause*:

> Art 39.
> 2. […] Any sole expert appointed shall act as an expert and not as an arbitrator or mediator and shall be instructed to endeavour to express an opinion on the resolution of the disagreement or to resolve the dispute, as the case may be […].[724]

According to this clause, the Sole Expert can be asked to either settle the dispute or express an opinion. The latter is a reference to a clause in the Lebanese contract which provides that the expert shall provide an opinion, which has to be approved by the Lebanese Government to come into force. As for the *Cypriot SED clause*, these provisions are not time and cost-efficient. If the State can overturn the Sole Expert decision, then the whole process of SED is questionable as it is likely that the contracting party will decide to appeal the State's rejection of the expert opinion and bring the dispute to arbitration. This addition, similar in its effects to the *Cypriot SED clause*, strips out the SED process from its efficacy and usefulness in a dispute resolution system.

The existence of an appeal procedure for Sole Expert Determination demonstrates that besides the "adjudicative" character of SED, it is at times still considered a step in the dispute resolution process. All clauses provide for arbitration as the last means to solve their dispute. Although the opportunity to contest an erroneous or fraudulent determination must be preserved, considering

[723] Santens (n 723) 687.
[724] Lebanese contract (n 42) art 39.2.

SED as a first step towards arbitration only would deprive the whole procedure of its purpose. SED needs to be a final Alternative Dispute Resolution Mechanism, otherwise parties will directly go to arbitration and provide expert determination during the arbitral procedure instead. Or, in the absence of strict rules of appeal, they would challenge the Sole Expert's decision if they disagreed with it.

When resort to SED is not mandatory, the parties are free to decide to refer to SED or to go directly to arbitration. Parties should be conscious of the help and rapidity of SED for handling their disputes. The relative freedom in appointing the Expert allows parties to have SED for all types of disputes, and not only technical ones. Furthermore, the right to appeal a decision, even if restricted, guarantees that an error in the determination or cases of fraud can be challenged. When correctly drafted and implemented, SED clauses can provide a quick, efficient and as a result cost-saving dispute resolution mechanism without interrupting the contract nor having to postpone the resolution of the dispute to the end of the contract as it would be the case with arbitration. In addition, SED may be used to promote arbitration, by acting as a filter. If the parties decide to resort to SED, the number of cases submitted to arbitration will decrease, and so may the costs and time of the procedure.

5.4. The way forward: Dispute Review and Adjudication Boards

Dispute Review and Adjudication Boards (hereafter *DB* or *DBs*) are an Alternative ADRM mainly provided for in construction contracts, but are not yet common in the oil and gas energy despite their recognised effectiveness.[725] DBs are the consequence of the lengthy and costly litigations in the construction industry, and the realisation that the "traditional" ADR (i.e. arbitration, mediation and mini-trials among others) were only available *ex post* the completion of the project.[726]

The inception of DBs takes its roots from the United States and was first reported for the Boundary Dam, a construction project in Washington in the 1960's.[727]

[725] Martin Dispute resolution in the international energy sector' (n 131) 339.
[726] Kathleen M J Harmon 'Effectiveness of dispute review boards' (2003) 129(6) *Journal of construction engineering and management* 674
[727] Peter H J Chapman, 'The Use of Dispute Boards on Major Infrastructure Projects' (2015) 1 Turk Com L Rev 219, 219

Since then, several institutions have created and implemented DBs procedures and rules, such as the ICC,[728] already mentioned regarding SED, the Chartered Institute of Arbitrators (CIArb),[729] the American Arbitration Association (AAA),[730] and the Fédération Internationale des Ingénieurs Conseils (FIDIC) among others.[731]

This section, as opposed to the previous ones, will not involve empirical study of clauses, as DBs have not been implemented in the contracts. This section will therefore cover the creation and functioning of DBs from the rules and clauses developed by international institutions, when available. From this comparative analysis, conclusions will be drawn regarding the opportunity to bring in this new "unconventional" ADRM into oil and gas investment contracts.

5.4.1. The constitution of DRBs

DBs, like TACs, are established at the initiation of a project and are provided for in the contract, and so are the modalities of appointment if the parties decided for an *ad hoc* DB.[732] They are normally constituted of three members, appointed by the parties. The rule would be that each party appoint a member, whereas the last member would be appointed by the first two.[733] However, three DBs members is merely a general conduct and parties are free to appoint more or less members. The ICC Dispute Board Rules (ICC DB Rules) as well as the CIArb Disputes Board Rules (CIArb DB Rules) offer the option to appoint one member.[734] This choice is advised for smaller projects as a cost saver.[735] Alternatively, bigger

[728] International Chamber of Commerce, Dispute Board Rules (2018) < https://iccwbo.org/content/uploads/sites/3/2015/09/icc-dispute-board-rules-english-version.pdf> (ICC Dispute Board Rules)
[729] Chartered Institute of Arbitrators, Dispute Board Rules (2010) < https://www.ciarb.org/media/3934/ciarb-dispute-board-rules.pdf> (CIArb Dispute Board Rules)
[730] American Arbitration Association, AAA® Dispute Resolution Board Hearing Rules and Procedures (2000) < https://www.adr.org/sites/default/files/AAA_Dispute_Resolution_Board_Hearing_Rules_and_Procedures.pdf> (AAA Dispute Resolution Board Hearing Rules and Procedures); AAA® Dispute Resolution Board Operating Procedures (2000) < https://www.adr.org/sites/default/files/AAA_Dispute_Resolution_Board_Operating_Procedures.pdf> (AAA Dispute Resolution Board Operating Procedures)
[731] Yasemin Cetinel, 'The Nature of Dispute Board Decisions, with Special Emphasis on the Turkish Law Approach' (2016) 2 Turk Com L Rev 103, 103-104
[732] Chapman, 'The Use of Dispute Boards on Major Infrastructure' Projects' (n 727) 219.
[733] ICC, Dispute Board Rules, Article 7.2 and 3; CIArb, Dispute Board Rules, Article 6.1 and 3.
[734] ICC, Dispute Board Rules, Article 7.2 and 3; CIArb, Dispute Board Rules, Article 6.1 and 3.
[735] Deborah Bovarnick Mastin, 'Government Construction Headaches: Dispute Review Boards to the Rescue' (2015) 23 Pub Law 3, 4; Donald Charrett, 'The Commercial Value of Dispute Boards

projects may require more members, in order to cover efficiently and technically all the possible issues that may arise.[736] Regarding appointment of members, as for SED and in the case that parties have not chosen to follow institutional rules, an alternative appointment system should be provided in the contract. Starting a contractual relationship on a dispute may not be the best method to ensure good performance of the contract and collaboration.

As for SED, DBs members are chosen by the parties for their professionalism and their knowledge in the field, and mandatory required qualifications should be carefully weighted. Construction disputes involving often technical and legal aspects, the presence of a Board member with a legal background in construction law can be a valued asset.[737] Parties should carefully choose the members of the Board, as they will be present during the whole performance of the contract. In addition to professional qualities, the parties should choose members with personal qualities.[738] Parties should envisage, when they appoint the members of the DB, that they will have to sustain the Board's composition until the completion of the project. Members should therefore be trusted by the parties, in order for them to attain legitimacy and as a result, give weight to their opinions and decision.[739] Moreover, the Board's members are neutral, regardless of the party who appointed them.[740] Neutrality can be improved by providing in the contract that none of the members will be of the same nationality as any of the parties.[741] In addition, parties can insert in the contract a specific clause on conflicts of interests and previous positions that members should not have held. Institutional rules, such as the ICC DBs' Rules and CIArb DBs' Rules impose an obligation of neutrality and impartiality.[742] In order to ensure effective neutrality, Board's members under these rules are subject to a disclosure obligation. They must, alongside their signed statement on impartiality and independence,

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under FIDIC Contracts' (2015) 1(3) Turkish Commercial Law Review 205, 217; Chapman, 'The Use of Dispute Boards on Major Infrastructure' Projects' (n 727) 228.

[736] Chapman, 'The Use of Dispute Boards on Major Infrastructure' Projects' (n 727) 224.

[737] Daniel D McMillan, 'Dispute Review Boards: What the Case Law Says About Them' (2010) Dispute Resolution Journal 58, 60.

[738] Bovarnick Mastin (n 735) 6-7.

[739] Kathleen M J Harmon, 'Construction conflicts and dispute review boards: Attitudes and opinions of construction industry members' (2003) 58(4) 68, 71

[740] Duzgun Agdas, Ralph D Ellis, 'Analysis of Construction Dispute Review Boards' (2013) 5(3) Journal of Legal Affairs and Dispute Resolution in Engineering and Construction 122, 123.

[741] Chapman, 'The Use of Dispute Boards on Major Infrastructure' Projects' (n 727) 231.

[742] ICC, Dispute Board Rules, Article 8; CIArb, Dispute Board Rules, Article 8.

communicate facts and circumstances which may contravene to this obligation.[743] Furthermore, disclosure is not limited in time, and members are required to disclose any arising circumstances endangering their neutrality during their appointment as well.[744]

DBs can be appointed from the start of the contract or during its performance. Nonetheless, implementation of the DB as soon as the contract is signed increases the familiarity of the members with the project and with the parties, creating from the start a relationship which is not based on a conflict.[745] The communication and relationship among the parties and the Board is further fostered by the cyclical visits on site, which is the main characteristic of DBs.

5.4.2. The functioning of DBs

5.4.2.1. Periodical meetings

DBs are different from most ADRMs as they are actioned and implemented regardless of the existence of a dispute.[746] The frequency of the meetings are provided in the contract, or in the relevant institutional rules if it is the choice of the parties.[747] As stated in the ICC DB's Rules, the regularity of the meetings should be sufficient to keep the Board well informed, either on the performance of the contracts and the works, or on any disagreement that may have arisen.[748] As a result, both ICC and CIArb advise for at least three meeting per year.[749] The number of meetings per year can also evolve during the different phases of the project. The parties may need more on site visits during the first months or years of the project, and the number of meetings can then be reduced once the most dispute-prone aspects of the project have been completed.[750] Reducing the number of visits may also reduce the costs of the DB.[751]

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[743] ICC, Dispute Board Rules, Article 8.2 ; CIArb, Dispute Board Rules, Article 8.2.
[744] ICC, Dispute Board Rules, Article 8.3 ; CIArb, Dispute Board Rules, Article 8.3.
[745] Mohamed-Asem U Abdul-Malak, Mohammad Hasan Senan, 'Operational Mechanisms and Effectiveness of Adjudication as a Key Step in Construction Dispute Resolution' (2020) 12(1) Journal of Legal Affairs and Dispute Resolution in Engineering and Construction1, 2.
[746] Agdas, Ellis (n 740) 123.
[747] ICC, Dispute Board Rules, Article 12; CIArb, Dispute Board Rules, Article 10.
[748] ICC, Dispute Board Rules, Article 12.1.
[749] ICC, Dispute Board Rules, Article 12.1; CIArb, Article 10.2.
[750] Harmon (n 649) 'Resolution of construction disputes' 196.
[751] Chapman, 'The Use of Dispute Boards on Major Infrastructure' Projects' (n 727) 226.

During these meetings and on-site visits, DB's members are given elements and information on the progress of the works and the contract. They can also receive copies of documents relative to the project.[752] These regular visits allow familiarity of the Board members with the project and with the parties.[753] This is strengthened by the obligation made to all parties and to all DB's members to be present at the visit.[754] But more importantly, and as TACs, the implementation of a DB creates a cyclical discussion forum, during which parties know that they will be able to present the progress and if need be, ask the opinion of the Board if an issue has arisen since the last meeting.

The main aim of DBs is to avoid issues to grow into disputes, and this is clearly evidenced by the procedure before DBs.

5.4.2.2. The procedure

5.4.2.2.1. Informality as a principle

DBs are a forum for discussion for the parties and the members. During meetings and on-site visits, the members are there to collect information and assist the parties on any disagreement they may currently have or had. On this point, the ICC DBs Rules provide that the Board may help the parties determine the scope of the disagreement and suggest means to settle it, without further involvement of the Board.[755] Informality is of the essence, and the DB can give its opinion to the parties, on their request or not, following a discussion or after communication to the DB that an issue exists.[756] The opinion given by the DRB at this stage is not compulsory, and should only be considered as an advice in order for the parties to settle their disagreement between them. Moreover, the DB is not bound either by the informal advice it has given and may provide another solution if the disagreement is later brought before it for a hearing.[757] Because disagreements

[752] Daniel D McMillan, 'An Owner's Guide to Avoiding the Pitfalls of Disputes Review Boards on Transportation Related Projects' (2000) 27(2) Transportation Law Journal 181, 185.
[753] McMillan, 'An Owner's Guide to Avoiding the Pitfalls of Disputes Review Boards' (n 752) 186.
[754] ICC, Dispute Board Rules, Article 12.1; CIArb, Dispute Board Rules, Article 10.2
[755] ICC, Dispute Board Rules, Article 16.
[756] CIArb, Dispute Board Rules, Article 12.
[757] ICC, Dispute Board Rules, Article 17.3; CIArb, Dispute Board Rules, Article 12.3.

are exposed, discussed and explained in due time, their escalation into a dispute is unlikely. This is partly due to the nature of the procedure, fostering non-adversarial communication, but also because the mere presence of the DB and their members is an incentive for parties to settle.[758] By offering the parties a solution to solve the dispute on their own, DBs allow them to make concessions "without losing face".[759]

However, the parties may at times still be unable to settle their issue themselves and need more involvement of the DB. In this case, and as soon as the parties realise that a negotiated settlement is unlikely, they must request a hearing before the Board.[760] At that stage, the issue or disagreement is elevated to a dispute.[761]

5.4.2.2.2. Hearings

Despite the formal term of "hearings", the procedure remains informal.[762] If the parties have opted for an institutional DB or have implemented a specific process in their contract, the procedure for referring a dispute to the Board will have to be followed. Otherwise the procedure will be determined by the DB. The ICC Dispute Board Rules, the CIArb Dispute Board Rules, as well as the AAA Dispute Resolution Board Hearing Rules and Procedures provide for a written referral of the dispute to the Board, featuring several elements such as the description of the dispute, the list of the issues on which the party seeks a recommendation or a decision, the position of the requesting party on these issues, documentation in support of the claim, as well as the relief sought.[763] The referral must be communicated to both the DB and the other party. However, these "position papers" should not take the form of a notice of arbitration or a legal pleading.[764]

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[758] Colleen A Libbey, 'Working Together while Waltzing in a Mine Field: Successful Government Construction Contract Dispute Resolution with Partnering and Dispute Review Boards' (2000) 15(3) Ohio State Journal on Dispute Resolution 825, 844.
[759] Harmon 'Construction conflicts and dispute review boards' (n 739) 73.
[760] Harmon 'Resolution of construction disputes' (n 649) 196.
[761] ICC, Dispute Board Rules, Article 18; CIArb, Dispute Board Rules, Article 13.2; AAA Dispute Resolution Board Hearing Rules and Procedures, Article 6.
[762] Harmon 'Resolution of construction disputes' (n 649) 196; AAA Dispute Resolution Board Hearing Rules and Procedures, Article 2.
[763] ICC, Dispute Board Rules, Article 19.1; CIArb, Dispute Board Rules, Article 13.2; AAA Dispute Resolution Board Hearing Rules and Procedures, Article 8.
[764] Chapman, 'The Use of Dispute Boards on Major Infrastructure' Projects' (n 727) 229.

Rather, the parties should present the dispute in their view and opinion, and the reason why their position should be followed.[765] In that sense, although enclosed in a strict procedure, the hearing process remains informal. If the dispute concerns principle and quantum, parties are free to only submit the principle to the DB, and decide on the quantum by themselves, or with further help of the DB.[766] This freedom in delimitating the dispute and the order in which to address the issues is directly linked to the continuous existence of the DB. Indeed, parties are aware that the Board will still be available at a later stage of the performance of the contract, which ease them into presenting only the most important elements of the disputes or the most urgent.

Regarding formal referral for a hearing, the CIArb Dispute Board Rules imposes on the parties to first comply with the dispute resolution steps provided in the contract, before requesting a hearing before the DB.[767] Such requirements, although contractually exact, may alter the success of the DB procedure as a whole. Indeed, the parties, when submitting a dispute for a hearing before the DB, have often tried a negotiated settlement, with or without the help of the Board. Forcing them to undertake the traditional dispute resolution process as provided in the contract will deprive the DB from its effect of “real-time” dispute resolution mechanism.[768] This would be considered as a step back by the parties and would render the dispute resolution process difficult to undertake. As such, if one follows the Rules of CIArb, would first present their issues to the DB, or try to settle them amicably without their involvement. At this stage, the problem is not yet a dispute but a disagreement. Then and if failing negotiated settlement, the issue is elevated to a dispute which would have to follow the “regular” dispute resolution process, that may be negotiation, mediation, expert determination, DB and arbitration. However, this system would involve starting the DB procedure and abandoning it to finally join it again if the other methods have failed. Such obligation is necessarily neither cost nor time efficient and increases the chances of confrontation between the parties and therefore the likelihood of a successful resolution.[769] In light of this, parties should either waive these types of clauses in

[765] Chapman, 'The Use of Dispute Boards on Major Infrastructure’ Projects' (n 727) 229.
[766] Chapman, 'The Use of Dispute Boards on Major Infrastructure’ Projects' (n 727) 229.
[767] CIArb, Dispute Board Rules, Article 13.1.
[768] Polkinghorne, Secomb (n 648) 2.
[769] Chapman, 'The Use of Dispute Boards on Major Infrastructure’ Projects' (n 727) 229; Bovarnick Mastin (n 735) 6-7.

their contract, or make the DB their only dispute resolution mechanism before arbitration (Chapter 7).

The conduct of the hearing, as well as the consideration of the different documents submitted is left to the DB's appreciation. Hearings should be conducted in presence of all the parties, in order to ensure transparency and impartiality but also to pursue the role of discussion forum of the DB.[770] Hearings are usually held without legal representation, so the parties are in control of the presentation of the dispute.[771] The hearing should not be confrontational, and remain inquisitorial. As such, if the parties may be able to present their position at the beginning of the hearing, the procedure should be directed by the Board's members who will ask questions to the parties.[772] Once the DB considers it has received all necessary information to reach a decision, the hearing will be adjourned.

5.4.2.2.3. Recommendations

Traditionally, the decision of a DB is not binding on the parties.[773] However, parties are free to decide in their contract which power they want to give to the decision. There are therefore two types of DBs, based on the biding (or not) character of the decision: Dispute Reviews Boards (DRB), which issue non-binding recommendations and Dispute Adjudication Boards (DAB), issuing binding decisions unless and until revised through settlement or further proceedings.[774]

It is interesting to note that the non-binding character of a recommendation does not affect the efficacy of the DRB procedure. Parties abide by the recommendation for several reasons. Firstly, they have confidence in the neutrality, professionalism and familiarity of the DRB members.[775] The choice of the members at the inception of the project is therefore of utmost importance, as

[770] McMillan, 'An Owner's Guide to Avoiding the Pitfalls of Disputes Review Boards' (n 752) 199.
[771] Harmon 'Construction conflicts and dispute review boards' (n 739) 74.
[772] Chapman, 'The Use of Dispute Boards on Major Infrastructure' Projects' (n 727) 229.
[773] Daniel D McMillan, Robert A Rubin, 'Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements' (2005) 25(2) Construction Lawyer 14, 14
[774] Pelin Alpkokin, Murat Samil Capar, 'Dispute boards in Turkey for infrastructure projects' (2019) 60 Utilities Policy 1, 3.
[775] McMillan, 'An Owner's Guide to Avoiding the Pitfalls of Disputes Review Boards' (n 752) 186.

it can affect the success of the recommendation. Furthermore, recommendations are rarely affecting one party only every time: it is rare that the same party will always be losing.[776] In addition, even if non-binding, the recommendation will be worded as an arbitral award, exposing the opinions presented and the reasons of the Board's decision.[777] Finally, a non-binding recommendation may still be admissible in further proceedings, such as arbitration.[778] In these cases, there is another incentive for the parties to follow the recommendation, as arbitrators and judges of the subsequent proceedings themselves will be tempted to implement the recommendation in their judgment or award.[779]

Regarding binding recommendations, they must be complied with immediately.[780] However, an appeal procedure is still allowed depending on the choice made by the parties in their contract: litigation, arbitration or an alternative agreement between the parties.[781] Binding recommendations may raise specific issues, especially if the Board's members face a legal dispute and lack a legal training.[782] The appointment of the right members is once again at the forefront of the efficiency of the procedure.

The ICC, in addition to DABs and DRBs, has developed Combined Dispute Boards (hereafter CDB). These Boards issue normally non-binding recommendations but can issue binding ones at the request of one party, if the other does not disagree or on the Board's own volition, following established criteria.[783]

5.4.3. Reasons for implementation of DBs in oil and gas contracts

[776] Chapman, 'The Use of Dispute Boards on Major Infrastructure' Projects' (n 727) 224.
[777] Kathleen M J Harmon, 'Dispute Review Boards: Elements of a Convincing Recommendation' (2004) 130(4) Journal of Professional Issues in Engineering Education and Practice 289, 291; McMillan, Rubin (n 773) 15; ICC, Dispute Board Rules, Article 24; CIArb, Dispute Board Rules, Article 15.2.
[778] McMillan, 'An Owner's Guide to Avoiding the Pitfalls of Disputes Review Boards' (n 752) 186; McMillan, Rubin (n 773) 14; ICC, Dispute Board Rules, Article 27; CIArb, Dispute Board Rules, Article 3.6.
[779] Chapman, 'The Use of Dispute Boards on Major Infrastructure' Projects' (n 727) 223.
[780] ICC, Dispute Board Rules, Foreword; CIArb, Dispute Board Rules, Article 4.3.
[781] CIArb, Dispute Board Rules, Article 4.3
[782] McMillan, Rubin (n 773) 18.
[783] ICC, Dispute Board Rules, Foreword.

Dispute Boards have been criticised for their cost.[784] Indeed, as they are implemented since the start of the contract and last during its whole performance, the pay of the members constitutes a contractual expense. However, it has been showed that the cost of a DB amounts to 0,1 to 0,3% of the overall project cost.[785] Moreover, as for SED, the costs are usually shared between the parties and nothing prevent them from mitigating the costs by resorting to a one-member DB or by reducing the number of visits and meetings per year.[786]

Furthermore, the advantages of a DB supersede largely its costs. It has been showed that DBs have a success rate comprised between 90 and 98%.[787] This means that out of all issues and disputes submitted to a DB, only 2 to 10% are found in further proceedings, such as arbitration or litigation. This is crucial with regards to costs, as a dispute is known to be costly. Immediate costs would be the legal expenses, whereas short-term costs would be found in increased project costs. However, dispute also feature long-terms and hidden costs, such as the loss of commercial opportunities or a reduced employees morale.[788]

Finally, DBs should be generalised due to their two-pronged role of Dispute Prevention Mechanism and Dispute Resolution Mechanism. The Dispute Prevention aspect of DRBs is well documented. It is one of the reasons they are so widely encountered in construction contracts. Besides their high success rate, the implementation of a DRB in a contract also leads to a diminution of the number of disputes submitted to it.[789] This decrease mandates considering DBs as Dispute Prevention Mechanisms, as well as Alternative Dispute Resolution Mechanisms. Inserting a DBs in a contract will reduce litigation or arbitration exposure and as well as the risk of an over-budget project.[790] They also avoid an explosion of massive claims at the end of the contract and at the completion of

[784] Polkinghorne, Secomb (n 648) 3.
[785] Agdas, Ellis (n 740) 126; Carol C Menassa, Feniosky Peña Mora, 'Analysis of Dispute Review Boards Application in U.S. Construction Projects from 1975 to 2007' (2010) 26(2) Journal of Management in Engineering 65, 66.
[786] Bovarnick Mastin (n 735) 5-6; Charrett (n 735) 217.
[787] Menassa, Peña Mora (n 785) 74; Libbey (n 758) 844; Christopher T Horner, 'Should Dispute Review Board Recommendations Be Considered in Subsequent Proceedings?' (2012) 32(3) The Construction Lawyer 17, 17.
[788] Agdas, Ellis (n 740) 122.
[789] John R Kohnke, 'Dispute Review Boards Rising Star of Construction ADR' (1993) 48(2) Arbitration Journal 52, 55.
[790] Libbey (n 758) 840.

the project, as well as surprise claims because they all have been tackled in due time and in a large majority of cases, settled.[791]

DBs are implementable in oil and gas contracts. This is due to the fact that they share many characteristics with construction contracts, as they are long-term, dispute-prone and capital intensive contracts, requiring technical and building works.[792] As a result, the cost of a DB will not largely affect the budget of an oil and gas exploration and exploitation project. They are at the cross roads between adjudication and mediation,[793] and offer an efficient "on the spot" dispute resolution system without affecting the contract's performance.[794] Nonetheless, the interaction between DBs and the other ADRMs as well as with arbitration is not always streamline, and has to be carefully engineered to avoid further disputes (Chapter 7).

5.5. Conclusion

The dispute resolution framework offered by the different contracts studied in this section allow to draw some conclusions.

Firstly, the use of TACs is generalised. All contracts have implemented TACs as a close monitoring mechanism of the works and undertakings of the IOC. However, except for the Greek TAC clause, the contracts have not considered TACs as a proper ADRM. Yet, the TAC, thanks to its implementation at the start of the contract, the presence of representatives of both the Host State/NOC and the IOC, allows to create a discussion forum, fostering communication and good relationship between the parties. The implementation of a TAC and its understanding as an unconventional ADRM should ensure that disagreements and issues are tackled and approached in due time, before they can escalate into a dispute.

Secondly, when carefully drafted, SED clauses can be an efficient dispute resolution mechanism, coupled with a dispute prevention mechanism. The insertion of a strict procedure within a predetermined timeframe gives to the

[791] Bovarnick Mastin (n 735) 4-5; Polkinghorne, Secomb (n 648) 2.
[792] Polkinghorne, Secomb (n 648) 3; Agdas, Ellis (n 740) 122.
[793] McMillan, Rubin (n 773) 15.
[794] Agdas, Ellis (n 740)126.

parties an overview of what their dispute resolution process may look like. However, and as evidenced in this chapter, parties should be aware of the appeal process opened after Sole Expert Determination. Although appeals are necessary, they should be limited to instances of fraud and grave mistake or error committed by the expert. Outside of these exceptions, the final and binding character of the determination should be the principle. Suppressing this facet of SED would render the procedure unnecessary for the parties, who should have either opted for a non-binding mechanism from the start, such as conciliation, or resorted directly to arbitration.

Thirdly, it is contended that DBs should be considered more often by parties when drafting their contract, as an efficient and "real-time" adjudication mechanism. Despite their high cost, compared to SED (paid only during the dispute resolution procedure) or TAC (free as composed of parties to the contract), their success rate shows that they would be an excellent alternative to arbitration. Parties should however opt for non-binding recommendations, as these appear to facilitate a good and close relationship between the parties and the Board, without affecting their efficiency and applicability.

Nonetheless, unconventional ADRMs cannot replace arbitration as a last resort mechanism. Indeed, TACs are a non-adjudicative mechanism and not decision-making process, based solely on communication and explanation from the parties. SED is an adjudicative process, but it is not as widely recognised as arbitration. The SED decision will only be contractually binding and cannot be directly enforced before national courts. DBs, regardless of the binding character of the decision, is only final if not challenged before the courts or an arbitral tribunal. The role of arbitration in oil and gas contracts, as an ADRM or as the last step in the dispute resolution procedure, will hence be studied in the next chapter (Chapter 6).

6. CHAPTER 6. ARBITRATION IN OIL AND GAS INVESTMENT CONTRACTS

6.1. Introduction

Arbitration is the preferred dispute resolution mechanism for international and transnational contracts.[795] This is mainly, but not solely, due to the neutrality of the forum and the enforceability of the decision. Regarding the former, resorting to arbitration allows an investor to avoid bringing its claims before the courts of the respondent state. Indeed, the impartiality or even ability of some courts is questionable. But even in countries where the courts and judges' competence and integrity are unquestionable, some local practices such as jury selection or the complexity of legal system call for an alternative mean for dispute resolution.[796]

This chapter will study the use of arbitration in oil and gas investment contracts. The contracts analysed in the previous chapter on unconventional alternative dispute resolution mechanisms (Chapter 5) will be analysed again with regards to arbitration. Section 6.2 will explain the concept of arbitration as a dispute resolution mechanism, using the aforementioned and previously studied contracts in order to determine the necessary clauses in an arbitration agreement. The resort to contract study as a comparative method of research is necessary to assess the need and position of practice in oil and gas investment contracts with regards to arbitration. In this section, the role of arbitral institutions will be discussed and compared to *ad hoc* arbitration. Then, the chapter will consider the classification of arbitration as an unconventional ADRM, using the criteria developed in chapter 5 for Technical Advisory Committees (TACs), Sole Expert Determination (SED) and Dispute Boards (DBs) (section 6.3.). Although the characterisation of arbitration as an unconventional ADRM cannot be ascertained, it will be demonstrated that arbitration is not so far off. Finally, the conclusion-discussion will settle on the fact that despite several disadvantages and issues, arbitration is today the most suitable ADRM for solving in a final and

[795] Theodore Eisenberg and Geoffrey P Miller, 'The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies' (2007) 56(2) DePaul L Rev 335, 368.
[796] Guy Robin, 'The Advantages and Disadvantages of International Commercial Arbitration' (2014) 2014(2) International Business Law Journal 131, 132-133.

binding way oil and gas disputes. Recent innovations have started to tackle the aforementioned problems, but the greatest improvements will come from an adaptable and tailored multi-step dispute resolution clause, as well as a re-evaluation of other ADRMs (Chapter 7).

6.2. The concept of arbitration: contract analysis

This chapter will study, as for the previous one (Chapter 5) several contracts and their arbitration clauses. These contracts will be used alternatively, i.e. they may not be all studied in each section. The aim of this contract review is to determine the most common arbitration system used by parties and Host states when drafting an oil and gas investment contract.

6.2.1. The scope of the arbitration clause

The most important clause with regards to arbitration is the arbitration clause per se, by which the parties agree to submit their disputes to an arbitral tribunal.
When drafting an arbitration clause, parties can decide to have as large of a scope as they can. For instance, the arbitration clause in the Gorisht Kocul contract of Albania (hereafter "*Albanian arbitration clause*") is worded as such:[797]

> 19.1 Any dispute, controversy, claim or difference of opinion including any purported termination under Article 22, arising out of or relating to this Agreement or the breach, termination or validity thereof, or to the Petroleum Operations carried out hereunder, shall be finally and conclusively settled by arbitration in accordance with the UNCITRAL Arbitration Rules ("Rules").[798]

This clause is very extensive in its acceptance of arbitration. The *Albanian arbitration clause* does not only encompass disputes, but controversies, claims, differences of opinions in order to enlarge as much as possible the scope of arbitrability. This broad-form clause also covers all potential disputes that may arise from the relationship between the parties by using the wording "arising out

[797] The Gorisht-Kocul Oil Field is situated in Albania and is active since 1966, <https://www.industryabout.com/country-territories-3/1182-albania/oil-and-gas/15953-gorisht-kocul-oil-field>
[798] Albanian contract (n 39) art 19.1.

of or relating to this Agreement".[799] It then proceeds with naming specific events that would render the contract inefficient, but still providing for arbitration for these disputes "the breach, termination or validity thereof".

A broad-form clause can be found in the Lebanese contract (hereafter "*Lebanese arbitration clause*"), save for the disputes that are to be mandatorily referred to Sole Expert Determination according to the contract:

> "Art. 38 Arbitration, 1. […] the Parties shall submit any dispute, controversy or claim arising out of or relating to the EPA (including any dispute, controversy or claim between the Parties arising out of the application of the decree no 10289/2013 (PAR) to the activities contemplated in this EPA), which shall for the purpose of dispute resolution include the interpretation, breach, termination or invalidity thereof, and which cannot be resolved by negotiation […] to binding arbitration".[800]

Another broad-arbitration clause, less detailed however, is given in the Libyan contract (hereafter the "*Libyan arbitration clause*"):

> 23.2 Arbitration
> Any controversy or claim arising out of or relating to this Agreement, or breach thereof, shall be finally settled by arbitration […][801]

It can be noted that this clause, as well as the *Lebanese* and *Albanian arbitration clauses*, are very close to the UNCITRAL arbitration clause which provides that "*any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof*", although it is to be noted that this clause is somewhat reshaped to suit the specific wording of the contract.[802]

These three arbitration clauses (Lebanese, Albanian and Libyan) present similar wording, including all types of disagreements between the parties for all matters pertaining to their relationship. Such clauses are broad enough to bring all

[799] R Doak Bishop, 'A practical guide for drafting international arbitration clauses' (2000) 16 International Energy Law and Taxation Review 1, 30
[800] Lebanese contract (n 42) art 38.1.
[801] Libyan contract (n 43) art 23.2.
[802] United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules (2010) Model Arbitration Clause (UNCITRAL Arbitration Rules).

disputes to arbitration and evacuate any risk to go to litigation instead.[803] Avoiding dissociation of forums between arbitration and litigation is key to an efficient dispute resolution process.

It must be clear for the parties that any dispute or disagreement arising between them in relation with the oil and gas investment contract will have to be settled through arbitration. Otherwise the choice of forum may become an additional dispute, to be resolved before the "actual" dispute. Such issue is evidenced in the case of *Henry Schein v Archer & White* saga before the U.S. courts.[804] The case relates to a dispute regarding the scope of an arbitration clause in a contract between two companies. The arbitration clause stated as follow: "*This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to ... intellectual property ...), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. The place of arbitration shall be in Charlotte, North Carolina*."[805]

In 2012, Archer & White, a low-price distributor, seller and servicer for dental equipment sued Henry Schein, the largest distributor in the United States for dental equipment for violating antitrust and competition laws for agreeing on prices and refusing to compete with a third party, Danaher. The claimant, Archer, alleged that these manoeuvres were aimed at reducing or terminating its distributor territory, hence causing it a loss. Archer sought damages and injunctive relief as compensation.[806] Archer filed its claim before U.S. courts in 2012, but the defendant argued that the dispute should be heard by an arbitral tribunal, as the contract provided an arbitration clause. In 2013, a magistrate judge agreed with the defendant and considered that the question of the arbitrability of the dispute should be left to an arbitral tribunal.[807] In its decision, the magistrate judge held that the incorporation of the AAA Rules in the arbitration clause demonstrated the intent of the parties to have their disputes arbitrated.[808]

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[803] Loretta W Moore, David E Pierce, 'A Structural Model for Arbitrating, Disputes under the Oil and Gas Lease' (1997) 37(2) Natural Resources Journal 407, 429.
[804] *Archer & White Sales, Inc. v. Henry Schein, Inc*., [2013] WL 12155243 (*Archer v Henry Schein*)
[805] Charles B Rosenberg, 'Henry Schein v Archer & White: A Lesson in the Importance of Carefully Drafting an Arbitration Clause' (2020) 8(3) American University Business Law Review 381, 384.
[806] Rosenberg (n 805) 383-384.
[807] *Archer v Henry Schein* [2013] para 1 and 3; Rosenberg (n 805) 384.
[808] *Archer v Henry Schein* [2013] paras 1 and 3; Rosenberg (n 805) 384.

Appeal was formed against the decision, and in 2016 the U.S. District Court for the Eastern District of Texas overruled the magistrate judge's decision and decided that arbitrability should be referred to a court.[809] To reach this conclusion, the U.S. District Court relied on the language and wording of the arbitration clause, which excluded namely claims for injunctive relief from the scope of arbitration.[810] The defendants (Henry Schein) then appealed before the U.S. Court of the Appeals for the Fifth Circuit, which in 2017 held the same reasoning than the U. S. District Court for the Eastern District of Texas.[811] Finally, the defendants appealed before the U.S. Supreme Court. In a decision dated 8th of January 2019, the Court ruled in favour of the defendants and held that when parties decide to entrust an arbitral tribunal with the question of arbitrability, courts must respect this choice.[812] However, the U.S. Supreme Court did not express any opinion on whether the contract at hand did in fact delegate arbitrability to an arbitral tribunal and gave to a circuit court the power to decide such matter.[813] The case of *Henry Schein v Archer & White* is particularly interesting with regards to the issues parties may face when the scope of the arbitration clause is not clearly determined. After more than seven years and appearing before four courts, the merits of the case, the "actual" dispute has not been even pleaded.[814]

When drafting their arbitration clause and deciding on its scope, parties must be mindful of the consequences an unclear arbitration clause may have on their prospect to have their dispute arbitrated rapidly, or even at all. To this end, broad arbitration clauses are necessary. The *Lebanese*, *Albanian* and *Libyan arbitration clauses* are good examples of this choice to circumvent any possibility to resort to another final dispute resolution mechanism other than arbitration.

[809] *Archer & White Sales, Inc. v. Henry Schein, Inc.* [2016] WL 7157421 paras 6 and 9; Rosenberg (n 805) 384.
[810] *Archer v Henry Schein* [2016] para 5; Rosenberg (n 805) 384.
[811] *Archer & White Sales, Inc. v. Henry Schein, Inc.,* [2017] 878 F.3d 488, 494-95; Rosenberg (n 805) 385.
[812] *Henry Schein, Inc. v. Archer & White Sales, Inc.,* [2019] 139 S. Ct. 524, 531; Rosenberg (n 805) 386.
[813] Rosenberg (n 805) 386.
[814] Rosenberg (n 805) 386.

Some other clauses exclude some disputes from the scope of arbitration. This is for instance the choice made by the Greek Model Lease Agreement arbitration clause (hereafter “Greek arbitration clause”):

> 23.3 Any Dispute which
> (a) is not referred to a Sole Expert for determination under Article 23.2; or
> (b) has been referred to the Sole Expert whose decision is appealed on a point of law; or
> (c) the Parties have failed to appoint a Sole Expert (or, as the case may be, a replacement Sole Expert) as per provisions of Article 23.2 shall be finally settled by arbitration.[815]

The *Greek arbitration clause* must be read jointly with Article 23.1 of the Greek Model Lease Agreement, which provides a definition of a dispute:

> 23.1 In the event of any dispute, controversy or claim between the Parties or between the Lessor and any Co-Lessee or any inability or failure by the Parties or by the Lessor and any Co-Lessee to agree on any matter regarding the validity, interpretation or implementation of any provisions of this Agreement, (a "Dispute”)[816]

Article 23.1. of the Greek Model Lease Agreement is similar to the *Lebanese, Albanian* and *Libyan arbitration clauses*, in that it provides for a wide construction of what constitutes a dispute. Nonetheless, the formulation of the realm of disputes could be problematic. Indeed, instead of using the wording “arising out of or relating to the contract”, which is the baseline in the three aforementioned arbitration clauses, the *Greek arbitration clause* adopts a narrower wording: “any matter regarding the validity, interpretation or implementation of any provisions of this Agreement”. When the *Lebanese, Albanian* and *Libyan arbitration clauses* were mentioning specific events, these should be construed as examples of disputes considered as arising out of or in relation with the contract. As a result, the arbitrability of disputes under the Greek Model Lease Agreement is limited to disputes on the validity, interpretation or implementation of the provisions of the Lease Agreement. Such a wording circumscribes arbitration to contractual matters only and does not therefore include any claim for torts. Narrowing down

[815] Greek contract (n 41) art 23.3.
[816] Greek contract (n 41) art 23.1.

the ambit of the arbitration clause increases the risks of a dissociation of dispute resolution forums in the case of a claim on both contractual and tort grounds.

The *Greek arbitration clause*, in its Article 23.3, adds more restrictions to the scope of arbitration. There are three cases in which the parties can start arbitration proceedings. Firstly, when the dispute does not fall within the scope of the Sole Expert Determination; secondly when the dispute has been referred to Sole Expert Determination but the decision is appealed on a point of law; thirdly when the dispute should have been referred to Sole Expert Determination but the parties failed to comply with the Sole Expert's nomination procedure. This clause demonstrates that in the Greek Model Lease Agreement, arbitration is a secondary choice compared to Sole Expert Determination. Indeed, the existence of arbitration proceedings depends on the existence and/or success of a Sole Expert Determination. The *Greek arbitration clause* operates a limitation of the disputes that can be submitted to an arbitral tribunal, by giving priority to Sole Expert Determination.

A similar approach is taken in the Model Exploration and Production Sharing Contract of the Republic of Cyprus (hereafter the "*Cypriot arbitration clause*") which states:

> 36.3 Arbitration
> If the dispute is not resolved through amicable settlement or expert determination within the period set out in Articles 36.1 and 36.2 above or if one of the Parties wishes to challenge the decision reached by the expert pursuant to Article 36.2, the dispute shall be referred to arbitration […].[817]

[817] Cypriot contract (n 40) art 36.3.

As for the *Greek arbitration clause*, the definition of disputes is given in a previous article, here Article 36.1 of the Model Exploration and Production Sharing Contract of the Republic of Cyprus:

> 36.1 Amicable settlement
> In the event of any difference or disagreement or dispute (hereinafter referred to as the "dispute") […] regarding the interpretation or implementation of any provisions of this Contract [..][818]

Hence, the *Greek arbitration clause* and the *Cypriot arbitration clause* are very similar in their definition of a dispute and the limits attached to this type of definition. Even more so for the *Cypriot arbitration clause*, which only includes disagreements regarding the interpretation or implementation. The scope of disputes arbitrable is therefore more restrictive.

The *Cypriot arbitration clause* makes arbitration as a last resort mechanism: the parties shall first endeavour to solve their dispute either amicably or by expert determination. Arbitration should be only used if the aforementioned methods reveal themselves inefficient, or, in the case of expert determination, if one of the parties decides to challenge the decision. Due to the specificity of the Sole Expert Determination clause of the Cyprus Model Contract and the unlimited right to appeal the Sole Expert's decision before an arbitral tribunal (Chapter 4), the Cypriot arbitration clause is not as limited in its scope as the Greek arbitration clause. However, in another context restricting right to appeal the Sole Expert's decision, both the *Cypriot arbitration clause* and the *Greek arbitration clause* would have a similar effect.

The scope of the arbitration clause is the first element of an arbitration clause. Parties define the scope by determining the types of disputes they want to see arbitrated. The widest the definition, the largest the scope. By inserting broad and clear definitions of what constitutes a dispute under the contract and providing arbitration as the dispute resolution mechanism for all of them, the parties ensure that all disputes will be decided before a same forum. The opposite would create a fragmentation of the dispute between national courts and an arbitral tribunal. It could also lead to lengthy procedures before courts in order to properly determine the scope of an ambiguous arbitration clause, such as in *Henry Schein v Archer*.

[818] Cypriot contract (n 40) art 36.1.

In addition, it must be noted that an arbitrator is given mandate to decide on the dispute according to the scope of the arbitration clause. If the arbitrator renders a decision outside of the scope of this mandate, in other words outside of the scope of the arbitration clause, the award may not be enforceable or recognised before national courts.[819]

6.2.2. The arbitration procedure under arbitration rules and institutions

The seven contracts analysed in this chapter refer to an arbitral institution as the centre for resolving their dispute. Such a prominence of arbitral institutions in oil and gas investment contracts must be studied to determine the reasons of this choice, as well as the criteria upon which States and companies select the institution. Nonetheless, reference to an arbitral institution is not mandatory and parties are free to design their own *ad hoc* procedure.

From the contracts analysed in this chapter, three institutions can be noted: the International Chamber of Commerce (hereafter ICC), the International Centre for the Settlement of Investment Disputes (hereafter ICSID) and the Permanent Court of Arbitration (hereafter PCA).

This section will first discuss the concept of arbitral institutions, before analysing and comparing the rules.

6.2.2.1. The notion of arbitral institutions

Arbitral institutions are administrative centres who supervise, organise and control arbitral procedures. There are international, regional and national arbitral institutions. The use of arbitral institutions has increased with the development of written rules fixing the arbitral procedure in each institution. Some of them have gained international recognition and are often found in commercial and investment contracts. This is the case of the International Chamber of

[819] New York Convention, Article V 1(c); Nigel Blackaby, Martin Hunter, Constantine Partasides, Alan Redfern, *Redfern and Hunter on Law and Practice of International Arbitration* (6th ed, Oxford University Press 2018) para 2.63; Rosenberg (n 805) 386.

Commerce, in Paris, cited in the Greek, Lebanese, Libyan and Tunisian arbitration clauses:

Greek arbitration clause:

> 23.6 The arbitration shall be conducted in accordance with the **Rules of Arbitration of the International Chamber of Commerce** (in force from time to time), to the extent that there is no conflict between any of those Rules and the provisions of this Agreement. (emphasis added)[820]

Lebanese arbitration clause:

> Art. 38 Arbitration
> 1.a) The dispute shall be settled by arbitration in accordance with the **Rules of Arbitration of the International Chamber of Commerce**, hereinafter referred to as the "ICC Rules of Arbitration'; (emphasis added)

Libyan arbitration clause:

> 23.2 Arbitration
> Any controversy or claim arising out of or relating to this Agreement, or breach
> thereof, shall be finally settled by arbitration, in accordance with the **Rules of**
> **Arbitration of the International Chamber of Commerce** […] (emphasis added)[821]

Tunisian arbitration clause:

> 27.2 Arbitration
> Any controversy or claim arising out of or relating to this Petroleum Agreement or breach thereof, and which has not been settled by negotiation within ninety {90) days after notice of existence of such controversy or claim shall be finally settled by arbitration in Paris, France in accordance with the **Rules of arbitration of the International Chamber of Commerce** (emphasis added)[822]

[820] Greek contract (n 41) art 23.6.
[821] Libyan contract (n 43) art 23.2.
[822] Tunisian/Libyan contract (n 45) art 27.2.

By inserting direct reference to the ICC and its Rules of arbitration in their arbitration clause, parties delegate the supervision and control of the procedural aspects of the resolution of the dispute to the ICC and its Secretariat.
The ICC provides services to parties to a dispute, such as confirming and appointing arbitrators (this will be considered in more details in section 2.3); monitoring the arbitral process; setting and managing fees and advances; handling emergency proceedings before the start of arbitration; or verifying and approving arbitral awards.[823] In other words, the ICC is an administrative centre taking in its hands the responsibility of overseeing the procedural aspects of the arbitration, in order for the parties to focus on the merits of their dispute.

The ICC is not the only arbitral institution to be mentioned in the oil and gas investment contracts studied in this work. For instance, the Cypriot contract has decided to resort to the International Centre for the Settlement of Investor-State Disputes (hereafter ICSID):

Cypriot arbitration clause:

> The dispute shall be **submitted to the International Centre for Settlement of Investment Disputes (ICSID)** upon request by one or both Parties, and shall be tried and decided in accordance with the rules set forth by the Convention on the Settlement of Investment Disputes between States and Nationals of other States. (emphasis added)[824]

ICSID is an institution dedicated to investment dispute settlement. It is one of the five organisations of the World Bank Group. The dispute resolution services of ICSID were founded on the ICSID Convention, signed and ratified by 163 countries. For an investor to access ICSID Arbitration or more generally dispute resolution services, the State must be a Contracting State to the Convention.

There are more arbitral institutions than the ones cited in the contracts. For instance, the London Centre for International Arbitration (LCIA), in London; the

[823] International Chamber of Commerce, ICC International Court of Arbitration <https://iccwbo.org/dispute-resolution-services/icc-international-court-arbitration/> accessed 20 September 2020.
[824] Cypriot contract (n 40) art 36.3.

Singapore International Arbitration Centre (SIAC) in Singapore are some among many others national, regional and international arbitration institutions.

All these institutions, and many more, offer to parties to an arbitration who have elected them in their contract an administrative support in their cases. This help concerns financial aspects, such as recovering the fees and the advances for the tribunal; logistical aspects by organising the hearings, the timetable and sometimes the travel arrangements for the arbitrators. In order to fulfil their mission successfully, they have developed organic rules pertaining to their functioning, by creating a Secretariat and administrative facilities. But more importantly, as evidenced in the clauses, they have also developed arbitration rules. They are specific to each institution and cover the most important elements of the arbitration procedure.

6.2.2.2. The use of arbitration rules

The use of arbitration rules is noticeable in the contracts studied in this chapter. For the contracts resorting to the ICC, they also require the application of the ICC Arbitration Rules to the procedure. Similarly, the *Cypriot arbitration clause* refers to both ICSID as the administrative management body of the arbitration and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereafter, the ICSID Convention).

Finally, some contracts may not refer to an arbitral institution as they want to handle the logistics of the case but choose to apply procedural rules to the arbitration. This option can be found in the *Albanian arbitration clause* and the *Syrian arbitration clause*:

Albanian arbitration clause:

> 19.1 Any dispute, controversy, claim or difference of opinion including any purported termination under Article 22, arising out of or relating to this Agreement or the breach, termination or validity thereof, or to the Petroleum Operations carried out hereunder, shall be finally and conclusively settled by **arbitration in accordance with the UNCITRAL Arbitration Rules ("Rules")**. (emphasis added)[825]

[825] Albanian contract (n 39) art 19.1.

Syrian arbitration clause:

> 23.1.2. […] The arbitration shall be held at Geneva, Switzerland and conducted in accordance with **UNCITRAL RULES**.[826]

The UNCITRAL Arbitration Rules were first developed in 1976 by the United Nations Commission on International Trade Law. They have been revised in 2010 and in 2013. The latest edition has incorporated the UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration in its article 1.[827]

The three aforementioned sets of arbitration rules (ICC, ICSID Convention and UNCITRAL 2013) present a similar structure, which will therefore be followed in this section. Regarding the ICSID Convention specifically, the rules applicable to the proceedings are in the Convention itself, but also in the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules) and Rules of Procedure for Arbitration Proceedings (Arbitration Rules). These different texts will be respectively referred to as the ICSID Convention, ICSID Institution Rules and ICSID Arbitration Rules.

6.2.2.3. The start of the arbitration

6.2.2.3.1. The request for arbitration

All sets of rules provide for the emission of a document by the party demanding the arbitration to either the other party under the UNCITRAL Arbitration Rules, or to the arbitral institutions (under the ICC Arbitration Rules and the ICSID Convention and Rules).[828] This document is named a *request for arbitration* in the ICSID Convention and the ICC Arbitration Rules, and a *notice of arbitration* in the UNCITRAL Arbitration Rules.[829] Besides this difference in terminology, the content and effect of the document is the same in all sets of rules. The notice or

[826] Syrian contract (n 44) art 23.1.2.
[827] UNCITRAL Arbitration Rules (2013).
[828] UNCITRAL Arbitration Rules, Article 3.1.; ICC Arbitration Rules, Article 4.1.; ICSID Institution Rules, Rule 1.
[829] ICC, Arbitration Rules, Article 4; ICSID Convention, IV 1; UNCITRAL Arbitration Rules, Article 3.

request must give the full names and contact details of the parties; a description of the claim; all relevant agreements under which the dispute has arisen, including the arbitration agreement; the relief and remedy sought; a proposal on the number of arbitrators, the seat and language of arbitration if not already agreed.[830]

Regarding arbitration under the ICSID Convention, the request must include nationality and proof of nationality of the party claiming to be a national of a Contracting State.[831] Furthermore, the requesting party must also state that the dispute is a legal one, arising directly out of an investment. These specific rules are due to the fact that the ICSID Convention is only applicable to legal disputes arising directly out of an investment between a Contracting State and a national (natural person or company) of another Contracting State.[832]

The effect of the request/notice of arbitration is to start the arbitration proceedings. The arbitration proceedings are deemed to be started once either the relevant Centre has received the notice of arbitration or when the respondent has received it.[833] Both the ICSID and the ICC have the obligation to register and transmit the request of arbitration to the respondent designated in the request.[834] The start of the arbitration proceedings bears three consequences: the start of the reply timeframe for the respondent, the start of the constitution of the arbitral tribunal and in some contracts, the suspension of the contract's obligations.

6.2.2.3.2. <u>The start of the timeframe for response to the request</u>

When the respondent receives the claimant's request for arbitration from the arbitral institution, a timeframe opens for the respondent to reply to the request.[835] As per the UNCITRAL Arbitration Rules and the ICC Arbitration Rules, the

[830] ICC, Arbitration Rules, Article 4.3; ICSID Convention, Article 36 and ICSID Institution Rules, Rule 2; UNCITRAL Arbitration Rules, Article 3.3.
[831] ICSID Institution Rules, Rule 2.
[832] ICSID Convention, Article 25.
[833] ICC, Arbitration Rules, Article 4.2; ICSID Convention, Article 36 and ICSID Institution Rules, Rule 2; UNCITRAL Arbitration Rules, Article 3.2.
[834] ICSID Convention, Article 36.3, ICSID Institution Rules, Rule 5.2.; ICC Arbitration Rules, Article 4.5.
[835] ICC Arbitration Rules, Article 5.1.; UNCITRAL Arbitration Rules, Article 4.1.; ICSID Arbitration Rules, Rule 31.1.

respondent has 30 days to reply to the request once notified of the arbitral proceedings by the claimant (UNCITRAL Arbitration Rules) or by the Secretariat (ICC Arbitration Rules).[836] The response to the request must include the names of the respondent and a response to all the elements put forward by the claimant in its request/notice.[837]

Under the ICSID Arbitration Rules, the reception of the request for arbitration opens a deadline for the parties to submit their memorials, fixed by the arbitral tribunal. This means that the constitution of the arbitral tribunal, other consequence of the start of the proceedings, will have to be realised first.

In ICC and UNCITRAL Arbitral Rules, any default in the reply to the notice of arbitration, either regarding its content or its existence (for the reply) will not affect the procedure. The constitution of the arbitral tribunal will not be prevented by a faulty reply, and any dispute on this matter will be resolved by the arbitral tribunal itself.[838] Under the UNCITRAL Arbitration Rules, even the notice of arbitration is included in this waiver.[839]

The lack of impact of a reply to a notice of arbitration on the procedure is sensible regarding the protection of the claimants' rights. If the response to the request was given enough force to stop the proceedings by its absence or defaults in content, respondents will take advantage of this possibility to annihilate any arbitral procedure brought against them. On the notice from the realm of nullities of the procedure, its exclusion is sensible again in the UNCITRAL Arbitration Rules. Contrary to ICSID and ICC, the parties choosing the UNCITRAL Rules often do not resort to an arbitral institution which could review the notice and ask the claimant to specify or complete their requests. As a result, accepting an arbitration to start despite an incomplete notice helps protecting the claimants' right to justice.

[836] ICC Arbitration Rules, Article 5.1.; UNCITRAL Arbitration Rules, Article 4.1.
[837] ICC Arbitration Rules, Article 5.1.; UNCITRAL Arbitration Rules, Article 4.1.
[838] ICC Arbitration Rules, Articles 5.2. and 6.3.; UNCITRAL Arbitration Rules, Article 4.3.
[839] UNCITRAL Arbitration Rules, Article 3.5.

6.2.2.3.3. The constitution of the arbitral tribunal

Furthermore, the start of the arbitration proceedings has for consequence the constitution of the arbitral tribunal.[840] This involves for the parties to select their arbitrators, and for them to accept their mission.

The modalities for the selection of arbitrators can be given in the contract, or follow the rules chosen in the absence of such choice. In all the contracts studied in this chapter, the parties have opted for the inclusion of the selection process in their contracts. For instance, the *Greek arbitration clause* provides as follows:

> 23.5 The **number of arbitrators shall be three**; they shall be appointed in accordance with the provisions of paragraph 13 of article 10 of the Hydrocarbons Law.[841]

The *Greek arbitration clause* sets aside the ICC Arbitration Rules regarding the rules of appointment of arbitrators and imposes to abide by the dispositions of the Greek Hydrocarbons Law.

On the contrary, the *Cypriot arbitration clause* and the *Libyan arbitration clause* rely completely on the chosen institutional rules (here the ICC Arbitration Rules) by only providing for the number of arbitrators, and no other selection method:

Cypriot arbitration clause:

> The arbitral tribunal shall consist **of three (3) arbitrators**. (emphasis added)[842]

Libyan arbitration clause:

> Any controversy or claim arising out of or relating to this Agreement, or breach thereof, shall be finally settled by arbitration, in accordance with the Rules of Arbitration of the International Chamber of Commerce, in Paris, France, in Arabic or English as the Parties may agree, **by three (3) arbitrators**. (emphasis added)[843]

[840] ICC Arbitration Rules, Article 4.2; ICSID Convention, Article 37.1. ; ICSID Arbitration Rules, Rule 1.1; UNCITRAL Arbitration Rules, Article 3.2.
[841] Greek contract (n 41) art 23.5.
[842] Cypriot contract (n 40) art 36.3.
[843] Libyan contract (n 43) art 23.2.

Each set of arbitration rules have developed a method, procedure, for the appointment of arbitrators. The ICSID Arbitration Rules give priority to the selection process chosen by the parties in the contract.[844] Nonetheless, they provide rules pertaining to the person of the arbitrator: as such, arbitrators should not be of the same nationality as the parties, unless both parties agree.[845] Also, there is an exclusion clause preventing people who have previously acted as arbitrator or conciliator in the dispute to be appointed.[846] If there is no provision in the contract regarding the appointment of arbitrators, the parties can decide to elect a sole arbitrator or a specified uneven number of arbitrators.[847]

According to the ICC Arbitration Rules, the arbitral tribunal can be composed of one or three arbitrators.[848] The number and selection method chosen in the contract will prevail on the appointment rules of the ICC Arbitration rules. If the parties have provided their selection method in their contract, they will need to appoint their arbitrator in the request for arbitration and in the response to the request, meaning that the respondent will have 30 days to appoint its arbitrator.[849] The two chosen arbitrators will then elect the third one within 30 days. If the elected arbitrators fail such appointment in the timeframe, the selection of the last arbitrator will be made by the ICC.[850] Similarly, if the parties do not appoint their arbitrator in the request or the response, the nomination will be undertaken by the Court.[851]

On the election of the third arbitrator, the *Libyan arbitration clause* has directly delegated this power to the ICC. The parties only select one arbitrator each:

> Each Party shall appoint one arbitrator, and **the International Chamber of Commerce shall appoint the third arbitrator** who must be in no way related to either Party and who will be the Chairman of the arbitration body. (emphasis added)[852]

[844] ICSID Convention, Article 37; ICSID Arbitration Rules, Rule 1.2.
[845] ICSID Arbitration Rules, Rule 1.3.
[846] ICSID Arbitration Rules, Rule 1.4.
[847] ICSID Arbitration Rules, Rule 2.1.
[848] ICC Arbitration Rules, Article 12.1.
[849] ICC Arbitration Rules, Article 12.4.
[850] ICC Arbitration Rules, Article 12.5.
[851] ICC Arbitration Rules, Article 12.4.
[852] Libyan contract (n 43) art 23.2.

A similar choice is made in the *Tunisian arbitration clause*:

> 27.2. Arbitration
> Each Party shall appoint one arbitrator, and **the International Chamber of Commerce shall appoint the third arbitrator** who must be in no way related to either Party and who will be the chairman of the arbitration body. (emphasis added)[853]

The decision to let the nomination the third arbitrator to the institution seems the most appropriate. Firstly, the two nominated arbitrators can disagree the same way parties disagree. The election of the third arbitrator could therefore be delayed. Secondly, the institution is the most able to determine which arbitrator will be available and to narrow a list of arbitrators without conflicts of interests. By leaving the nomination of the president of the arbitral tribunal to the arbitral institution, parties increase the impartiality of the nomination, hence the chances to see the award recognised and enforced.

In the event where the parties have not provided for an appointment method in the contract, the ICC will, as a principle, appoint a sole arbitrator. The decision of a three-person tribunal will be made if the circumstances of the case warrants such choice. In that case, the parties will nominate an arbitrator each within 15 days, and once again, the ICC will proceed to the appointment if the parties do not complete it in time.[854]

Finally, the UNCITRAL Arbitration Rules have designed a method to alleviate the lack of institution in the appointment of arbitrators. If the selection of the arbitrators, regarding their numbers and their method of selection, is left to the appreciation of the parties in the contract, the parties must elect an Appointing Authority who will nominate the arbitrators if the parties fail to do so within a 30-day timeframe.[855] As opposed to the ICC Arbitration Rules, the arbitral tribunal will be composed of three arbitrators, unless the parties agree otherwise.[856]

[853] Tunisian/Libyan contract (n 45) art 27.2.
[854] ICC Arbitration Rules, Article 12.3.
[855] UNCITRAL Arbitration Rules, Articles 6, 8, 9 and 10.
[856] UNCITRAL Arbitration Rules, Article 7.1.

The *Albanian arbitration clause* presents an appointment method with the designation of an Appointing Authority:

> 19.2. With respect to the foregoing, **the appointing authority under the Rules shall be the President of the Court of International Arbitration of the International Chamber of Commerce** in Paris, France.
> 19.3. The number of arbitrators shall be three. The Party instituting the arbitration shall appoint one arbitrator and the Party, responding shall appoint another arbitrator, and upon failure of such responding Party to so appoint an arbitrator within thirty (30) days the Party instituting the arbitration may request the appointing authority to appoint such second arbitrator in accordance with the Rules. The two (2) arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.
> 19.4. If, within thirty (30) days of appointment of the second arbitrator to be appointed, the two (2) appointed arbitrators cannot agree upon the third arbitrator, either Party may request the appointing authority to appoint the third arbitrator. (emphasis added)[857]

In addition to the rules on appointment, the different arbitral institutions and set of rules have implemented dispositions on the qualities of the arbitrator. Although these rules will be further explained and discussed in section 4, the nature of such obligations will be considered here.

A first condition relating to the person of the arbitrator is its nationality. The ICSID Convention and the Arbitration Rules prohibit arbitrators to be of the same nationality than the parties without the agreement of the parties themselves.[858] Under ICC Arbitration Rules, albeit the nationality of the arbitrator is not a criteria for revocation, it will be taken into consideration by the Court when confirming or undertaking the appointment, alongside with the arbitrator's residence and the possible ties it may have with the country of one of the parties.[859] Secondly, arbitrators must be neutral and impartial and must disclose to the Court or the parties any conflicts of interests that could prevent them from exercising their mission in accordance with these ethics principles.[860]

[857] Albanian contract (n 39) art 19.2.-4.
[858] ICSID Convention, Articles 38 and 39; ICSID Arbitration Rules, Rules 1 and 6.
[859] ICC Arbitration Rules, Articles 13.1 and 13.5.
[860] ICSID Arbitration Rules, Rule 6.2.; ICC Arbitration Rules, Article 11; UNCITRAL Arbitration Rules, Article 11.

6.2.2.3.4. The suspension of the contract's obligations

The suspension of the contract's obligations for the parties during the arbitration is not considered in the different arbitration rules studied in this chapter. It is however provided in two contracts, the Cypriot and Greek:

Cypriot arbitration clause:

> A request to arbitration shall give the right to either Party to apply to the arbitral tribunal for the suspension of the contractual provisions concerning the subject matter of the dispute, but all other rights and obligations of the Parties under this Contract shall not be suspended.[861]

Greek arbitration clause:

> 23.9 Save in case of a determination rendered by the Sole Expert in which case Article 23.10 applies during the period of any arbitration, the time limits set for the fulfilment by either Party or those contractual obligations under this Agreement which are the subject of such arbitration shall be suspended for a time period equivalent to the period of such arbitration.
> 23.10 In case of a determination rendered by the Sole Expert and pending resolution of the dispute by the panel of arbitrators, there will be no suspension of the Agreement and the Lessor and the Lessee shall have the right and the obligation to continue performing under this Agreement.[862]

Both arbitration clauses envisage a materially limited suspension of obligations. The *Cypriot arbitration clause* and the *Greek arbitration clause* only allow the suspension of the obligations which are the subject and matter of the arbitration. Any other obligation must be fulfilled. The *Greek arbitration clause* adds another limitation: if the dispute constitutes an appeal on a previous Sole Expert determination, there is no suspension of the obligations.

Suspending the contract's obligations at hand in the arbitration allows to maintain the status quo. As a result, if experts are required during the procedure by the

[861] Cypriot contract (n 40) art 36.3.
[862] Greek contract (n 41) art 23.9 and 23.10.

arbitral tribunal, their task should be easier as nothing should have changed since the introduction of the claim. Also, parties tend to resort to arbitration when their relationship is severed and can hardly be mended. The suspension of the obligations has therefore little impact on the contract as a whole.

6.2.2.4. The proceedings

The proceedings before an arbitral tribunal are left to the tribunal's and the parties' appreciation. Some requirements may be provided in the contract and/or in the rules chosen, but for the rest, proceedings are held under the principle of diligence and party's autonomy.

6.2.2.4.1. Language and seat of the arbitration

The language and seat of arbitration are part of the main elements of an arbitration clause, for several reasons. The first is that the seat of arbitration – or forum of arbitration – will determine the law applicable to the proceedings after the arbitration, if the parties decide to challenge the award by means of annulment or if they seek recognition and enforcement of the award before national courts.[863] As a result, parties should be careful in choosing a seat of arbitration in a country where the national law on arbitration is developed and national courts are known to be welcoming to these procedures.[864] Furthermore, parties should always consider as the seat of arbitration a country party to the New York Convention.[865]

Regarding language, parties tend to choose one they both comprehend and spoken by enough people to appoint arbitrators easily. In addition, parties should consider applying to the procedure the language of the contract, or of one of the versions of the contract. Doing so will limit the difficulties that may arise in relation with translation.

[863] *Russel on Arbitration* (n 159) para 2-126.
[864] Bishop, 'A practical guide for drafting international arbitration clauses' (n 799) 31.
[865] New York Convention.

The choice of seat and language of the arbitration is left to the parties, and they generally elect them in the contract. For instance, the *Albanian arbitration clause*, which refers to UNCITRAL Arbitration Rules, provides:

> 19.5. The arbitration shall take place in Zurich, Switzerland. The language to be used in the arbitration proceedings shall be English.[866]

On the other hand, the *Greek arbitration clause* states as follow:

> 23.4 The place of arbitration shall be Athens, Greece
> 23.7 The language to be used in the arbitral proceedings shall be Greek and English, unless the Parties agree otherwise.[867]

In the latter arbitration clause, the seat is given clearly. However, although the language has been chosen, i.e. Greek and English, the parties are free to decide and negotiate otherwise. Such a clause may bring issues during the proceedings and could add a dispute to the dispute. What would be the solution if parties disagree on the language of the proceedings? The Greek arbitration clause has elected the ICC as its arbitral institution, the ICC Arbitration Rules should therefore apply.

According to the ICC Rules, if the parties cannot agree on the language of the arbitration, the arbitral tribunal itself will determine it, taking into account the circumstances of the case, including the language of the contract.[868] The UNCITRAL Arbitration Rules have taken the same stand: the arbitral tribunal only decides the language when parties fail to do so.[869]

A different choice has been made in the ICSID Arbitration Rules: if the parties disagree on the proceedings' language, they can each choose one of the official languages of the Centre, i.e. French, English or Spanish.[870] If two languages emerge out of this choice, then all orders and the award must be rendered in both languages, each version equally authentic.[871] During the proceedings, the

[866] Albanian contract (n 39) art 19.5.
[867] Greek contract (n 41) art 23.4. and 23.7.
[868] ICC Arbitration Rules, Article 20.
[869] UNCITRAL Arbitration Rules, Article 19.
[870] ICSID Arbitration Rules, Rule 22.1.
[871] ICSID Arbitration Rules, Rule 22.2.

hearings and the submission of documents for instance, any of the language can be used but translation should be provided if the tribunal needs it.[872]

Parties should be careful in drafting their choice of language clause, and even more with the choice of seat. Regarding the former, any disagreement between them will lead the arbitral tribunal to choose a language which may not perfectly suit the parties and create translation issues. For the seat, the consequences may be even dire. Because the law of the seat will determine the law applicable to the proceedings outside of the arbitration (annulment, enforceability, appeal, court orders), it is crucial to choose a seat in a country party to the New-York Convention on the Recognition and Enforcement of Arbitral Awards. If the award is rendered in a country party to the convention, its enforceability is guaranteed when procedural rules are followed. Furthermore, a seat in a country with national laws favourable to arbitration will also ease any further proceedings after the arbitration and protect the rights of the parties under the award.

6.2.2.4.2. <u>The written procedure</u>

Arbitration is composed of a mix of written and oral procedures.[873] The start of the arbitration is made by writing with the issuance of a notice of or request for arbitration. Then the arbitral rules differ. Under the UNCITRAL Arbitration Rules, once the arbitral tribunal has been constituted, the claimant must transmit a statement of claim to its opponent and the arbitral tribunal. The statement must contain several elements, similar to the ones already given in the notice of arbitration. The respondent will then reply to the statement of claim with a statement of defence. The parties can decide to treat their notice of arbitration and reply to the notice as statements of claim and defence. As a result, these statements are not mandatory.[874]

Generally, the procedure will be left to the appreciation of the tribunal and the parties. A written part followed by hearings can be provided in the arbitration rules, but it is not a principle.[875] The submission of written elements takes the

[872] ICSID Arbitration Rules, Rule 22.1.
[873] ICSID Arbitration Rules, Rule 29; ICC Arbitration Rules, Article 25.2.
[874] UNCITRAL Arbitration Rules, Articles 20 and 21.
[875] ICSID Arbitration Rules, Rule 31.

form of memorials and counter-memorials and are sent following a timeframe designed by the arbitral tribunal.[876] Alongside their claims and counter claims, parties must join all necessary documentation and evidence.

6.2.2.4.3. The oral procedure: the hearings

The dates and time of hearings are decided by the tribunal and communicated to the parties.[877] Hearings are meant for the tribunal to listen to the parties' arguments, their positions, to have more information on some points of their memoranda.[878] Organising hearings is also a means for the arbitral tribunal to hear witnesses and experts.[879]

A distinction must be made between the seat of the arbitration, discussed in a previous sub-section, and the place where the hearings are held. The seat of arbitration is the legal place of the arbitration proceedings and does not automatically refer to the physical place where the procedure is conducted.[880] There may be a connection between both the legal and physical place, but the legal consequences of the seat – the applicable procedural law – do not affect the substance of the hearings, their legality or their legal value in the proceedings. As a result, hearings can be held in different places, countries and online.

Parties are summoned by the tribunal to appear at the hearings.[881] The absence of a party to the hearing under the ICSID Convention and Arbitration Rules, however, does not mean acceptance or agreement by the missing party with the arguments of the party present at the hearings.[882] On the contrary, the ICC and UNCITRAL Arbitration Rules provide that if any of the parties fails to appear to the hearing, the tribunal can proceed with the hearing.[883]

[876] ICSID Arbitration Rules, Rule 31; UNCITRAL Arbitration Rules, Article 21.
[877] ICSID Arbitration Rules, Rule 32.1; ICC Arbitration Rules, Article 26.1.; UNCITRAL Arbitration Rules, Article 28.1.
[878] ICSID Arbitration Rules, Rule 32.3.
[879] ICSID Arbitration Rules, Rule 32.2; UNCITRAL Arbitration Rules, Article 28.2.
[880] *Russel on Arbitration* (n 159) para 2-125.
[881] ICSID Arbitration Rules, Rule 32; ICC, Arbitration Rules, Articles 25.3 and 26.3.; UNCITRAL Arbitration Rules, Article 28.1.
[882] ICSID Convention, Article 45.
[883] ICC, Arbitration Rules 26.2.; UNCITRAL Arbitration Rules, Article 30.2.

With regards to both written and hearing procedures, all arbitration rules provide the same sanction for lack of communication by one of the parties. The tribunal, unless provided with a sufficient cause for this failure, may render the award on the elements presented before it.[884] As a corollary, the tribunal may also dismiss the case or refuse to decide on the dispute if the elements are not sufficient to prove the case.[885] This rule is necessary with regards to the protection of the parties' rights. It would be unacceptable for any of the parties to be either attracted (for the defendant) or held (for the claimant) in proceedings without having a decision on the merits of the case.

6.2.2.4.4. Provisional measures

Provisional and conservatory measures are orders issued by the arbitral tribunal to protect the arbitration proceedings and the parties' rights before the final resolution of the dispute.[886] They can relate to the preservation of evidence, the protection of assets, or help maintaining the position of the parties in the state prior to the arbitration, until the final award is rendered.[887] The topic of provisional measures has been largely covered in literature and this section aims simply to provide general elements on the notion, use and limits of these orders.[888]

The arbitration rules examined in this chapter give different denominations to orders of provisional measures. Under the ICSID Arbitration Rules, they are called "provisional measures".[889] The ICC names them "conservatory and interim

[884] ICSID Convention, Article 45.2.; ICC Arbitration Rules, Articles 25.6. and 26.1.; UNCITRAL Arbitration Rules, Article 30.3.
[885] *Russel on Arbitration* (n 159) para 5-197.
[886] Lee Anna Tucker, 'Interim Measures under Revised UNCITRAL Arbitration Rules: Comparison to Model Law Reflects Both Greater Flexibility and Remaining Uncertainty' (2011) 1(2) Int'l Com Arb Brief 15, 15
[887] Blackaby and others (n 819) para 7.14.
[888] Ylli Dautaj and Bruno Gustafsson, 'Provisional Measures in Investor-State Arbitration: States Playing Games in Local Courts by Invoking the Trump Card (Police Powers)' (2019) 4(1) U Bologna L Rev 27; Benoit Le Bars and Tejas Shiroor, 'Provisional Measures in Investment Arbitration: Wading through the Murky Waters of Enforcement' (2017) 6(1) Indian J Arb L 24; Dan Sarooshi, 'Provisional Measures and Investment Treaty Arbitration' (2013) 29(3) Arbitration International 361; Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (2005 Kluwer Law); Charles N Brower and W Michael Tupman, 'Court-Ordered Provisional Measures Under the New York Convention' (1986) 80(1) The American Journal of International Law 24; Paul D Friedland, 'Provisional measures and ICSID arbitration' (1986) 2(4) Arbitration International 335
[889] ICSID Arbitration Rules, Rule 39

measures".[890] Finally, the UNCITRAL Arbitration Rules have chosen "interim measures".[891] Despite these differences in the denomination of these measures, they all refer to the same process. The present section will use these terms interchangeably.

A precise definition of provisional measures and their categorisation is given in the UNCITRAL Rules, Article 26.2:

> 2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:
> (a) Maintain or restore the status quo pending determination of the dispute;
> (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
> (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
> (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

The main aim of provisional measures is therefore to preserve the rights of one or all parties.[892] The UNCITRAL Arbitration Rules organise provisional measures in four categories: orders to maintain the status quo; orders to prevent actions that would cause harm or prejudice the proceedings; to preserve assets; and to preserve evidence.

A request for a provisional measure can be raised by a party at any point of the proceedings.[893] The request must nonetheless be presented to the arbitral tribunal with elements to establish the basis of the request and the necessary evidence for the tribunal to grant the provisional measure.[894]

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[890] ICC Arbitration Rules, Article 28
[891] UNCITRAL Arbitration Rules, Article 26
[892] ICSID Convention, Article 47.
[893] ICSID Arbitration Rules, Rule 39.1.; ICC Arbitration Rules, Article 28.1.; UNCITRAL Arbitration Rules, Article 26.1.
[894] ICSID Arbitration Rules, Rule 39.1.; ICC Arbitration Rules, Article 28.1.; UNCITRAL Arbitration Rules, Article 26.3.

Under the UNCITRAL Arbitration Rules, the requesting party must prove that the harm to be caused by the other party is greater than the harm that would be caused to that party if the provisional measure is granted; and that the requesting party has a chance to succeed on the merits of the case.[895]

The ICSID Convention and Rules do not provide conditions *per se* for a request to be accepted. Article 47 of the Convention only states the following:

> Except as the parties otherwise agree, the Tribunal may, **if it considers that the circumstances so require**, recommend any provisional measures which should be taken **to preserve the respective rights of either party**. (emphasis added)

The ICSID Convention, through its Article 47, imposes on the arbitral tribunal constituted in application of the Convention to verify that specific circumstances warrant to grant provisional measures. Furthermore, such measures must participate to the preservation of the rights of the parties, i.e., the rights of one of the parties is under possible harm. Although an ICSID tribunal appears to have a broad discretion in the granting of provisional measures, the arbitral practice has developed two other criteria that need to be assessed and verified.[896] These are the urgency of the measure and the necessity of protection of the rights of the parties.[897] Regarding the latter, the ICSID has for long followed the position of the International Court of Justice and the characterisation of "irreparable prejudice", forcing upon the requesting party a high threshold of proof.[898] The recent developments in the ICSID jurisprudence have lowered the threshold by sometimes accepting the proof of a "significant harm" instead.[899]

These limitations to the right to obtain provisional measures are inexistent before an ICC tribunal. Criteria and conditions may be asked by the tribunal but the ICC Arbitration Rules give complete freedom to the arbitrators on deciding whether to

[895] UNCITRAL Arbitration Rules, Article 26.3.
[896] Sarooshi (n 888) 363-364.
[897] Sarooshi (n 888) 366.
[898] Sarooshi (n 888) 367; *Nuclear Tests Case (New Zealand v France) (Interim Protection Order)* [1973] ICJ Rep 135
[899] Sarooshi (n 888) 377; *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (Decision on Provisional Measures)* [2009] ICSID Case No ARB/08/6 para 43.

grant or not a measure.[900] Indeed, Article 28(1) of the Arbitration Rules states that the tribunal may order any provisional measures "it deems necessary".[901]

The decision of ordering a provisional measure will only be rendered once both parties have been given the opportunity to present their case.[902] The tribunal will issue its decision, with motivation and reasons as an order or as an award.[903] The provisional measure, as its name indicates, is a provision, meaning it can be amended or even revoked by the tribunal if it considers that the circumstances mandating the measure have changed.[904] More importantly, and to avoid frivolous claim and dilatory proceedings, the tribunal can order the requesting party to provide monetary security as a condition to grant the measure.[905] As a result, only parties truly willing to obtain a provisional measure and therefore who have an actual claim, will pursue the procedure.

Interestingly, during an arbitration procedure, not only the arbitral tribunal is entitled to issue provisional measures. The three sets of arbitration rules provide for the right of the parties to request provisional measures before judicial and national courts. They allow the parties, if they have not waived this right in their contract, to apply to competent judicial authorities to obtain interim measures to protect and preserve their rights and interests, even when the arbitral proceedings have already started.[906] Provisional measures are inherent powers of national courts and even recognised as a law common to all legal systems.[907] Resort to judicial authorities is not common and is circumscribed to extremely urgent or perilous situations, or where there may be denial of justice.[908] The application to national courts before the constitution of the arbitral tribunal is sensible and understandable: it is the only means for the parties to obtain the preservation of their rights.[909] During the arbitration, resort to national courts can

[900] Sarooshi (n 888) 370.
[901] ICC Arbitration Rules, Article 28.1.
[902] ICSID Arbitration Rules, Rule 39.4.; UNCITRAL Arbitration Rules, Article 26.1, 2., and 3.
[903] ICC Arbitration Rules, Article 28.1.; UNCITRAL Arbitration Rules, Article 32.1.
[904] ICSID Arbitration Rules, Rule 39.3.; UNCITRAL Arbitration Rules, Article 26.5.
[905] ICC Arbitration Rules, Article 28.1.; UNCITRAL Arbitration Rules, Article 26.6.
[906] ICSID Arbitration Rules, Rule 39.6; ICC Arbitration Rules, Article 28.2.; UNCITRAL Arbitration Rules, Article 26.9.
[907] Sarooshi (n 888) 361-362.
[908] Guy Robin, 'Conservatory and Provisional Measures in International Arbitration: The Role of State Courts' (2008) 2008(3) Int'l Bus LJ 319, 331
[909] Blackaby and others (n 819) para 7.17.

be necessary to obtain provisional measures against a third-party which would be forbidden otherwise.[910] Finally, parties may see an interest in obtaining interim measures from a judicial authority as these will have a more important legal value. An arbitral tribunal has no executory power to enforce an order against a party. On the contrary, the order issued by a national court will be enforceable by itself and does not rely on the party's willingness to abide by it.[911] In addition, albeit arbitration benefits from a wide recognition with the New York Convention, the Convention only refers to "arbitral awards" and therefore may not cover provisional measures when granted through an order.[912]

6.2.2.4.5. Experts and establishment of evidence

The parties must accompany their demands, claims and counterclaims with the necessary documents to support their arguments. In addition, the parties are free to bring to hearings witnesses and experts in support of their claims. Their audition is submitted to the tribunal's approval, as well as their admissibility.[913] This section will discuss in depth the question of experts, either party-appointed or tribunal appointed, and will try to provide a more efficient solution through the implementation, when possible, of Scientific Panels.

6.2.2.4.5.1. Party and tribunal appointed experts and their limits

The use of party-appointed experts' testimonies and expert evidence has considerably grown over the last decades, before both national and international courts and arbitral tribunals. [914] Relying on expert's opinions is critical for cases involving high level of science or engineering in which judges or arbitrators may not have the substantive and necessary knowledge. However, party-appointed

[910] Blackaby and others (n 819) para 7.18.
[911] Brower, Tupman (n 888) 24.
[912] Walter G Semple, 'The Uncitral Model Law and Provisional Measures in International Commercial Arbitration' (1993) 1993(6) Int'l Bus LJ 765, 766.
[913] ICSID Convention, Article 43; ICSID Arbitration Rules, Rule 34.1. and 2; ICC Arbitration Rules, Article 25.3; UNCITRAL Arbitration Rules, Article 27.
[914] Marilee M Kapsa and Carl B Meyer, 'Scientific Experts: Making Their Testimony More Reliable' (1999) 35(2) California Western Law Review 313; Doug Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last' (2008) 24(1) Arbitration International 137, 137; Matthew W Swineheart, 'Reliability of Expert Evidence in International Disputes' (2017) 38 Mich J Int'l L 287, 288, accessible at <http://repository.law.umich.edu/mjil/vol38/iss2/6>

are often considered partisans ("hired-guns") as they are paid by the parties themselves and their opinion may appear not reliable.[915] Parties will also tend to appoint the best-spoken experts, the most convincing rather than a competent and recognised expert who will not appear as clear and convincing during cross-examination.[916]

It stems from these two criticisms of party-appointed experts the risk of "witness shopping", by which parties will only appoint an expert able to represent their position, ultimately reducing the reliability of the testimony.[917] In addition to this risk, the resort to party-appointed experts is also seen as a major contribution to the increasing costs and lengths of dispute resolution procedures.

The national courts (federal and state courts) of the United States had to face this issue in the nineties with the development of mass-tort claims in medical and criminal matters.[918] The unreliability of party-appointed experts is commonly known as "junk science", emerging from the work of Peter Huber of the Manhattan Institute and popularised in his book Galileo's Revenge: Junk Science in the Courtroom. [919] The term "junk science" does not have a clear definition and is generally opposed to "good science". "Junk science" is therefore a science unable to display the same levels of credentials, peer reviewed processes, publications, methods, as those used in "good science", but also a science relying on evidence and results rejected by the scientific community numerous years ago. [920]

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[915] Richard A Posner, 'The Law and Economics of the Economic Expert Witness' (1999) 13(2) Journal of Economic Perspectives 91, 93.
[916] Posner (n 915) 93; Doug Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last' (2008) 24(1) Arbitration International 137, 138; George Ruttinger, Joe Meadows, 'Using experts in arbitration' (2007) 62(1) Dispute Resolution Journal 46, 48: "*An expert experienced in testifying on direct and cross-examination who is uncomfortable with the idea of being questioned by someone knowledgeable in the area is not the best choice of witness for an arbitration proceeding*."; Kapsa, Meyer (n 914) 315.
[917] Posner (n 915) 98.
[918] Paul C Giannelli, 'Junk Science: The Criminal Cases' (1993) 84 J Crim L & Criminology 105, 114; See in relation with breast-implants' case Joseph M Price, Ellen S Rosenberg, 'The war against junk science: the use of expert panels in complex medical-legal scientific litigation' (1998) 19 1425.
[919] Peter W Huber, *Galileo's Revenge: Junk Science In The Courtroom* (Basic Books 1993); Gary Edmond, David Mercier, 'Trashing Junk Science' (1998) 3 Stanford Technology Law Review, para 5 accessible <http://stlr.stanford.edu/STLR/Articles/98_STLR_3>
[920] Edmond, Mercier (n 919) para 9; Charles N Herrick, Dale Jamieson, 'Junk Science and Environmental Policy: Obscuring Public Debate with Misleading Discourse' (2001) 21(3) Philosophy & Public Policy Quarterly, 12.; Giannelli (n 918) 105.

The answer of the U.S. national courts to the development of such party-appointed experts' testimonies results from a medical case. In *Daubert v. Merrell Dow Pharmaceuticals, Inc*, the Supreme Court imposed on trial judges the task to ensure that the expert's testimony presents reliable foundation and is relevant, by using four factors (testing, peer review, error rates and acceptability in the relevant community).[921] Federal and trial judges have therefore to act as a filter in order to determine the reliability and relevance of expert's testimony. Before this decision, judges were relying on the "general acceptance test" formulated in the Frye case.[922] Under this test, scientific discoveries and principles can be accepted by a court if "the thing from which the deduction is made [is] sufficiently established to have gained general acceptance in the particular field in which it belongs".[923] The "filter" role was further refined through the cases of *General Electric v. Joiner* and *Kuhmo v. Carmichael*. In *General Electric v. Joiner*, the Supreme Court confirmed the "gatekeeper" role of trial judges in ensuring that experts' evidence are both reliable and relevant, as per *Daubert v. Merrell Dow Pharmaceuticals*. In *Kuhmo*, the Supreme Court firstly held that the factors set out in *Daubert* apply to all expert testimonies, and not only scientific experts. Testimonies of engineers acting as experts as in *Kuhmo* are therefore subject to these factors. Furthermore, the Supreme Court decided that the *Daubert*'s factors are not definitive and the court has full discretion to apply part or all of them in its assessment of the reliability and relevance of the testimony.

In the United Kingdom, the issue of party-appointed experts was tackled early as well.[924] In the Woolf Report, Lord Woolf outlined the tendency of parties to call multiple experts when only one is needed, or to rely on experts' opinions when none are useful.[925] Combined with the partisan aspect, his Lordship concluded that party-appointed experts contributed to the increase of costs and delays in litigation.[926] The Report proposed several reforms, including the ordering joint

[921] *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 509 U. S. 579 (1993); Kapsa, Meyer (n 914) 318.
[922] *Frye v United States* [1923] 293 F. 1013.
[923] 54 App D C, at 47, 293 F, 1014.
[924] England and Wales in relation to arbitration and as per the Woolf Report: Lord Woolf MR, 'Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales' (1996) HM Stationery Office; Doug Jones, Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last, Arbitration International, Vol. 24, No. 1, at 138.
[925] Lord Woolf MR 'Final Report to the Lord Chancellor on the Civil Justice System in England and Wales' (n 924); Jones (n 916) 138.
[926] Jones (n 916) 138.

conferences between the different party-appointed experts, as well as the appointment of neutral experts, i.e. appointed by both parties or by the court.[927]

Regarding arbitration there are two sets of guidelines referring and organising experts' witnesses: the International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration, published in 1999, and the Protocol for the Use of Party Appointed Expert Witnesses in International Arbitration developed by the Chartered Institute of Arbitrators ('CIArb).[928] These rules primarily focus on the bias of experts and oblige them to disclose any relationship they may have with the parties and the arbitral tribunal.[929] These two sets of Rules are complementary. The Protocol, developed after the IBA Rules, uses the same terms and language, hence providing continuity and consistency.[930] Under the IBA Rules and the CIArb Protocol, the Arbitral Tribunal may direct the party-appointed experts for the same matter to have a joint conference in order to discuss their views and reach an agreement.[931] This is a direct implementation of one of the propositions of the Woolf Report.[932] Finally, the arbitral tribunal retains all discretion under both set of rules to determine the relevance of the expert's testimony and exclude if necessary.[933]
The position of the IBA Rules and the CIArb Protocol is therefore analogous to the position developed by the U.S. Supreme Court in the aforementioned cases. Arbitral tribunals and trial judges are the "gatekeepers" of the relevance and reliability of expert's testimonies.

However, although the regulation of party-appointed experts and their testimonies is crucial, the fact that this regulation is left to judges and arbitrators seems paradoxical. Experts' testimonies and presentations may be abused by

[927] Jones (n 916) 138.
[928] Swineheart (n 914).
[929] International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration (2010) Article 5.2.; CIArb Protocol for the Use of Party Appointed Expert Witnesses in International Arbitration, Article 4.4.
[930] Doug Jones, 'Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last' (2008) 24(1) Arbitration International 137, 140-141.
[931] IBA Rules on the Taking of Evidence in International Commercial Arbitration (2010), Article 5.4.; CIArb Protocol for the Use of Party Appointed Expert Witnesses in International Arbitration (2007), Article 6.
[932] Jones (n 916) 145-146.
[933] IBA Rules on the Taking of Evidence in International Commercial Arbitration, 2010, Article 9.1. and 2.; CIArb Protocol for the Use of Party Appointed Expert Witnesses in International Arbitration, Article 7.4.

the parties, but their use is generally compelled by the complexity of the cases and the lack of technical knowledge of the judges or arbitrators on the matter. Their role to act as a "filter" can be understood in relation with the procedure and to acknowledge the independency of the experts, but hardly when it comes to the substance of the testimony itself.[934] Suggestions have been made in order to palliate these difficulties such as the development of an analytical framework for expert's reliance in international disputes which is worth being pushed forward and applied, although still requires a certain knowledge and appreciation of scientific methodology.[935] Another idea was the generalisation of tribunal-appointed experts, which raises another issue being the expert not acting as an expert but as a member of the court or the arbitral tribunal, his testimony having a decisive effect.[936] A second risk is that the expert's opinion will reflect the demands of the parties.[937] This work is therefore proposing to use scientific panels as a means to either corroborate or dismiss experts' opinions when appointed by the parties.

6.2.2.4.5.2. A way forward: Scientific (Experts) Panels

Scientific (Experts) Panels are composed of numerous experts in different fields and is organised as a research and discussion pool. Scientific Panels are used as a support for policy regulations changes and in specific areas such as medicine, health, environment and engineering.[938] Scientific panels can be also used as an ADRM by neutrally assessing facts of a case or the reliability of a party-appointed expert. Following the *Daubert* case in the U.S., trial judges facing silicone breast implant litigations and the alleged effect on connective tissue disease appointed their own panels of experts and scientists.[939] The scientific panel examined existing studies, research and observations, as well as publications submitted by the parties and their appointed experts.[940]

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[934] Swineheart (n 914) 306-9.
[935] Swineheart (n 914) 328 and 341.
[936] Swineheart (n 914) 306.
[937] Swineheart (n 914) 306.
[938] P Cottingham, M C Thoms, GP Quinn, 'Scientific panels and their use in environmental flow assessment in Australia' (2002) 5(1) Australian Journal of Water Resources 103, 103-104; B Dufour and others, 'A qualitative risk assessment methodology for scientific expert panels' (2011) 30(3) Rev sci tech Off int Epiz 673, 674.
[939] Price, Rosenberg 'The war against junk science' (n 918) 1425; Joseph M Price, Ellen S Rosenberg, 'The silicone breast implant controversy: the rise of expert panels and the fall of junk science' (1998) 93 J R Soc Med 31.
[940] Price, Rosenberg 'The silicone breast implant controversy' (n 939) 31.

The use of scientific panels is not limited to U.S. courts. The North America Free Trade Agreement (hereafter NAFTA) provides for the appointment of a Scientific Review Board as part of the dispute settlement process. The arbitral panel when facing a dispute concerning environmental, health, safety or other scientific matters can on its own volition or on request of a disputing party, appoint a scientific panel composed of highly qualified and independent experts. The arbitral panel cannot however appoint a scientific panel without the agreement of the parties.[941]

Scientific panels can have three forms. Blue Ribbon Panels comprised only scientists and have for aim to summarise the current state of knowledge. "Adversary Science" are the most common type of scientific panels encountered in litigation and arbitration. Parties' appointed experts and their representatives will object and try to diminish the value of the testimony presented by the other party. The shortcomings of this system have been presented earlier. "Adversary Science" leads to the multiplication of experts, a lack of reliance on the opinions provided, and ultimately an increase in the length and cost of the procedures. Another model of scientific panels, "Joint Fact-Finding", has been praised. Such panels are composed of scientists and experts, but they also involve the stakeholders, i.e. the parties to the dispute.[942] A distinction must be drawn between Blue Ribbon Panels and Joint Fact-Finding Panels regarding their use in dispute resolution. Joint Fact-Finding Panels must be understood and considered as an ADRM *per se*. They involve the parties to the dispute and creates a pool of discussion among them and scientists and experts. Furthermore, if such panels are created before the emergence of a dispute or propose discussions on non-contentious issues, they could also act as a DPM (Dispute Prevention Mechanism), analogous to TACs and in some extent DRBs. The involvement of independent experts in TACs, on the model of Joint Fact-Findings Panels, could improve their role as a DPM and an ADRM. However, the Joint Fact-Finding model cannot be applied to scientific panels appointed during litigation or arbitration as they involve the parties to the dispute. Hence, the system of Blue Ribbon Panels seems to be the most appropriate to balance the

[941] North American Free Trade Agreement (entry into force 1 January 1994, replaced on 1 July 2020), Article 2015.1 and 2.

[942] Scott T McCreary, John K Gamman and Bennett Brooks, 'Refining and Testing Joint Fact-Finding for Environmental Dispute Resolution: Ten Years of Success' (2007) 18(4) Mediation Quarterly 329.

issues of reliability of parties' appointed experts in litigation and arbitration. They allow to shift the burden of reliability from arbitrators to the panel, which is more capable of determining the relevance of the substance of experts' opinions.
Nevertheless, the appointment of scientific panels by arbitral tribunals is not a panacea. In the example of the aforementioned breast implant litigation, the panel reached its conclusion after two years.[943] For the purposes of reducing costs and length of arbitration, scientific panels may not be always appropriate. They are therefore, like arbitration, a last resort for the parties and the arbitral tribunal.
To conclude, scientific panels generally deserve to be implemented in the dispute resolution process in the oil and gas industry. However, their use must be limited to situations involving large-scale scientific issues, such as pollution or territorial delimitation.

6.2.2.5. The award

The three sets of arbitration rules studied in this chapter provide for specific headings dedicated to the award and its making.[944] The different steps in the issuance of the award will be described.

6.2.2.5.1. The form of the award

An arbitral award must be rendered in writing.[945] It shall state the reasons upon which the decision has been reached.[946] When the tribunal is composed of an uneven number of arbitrators, the decision must have been taken at a majority but still be signed by all arbitrators.[947] The ICSID and ICC Arbitration Rules also provide for a time limit within which the award must be issued. The ICSID Arbitration Rules impose a 120 days limit to the arbitral tribunal to render the award, although it can be extended up to 180 days.[948] On the other hand, the ICC Arbitration Rules leave the timeline to the appreciation of the arbitral tribunal.[949]

[943] Price, Rosenberg 'The silicone breast implant controversy' (n 939) 31.
[944] ICSID Arbitration Rules, Chapter VI "The Award"; UNCITRAL Arbitration Rules, Section IV "The award"; ICC Arbitration Rules, "Awards".
[945] ICSID Arbitration Rules, Rule 47.1.; UNCITRAL Arbitration Rules, Article 34.2.
[946] ICSID Arbitration Rules, Rule 47.1(i); ICC Arbitration Rules, Article 32.2.; UNCITRAL Arbitration Rules, Article 34.3.
[947] ICSID Arbitration Rules, Rule 47.2; ICC Arbitration Rules, Article 32.1.; UNCITRAL Arbitration Rules, Articles 33.1. and 34.4.
[948] ICSID Arbitration Rules, Rule 46.
[949] ICC Arbitration Rules, Article 31.

6.2.2.5.2. Interpretation and correction of the award

Once the award has been rendered, parties can apply to the arbitral tribunal to obtain its interpretation or correction.

Firstly, they can ask the tribunal to correct the award. Correction entails a request of a party to alter the award that has been issued, but only on minor errors and not on errors of law. This means an error in the amount of compensation, between the amount in numbers and in letters for instance. The request for correction has to be made within a specific timeframe, between 30 and 45 days of the issuance of the award.[950] The arbitral tribunal can accept or refuse the request for correction. In the case of *Guaracachi v Bolivia*, the parties had requested four corrections of the award.[951] The first referred to the payment of the deposit by the respondent, which had not happened at the time of the award. The payment of the deposit being received after the award, the tribunal accepted to correct the award in this regard.[952] The tribunal however refused to correct a discrepancy between the Spanish and English version of the award, because it was only due to a typological error.[953] The correction can also come from the arbitral tribunal itself: in *Guaracachi v Bolivia*, the tribunal corrected some typographical and clerical errors.[954]

The interpretation of the award consists in obtaining further explanations on the terms of the award. The request for interpretation must be transmitted in writing and highlight the elements on which interpretation is required.[955] As for correction of the award, the tribunal will have to provide its decision within a specific time, often between 30 and 45 days.[956] For both the correction and the interpretation of the award, the decision of the tribunal will become part of the award and therefore will benefit de facto and de jure of the enforceability of an award.

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[950] ICSID Arbitration Rules, Rule 49.1.; ICC Arbitration Rules, Article 36.2.; UNCITRAL Arbitration Rules, Article 38.1.

[951] *Guaracachi America, Inc., Rurelec PLC v The Plurinational State of Bolivia (Letter from Tribunal to Parties on Correction of Award)* [2014] PCA Case No. 2011-17 (*Guaracachi v Bolivia*).

[952] *Guaracachi v Bolivia* (n 951) 2.

[953] *Guaracachi v Bolivia* (n 951) 2.

[954] *Guaracachi v Bolivia* (n 951) 2; ICC Arbitration Rules, Article 36.1.; UNCITRAL Arbitration Rules, Article 38.2.

[955] ICSID Arbitration Rules, Rule 50.1.(c)(i); ICC Arbitration Rules, Article 36.2.; UNCITRAL Arbitration Rules, Article 37.1.

[956] ICC Arbitration Rules, Article 36.2.; UNCITRAL Arbitration Rules, Article 37.2.

6.2.2.5.3. Enforcement

The enforceability and enforcement of the award is guaranteed and upheld by the New York Convention on the Recognition and Enforcement of Arbitral Awards.[957] Through the ratification and implementation of the New York Convention in 1958, arbitral awards are given a legal force equal to judgements of national courts. Under arbitration rules, issuing an enforceable award is almost an obligation for the arbitral tribunal. The rules regarding the form and content of the award participate to ensuring that the award will be enforceable before national courts, in application of the national laws of the country in which the award must be enforced and of the principles of the New York Convention.

The enforceability is also protected by the binding and final aspect of the award, i.e. the absence of appeal and the obligation to comply with it. When this facet is not provided for in the arbitration rules, it can be given in the contract, or only reiterated in the contract.[958]

The *Albanian arbitration clause* refers to UNCITRAL Rules which do not provide for an automatic binding and final character of the award. However, in order to uphold the enforceability of the decision, such waiver has been provided for in the contract:

> 19.5. The Parties expressly waive any right to appeal an arbitral award to any court whatsoever, and the arbitral award shall be final and binding upon the Parties.[959]

Some contracts may also decide to include in the contract the final and binding element, even though the arbitration rules applicable to the contract already enounce this principle. This is the case of the *Cypriot arbitration clause* for instance:

> 36.3. Arbitration
> The arbitration award shall be final and binding on the Parties and immediately enforceable.[960]

[957] New York Convention.
[958] ICSID Arbitration Rules, Article 53.1.; ICC Arbitration Rules, Article 35.6.
[959] Albanian contract (n 39) art 19.5.
[960] Cypriot contract (n 40) art 36.3.

Where the possibility of an appeal is not explicitly waived in the contract, parties can appeal the decision before the courts of the seat of the arbitration, under the procedural national laws of this country. The choice of the seat is hence particularly important.

6.2.2.5.4. Appeals

Appealing an arbitral award is very limited, due to the global acceptance of this dispute resolution mechanism as final and binding. However, when allowed, either by the contract or arbitration rules or national laws, a party can require the award to be annulled for violation of these dispositions.

6.2.3. The *ad hoc* arbitration: no choice of arbitration centre or rules

Contrary to arbitration under institutional and arbitration rules, some parties choose to resort to arbitration without using an institution or arbitration rules. Traditionally, *ad hoc* arbitration is said for arbitration held without an arbitral institution, as in the *Albanian arbitration clause* and the *Syrian arbitration clause*. The clauses refer to the UNCITRAL arbitration rules and follow their procedure but did not elect an institution to supervise the proceedings nor provide administrative support. This is now the most common position in ad hoc arbitration.[961]

However, in the denomination of "*ad hoc*" can be included contracts and arbitration clauses that did not rely on arbitration rules nor arbitral institutions as well.[962]

The consequences of this choice are that the parties need to provide all the procedure and alternative systems of elections of arbitrators, seats and languages, among others, to ensure that the arbitration will not be halted because the parties cannot agree on these elements. The parties will have to create entirely the procedure applicable to the arbitration, starting from the arbitration clause itself (the one establishing the choice of arbitration as the dispute

[961] Blackaby and others (n 819) para 1.144.
[962] Blackaby and others (n 819) para 1.141.

resolution system) to the correction and interpretation of the award. Although not using arbitral institutions nor rules necessarily offers more freedom to the parties and the resolution system will be perfectly tailored to the needs of the parties.[963] However, this system requires full cooperation between the parties and the intervention of an expert in arbitration and its pitfalls and difficulties at the time of the drafting of the clause.[964] Otherwise, an elongation of the dispute due to misunderstandings and equivocal wording as in *Henry Schein v Archer* is highly probable.[965]

6.2.4. Discussion on the opportunity to choose an arbitral institution

6.2.4.1. The advantages: a close management of the case

The most obvious advantage in institutional arbitration is the management, logistically and administratively, of the case by the institution. The parties, once they have sent their request to arbitration to the competent centre, have only to follow the proceedings as given in the rules and the arbitral tribunal. Arbitral institutions impose on arbitral tribunals to organise the whole proceedings by creating case management conferences with the parties, during which the timetable for all predictable steps of the procedure will be discussed and established.[966] This role is supervised by the competent Centre, either ICC or ICSID.[967] This means that the institution itself does not lose track of the proceedings and continues managing the case even once the arbitral tribunal has been selected.

Besides the management of cases, arbitral institutions have an advantage over *ad hoc* arbitration in that they review the award issued by the tribunal. Under the ICC Arbitration Rules, every award has to be given in draft form to the Court (the managing body of the ICC). The Court will examine the award and can make suggestion as to the form as well as the substance of the award. The tribunal is

[963] Blackaby and others (n 819) para 1.143.
[964] Blackaby and others (n 819) para 1.145.
[965] *Archer v Henry Schein* [2019] (n 812).
[966] ICC Arbitration Rules, Articles 22 and 24.
[967] ICSID Arbitration Rules, Rule 13.1 and 2; ICC Arbitration Rules, Article 24.2.

compelled to wait for this approval before properly rendering the award.[968] An analogous procedure exists under the ICSID Arbitration Rules. Once the last arbitrator has signed the award, it is transmitted to the Secretary-General of the ICSID who will authenticate the award.[969]

These two procedures are helpful in strengthening the enforceability of an award. Having an authenticated original award to present to the court where enforcement of the award is requested is mandatory.[970] Obtaining an authenticated or approved arbitral award is therefore a first step in the enforcement process.

6.2.4.2. The disadvantages: the costs

As opposed to ad hoc arbitration, the resort to arbitral institutions costs a price. Parties must pay, in addition to the regular arbitration costs (legal fees, arbitrators expenses) the cost of the institution. The price of the institution will depend on the dispute at hand. The ICC for instance provides for a costs' simulator on its website.[971]

Figure 3: Screenshot of the costs' calculator as per the International Chamber of Commerce' website

[968] ICC Arbitration Rules, Article 34.
[969] ICSID Arbitration Rules, Rule 48.1(a).
[970] New York Convention, Article IV.1.(a).
[971] International Chamber of Commerce <https://www.dropbox.com/s/g8tyy59w5ad5tx8/Capture%20d%E2%80%99%C3%A9cran%2020-09-29%20%C3%A0%2017.32.43.png?dl=0>, accessed 29 October 2020

Source: International Chamber of Commerce website <https://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/cost-calculator/>

It can be seen from the above figure that the costs of the institution will depend on the amount in dispute, the choice of procedure and the number of arbitrators. This calculation is only an estimation, but it is possible to therefore estimate the costs of the arbitration, in a dispute with 10 000 000 USD as amount in dispute, following an ordinary procedure and with three arbitrators at 57 515 USD.

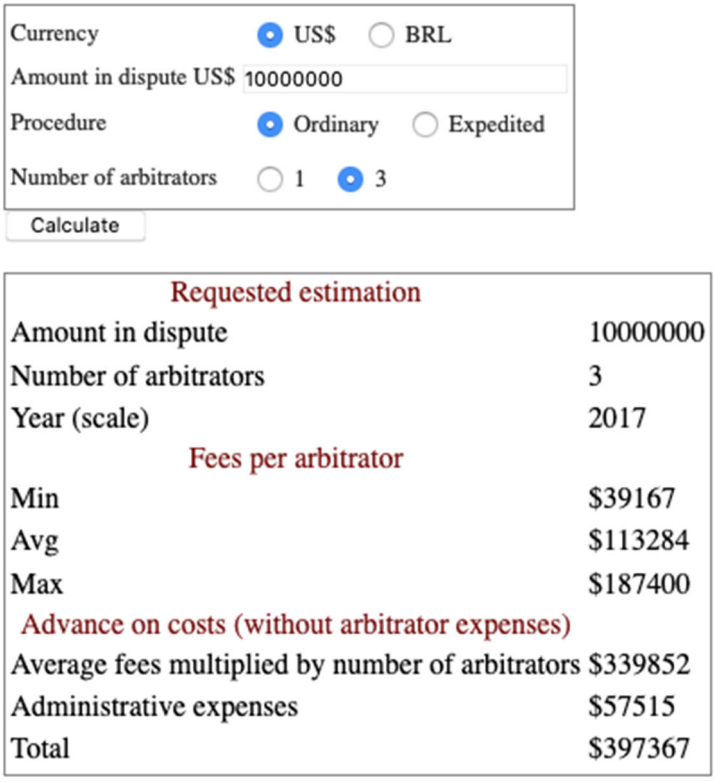

Figure 4: Screenshot of the costs' calculator as per the International Chamber of Commerce's website

Source: International Chamber of Commerce's website <https://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/cost-calculator/>

The ICSID does not offer such a costs' calculator system but one can only assume that the cost of the centre will be close to the ICC's costs. Paying for the service these institutions provide is natural and evident, but parties should be aware of these extra costs when drafting their contracts.

The costs of the institution bear another consequence: the proceedings under the ICC and ICSID arbitration rules are halted if the parties fail to pay the costs. Under the ICSID Institution Rules, the Secretary-General is prevented to take actions after receiving the request for arbitration, until the request's lodging fees have been received.[972] Under the ICC Rules, the claimant must pay the filing fees at the same time the request for arbitration is submitted.[973] Failure to pay these fees will, after the expiration of a delay fixed by the Secretariat, lead to the cancellation of the request and the proceedings. The claimant remains free to submit another request, on the same facts, when able to pay the filing fees.[974] The *Cypriot arbitration clause* has foreseen the possibility of a failure in the payment of arbitration expenses, including the institutional costs:

> 36. Arbitration
> In the event a Party does not pay all or part of its share of the arbitration expenses, **the arbitration process shall not be suspended** and the settlement of payment shall be included in the arbitration award. (emphasis added)[975]

The clause provides for the continuation of the proceedings despite the absence of payment, and the payment to be included in the award.

A question arises with regards to the payment of institutions: what happens to parties who went bankrupt due to the actions of the other party, or parties who do not have the financial means to cover the costs of an institutional arbitration, especially in the absence of a clause such as in the *Cypriot arbitration clause*? In these instances, practice has recently developed a system called third-party funding, in reaction to the always increasing cost of international arbitration. Although the ambit of this thesis is not to delve into examining in depth third- party

[972] ICSID Institutional Rules, Rule 5.1.(b).
[973] ICC Arbitration Rules, Article 4.4.b)
[974] ICC Arbitration Rules, Article 4.4.b)
[975] Cypriot contract (n 40) art 36.3.

funding, nevertheless we will endeavour to state the main features of this practice for the purposes of our argument herein. Hence, it is worth mentioning here that third-party funding can be explained in three elements, being the funding of the litigation or arbitration proceedings by a person who (i) has no pre-existing interest in the proceedings, (ii) will be paid out of any amounts recovered as a consequence of the proceedings, often as a percentage of the sum recovered, and (iii) the funder is not entitled to any payment if the funded party's claim fails.[976] The reasons for the development of third-party funding are well-known, access to justice being the first to be cited.[977] Indeed, third-party funding allows impecunious claimants to bring their claim despite their lack of resources or their unwillingness to face the financial risks associated with investment arbitration.[978] This enhanced access to justice faces also critics. One of the most common argument against third-party funding is that it permits frivolous claims to be pursued, affecting the balance between the protection due to the investor and the interests of the state.[979] Another issue raised is that until very recently, third-party funding in investment arbitration was developing without any form of regulation besides the one emerging from arbitration cases.[980] Third-party funding as an access to justice tool can be extremely useful only if well regulated. Indeed, by delegating the payment of the proceedings to a third-party, the funded party brings in private proceedings a person who has only financial interests in the case. As a result, the funder could direct the proceedings in a manner that would bring more revenues but would be detrimental to the funded. Furthermore, the risk is also that arbitration is not the wish of the parties anymore, but also relies on external elements and people, such as a funder.

It stems from this section that arbitration is a well-regulated, organised dispute resolution mechanism. The parties are given a large array of choices in determining the most appropriate procedure for their contract and foreseeable

[976] R Jackson, 'Review of Civil Litigation Costs: Final Report' (2009) The Stationery Office, viii and xv.
[977] Kelsie Massini, 'Risk Versus Reward: The Increasing Use of Third Funders in International Arbitration and the Awarding Security for Costs' (2015) 7(1) Y B Arb & Mediation 323.
[978] Derric Yeoh, 'Third Party Funding in International Arbitration: A Slippery Slope or Levelling the Playing Field?' (2016) 33(1) Journal of International Arbitration 115.
[979] Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration (2018) 4 ICCA Reports, 203.
[980] Sai Ramani Garimella, 'Third Party Funding in International Arbitration: Issues and Challenges in Asian Jurisdictions' (2014) 3(1) AALCO Journal of International Law 45, 45.

disputes. They may decide to rely on the administrative support of an arbitral institution and their rules, or on the contrary create a tailored dispute resolution system.

Whether the parties use arbitration rules or not, the arbitration will always be organised in the same manner. First, the parties must determine the scope of the arbitration to come: too narrow, and they face the risk of dislocating the dispute between different fora, hence increasing the dispute resolution costs and time. Then they have to abide by a procedure. If the parties have incorporated arbitration rules in their contract, the procedure is already accounted for. Contrariwise, in the absence of arbitration rules, the parties will have to draft the entirety of the proceedings, from the method of designation of arbitrators to the submission of evidence and the legal value of the award.

The award and its general enforceability could be one of the real advantages of arbitration and the reason parties tend to include arbitration clauses as a last resort dispute resolution mechanism. Thanks to the New York Convention, arbitral awards are enforceable in all ratifying countries as a principle, unless the award does not present some necessary elements to guarantee its legality.

6.3. Arbitration as an Unconventional Alternative Dispute Resolution Mechanism?

This section aims to determine whether arbitration can be classified as an unconventional Alternative Dispute Resolution Mechanism, and enter the same category as Technical Advisory Committees, Sole Expert Determination and Dispute Review Boards.

The definition and nature of unconventional ADRMs have been developed in Chapter 5. Unconventional ADRMs are alternative dispute resolution mechanism which intervene in a timely manner with regards to the emergence of the dispute and allow the contract to resume. Furthermore, they present a Dispute Prevention facet. This means that their sole existence limits the emergence of disputes.

An ADRM can therefore be classified unconventional if two specific criteria are met: the ADRM must intervene at a time allowing the contract on which it is based to resume and the ADRM must prevent disputes to arise by its sole existence.

This section will therefore follow the structure of the definition. First will be studied the intervention of arbitration in a timely manner, allowing contracts to resume to their state before the dispute. Then the question of arbitration as a Dispute Prevention Mechanism (DPM) will be analysed.

6.3.1. The intervention of arbitration in a timely manner

6.3.1.1. The regular arbitration timeline in ICC and ICSID arbitration

In order to validate the first criterion of Unconventional ADRM, it is necessary to observe the regular and general timeline of arbitration proceedings. This sub-section will analyse the provisions of ICC, ICSID and UNCITRAL arbitration rules in relation to time, as they are the ones referred to in the contracts used for this empirical review and their content has been described in depth in the previous section.

6.3.1.1.1. The request and its response

Once the dispute has arisen, the claimant has to issue a request for arbitration.[981] This request will be received by the competent institution and then sent to the respondent once the claimant has paid the lodging or filing fees.[982] The timeframe for the inception of arbitration is already not concomitant to the emergence of the dispute. Indeed, the claimant will have to first draft a notice of arbitration and in that respect, find first a counsel to represent him/her. Then the issue of lodging/filing fees may postpone the transmission of the request to the respondent. In the event of an impecunious claimant, such payment may be subject to the obtention of a loan from a bank or the involvement of a third-party funder.

[981] ICC Arbitration Rules, Article 4.1.; ICSID Institution Rules, Rule 1.
[982] ICC Arbitration Rules, Article 4.5.; ICSID Institution Rules, Rule 5.2.

Regarding the response to the request by the respondent, it has to intervene within 30 days under the ICC Arbitration Rules.[983] However, the Secretariat of the ICC can grant an extension to the respondent, if in the proposal for extension are already included observations on or nomination of the number of arbitrators and their names. The amount of the extension itself is left to the appreciation of the Secretariat.[984] Furthermore, the claimant is entitled to submit a counterclaim to the response to the request within 30 days, although an extension to provide such counterclaim can also be granted by the Secretariat.[985]

In the ICSID Convention and Arbitration Rules, the timeframe for responding to the request is fixed by the arbitral tribunal. The total timeline will hence depend on the time the parties have taken to nominate their arbitrators and constitute the arbitral tribunal.

6.3.1.1.2. The constitution of the tribunal: nomination and challenges

The parties must choose the number of arbitrators and the arbitrators themselves. The number of arbitrators is often provided for in the contract. If the parties have not agreed on the number of arbitrators, they will have to do so in the request for arbitration and in the response to this request.[986] If the parties are unable to agree, the number of arbitrators will be chosen by the ICC Court.[987] Then, the parties will have to designate each their own arbitrator: this has to be included in the request and response as well. If they fail to, arbitrators will be nominated by the Court.[988] The nomination of arbitrators does not therefore appear as a time-consuming process. Nevertheless, an issue can arise regarding the nomination of the third arbitrator. The parties have two options for the nomination of the third arbitrator: they either leave it to the ICC Court, or to the two already nominated arbitrators.[989] In the latter case, the two arbitrators are

[983] ICC Arbitration Rules, Article 5.1.
[984] ICC Arbitration Rules, Article 5.2.
[985] ICC Arbitration Rules, Article 5.6.
[986] ICC Arbitration Rules, Articles 4 and 5.
[987] ICC Arbitration Rules, Article 12.2.
[988] ICC Arbitration Rules, Article 12.4.
[989] ICC Arbitration Rules, Article 12.5.

given 30 days to elect the third arbitrator. Passed this delay, the ICC Court will appoint the last arbitrator itself.[990]

Any dispute on the nomination of arbitrators under the ICSID Arbitration Rules can lead to a severe delay. If the parties have not agreed in their contract on the method of appointment and the number of arbitrator, then the requesting party must within 10 days after the registration of the request (an administrative task performed by the Secretary-General once request and lodging fees have been received) propose a number of arbitrators and how to nominate them.[991] Following this communication, the respondent has 20 days to agree or disagree with this method.[992] Once the claimant has received such response, it has 20 days again to accept the proposal.[993] 60 days after the registration of the request, one of the parties can ask the Secretary-General to proceed to the composition of the tribunal itself.[994] However, if no party requires the intervention of the Secretary-General, the next intervention of the Centre is fixed at 90 days without constitution of the arbitral tribunal. Hence it is possible for an arbitral tribunal to not be constituted 90 days – three months – after the registration of the request, meaning more than three months after the start of the dispute.

The challenge of arbitrators has not been analysed in the previous section because of its nature of incident of procedure. Challenging an arbitrator means refusing the nomination of an arbitrator by the other party or once the arbitration has started, requesting the arbitrator to be demoted. Under the ICSID Convention and Arbitration Rules, a party can ask for the disqualification of an arbitrator when this arbitrator does not fit the criteria of nationality, competence, impartiality and fairness.[995] The decision on disqualification is taken by the arbitral tribunal within 30 days but this timeframe is not mandatory.[996] During this time, the proceedings are suspended.[997] If the disqualification is not accepted, the proceedings resume. However, if the disqualification is found grounded, the party whose arbitrator has been disqualified will have to nominate again an arbitrator on the basis of the

[990] ICC Arbitration Rules, Article 12.5.
[991] ICSID Arbitration Rules, Rule 2.1.a).
[992] ICSID Arbitration Rules, Rule 2.1.b).
[993] ICSID Arbitration Rules, Rule 2.1.c).
[994] ICSID Arbitration Rules, Rule 2.3.
[995] ICSID Convention, Article 57 and Section IV; ICSID Arbitration Rules, Rule 6.2 and Rule 9.
[996] ICSID Arbitration Rules, Rule 9.4 and 5.
[997] ICSID Arbitration Rules, Rule 9.6.

procedure described above.[998] During this whole time, which can therefore last for 90 days, the proceedings are halted. Furthermore, in order for the newly appointed arbitrator to be aware of the specificities of the case and judge as best as possible, he/she may ask for the hearings to be recommenced if they had already started.[999]

Under the ICC Rules, the right to challenge an arbitrator, either on the grounds of lack of impartiality or independence or otherwise, is limited to 30 days after the nomination or confirmation of the arbitrator, or 30 days after the party requesting the challenge has been aware of the facts mandating such challenge.[1000] The system of designation of the new arbitrator if the challenge is accepted by the ICC Court is also left to the appreciation of the Court. It can hence decide to follow the original process or appoint a new arbitrator directly.[1001]

The UNCITRAL Arbitration Rules have developed a system of challenge of arbitrators at the cross-roads between the ICC Arbitration Rules and the ICSID Arbitration Rules. As in ICC rules, challenge is limited in time and the timeframe is here even shorter – 15 days after the appointment or obtaining knowledge on the facts for the challenge.[1002] Then the replacement of the arbitrator will have to follow the original appointment system, even if during the first nomination, the party had failed to elect its arbitrator itself.[1003] It is a noteworthy point knowing that the nomination of arbitrators, in the case of a disagreement between the parties, can take more than 60 days.[1004]

The nomination of arbitrators, in the same way than a Sole Expert, can extend dramatically the timeframe in which the dispute will be resolved. The parties have to be aware that the failure to opt for a number of arbitrator and the method of appointment can lead to extended delays, to which can be added other unpredictable issues, such as the challenge of an arbitrator. Unpredictable issues also include an arbitrator who steps down for personal or professional reasons, or sadly its death. Providing for at least the number of arbitrators and how to appoint them will already limit the extension of the timeframe to solve the dispute.

[998] ICSID Arbitration Rules, Rule 11.1.
[999] ICSID Arbitration Rules, Rule 12.
[1000] ICC Arbitration Rules, Article 14.1 and 2.
[1001] ICC Arbitration Rules, Article 15.4.
[1002] UNCITRAL Arbitration Rules, Article 13.1.
[1003] UNCITRAL Arbitration Rules, Article 14.1.
[1004] UNCITRAL Arbitration Rules, Article 9.

6.3.1.1.3. The choice of seat and language

A lack in choosing the seat and/or the language of the arbitration can create, in the same way than number of arbitrators and method of nomination, substantive delays in the proceedings. Under the different arbitration rules, failure to agree on these two elements delegate the power of choice to the competent court or arbitral tribunal.[1005]

6.3.1.1.4. The general proceedings: written submissions and hearings

The timeframe in which the general proceedings are held does not call for many comments. The timeline is fixed by the arbitral tribunal and can be extended by it if need be.[1006] The time devoted to the establishment of the facts of the dispute will depend on the dispute, the number of parties, the complexity. A strict approach to the proceedings' timeframe could be counterproductive as the parties should always aim for the best resolution of their dispute in order to reduce the possibilities of non-compliance with the award and non-enforceability.

6.3.1.1.5. The award and its issuance

The ICSID and ICC Arbitration Rules provide respectively that the arbitral tribunal has up to 120 days and 6 months from the closure of the proceedings to issue its award. These times can nonetheless be extended, without conditions under the ICC Rules but up to 60 more days only for an ICSID procedure.[1007]

But once the award has been issued, other delays pertaining to its interpretation or correction. The correction of an award can extend the timeline for a final award between 60 and 120 days.[1008]

[1005] UNCITRAL Arbitration Rules, Articles 18 and 19; ICC Arbitration Rules, Articles 18 and 20.
[1006] ICSID Arbitration Rules, Rule 26; UNCITRAL Arbitration Rules, Article 25; ICC Arbitration Rules, Articles 22, 24 and 25.
[1007] ICSID Arbitration Rules, Rule 46; ICC Arbitration Rules, Article 31.
[1008] UNCITRAL Arbitration Rules, Article 38; ICC Arbitration Rules, Article 36.2.

6.3.1.1.6. Summary

As a general comment, from all the above, it can be said that original arbitration is not an ADRM that can intervene in a timely manner, shortly after the dispute has arisen. Arbitration proceedings are long because they require several steps, the constitution of a tribunal and even once the award has been issued, other proceedings before national courts may start.

Therefore, it is not possible to classify arbitration as an unconventional ADRM.

However, there exist two other types of arbitration: the expedited procedure, the emergency arbitration and the still developing online arbitration. The next three subsections will consider these specific procedures in relation to time and the possibility for them to be classified as unconventional ADRMs.

6.3.1.2. The expedited procedure

Expedited procedure or fast-track arbitration was first developed by the Geneva Chamber of Commerce in 1992.[1009] However, the notion and use of expedited procedures for labour related disputes, instead of "regular" arbitration, was already commented since the 1970's in the United States and Canada.[1010] The idea of fast-track arbitration was then implemented in the American Arbitration Association (AAA) rules, the rules of the Stockholm Chamber of Commerce (SCC), of the Hong Kong International Arbitration (HKIA), of the Singapore International Arbitration Centre and finally the International Chamber of Commerce (ICC) in 2017.[1011] Fast-track arbitration and expedited procedure share the principle of a simplified procedure, with a timeline set in advance for the issuance of the award. The ICC Expedited procedure rules provide for the award to be issued within six months of the case management conference, and so do Swiss Arbitration Rules and the SIAC Arbitration Rules.[1012]

[1009] Irina Tymczyszyn, 'Using fast track arbitration for resolving commercial disputes' (2018) 6 Corporate and commercial disputes review 25, 25.
[1010] Steven E Kane, 'Current Developments in Expedited Arbitration' (1973) Labour Law Journal 282; Marcus H Sandver, Harry R Blaine, Mark N Woyar, 'Time and Cost Savings through Expedited Arbitration Procedures' (1981) 36(4) The Arbitration Journal 11.
[1011] Tymczyszyn (n 1009) 25.
[1012] ICC Arbitration Rules, Article 30 and Appendix VI, Article 1.2.; Swiss Rules of International Arbitration (2012), Article 42.1.d); SIAC Rules 6th Edition (2016), Rule 5.2.d).

The procedure under fast-track arbitration or expedited procedure is usually lighter, in order to reduce delays. As a result, an expedited procedure will separate itself from the "standard" arbitration procedure with two rounds of submissions; an extended period for disclosure; pre- and post-hearings; cross examination of witnesses; provision for experts reports.[1013] The arbitral tribunal tends to be constituted of a sole arbitrator, once again in order to reduce costs. Under the ICC rules, the ICC Court can appoint a sole arbitrator even if the contract provided otherwise.[1014] The rest of the procedure is left entirely to the appreciation of the arbitrator, in order to reach the award issuance period.[1015]

Expedited procedure is a subset of arbitration, with a swifter procedure and as a result, less delays. They are however reserved for a certain type of disputes, a narrower class determined by the parties in their contract or by the institutions' and arbitration rules themselves.[1016] Indeed, the aforementioned institutions have set thresholds allowing or not disputes to be administered using expedited procedure.

The HKIA accepts expedited procedures for disputes with an amount at stake under 25 million HKD, or if the parties have agreed to this procedure, or in case of exceptional urgency.[1017]

The ICC Arbitration Rules of 2017, in which are implemented the provisions on expedited procedure, have set a maximum amount of dispute at two million USD.[1018] They are also additional conditions to access the procedure: the arbitration agreement must have been signed after the 1st of March 2017 (entry into force of the provisions for expedited procedure), if the parties have freely opted-out of the possibility to resort to the expedited procedure and finally, if the ICC Court considers that the expedited procedure is not appropriate for the dispute.[1019] Interestingly, the expedited procedure under the ICC rules takes

[1013] Lucy Greenwood, 'Tear up the procedural schedule: reducing time and costs in international commercial arbitration' (2010) 76(3) Arbitration 563, 567.
[1014] ICC Arbitration Rules, Article 30 and Appendix VI, Article 2.
[1015] ICC Arbitration Rules, Article 30 and Appendix VI, Article 3.
[1016] Alice Broichmann, 'Disputes in the fast lane: fast track arbitration in M&A disputes' (2008) 11(4) International Arbitration Law Review 143, 144
[1017] Elena V Sitkareva, Andrei A Konstantinov, 'Expedited Arbitration as a Competitive Element of Arbitration Centers' (2020) 12(2) Talent Development and Excellence 699, 700.
[1018] ICC Arbitration Rules, Article 30 and Appendix VI, Article 1.2.
[1019] ICC Arbitration Rules, Article 30.3.

precedence over any contrary terms in the arbitration agreement.[1020] In other words, if the parties have not opted out from the procedure and otherwise fit all the criteria, the expedited procedure will be forced upon them, unless the ICC Court considers the procedure to be inapplicable to the specificities of the dispute. This would therefore mean that an expedited procedure could be applied to a dispute under the *Greek Model Lease Agreement*, if this contract were to be signed in 2017 and the amount in dispute was within the limit of two million USD. Indeed, resort to the expedited procedure has not been expressly waived.

The possibility for such a switch between the procedures could drastically reduce the time and costs of the arbitration. In a study of 2018 on the differences between "traditional" and expedited arbitration in labour related disputes, researchers have demonstrated that there were fewer days of delays in expedited arbitration in relation to the obtention of a first day of hearing, the release of the decision and the total delay of arbitration.[1021] Furthermore, the study showed that the mode of arbitration had no impact on the outcome of the case: neither expedited procedure nor "traditional" arbitration are not more comprehensive with the claimant.[1022]

A flaw of expedited procedure or fast-track arbitration that is often raised is the fear of the parties and arbitrators of the award to be set aside, or its enforcement refused on grounds of procedural irregularity or lack of procedural fairness.[1023] This is especially true regarding the hearings. Under the ICC Arbitration Rules, the arbitrator is entitled to decide the case only on the basis of the documents that have been submitted, with no hearings and no documents submitted.[1024] In that instance, none of the parties have benefited from their right to be heard, their right to a voice. None of the parties could therefore claim any partiality or inequality of the proceedings. Nevertheless, when the arbitrator organises hearings, the aforementioned study has found that the duration of hearings, i.e. the number of days, are the same in expedited or "traditional" arbitration. The

[1020] ICC Arbitration Rules, Article 30.1.
[1021] Shannon R Webb, Terry H Wagar, 'Expedited Arbitration: A Study of Outcomes and Duration' (2018) 73(1) Relations industrielles/Industrial Relations 146, 166
[1022] Webb, Wagar (n 1021) 165.
[1023] James Rogers, Katie Chung, 'Summary awards and expedited procedures' (2018) 10 International arbitration report 14, 16.
[1024] ICC Arbitration Rules, Article 30; Appendix VI, Article 3.5.

choice of an expedited procedure over a “traditional” arbitration hence has no impact on the procedural process and the right for the parties to be heard.[1025]

The low financial threshold for expedited procedure is not completely explainable. First, an expensive dispute does not necessarily mean a difficult dispute that will take time to solve. Secondly, it is not because a dispute is complex that the resolution will be complex. There are examples of the opposite. In 1991, four arbitrations were started before the ICC, for an amount in dispute of 100 million USD. Two of these arbitrations were started as expedited procedure, and the two others as “regular” arbitration. The four arbitrations dealt with the same issue, the redetermination of purchase price for a commodity. The parties were not the same but were related. In addition to the complex nature of the dispute, the procedures were equally difficult with requests to join the four procedures, problems of jurisdiction and challenges of arbitrators. Still, the first fast-track arbitration was determined in six months, the second in eight months.[1026] This may seem anecdotal, but it demonstrates that solving high value and complexity cases under a fast-track arbitration could be possible.

The value threshold set by arbitral institutions is nonetheless understandable as it limits parties from requesting fast-track arbitration for the sole benefit of lesser costs. Some parties may insist on expedited procedure but not realise the procedural implications of such a choice. Because the process is left principally to the appreciation of the arbitrator, parties may not be able to present their case in the manner they could have if they had chosen “regular” arbitration. Such a limitation is necessary in order to attain the aim of expedited arbitration that is reaching an award in a pre-defined period of time. Arbitral institutions should therefore be able to impose a change of procedure, from expedited to “traditional” if it appears that the delays and process of expedited procedure are not applicable to the specificities of the dispute anymore.[1027]

Under the ICSID Arbitration Rules or the Convention however, there are no expedited procedure. The only dispositions that would come close to an expedited arbitration are the ones dealing with claims with a manifest lack of legal

[1025] Webb, Wagar (n 1021) 166.
[1026] Broichmann (n 1016) 143.
[1027] ICC Arbitration Rules, Article 30; Appendix VI, Article 1.4.

merit.[1028] Rule 41(5) provides for an objection to be raised within 30 days of the constitution of the arbitral tribunal to have the tribunal recognise that the claim manifestly lacks legal merit.[1029] The rule applies to both jurisdiction and merits objections. After two rounds of written observations and a hearing, the arbitral tribunal renders its decision. The whole procedure takes place at the earliest stages of the proceedings, right after the constitution of the tribunal. If the tribunal founds that the claim is unmeritorious, it will issue an award in that sense and the case will be disposed.[1030] The manifest lack of legal merit, although sharing common traits with an expedited arbitration, simply evacuates the claim without judging or appreciating it. The case is dismissed.

The recent proposals for amendments of the ICSID Arbitration Rules include provisions on expedited procedure, evidencing the practice's needs.[1031] The Working Paper proposes to add a Chapter XII dedicated to the procedure of expedited arbitration. Under this procedure, the tribunal must be constituted of a sole arbitrator or three arbitrators, appointed in 20 days by the parties or the Secretary-General of the ICSID.[1032] The first session must be held no later than 30 days after the constitution of the arbitral tribunal.[1033] The procedure of written submissions is then fixed by strict deadlines. The claimant has to file its memorial within 60 days, and the respondent has the same amount of time to reply. Memorials must be less than 200 pages, in order to guarantee for both the parties and the arbitrator(s) to stick to the schedule.[1034] Parties can submit one reply and one rejoinder within 40 days, and they cannot be more than 100 pages.[1035] The hearings are held maximum 60 days after the last submission, and the award shall be issued as soon as possible, and in any case no later than 120 days after the hearing.[1036]

As opposed to the institutional rules studied in this section, the proposal does not fix a financial threshold to reject claims from the expedited procedure. The

[1028] ICSID Arbitration Rules, Rule 41(5).
[1029] Hervé Ascensio, 'Abuse of Process in International Investment Arbitration' (2014) 13(4) Chinese Journal of International Law 763, 769
[1030] ICSID, 'Manifest Lack of Legal Merit – ICSID Convention Arbitration' <https://icsid.worldbank.org/services/arbitration/convention/process/manifest-lack-legal-merit> (accessed 10 October 2020)
[1031] ICSID, 'Working Paper 4' (February 2020) <https://icsid.worldbank.org/resources/rules-and-regulations/icsid-rules-and-regulations-amendment-working-papers>
[1032] ICSID, 'Working Paper 4' (n 1031) Rules 75 to 78.
[1033] ICSID, 'Working Paper 4' (n 1031) Rule 80.
[1034] ICSID, 'Working Paper 4' (n 1031) Rule 81.1.a), b), c).
[1035] ICSID, 'Working Paper 4' (n 1031) Rule 81.1.d), e), f).
[1036] ICSID, 'Working Paper 4' (n 1031) Rule 81.1.g), i).

proposed expedited procedure constitutes an evolution of the ICSID Rules but compared to other institutional rules, the decision does not intervene as quickly. However, this may be the solution to allow high amount claims into expedited procedures.

6.3.1.3. The emergency arbitration

Emergency arbitration has been developed in the last fifteen to twenty years in international commercial arbitration. As explained in sub-section 6.2.2.4.4. on provisional measures, parties can request – in the event of imminent harm, to maintain the status quo or to preserve evidence among others – an interim measure to the arbitral tribunal in order to have this potential harm stopped before causing a prejudice. However, at is was explained, the arbitral is not always competent to grant these measures, especially when it has not been constituted. Yet, the constitution of the arbitral can take months: in 2012, out of 34 cases registered with ICSID, the average time between registration and constitution was 211 days, almost seven months. The fastest constitution had taken 91 days and the slowest 470 days.[1037] The only solution parties had was to resort to national courts to obtain these provisional measures, courts they wanted to avoid by electing arbitration as their dispute resolution mechanism.[1038] The exclusion of any other means to obtain interim measures was warranted by one of the advantages and principles of international arbitration that is party participation in the selection of the decision maker. The obtention of provisional measures before the constitution of the tribunal was therefore impossible.[1039]

Emergency arbitration was developed as a remedy to this paradox, as a response to market demand.[1040] The first rules were introduced by the ICC as Pre-Arbitral Referee Procedure in early 1990's, but the system did not really gain interest before 2005.[1041] Emergency arbitration has now become a standard rule in

[1037] Janice Lee, 'Is the Emergency Arbitrator Procedure Suitable for Investment Arbitration' (2017) 10(1) Contemporary Asia Arbitration Journal 71, 79.
[1038] Diana Paraguacuto-Mahéo, Christine Lecuyer-Thieffry, 'Emergency Arbitrator: A New Player In The Field – The French Perspective' (2017) 40(3) Fordham International Law Journal 749, 751; Ira M Schwartz, 'Interim and Emergency Relief in Arbitration Proceedings' (2008) 63(1) Dispute Resolution Journal 56, 61.
[1039] Grant Hanessian, E Alexandra Dosman, 'Songs of Innoncence and Experience: Ten Years of Emergency Arbitration' (2016) 27(2) American Review of International Arbitration 215, 215.
[1040] Paraguacuto-Mahéo, Lecuyer-Thieffry (n 1038) 757.
[1041] Hanessian, Dosman (n 1039) 216.

international arbitration and most institutions have implemented emergency arbitration's dispositions.[1042] The procedures of each institution are similar. They are based on a strong institutional role, with the institution acting as a "gatekeeper". Furthermore, and as opposed to normal procedure, the arbitrator (a sole arbitrator) is appointed by the institution itself.[1043] The process is expedited, and the arbitrator is appointed between one and three days. The time limit for an award starts from five days (Stockholm Chamber of Commerce) up to fourteen (London Chamber for International Arbitration) or fifteen (ICC and SIAC Rules).[1044] The emergency arbitrator has the same powers as a regularly constituted arbitral tribunal, but the latter will not be bound by the provisional measures ordered by the former.[1045]

A debate was raised as to the enforceability of the interim measure issued by an emergency arbitrator before national courts. Indeed, the New York Convention provides for enforcement of awards only.[1046] As a result, depending on the name given to the tribunal's decision, either award or order, the enforceability may be affected. This is even more true with regards to emergency arbitrators' decisions under the ICC Rules, as these impose on the arbitrator to issue an order and not an award.[1047] Nevertheless, this problem of enforceability has to be mitigated for two reasons, one legal and one practical. Firstly, legally, national courts tend to apply the principle of "substance over form".[1048] They have more regard for the content of the provisional measure than the name that has been given to it. Secondly, the widespread use of emergency arbitration demonstrates that enforceability is not a major concern for its users.[1049]

[1042] Hanessian, Dosman (n 1039) 216.
[1043] See, among others: ICC Arbitration Rules (2017), Appendix V – Emergency Arbitrator Rules, Article 2.1; LCIA Arbitration Rules (2014), Article 9.6; SCC Arbitration Rules, Appendix II – Emergency Arbitrator, Article 4; SIAC Arbitration Rules, Schedule 1 – Emergency Arbitrator, Article 3. .
[1044] Hanessian, Dosman (n 1039) 219.
[1045] ICC Arbitration Rules (2017), Article 29.3; LCIA Arbitration Rules (2014), Article 9.11; SCC Arbitration Rules, Appendix II – Emergency Arbitrator, Article 9(5); SIAC Arbitration Rules, Schedule 1 – Emergency Arbitrator, Article 10. .
[1046] New York Convention, Article I.2.
[1047] Paraguacuto-Mahéo, Lecuyer-Thieffry (n 1038) 752 and 759; ICC Arbitration Rules, Appendix V – Emergency Arbitrator Rules, Article 6.1.
[1048] Paraguacuto-Mahéo, Lecuyer-Thieffry (n 1038) 770.
[1049] Paraguacuto-Mahéo, Lecuyer-Thieffry (n 1038) 752.

Regarding investor-state arbitration, the ICSID Arbitration Rules provide for interim relief but not for emergency arbitration.[1050] This is also the stand of the ICC, which has excluded emergency arbitration for investor-state disputes.[1051] Parties to an investment contract who would wish to benefit from emergency arbitration should therefore be advised to choose different arbitration rules in their contract, such as the Stockholm Chamber of Commerce Arbitration Rules, which allow emergency arbitration for these contracts.[1052]

An emergency arbitrator does not decide on the merits of the case. As for a regularly constituted arbitral tribunal, the emergency arbitrator will solely verify that the conditions for granting an interim measure are met. Furthermore, if the decision of the emergency arbitrator is binding on the parties, due to its enforceability, it is not final because the succeeding arbitral tribunal is not bound by the measure ordered by the emergency arbitrator. It seems at first sight that emergency arbitration should not be included within the modes of arbitration susceptible to offer dispute resolution in a timely manner.

However, the role of emergency arbitration has been extrapolated by the parties themselves, and its use is not only limited to issuing provisional measures, at least in the parties' minds. The intervention of an emergency arbitrator can give the parties a first approach in the way the succeeding arbitral tribunal would consider the merits of the dispute. Some parties decide to abandon their case and settle because they realise that they will not obtain an effective remedy, even though they could have succeeded in the following arbitration. Others decide to step back as they consider that the tribunal will unlikely give them precedence on the merits, on the basis of their underlying claims.[1053] Emergency arbitrator has hence dispute resolution aspect, an ADRM facet which present the advantage of intervening very close to the emergence of the dispute.
This position is further consolidated by the case law or rather, the absence of case law. In 2015, 49 cases for emergency arbitration were filed with the International Centre for Dispute Resolution (hereafter ICDR), the centre for

[1050] Lee (n 1037) 80.
[1051] Hanessian, Dosman (n 1039) 223.
[1052] Hanessian, Dosman (n 1039) 223; Stockholm Chamber of Commerce Arbitration Rules (2017), Appendix II – Emergency Arbitrator.
[1053] Peter Michaelson, 'When Speed and Cost Matter: Emergency and Expedited Arbitration' (2014) 218(4) New Jersey Law Journal 50, 52-53

dispute resolution of the American Arbitration Association. Out of these 49 cases, nine of these cases were settled and in two others, the request for interim relief was withdrawn, amounting to nearly 22,5% of the case load.[1054] This would therefore mean that emergency arbitration can act as "traditional" arbitration as a second nature, hence its classification as a mode of arbitration.

In light of the foregoing, emergency arbitration can be considered an actual mechanism of dispute resolution, a sub-system of arbitration which, contrary to arbitration, can be actioned at the very start of the dispute and bring a solution to the parties in a limited amount of time.

6.3.1.4. Online arbitration or e-arbitration

Online arbitration, or e-arbitration (the terms will be used interchangeably) is used to designate an arbitration conducted wholly or partially online, through online communication and systems such as emails and videoconferencing.[1055] E-arbitration is therefore analogous to "regular" arbitration as a process, the difference being that it is conducted online.[1056] E-arbitration is said to offer constant availability and accessibility, a more efficient case management.[1057] The appropriateness of e-arbitration for large, complex, high value claims, such as investment claims, is still disputed.[1058] However, shifting part of the procedure online could reduce time and as a result, costs.

Online arbitration faces concerns of technical and legal sorts.[1059] Technically, parties may be facing connection, compatibility and standards issues, security and confidentiality, organisation of online hearings, data integrity and

[1054] Sarah Vasani, 'The Emergency Arbitrator: Doubling as an Effective Option for Urgent Relief and an Early Settlement Tool' (Lexology, 8 May 2015) <https://www.lexology.com/library/detail.aspx?g=e786221a-8823-4f25-8307-d28df1078fdc> , accessed 2 October 2020
[1055] Farzaneh Badiei, 'Online Arbitration Definition and Its Distinctive Features' (2010) ODR 87, 92
[1056] Julio César Betancourt, Elina Zlatanska, 'Online dispute resolution (ODR): what is it, and is it the way forward?' (2013) 79(3) Arbitration 256, 262
[1057] Mohamed S Abdel Wahab, 'ODR and E-Arbitration' in Mohamed Abdel Wahab, Ethan Katsh & Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice*, (Eleven International Publishing, 2012), 391; Paul Schwarzenbaker, 'Online Arbitration: A European and US Perspective' (2018) 10(1) Bocconi Legal Papers 387, 389
[1058] For the positive: Abdel Wahab (n 1057) 391; for the negative: Betancourt, Zlatanska (n 1056) 263.
[1059] Abdel Wahab (n 1057) 391.

authentication, as well as a gap in parties' abilities to use online methods.[1060] These are the same as for other Online Dispute Resolution Mechanisms (ODR) such as e-meditation and e-conciliation, but they bear more consequences in arbitration due to the binding and final nature of the award.[1061]

The most contentious point would be a decreased level of confidentiality by using online systems. This risk is not limited to online arbitration as documents can be altered or forged in offline arbitration. Such concerns can be addressed in resorting to encryption technologies, digital signatures and firewalls.[1062]

The legal concerns pertain to arbitration agreement, arbitral proceedings and awards related challenges.[1063] The two latter are of higher importance in assessing the use of e-arbitration as a timely dispute resolution mechanism for oil and gas investment disputes. Regarding e-arbitration agreements, questions have arisen in relation to their recognition: is an arbitration agreement entered via online means only valid? This will be settled by both the law of the seat and the law of the place of enforcement of the subsequent award.[1064]

The conduct of online proceedings is crucial to determine the swiftness of the procedure. Indeed, it is usually the process in itself, from the nomination of the arbitrators to the issuance of the award, that delays are more likely to arise. There are not too many differences between an offline and online procedure except for the hearings. In an online arbitration, hearings, including auditions and cross-examinations of witnesses are performed online, using videoconferencing. Albeit not problematic, the absence of in-person hearings could raise doubts as to due process being respected, giving grounds for annulment of the award before national courts. Response to this has been to guarantee to each party the right to be heard, to be treated equally and given an opportunity to present their case, in order to ensure due process has been respected.[1065]

[1060] Abdel Wahab (n 1057) 391.
[1061] Abdel Wahab (n 1057) 391.
[1062] Abdel Wahab (n 1057) 401.
[1063] Abdel Wahab (n 1057) 391.
[1064] Thomas Schultz, 'Online arbitration: binding or non-binding?' (2002) ADR Online Monthly, 5. Available at SSRN: <https://ssrn.com/abstract=898622>
[1065] Abdel Wahab (n 1057) 403.

Another problem was voiced on how to elect the seat of the arbitration when the parties disagree and have not made this choice in their contract. There is no consensus on this point, but it would appear that using the usual rules for seat determination – i.e. election by the arbitral tribunal – is the simplest and most impartial.[1066]

Finally, the enforceability of an e-award is not a contentious point. Firstly, the New York Convention refers to awards in general, which does not allow to exclude e-awards from its scope.[1067] If the award then embodies the usual requirements, being respect of due process, matter (e-)arbitrable and final and binding, recognition is granted.[1068] Secondly, as for e-arbitration agreement, the value and force given to the award will depend on the law of the place of enforcement of the award. If the laws adhere to the conception that an e-signature equals a hand-written signature, the award will not be set aside or refused to be enforced on this ground.[1069] In the particular case of an award signed by hand and scanned, it will be recognized without difficulty as the award was first paper based.

E-arbitration presents numerous advantages that could limit the time devoted to arbitration proceedings and therefore allow the resolution of the dispute closer to the moment it has emerged. Online arbitration does not call for particular procedural adaptations nor endangers the enforceability of the award.
Nevertheless, the appropriateness of online arbitration to large and complex disputes has not been settled nor demonstrated, and it seems that no extensive research on the implications of online arbitration on investment arbitration has been realised in order to draw conclusions. Some elements of offline arbitration may be of paramount importance for some parties, especially regarding cross-examination of witnesses or expert testimony which are more powerful and vivid during in-person hearings.[1070]

6.3.2. Can arbitration intervene in a timely manner?

[1066] Abdel Wahab (n 1057) 410.
[1067] Abdel Wahab (n 1057) 416.
[1068] Abdel Wahab (n 1057) 417-418.
[1069] Abdel Wahab (n 1057) 412.
[1070] Julia Hörnle, 'Online Dispute Resolution: The Emperor's New Clothes?' (2003) 17(1) International Review of Law Computers & Technology 27, 31

It results from the above sections that "traditional" arbitration can hardly, if at all, intervene in a timely manner, in a short period of time after the emergence of the dispute. Under the three sets of arbitration rules analysed, if the parties make most use of the dispositions on the constitution of the arbitral tribunal, nominations of arbitrators can take up to 90 days.[1071] In some cases, it has taken 470 days hence almost a year and three months.[1072]

These delays are not always to that extent but the procedure before arbitral tribunals tends to not be time-efficient, even at the stage of the award. In a study that I have undertaken during my research internship at the Hellenic Hydrocarbon Resources Management in Athens, Greece, a substantial amount of published arbitral awards in oil and gas was analysed to determine the average time for arbitral procedure, from the notice of arbitration to the issuance of the awards. This study was limited to disputes related to changes in the law of the host country. 31 arbitration awards or procedures were publicly available at the time of the study in May/June 2019. The analysis showed that the time spent in the arbitration process varies greatly between the different cases. It can however be noted that the majority of cases (24) presents procedure's times between three and four years. The extremes are found in *Slovak Gas v Slovak Republic*, in which the arbitral procedure was stopped in less than a year, due to a settlement between the parties; and in *Murphy Exploration and Production Company International v Republic of Ecuador*, in which the arbitration took 18 years.[1073]

In comparison with TACs, SEDs and DBs, a 3 to 4 years' procedure for "traditional" arbitration cannot be considered fit to enter the category of unconventional Alternative Dispute Resolution Mechanisms. DBs intervene as soon as the dispute or the disagreement arises. They are the most responding ADRM. Regarding TACs and SEDs, the length of the procedure will depend on the specificities of each contract. As an example, the *Greek TAC clause* provides for maximum of a 45-days period to either solve the disagreement or transfer it

[1071] ICSID Arbitration Rules, Rule 2.
[1072] Lee (n 1037) 79.
[1073] *Slovak Gas Holding B.V., GDF International S.A.S, E.ON Ruhrgas International GmbH v The Slovak Republic* [2013] ICSID Case No ARB/12/7 (Settled); *Murphy Exploration & Production Company-International v The Republic of Ecuador* (Final Award) [2017] PCA Case No 2012-16. The list of cases is available in the bibliography. However, the study being the basis for further publication, the case-by-case analysis is not publicly available.

to another dispute resolution mechanism (in the case of the Greek Model Lease Agreement, to Sole Expert Determination). Under the Greek Model Lease Agreement still, the procedure before the Sole Expert should not be longer than 80 days.
Where the classification of TACs, SEDs and DBs as Unconventional Alternative Dispute Mechanisms is clear, “traditional” arbitration cannot be considered a timely intervening dispute resolution mechanism and therefore, an Unconventional ADRM.

However, expedited arbitration, emergency arbitration and e-arbitration, three subsets of arbitration can intervene swiftly after the dispute has arisen, and a resolution in a timely manner. Regarding expedited arbitration, the whole procedure is shortened in order to obtain an award in a short or very short timeframe. Besides this reduced procedure, expedited arbitration is analogous to arbitration, and the award issued is final and binding on the parties, and no different to an award issued following a “traditional” arbitration. E-arbitration benefits from the use of online methods and means to limit delays and extended procedures. The resolution of the dispute being made solely online, it is said that case management is more efficient and that the absence of in-person hearings, movements of parties, arbitrators, counsels, witnesses and experts allows the dispute to be solved in a shorter timeframe. Finally, emergency arbitration, which was first designed for an arbitrator to grant interim measures before the constitution of the arbitral tribunal, has become partly a Dispute Resolution Mechanism, allowing to solve the dispute in a few weeks’ time.

As a result, although “traditional” arbitration as it is cannot be defined as an Unconventional ARDM, expedited procedure, online arbitration and emergency arbitration can be classified as such due to the quickly issued decisions.

6.3.3. Arbitration as a Dispute Prevention Mechanism

The criterion of Dispute Prevention Mechanism can be summarised in a question: can the mere existence of arbitration prevent disputes to arise? Taken *stricto sensu*, the answer to this question must be no as arbitration only intervenes once a dispute has arisen. However, if understood more largely, Dispute Prevention

Mechanism can also encompass a mechanism preventing a dispute to grow by tackling it as its inception. In that sense, the question could therefore be turned in: is arbitration an early dispute settlement mechanism? Or in other words: can the mere existence of arbitration be a deterrent to arbitration?

This question was partly answered in relation to emergency arbitration in the previous sub-section. Firstly, the data issued from the ICDR demonstrates that almost a quarter of parties who had applied for emergency arbitration had afterwards either settled or withdrawn their applications.[1074] Secondly, it appears that when a dispute arises, parties often contact arbitral institutions, such as the ICDR and ICC, and intent to file both a "traditional" arbitration and an emergency arbitration, but none of them are ever filed. According to arbitral institutions, this would mean that the mere ability for the parties to start proceedings act as a deterrent and as an early settlement tool.[1075]

The Dispute Prevention character of arbitration can be extracted from another study that I have undertaken during my research internship in 2019-2020 at the Hellenic Hydrocarbon Resources Management in Athens, Greece. The purpose of this study was to collect and analyse as many published arbitral awards in the oil and gas industry as possible, and compare the causes of disputes, outcomes, duration of proceedings in order to determine if not a baseline, a tendency in the dispute resolution system before investment arbitration tribunals.[1076] The research gathered 115 cases. Out of these 115 cases, 14 were settled and 19 were discontinued, either on the basis of Rules 43 or 44 of the ICSID Arbitration Rules. The discontinued cases do not present information on the reason for the discontinuance. In this absence, it cannot be assumed that all of the discontinued cases have been settled, as the claim may have just been withdrawn in some instances. For that reason, discontinued cases will be differentiated from settled cases.
This means that the settled cases amounted for 12,17% of all cases; the discontinued cases for 16,5%; and taken together for 28,7% of all cases.

[1074] Vasani (n 1054).
[1075] Vasani (n 1054).
[1076] The list of all cases and the study being the basis for further publication, the list as well as the case-by-case analysis are not publicly available.

As a result, 33 cases out of 115 or 28,7% of them have found a solution, either through actual settlement or by discontinuance, without using arbitration proceedings and without needing an award.

The conclusions that can be drawn from the foregoing data is that a fair amount of arbitrations is terminated by the parties themselves before the end of the proceedings. Parties to arbitration decide to settle outside of the arbitration proceedings but only once the claimant has started proceedings. It can be assumed that parties dread and fear proceedings that may last for years and prefer to find an agreement outside of the arbitration procedure. They may also reconsider their claim once the procedure has started and they have received the respondent's counterclaim.

The collected data are sufficient to consider that arbitration can have an early settlement aspect, and as a result a Dispute Prevention Mechanism. Indeed, if commencing arbitration leads parties to abandon the procedure or to settle instead, it could also mean that some parties decide to settle even before starting proceedings, knowing that the dispute resolution method will be arbitration or once threatened to be called to arbitration.
Also, another conclusion can be that the threat of arbitration and starting proceedings forces party to enunciate and explain their claims and positions. Such an aspect of arbitration mandates to consider it, at least partly, as an ADRM and to some extent as a Dispute Prevention Mechanism.

6.4. Conclusions

6.4.1. General Conclusive Remarks

It results from the above that "traditional" arbitration does not perfectly fit the criteria of Unconventional Alternative Dispute Resolution Mechanisms. Arbitration is not a dispute resolution mechanism intervening quickly after the dispute arises, and the proceedings, from the constitution of the arbitral tribunal to the issuance of the award are long.

Furthermore, regarding the action of arbitration as a Dispute Prevention Mechanism, it does exist, but it is not its main feature, as opposed to DBs and TACs.

However, arbitration should not be held captive to its classification as a dispute resolution only mechanism.[1077] As it has been demonstrated, arbitration can allow early settlement of disputes and prevents disputes from reaching a point where resuming to the contract and to the operations is impossible.[1078] In addition, some subsets of arbitration, namely expedited arbitration, emergency arbitration and e-arbitration, have developed faster procedures which permit resolving disputes in a timely manner.

Arbitration is therefore in a grey area: it is definitely a dispute resolution mechanism, and the only one to be final and binding. Nevertheless, it can also be actioned as a Dispute Prevention Mechanism, without being classified as an Unconventional ADRM.
This leads our conclusions to examining whether arbitration is an adequate Dispute Resolution Mechanism in oil and gas investment contracts.

6.4.2. Is arbitration an adequate Dispute Resolution Mechanism in oil and gas investment contracts?

Arbitration is an efficient dispute resolution mechanism. It is indeed the leading forum for dispute resolution.[1079] The foremost reason to choose arbitration is its final and binding character – a rarity in Alternative Dispute Resolution Mechanisms – and its recognition and enforceability.[1080] The New-York Convention guarantees the enforceability of arbitral awards before 159 countries, with little restrictions.[1081]

[1077] Albert D Angel, 'The Use of Arbitration Clauses as a Means for the Resolution of Impasses Arising in the Negotiation of, or During the Life of, Long-Term Contractual Relationships' (1973) 28(2) The Business Lawyer 589, 593.
[1078] Angel (n 1077) 592.
[1079] Cavinder Bull, 'An Effective Platform for International Arbitration: Raising the Standards in Speed, Costs and Enforceability', in Peter Quayle and Xuan Gao (eds) International Organizations and the Promotion of Effective Dispute Resolution (Brill, 2019), 8-9.
[1080] Bull (n 1079) 8-9.
[1081] New York Convention; Bull (n 1079) 9.

Furthermore, it leaves parties extensive freedom and control over the proceedings.[1082] They can elect their judges, the place where they want to be judged, the language of the proceedings, the rules applicable to them. Electing arbitrators allows the parties to have specialised and expert judges, competent in the subject matter of the dispute.[1083]

However, the demand for highly qualified arbitrators has led to a restricted pool of experts in each matter. Resorting to the same limited pool of arbitrators necessarily increases the risks of conflicts of interests, and consequently augments the risks of having an award set aside.[1084] This leads in return to unavailable and over-worked arbitrators, ultimately affecting the proceedings and their length.[1085] The duration of the proceedings, and the costs associated to them, are maybe the main disadvantage of arbitration.[1086] It has been renamed the 'New Litigation' due to its infamous resemblance with the so avoided litigation.[1087] The problem of costs and delays of arbitration being the same as in litigation was raised since the 1980's.[1088] Parties are increasingly expressing unhappiness with the duration and the costs of the proceedings, leaving only 9% of the respondents of the 2007 Fulbright & Jaworski Litigation Trends believing that international arbitration was cheaper than litigation.[1089] The rise in length and costs of international arbitration may be partly attributed to the penetration of legalism in the arbitration proceedings.[1090] Where arbitration used to be a swift and informal dispute resolution process, the insertion and application of legal

[1082] Stephen R Stern, Sloan J Zarkin, 'Why Arbitration Beats Litigation for Commercial Disputes' (2015) 32(1) GPSolo 40, 40
[1083] Mikhail Kartuzov, 'Advantages and Disadvantages of International Commercial Arbitration in comparison to Litigation and other means of Dispute Resolution' (2015) 2(3) European Political and Law Discourse 64, 66; Benoit Le Bars, 'Recent Developments in International Energy Dispute Arbitration' (2015) 32(5) Journal of International Arbitration 543, 548-549
[1084] Le Bars (n 1083) 548-549; Michael Waibel and others, 'The Backlash Against Investment Arbitration: Perceptions and Reality' in Michael Waibel, Asha Kaushal, Kyo-Hwa Chung & Claire Balchin (eds) *The Backlash Against Investment Arbitration* (Kluwer Law International, 2010) 3.
[1085] Le Bars (n 1083) 548-549.
[1086] Gustavo Sampaio Valverde, 'Potential Advantages and Disadvantages of Arbitration v. Litigation in Brazil: Costs and Duration of the Procedures' (2006) 12(4) Law & Bus Rev Am 515, 515.
[1087] Thomas J Stipanowich, 'Arbitration: The New Litigation' (2010) 1 University of Illinois Law Review 1, 1.
[1088] Francis J Higgins and others, 'Pitfalls in International Commercial Arbitration' (1980) 35(3) The Business Lawyer 1035, 1038.
[1089] Lucy Greenwood (n 1013) 564.
[1090] Higgins and others (n 1088) 1042.

procedures and courtroom practices has resulted in a global delay in the arbitration process.[1091]

These are for the procedural critiques, but arbitration is also facing issues with regards to the substance of arbitration itself.[1092] The critiques range from the interpretation and the application of investment law; the substance of the investment regime; the legitimacy of the system but all relate to sovereignty.[1093] The countries' wish to regain sovereignty against investment arbitration is not limited to the Latin American countries and proponents of the Calvo doctrine. Such backlash against investment arbitration can be found in the US, as well as in the Europe, where BITs and their arbitration provisions were recently found to be incompatible with European Union law in the *Achmea* judgment.[1094]
Albeit solving the issue of sovereignty appears close to impossible due to its necessary links with the State or the region's ideology, arbitration as a process can be improved and enhance in order to address the aforementioned problems.

Arbitral institutions and arbitration have started tackling the issues of duration and costs. They have created, implemented and initiated new procedures, such as emergency arbitration, expedited procedure and e-arbitration. These innovations allow to start reducing costs and durations, by replacing in-person hearings by videoconferencing and therefore limit part of the arbitration and arbitrators' costs and fees.[1095]

Costs and duration of arbitration could be bettered by ensuring that arbitration remains a "last chance" mechanism. To that end, the filtering system prior to arbitration must be efficient. This entails using appropriate dispute resolution mechanisms, adapted to the contracts and to the dispute. The use and design of a multi-tiered dispute resolution clause (MTDR clause) will be the subject of Chapter 7.

[1091] Webb, Wagar (n 1021) 148-149.
[1092] Waibel and others (n 1084) 3.
[1093] Waibel and others (n 1084) 3, 4, 5.
[1094] Case C-284/16 *Slowakische Republik v Achmea BV* [2018]
[1095] Bull (n 1079) 22; Higgins and others (n 1088) 1042.

Despite the critiques, arbitration, although not being an Unconventional ADRM, seems to be the second-to best solution for investment and transnational disputes. Its global recognition and enforcement, the neutrality and impartiality of the tribunals make it a reliable method to solve oil and gas investment disputes. The issue of time and costs are serious enough to be addressed, and practice is creating news means to enhance the process.

7. CHAPTER 7. THE WAY FORWARD: AN ADAPTABLE MULTI-TIERED DISPUTE RESOLUTION CLAUSE

7.1. Introduction

The previous chapter (Chapter 6) has highlighted the current issues faced by arbitration. Constant resort to this mechanism has led to time consuming and costly proceedings as the procedural patterns of national courts and litigation have been introduced in arbitration.[1096] In light of this, parties to long-term and capital-intensive contracts have been seduced by multi-tiered dispute resolution clauses (hereafter MTDR clauses). This growing interest and popularity for MTDR clauses stems from the unique combination of consensual and adjudicative methods, allowing the disputes to be filtered by significance.[1097] Consequently, the strain on arbitration is hoped to reduce and the procedure to return to its original state of time and cost-efficient mechanism.

This chapter will undertake an analysis of MTDR clauses, using as examples some MTDR clauses used in the contracts observed in Chapter 5 and 6 (Section 7.2.). The aim of this chapter is to propose a modulable MTDR clause adapted to oil and gas investment contracts. To this end, the available mechanisms will be analysed and selected (section 7.3.1.) before establishing their efficiency on a case-by-case basis (section 7.3.2.). Finally, the crucial question of interaction between the different steps of the MTDR will be considered, in order to design the most efficient MTDR clause (section 7.3.3.).

7.2. Multi-tiered dispute resolution clauses: a study

7.2.1. Definition

Multi-tiered dispute resolution clauses (hereafter MTDR clauses), as their name indicates, are a dispute resolution clause providing for different dispute resolution mechanisms, organised in stages to be completed before reaching arbitration.[1098]

[1096] Ewelina Kajkowska, *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Bloomsbury, 2017) (n 173) paras 1.2. and 1.3.
[1097] Ewelina Kajkowska (n 173) paras 1.6. and 1.8.
[1098] Klaus Peter Berger, 'Law and Practice of Escalation Clauses' (2006) 22(1) Arbitration International 1, 1

They can be found in the literate under the name of multi-tiered, multi-step, ADR first, escalation clauses or layered dispute resolution clauses.[1099] This chapter will refer to them using the term MTDR clause, which must be understood as encompassing all the different wordings.

The aim of MTDR clauses is to offer to the parties a dispute resolution system tailored to the disputes that may and will arise under their specific contract, whilst limiting access to arbitration to the most complex disputes.[1100] MTDR clauses filter disputes according to their significance.[1101]

The importance of MTDR clauses in long-term contracts, such as construction and oil and gas, can be linked to five main reasons. Firstly, the previous chapter (Chapter 6) demonstrated that arbitration, despite its qualities as a final and binding dispute resolution mechanism, is a costly and time-consuming process. On the contrary, MTDR clauses allow the dispute to be solved by fast and cheap ADRMs.[1102] An MTDR clause, by providing different steps in the dispute resolution process, enables the parties to solve their dispute in a structured manner.[1103] Furthermore, it gives them time to make use of the ADRMs and to settle their dispute before reaching the arbitration stage.[1104] The aim being to settle amicably the dispute before incurring the expenses of formal proceedings, a successful MTDR clause entails a cheaper dispute resolution mechanism.[1105]

Secondly, MTDR clauses, through the implementation of ADRMs as pre-arbitral steps, enable the parties to protect their contractual relationship.[1106] This specific point is fundamental in the oil and gas industry, where contracts are expected to last for an average of twenty-five to thirty-five years, or in some cases even longer, or at least until the investor has recovered its costs. Parties to a long-term

[1099] Berger (n 1098) 1; Robert N Dobbins, 'The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity' (2005) 1 Hastings Bus LJ 159; Didem Kayali, 'Enforceability of Multi-Tiered Dispute Resolution Clauses' (2010) 27(6) Journal of International Arbitration 551, 552; Craig Tevendale and others, 'Multi-Tier Dispute Resolution Clauses and Arbitration' (2015) 1(1) Turkish Commercial Law Review 31, 32.
[1100] Tevendale and others (n 1099) 32-33; Berger (n 1098) 1.
[1101] Kajkowska (n 173) para 1.8.
[1102] Kayali (n 1099) 552-553.
[1103] Kajkowska (n 173) para 1.8.
[1104] Berger (n 1098) 2.
[1105] Simon Chapman, 'Multi-tiered Dispute Resolution Clauses: Enforcing Obligations to Negotiate in Good Faith' (2010) 27(1) Journal of International Arbitration 89, 90.
[1106] Kayali (n 1099) 552-553; Dobbins (n 1099) 160.

investment contract need to be able to solve their disputes in a timely manner, whilst being able to resume to their contractual relationship afterwards. This implies having at hand dispute resolution mechanisms that are not immediately adversarial, in order to preserve as much as possible the good relations between the parties.

Thirdly, long-term contracts are characterised by the different types of operations and obligations that may arise under them. As a result, the types of disputes are necessarily different from one operation to another and require appropriate methods to be solved.[1107] The dispute resolution mechanisms used in a contract have to reflect this diversity in the disputes. It is by ensuring appropriateness that efficiency can be attained.

Fourthly, the intervention of different ADRMs in the dispute resolution process allows the parties to reflect and consider the facts of the case and the basis of their claims at several stages.[1108] Using ADRMs before going to arbitration will give them the opportunity to obtain an assessment of their legal positions by a neutral third-party, and maybe will result in an impetus to settle, if one of them realise that their claim is ill-founded or has no chance to succeed before an arbitral tribunal.

Fifthly, an MTDR clause allows to filter disputes, not only on the number of them reaching arbitration, but also on their extent. It is possible that a complex enough dispute will need to pass through all the steps, including arbitration, to be resolved. However, resorting to one or two ADRMs steps before arbitration enables the parties to shed some aspects of the dispute and to present to the arbitrators only the "unsolvable" part of it. Consequently, the arbitration proceedings will be more time and cost efficient.

7.2.2. The main features of MTDR clauses

MTDR clauses are often composed of a mix of consensual ADRMs, such as negotiation, mediation and conciliation; and adjudicative or adversarial

[1107] Kayali (n 1099) 553.
[1108] Katarina Tomic, 'Multi-Tiered Dispute Resolution Clauses: Benefits and Drawbacks' (2017) 2017 Harmonius: J Legal & Soc Stud Se Eur 360, 365.

mechanisms like arbitration.[1109] This means that arbitration in MTDR clauses has a new role, a new function and shall only intervenes as a last resort, once the consensual ADRMs have failed.[1110]

In between these two steps can be inserted Sole Expert Determination (SED) and Dispute Boards (DBs) which are quasi-adjudicative ADRMs.[1111] Their main feature, as opposed to consensual ADRMs, is that the contractually binding decision is issued by a third-party and does not result from the amicable resolution of the parties.[1112] In other words, a quasi-adjudicative mechanism will always lead to a decision. Failure of the process will be measured by either the need to have the decision judicially enforced or the existence of an appeal procedure.

Among the contracts studied in Chapter 5 (Unconventional ADRMs) and Chapter 6 (Arbitration), some provide MTDR clauses for the resolution of disputes. This is the case of the *Greek Model Lease Agreement* for instance. In the Greek Model Lease Agreement, the dispute resolution process starts from the Technical Advisory Committee (TAC), then moves on to SED and ultimately to arbitration:

> 4.10 If the Technical Advisory Committee is unable to reach unanimity on any matter being considered by the committee under this Article 4, the matter shall be referred to the Lessee and the Lessor within fifteen (15) calendar days from the date of the meeting where the matter was considered. If the Parties fail to reach unanimity within thirty (30) calendar days of such referral, the matter shall be referred to a Sole Expert for determination in accordance with Article 23.
>
> 23.2 In the event of failure of the Parties to reach an amicable settlement within the aforesaid period regarding any dispute mentioned in Articles 4.10, 5.4, 7.3, 7.6 (a), 7.8, 7.9, 8.3(b), 8.5, 8.6, 9.5 and 16.3, the Parties shall refer to a Sole Expert […]
>
> 23.2.(f) Save in the event of fraud or manifest error, the Sole Expert's determination shall be conclusive and binding on the Parties and shall be delivered within thirty (30) calendar days following the end of the Submissions Period. The decision of the Sole Expert may be referred to arbitration by way of appeal on a point of law, but not on a point of fact.[1113]

[1109] Dobbins (n 1099) 161; Berger (n 1098) 1.
[1110] Kajkowska (n 173) paras 1.6 and 5.11.
[1111] Kajkowska (n 173) paras 1.6. and 5.13.
[1112] Kajkowska (n 173) para 5.13.
[1113] Greek contract (n 41) art 4.10 and 23.2.

The MTDR clause of the *Greek Model Lease Agreement* (hereafter *Greek MTDR clause*) is a three-tiered dispute resolution clause. This means that there exist three different ADRMs, hierarchically organised in order for the parties to try and resolve their dispute without resorting to arbitration. Furthermore, it can be observed that the Greek MTDR clause provides for one consensual ADRM, the TAC procedure; one quasi-adjudicative process, the SED; and finally arbitration as final and binding dispute resolution mechanism.

The *Greek MTDR clause* also provides for an amicable settlement step in the event where a dispute has not been raised during a TAC meeting and did not go through this dispute resolution procedure:

> 23.1 In the event of any dispute, controversy or claim between the Parties or between the Lessor and any Co-Lessee or any inability or failure by the Parties or by the Lessor and any Co-Lessee to agree on any matter regarding the validity, interpretation or implementation of any provisions of this Agreement, (a "Dispute"), the Parties shall first attempt to resolve that dispute amicably through negotiations which shall not exceed a period of thirty (30) days after the receipt by one Party of a notice from the other Party of the existence of such a Dispute.[1114]

As a result, the use of negotiations, either through the spectrum of a TAC procedure or as a stand-alone mechanism, is a pre-requisite before using SED and arbitration.

The MTDR clause of the Model contract of Cyprus (hereafter *Cypriot MTDR clause*) provides for the same escalation of consensual, quasi-adjudicative and adjudicative mechanisms, but replacing TAC procedure with amicable settlement, i.e. negotiation:

> 36.1. Amicable settlement
> In the event of any difference or disagreement or dispute […] the Parties shall first attempt to resolve that dispute amicably through negotiations which shall not exceed a period of sixty (60) days after the receipt by one Party of a notice from the other Party of the existence of such a dispute.

[1114] Greek contract (n 41) art 23.1.

> 36.2 Expert Determination
> In the event of failure of the Parties to reach an amicable settlement within the aforesaid period of sixty (60) days, the Parties shall, within (10) days, by mutual agreement, request an expert to provide its expert decision on the dispute. […] The expert shall render his decision no later than one hundred and twenty (120) days after his or her appointment. […] The expert's decision shall be final and binding upon the Parties unless the Parties refer the dispute to arbitration pursuant to Article 36.3 within sixty (60) days of the date on which the expert's decision is received by the Parties […].
>
> 36.3 Arbitration
> If the dispute is not resolved through amicable settlement or expert determination within the period set out in Articles 36.1 and 36.2 above or if one of the Parties wishes to challenge the decision reached by the expert pursuant to Article 36.2, the dispute shall be referred to arbitration.[1115]

The transition between each step of the MTDR clauses is based on a time limit. If the negotiations (either within a TAC procedure or under the heading of amicable settlement) are not successful within 30 days, the parties can then move on to SED or arbitration depending on the clause, as the *Greek MTDR clause* and the *Cypriot MTDR clause* take different approaches.

Under the *Greek MTDR clause*, SED is reserved for disputes arising out of some provisions of the contract only. Therefore, depending on the nature of the dispute, the MTDR clause will either be three-tiered – for disputes requiring SED – or two-tiered – for disputes outside the scope of the SED clause. In the latter instance, the dispute will escalate directly from negotiations to arbitration.

However, the limited access to SED can be overcome if the dispute has been raised and resolution has been attempted under the TAC procedure. In that case, the dispute will follow the dispute resolution path of Article 4.10. and be submitted to SED if the discussions/negotiations of the TAC remain unsuccessful.

Then regarding the transition from SED to arbitration, the *Greek MTDR clause* restricts it to appeals on point of law. Challenges are also accepted in case of fraud and manifest error of the Sole Expert in its decision.

The *Cypriot MTDR clause*, on the other hand, imposes SED to all disputes once amicable settlement has failed. The transition from SED to arbitration is not

[1115] Cypriot contract (n 40) art 36.

subject to any limitations. Any party can appeal the decision of the Sole Expert for any reason, as long as the challenge intervenes within the sixty days of the decision.

The discussion on the appropriateness and effectiveness of each method and clause will be held in sections 7.3.1. and 7.3.2. of the chapter.

Using these two clauses as examples of the MTDR system of oil and gas investment contracts, it can be said that clauses that appear similar in the methods they use may have very different effects, due to the transition criteria as well as the wording of the clause itself. These two elements are some of the reasons making a MTDR clause ineffective.

7.2.3. The enforceability of the MTDR clause

The enforceability of a MTDR clause is essential. The clause and each of its components must be given effect in order to be useful. There is indeed little interest in designing a specific dispute resolution clause for it to be ineffective. This is especially true because the aim of an ADRM is to solve disputes using cooperation and processes made for compromise. The ineffectiveness or difficulties of certain TAC, DB and SED clauses has been mentioned in chapter 5. Unluckily, the combination of different ADRMs increases the risks of error and inefficiency of the clause.[1116] These risks mostly arise from loosely drafted clauses, rendering them at times pathological, i.e. absolutely ineffective.[1117]

The effectiveness of an MTDR clause stems from its enforceability, in other words its mandatory aspect for the parties.[1118] Enforceability will be determined by national courts, if parties have provided for litigation as a last-resort mechanism, or by an arbitral tribunal if arbitration is the last step of the MTDR clause. Both the national courts and arbitral tribunals first ascertain the mandatory character of pre-arbitral procedures, before verifying if the obligation made to the parties has been complied with.[1119]

[1116] Berger (n 1098) 3.
[1117] Chapman, 'Multi-tiered Dispute Resolution Clauses' (n 1105) 90; Berger (n 1098) 11.
[1118] Chapman, 'Multi-tiered Dispute Resolution Clauses' (n 1105) 90.
[1119] Kayali (n 1099) 571.

The first element to be verified is the language used in the pre-arbitral mechanism. Questions as to the mandatory character of an ADRM will come from an equivocal wording, such as “may” and “could”. A mandatory language, the use of “shall” and “must” are necessary for the ADR clause to be enforceable and valid.[1120] For instance, the arbitral tribunal an ICC arbitration (ICC Case no 4230) considered that the pre-arbitral ADRMs were not obligatory because the wording of the clause was not. In this case, the clause provided “all disputes related to the present contract may be settled amicably”.[1121]

The second criterion is the existence of time-limits and a specific procedure set out in the dispute resolution clause and in the different ADRMs. An absence of such is considered a strong indication of the non-binding nature of the pre-arbitral steps.[1122] This is also the position of arbitral tribunals. In the ICC Case no 6276, the tribunal had to decide whether a three-tiered dispute resolution clause, composed of amicable settlement, an engineer’s decision and arbitration steps was mandatory.[1123] The claimant had complied with the amicable settlement mechanism but had proceeded directly with arbitration. The tribunal observed the clause and held that the amount of details and the strict modalities of the dispute resolution system had to mean that the process was strictly binding on the parties.[1124] A MTDR clause must present certain and effective elements, the process of each step and the transitions between them to be clear enough.[1125] Resultantly, the mandatory character of the MTDR clause is not ambiguous and subject to challenges.

The enforceability of an MTDR clause therefore relies on two prima facie criteria: the existence of a mandatory language and of a formal procedure. MTDR clauses hence must be drafted in a binding and certain manner.[1126]

[1120] Kajkowska (n 173) para 6.1.
[1121] Kayali (n 1099) 567.
[1122] Christopher Boog, ‘How to Deal with Multi-tiered Dispute Resolution Clauses’ (Note on the Swiss Federal Supreme Court’s Decision 4A_18/2007 of 6 June 2007) (2008) 26(1) ASA Bulletin 103, 106.
[1123] Kayali (n 1099) 567.
[1124] Kayali (n 1099) 567.
[1125] Kayali (n 1099) 573-574.
[1126] Kayali (n 1099) 570.

Once the prima facie test of the existence of a mandatory pre-arbitral process has been ascertained, the arbitral tribunal must determine whether the obligation has been complied with. In order to do so, tribunals will look at factual elements, in particular the effective compliance with the ADRM step. Tribunals will verify whether a party has actually complied with its obligation to use a pre-arbitral mechanism with due diligence, and in other words, with good faith. The notion of good faith in MTDR clauses is factual as it relies on the behaviour of the parties. Arbitral tribunals will research evidence that the negotiations were held in a proper and constructive way. The parties need to have started the negotiations and have participated in them, in the scope of reaching a solution to their dispute.[1127] This obligation to partake in the pre-arbitral process in good faith is for both the claimant introducing the claim before the arbitral tribunal and its respondent refusing for the claim to be heard. The party denouncing the arbitral proceedings for non-compliance with the MTDR clause must have tried to implement such clause.[1128] However, forcing a party who does not want to participate in negotiations or a mediation may prove counterproductive given the aim of MTDR clauses as a cost and time efficient dispute resolution mechanism.[1129]

Finally arises the question of the sanction for non-compliance with an MTDR clause and a pre-arbitral process.[1130] The sanction depends on the nature of an agreement to use pre-arbitral steps. It appears from the practice of most arbitration cases, and of the French, English and German courts, that the procedural approach has been preferred, as opposed to the substantive one.[1131] Considering the procedural nature of an agreement to use consensual dispute resolution mechanisms before arbitration entails that the sanction and impact of non-compliance will be procedural. In that case, the sanction for non-compliance with a MTDR clause is the inadmissibility of the claim before an arbitral tribunal.[1132] The procedural approach indeed appears to be the most adequate with the will of the parties because when they contracted, they wanted the pre-

[1127] Kayali (n 1099) 570.
[1128] Boog (n 1122) 110.
[1129] Chapman, 'Multi-tiered Dispute Resolution Clauses' (n 1105) 98.
[1130] Boog (n 1122) 103.
[1131] Boog (n 1122) 107-108.
[1132] Boog (n 1122) 107.

arbitral steps to be mandatory. Hence the sanction of inadmissibility is the most appropriate.[1133]

If MTDR clauses had been treated of substantive value, the sanctions for non-compliance would have to be the ones applicable to contracts and therefore an action for breach of contract.[1134] Consequently, the remedies offered to parties whose counterparty has not complied with the MTDR clause would be either damages – and the issue of quantifying them – or withdrawal from the contract and dismissal of the claim, which does not benefit to any of the parties.[1135]

Opting for the procedural approach and the inadmissibility of the claim leads to new issues for the arbitral tribunal whose jurisdiction has been challenged. As the claim has been brought before it, the arbitral tribunal is already constituted but cannot settle the dispute before all mandatory pre-arbitral faces have been complied with. Closing the arbitral proceedings and demanding the parties to re-open them once the MTDR clause has been respected is unpractical. Indeed, an arbitral tribunal should be reconstituted within a month or so, and the preceding chapter has proven that constitution of an arbitral tribunal can lasts months if not years. Secondly, the arbitrators of the first tribunal may not be eligible again, and parties would have to select new arbitrators, adding to the time and cost of the procedure.[1136]

In light of the foregoing, arbitral tribunals facing this issue of non-compliance with a MTDR clause should stay the proceedings until the parties have fulfilled their obligations.

7.3. Designing an effective multi-tiered dispute resolution clause for oil and gas investment contracts

Designing an effective MTDR clause for oil and gas investment contracts implies drafting a clause efficient enough to filter the disputes, in order to keep arbitration for the most complex cases. In light of this, the choice of the pre-arbitral steps is key, as well as ensuring a smooth transition between each ADRM.

[1133] Boog (n 1122) 108.
[1134] Boog (n 1122) 107.
[1135] Boog (n 1122) 108.
[1136] Boog (n 1122) 109.

Importantly, the parties should not feel that the MTDR clause is a loss of time and resources. Such a feeling is counterproductive as it will trigger behaviours against a peaceful and consensual dispute resolution. Hence the need to select appropriate ADRMs, for the parties, the contract and the disputes arising out of it.

7.3.1. Choosing appropriate ADRMs

The choice of appropriate ADRMs for oil and gas investment contracts must be based on practice, as it is practice using MTDR clauses. However, the non-decreasing number of arbitrations in the oil and gas industry may be a sign that practice does not have all the answers. Indeed, between 2010 and 2020, the oil, gas and mining industry was the largest provider of arbitral cases before the ICSID, except for the years 2016 and 2017.[1137] Furthermore, since 1966, oil, gas and mining arbitral cases accounted for 26% of all cases introduced before ICSID, as per the ICSID Caseload – Statistics.[1138]
As a result, designing an appropriate MTDR clause needs to rely on all aspects of the oil and gas field, i.e. on the *lex petrolea*.

An appropriate ADRM for oil and gas investment contracts will take into account the specificities of the contracts and the disputes arising out of them.
Using the examples of the *Greek* and the *Cypriot MTDR clause*, it can be noticed that parties wish to have a negotiation period as the first step of the dispute resolution process. Amicable settlement can also be found in the Libyan Model Contract as the first-tier of the dispute resolution clause (hereafter the *Libyan MTDR clause*):

> 23.1. Amicable settlement
> The Parties shall make every effort to settle amicably any dispute arising under this Agreement.[1139]

[1137] The ICSID Caseload – Statistics, available at <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics>
[1138] The ICSID Caseload – Statistics (Issue 2020-2), available at <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics>
[1139] Libyan contract (n 43) art 23.1.

It is present in the Syrian contract (hereafter the *Syrian MTDR clause*) as well:

> 27.1 AMICABLE SETTLEMENT
> Periodically, the Parties shall meet to discuss the conduct of the Petroleum Operations under this Petroleum Agreement and shall make every effort to settle amicably any dispute arising out of or in connection with the validity of this Petroleum Agreement, its performance, interpretation, or termination and all the consequences thereof.[1140]

Amicable settlement and negotiations therefore appear as an unavoidable step in the dispute resolution process for oil and gas investment contracts. This ADRM must nonetheless provide some enforcement guarantees, such as a mandatory wording and determined time limits. In this regard, the amicable settlement clauses of the *Greek* and *Cypriot MTDR clauses* should be considered better drafted than the *Libyan* and *Syrian MTDR clauses*. The latter, although using mandatory terms such as “shall”, does not provide for any timeframe for the length of the negotiation process. When does the “every effort to settle amicably” finish? This lack of certainty in the drafting of the clause will necessarily create disagreements as to the proper compliance with the pre-arbitral step and could lead in the admissibility of the claim before an arbitral tribunal.

For the contracts providing a TAC clause too, the system chosen by the *Greek MTDR clause* appears to be the most appropriate to ensure that all disputes go through a negotiation step, either using the TAC procedure or the amicable settlement sub-clause.

Mediation and conciliation processes, which have been excluded from the scope of this research work, should not be part of an oil and gas investment contract MTDR clause. This is based on two observations. Firstly, oil and gas investment contracts, by providing for amicable settlement or a TAC clause, have already implemented a consensual dispute resolution mechanism. Adding another method which relies on the sole agreement of the parties does not appear

[1140] Syrian contract (n 44) art 27.1.

appropriate timewise and cost-wise. Indeed, the intervention of a mediator is not a free mechanism, as opposed to a TAC procedure or stand-alone negotiations. Secondly, mediation processes are completely absent of oil and gas investment contracts. This evidences the reluctance of the practice for mediation as a dispute resolution mechanism in the oil and gas industry.

MTDR clauses, if based on the oil and gas investment contracts, must also include SED and arbitration. SED, as for amicable settlement/negotiations, is extremely common in the contracts. Out of all the contracts studied, four of them provided for a SED clause (see Chapter 4, section 3). This method being quasi-adjudicative, the result does not require an agreement of the parties. Consequently, parties enter the procedure knowing that a decision will be reached in any case but also that they will be able to challenge the decision. The latter will be explained in detail in section 7.3.3.3. of this chapter.

The features of arbitration have been largely discussed in chapter 5 and in spite of the difficulties of this dispute resolution mechanism, it was concluded that it is the most appropriate method for a final and binding decision. This is due to the wide recognition and enforcement of arbitral awards before national courts, thanks to the New York Convention.[1141] The disadvantages of arbitration, namely the time and cost of the proceedings, have been often raised. However, these pitfalls could be greatly limited by the use of appropriate and well-articulated pre-arbitral ADRMs, effectively acting as a filter and reducing the number of cases reaching arbitration.

Finally, inserting Dispute Boards in oil and gas investment contracts should be considered as they have proven to be an effective dispute resolution mechanism in construction contracts. Their quasi-adjudicative character, similar to SED, ensures that a decision will be reached even if the parties are unable to reach a settlement. Nevertheless, the question of the types of disputes to be solved by a DB has to be addressed.

7.3.2. Thinking adaptability and flexibility

[1141] New York Convention.

A MTDR clause needs to provide stability of the dispute resolution process. The parties need to know they can rely on the MTDR clause when a dispute arises, because its drafting is mandatory and sufficiently certain.
Nonetheless, stability of the dispute resolution process does not necessary mean it has to remain static.

Oil and gas investment contracts are somewhat specific compared to other long-term, high capital contracts. Oil and gas investment contracts have their operations separated into two phases: first the exploration phase, and then the production phase. The exploration phase usually last for 5 to 8 years, with a possibility for extension. This exploration phase is coupled with Minimum Work Obligation and Minimum Expenditures. However, an investor is not bound by the time limit of the exploration phase. It can proceed onto the production stage if a commercial discovery is made or decide to abandon the project if it becomes apparent that no commercial discovery will be realised.
The production phase intervenes once a commercial discovery has been made. The production phase lasts for five or six times the duration of the exploration phase, so between twenty-five and thirty years, with extensions again.
The dichotomy between these two stages involves also different types of disputes. The exploration phase will generally give rise to technical and sporadical issues, whereas the production phase is characterised by long-lasting problems, which could ultimately sever the parties' relationship.[1142]

Based on these specificities, the MTDR clause of an oil and gas investment contract must reflect the different phases of operation, as well as the various types of disputes stemming from them. In this regard, it is appropriate to have a MTDR clause designed for the exploration phase, which will evolve into a different one once the contract enters into the long-lasting production phase.

For the exploration phase, the MTDR clause should be three-tiered. The first step has to be the TAC procedure or stand-alone negotiations, in order to comply with the will of the practice. As a second step, parties will have to comply, for a selected range of issues, with a SED clause. Arbitration will then be open to them,

[1142] Greek contract (n 41), Articles 2.1.(a) and 8.1.Lebanese contract (n 42), Articles 7.1.-2 and 12.2.; Libyan contract (n 43), Article 1.30.

but on restricted terms. The transition between SED and arbitration will be discussed in section 7.3.3.3.
This escalation between the ADRMs corresponds to the type of disputes that will arise during an exploration phase. The TAC, constituted of members from both the investing company and the host State, is an effective forum for discussing new issues relating to exploration operations. Furthermore, the TAC can invite professionals to assist to the meetings, hence enhancing the negotiation process by involving skilled professionals from the first step. SED is well adapted mechanism for solving technical disputes in a quick and efficient manner.

For the production phase, both the TAC and the SED procedures should be replaced by a DB. The replacement of the TAC relies on the fact that DBs also offer periodical meetings, involving a discussion/negotiation phase between the parties. DBs are a Dispute Prevention Mechanism in addition to be an ADRM, and therefore present the same characteristics as a TAC. The DB is constituted from the beginning of the operations, creating a trustful relationship between the parties and the members of the board.
The replacement of the SED is also reasoned. Firstly, DBs are, like SED, a quasi-adjudicative mechanism. The proceedings of a DB comprise a negotiation aspect and a hearing and decision phase. As a result, if the negotiation stage is not sufficient for the resolution of the dispute, a decision will be reached despite the absence of an amicable settlement between the parties. Secondly, the decision that will be issued by the DB is binding and/or final on the parties and rendered by a panel of three experts. Yet, contrary to SED, because the Board is already constituted, it can act on the issue has soon as it is raised by the parties. The dispute resolution system will be more reactive. If the issue is recurrent, the members of the Board will already be aware of it and will not need to be briefed on all the past and underlying issues of the production phase.

Resorting to a DB at the production stage is sensible with regards to the expected length of the parties' relationship and the issues at stake. It is indeed at the production stage that an investor could face measures constituting an expropriation, because the production rates have reached levels that are not

equitable between the parties anymore.[1143] It has been contended that a DB is an expensive ADRM.[1144] This assertion is legitimate as the cost of a DB is expected to reach 0,1 to 0,3% of the total cost of a project.[1145] This means that for a ten million dollars project, the DB will amount for 10,000.00 to 30,000.00 dollars. If no disputes arise – which is very unlikely – these costs would seem to be wasted. However, one has to consider DBs as an insurance contract. In the absence of damage in an insurance contract, the contract consists only in paying a premium for the insured. But once the damage arises, the insurer provides coverage of the totality of the damage, which often largely exceeds the premium paid.

For instance, a ten million dollars project will give incur a DB's cost of 10,000.00 to 30,000.00 dollars. Taking into account that a DB has over 90% of success rate, the risks of entering subsequent arbitration proceedings are low, therefore fulfilling the goal of limiting the number of disputes accessing to arbitration.[1146] The global costs of the dispute resolution system will therefore remain around this estimated amount of 10,000.00 to 30,000.00 dollars. On the other hand, the study conducted on arbitral awards rendered for changes in the legal framework by the host State has demonstrated that the average amount awarded by the tribunal (excluding sums rendered in currencies other than US Dollars) is 1,056,561,347.20 USD, without the legal, institutional and arbitrators' fees. In comparison, the cost of a DB is more advantageous.

For both the exploration and the production stages, arbitration will remain the last resort mechanism as it is the sole dispute resolution tool benefiting from global recognition and enforcement.

7.3.3. Ensuring efficient interaction between the different ADRMs

7.3.3.1. Interaction between Technical Advisory Committee and Sole Expert Determination

[1143] *Burlington v Ecuador* (n 513); *City Oriente Limited v The Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (Petroecuador)* (*Decision on Provisional Measures*) [2007] ICSID Case No. ARB/06/21.
[1144] Polkinghorne, Secomb (n 648) 3.
[1145] Agdas, Ellis (n 740) 126.
[1146] Menassa, Peña Mora (n 785) 74.

The interaction between a TAC procedure and the SED is crucial as it is the escalation from the first to the second step of the MTDR clause, from a consensual ADRM to a quasi-adjudicative ADRM. Due to the consensual nature of the TAC procedure, parties must be careful when drafting their clause. The rules applicable to agreements to negotiate must be respected. In light of this, the TAC clause must be drafted with mandatory wording. The negotiation process to be held between members of the TAC or between the parties has to be given with terms such as “shall” and “must”. The procedure before the TAC must also be certain enough and provide explicit indications as to the progression of the dispute to the SED stage. Resultantly, the TAC clause must define a time limit within which the parties have to reach an agreement or consider the TAC negotiations have failed. The determination of such time bar depends on the will of the parties. However, they should be aware that too short a delay will not be sufficient to hope reaching an agreement. On the contrary, providing for an extensive time limit will give the parties the impression of inefficiency of the procedure, and therefore that they are losing time and money. The choice made in the Greek TAC clause appears appropriate. If the TAC is unable to reach an agreement on a dispute, it must refer it within 15 days to the parties themselves who then have 30 days to negotiate an appropriate solution. The TAC procedure lasts for 45 days maximum, which gives time to the parties to agree on the issue at hand, without enclosing them in a long process. Another possibility would be to add the right for the parties to proceed to the SED step if they both decide, before the end of the mandatory timeframe, that the dispute is not solvable by negotiations.

A SED procedure as escalation of a TAC procedure can result of two cases: either the Sole Expert has to decide on the entirety of the dispute; or the parties aimed to solve part of the issue and submit to the SED the remaining elements. In the latter instance, it would be useful for the Sole Expert to access to the negotiated part of the dispute in order to assess the extent of the disagreement. This can be realised by providing such access in the SED clause itself, or by enabling the Sole Expert to request any document it consider necessary from the parties. The latter option is preferable due to its larger scope.

7.3.3.2. Interaction between Dispute Boards and arbitration

Dispute Boards are of two types: Dispute Review Boards (hereafter DRB) and Dispute Adjudication Boards (hereafter DAB). The difference between the two lies in the decision issued by the Board. After a hearing, a DRB will issue a non-binding recommendation. This means that the parties have no obligation to comply with the recommendation. Contrariwise, a DAB provides a decision that has interim binding force hence compliance is mandatory unless the decision is challenged before an arbitral tribunal or a state court.[1147] In both cases, the parties have the right to access the last step of the dispute resolution process, i.e. arbitration. Although the transition from a DB procedure to arbitration is rare due to the high success rate of DBs, it remains a possibility. In light of this, the interaction between DBs and arbitration has to be ascertained and the rules most beneficial for an appropriate and efficient dispute resolution process established.

Arbitral tribunals and litigation at times have been paramount in determining the extent of DRBs' clauses and recommendations. In the case-law saga *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK*,[1148] a binding but not final recommendation had been issued by a DRB (established under a FIDIC DRB clause) against PGN (PT Perusahaan Gas Negara). This decision imposed on PGN to pay a certain amount of money to CRW. CRW (CRW Joint Operation) sought its enforcement before two consecutive ICC arbitral tribunals, which was approved by both. The first ICC tribunal rendered a final award, whereas the second issued a partial award. Both arbitrations were followed by court proceedings before Singaporean courts. These proceedings allowed to refine the link between DB and arbitration. More interestingly, both jurisdictions upheld certain principles of DBs. As such, the High Court embodied the principle of "pay now, argue later" upon which DBs are created.[1149] The Court of Appeal recognised the right for a party to seek enforcement of a binding DB's recommendation before an arbitral tribunal for reasons pertaining to the nature of

[1147] Chapman 'The Use of Dispute Boards on Major Infrastructure' Projects' (n 727) 220 and 223-224.
[1148] [2010] SGHC 202; [2011] SGCA 33; [2014] SGHC 146 ; [2015] SGCA 30.
[1149] [2014] SGHC 146, para 157; Cetinel (n 731) 106.

DBs. The Court of Appeal recalls that compliance with a DRB's recommendation may be vital for the receiving party to continue arbitral proceedings.[1150] According to the Court of Appeal, parties should be able to immediately seek enforcement and compliance with binding DB's decisions before arbitral tribunals, without needing the merits of the dispute to be heard first. Indeed, an arbitration regarding the non-compliance with the decision will issue an award faster than an arbitral tribunal deciding on the merits of the case.[1151] The Court of Appeal of Singapore therefore aknowledged the importance in guaranteeing the effectiveness of DBs. But it also appreciates the ultimate reliance of DBs on arbitration in the event of non compliance of a party with the DB's decision. Arbitration is therefore necessary to DBs, as it is the only existing mechanism to ensure the compliance with recommendations and decisions.

7.3.3.3. Interaction between Sole Expert Determination and arbitration

Despite the preponderance of SED and arbitration clauses as part of MTDR clauses in oil and gas investment contracts, the interaction of the two mechanisms has been barely covered by literature. Quasi-adjudicative methods indeed, like DBs and SED, have remained the thing of practice.[1152] The lack of normative background applicable to Expert Determination as an ADRM also renders a general review of the mechanism difficult.[1153] However, a SED decision will play a crucial role in the subsequent arbitration process. It will constitute a heavily relied on piece of evidence, and the expert is likely to be called and heard as key witness.[1154]

Nevertheless, the drafting of some SED clauses makes it impossible for the SED procedure to attain its role of effective pre-arbitral step. This is for instance the case of the *Cypriot SED clause*, reproduced here for more clarity:

> 36.2 Expert Determination
> The expert's decision shall be final and binding upon the Parties unless the Parties refer the dispute to arbitration pursuant to Article

[1150] [2015] SGCA 30 (n 1148) para 73.
[1151] [2015] SGCA 30 (n 1148) para 76.
[1152] Kajkowska (n 173) para 5.7.
[1153] Kajkowska (n 173) para 5.7.
[1154] Kajkowska (n 173) para 5.13.

> 36.3 within sixty (60) days of the date on which the expert's decision is received by the Parties […].[1155]

This clause provides that the SED decision has interim binding force. But such provisions lead to the inefficiency of the mechanism as a whole. If a SED decision can be challenged on every ground, without limitations, the SED mechanism is ripped off its efficiency. Firstly, it is not efficient as a dispute resolution mechanism, designed to provide the parties with a final and contractually binding decision, and enforceable. Secondly, it is not efficient as a pre-arbitral step, inserted with the aim of limiting access to arbitration to the most complex cases only. The model of the *Greek SED clause* would be a more appropriate choice for preserving the efficacy of SED, by reducing the grounds for appeal of a decision.[1156]

SED is in oil and gas investment contracts the last step before arbitration. When the parties draft their MTDR clause and include an SED stage, they aim to obtain a satisfactory and binding decision from the Sole Expert, which will render arbitration not needed. However, SED presents two issues. Firstly, grounds for challenges in some MTDR clauses are too wide to ensure that the SED decision will be complied with and not challenge only because one of the parties factually disagrees with the decision. Secondly, SED decisions are solely contractually binding.[1157] This means that a party wishing to enforce a SED decision will have to obtain recognition of the decision before national courts or an arbitral tribunal, as it would have to do with any other contract, before being able to have it enforced. It does not have the same value and recognition as an arbitral award. It is nevertheless possible to increase the power given to a Sole Expert and hence to its decision.

The proposal is that the recognition of Expert's determination could come from arbitration itself. This proposition is limited to cases when the parties obtained an Expert's determination and then started arbitration for the same dispute or for another dispute involving the matter determined by the Expert. When such cases are presented to arbitrators, the Expert Determination could be considered as

[1155] Cypriot contract (n 40) art 36.2.
[1156] Santens (n 718) '696.
[1157] Martin Valasek, Frédéric Wilson, 'Distinguishing Expert Determination from Arbitration: The Canadian Approach in a Comparative Perspective' (2013) 29(1) Arbitration International 63, 68.

binding unless gross negligence, misconduct or change of circumstances on the matter determined. This seems achievable as negligence or misconduct are grounds on which parties can already sue an expert.[1158] The addition of change of circumstances on the matter determined is a means to take into account the discrepancies that may occur between the Expert's determination and the start of the arbitration procedure. The appreciation of the change of circumstances is left to the arbitrators. This proposition would help reduce the length of arbitration processes as arbitrators will rely on the Expert determination previously realised. Furthermore, it appears that such reliance would not prevent the enforceability of the award. Article V of the New York Convention provides that recognition and enforcement of an award can be refused if a party was unable to present its case.[1159] This risk was for instance raised in relation with the proposition to limit the appointment of experts by parties "by leave of the court".[1160] In addition, relying on the Sole Expert Determination would tackle the problem of reliability of the party-appointed experts. Indeed, Sole Experts are jointly appointed by the parties and are therefore neutral. Finally, in the event where the arbitral tribunal considers appropriate to resort to other opinions, they can appoint their own expert or scientific panel.

7.4. Proposal for a multi-tiered dispute resolution clause and simulation with case law

The modulable MTDR clause should feature a consensual ADRM, such as negotiation or a Technical Advisory Committee, followed by a quasi-adjudicative ADRM, taking the form of Sole Expert Determination or a Dispute Board, and finally an adjudicative ADRM, arbitration.

As explained in the previous section, the dispute resolution mechanism in oil and gas investment contracts should reflect the two phases of performance of the projects: exploration and production.

[1158] Susan Blake, Julie Browne, Stuart Sime, *A practical approach to Alternative Dispute Resolution*, (Oxford University Press, 2014 3rd Edition), para 24.63; *Sutcliffe v Thackrah* [1974] AC 727 and *Arenson v Casson Beckman Rutley and Co* [1977] AC 405;
[1159] New York Convention, Article V, 1.b); UNCITRAL Model Arbitration Rules (2010), art 17.1.
[1160] Jones (n 914) 149-150.

Resultantly, the proposed MTDR clause will present a two-fold dispute resolution method, with one system applicable to the exploration phase, and a second activated when the project enters the production phase.

The MTDR clause will then be applied to arbitration cases, in order to demonstrate the prospective usefulness this type of clauses could have had, should the parties have decided to include it in their contract.

7.4.1. The proposed multi-tiered dispute resolution clause

Article X. Multi-tiered Dispute Resolution Clause

Article X.1. Provisions applicable to Disputes during the Exploration Phase

During the Exploration Phase, as defined in Article [●] of the Contract, the parties agree to submit any dispute, controversy, disagreement or claim between them to the following dispute resolution method.

Article X.1.a.

In the event of any dispute, controversy, disagreement or claim (a "Dispute" as defined in Article [●] of the Contract) between the Parties, arising from or out of, or relating to the Contract, including but not limited to, its validity, performance or termination, and which has not been referred to the Technical Advisory Committee and negotiated between the members of the Technical Advisory Committee and/or the senior management of the Parties, pursuant to Article [●] of the Contract, the Parties shall first attempt to solve the Dispute amicably through negotiations. Negotiations shall not exceed a period of thirty (30) days after the receipt by one Party of a notice from the other Party of the existence of the Dispute.

Article X.1.b.

In the event of any Dispute raised by the Parties before the Technical Advisory Committee, pursuant to Article [●] of the Contract, and if the members of the

Technical Advisory Committee have failed to solve the Dispute in the provided timeframe of fifteen days, the Dispute shall be referred by the Technical Advisory Committee by written notice to the senior management of the Parties. The senior management of the Parties shall discuss and negotiate, in the scope of reaching an amicable settlement of the Dispute within twenty (20) days from the date of referral.

Article X.1.c.

If the Parties have raised their Dispute before the Technical Advisory Committee, pursuant to Article [●], and undertaken the Dispute Resolution System provided in Article X.1.b, the Parties are exempt from resorting to the mandatory negotiation period of Article X.1.a.

Article X.1.d.

If the Parties fail to amicably settle their Dispute pursuant to Article X.1.a or pursuant to the Technical Advisory Committee provisions of Article X.1.b, the Dispute shall be referred to a Sole Expert for determination. The Sole Expert shall be jointly appointed by the Parties. The appointment shall be made within fifteen (15) days from the failure of the negotiations pursuant to Article X.1.a or pursuant to Article X.1.b Should the Parties be unable to appoint their Sole Expert in the aforementioned timeframe, the Sole Expert shall be appointed by [name of an institution or court]. The Sole Expert shall be given all powers to conduct its mission, including but not limited to, travel on the Project's site, request the Parties to produce documents and evidence. The Sole Expert shall render its decision in no more than ninety (90) days from the date it has been appointed. The decision of the Sole Expert shall be binding upon the Parties. The decision of the Sole Expert may be referred to arbitration only in events of fraud or manifest error, and if the arbitration proceedings are introduced within sixty (60) days from the day the Sole Expert has rendered its decision.

Article X.2. Provisions applicable to Disputes during the Production Phase – Dispute Review Board

During the Production Phase, as defined in Article [●] of the Contract, the parties agree to submit any dispute, controversy, disagreement or claim between them to the following dispute resolution method.

Article X.2.a. Constitution and powers of the Dispute Review Board

Within no more than two (2) weeks of the start of the Production Phase, as defined in Article [●] of the Contract, the Parties shall establish a Dispute Review Board. Each Party shall appoint one Board Member, and the two appointed Board Members shall appoint an umpire. The role of the Dispute Review Board is to (i) assist the Parties in fulfilling their contractual obligations under the Contract; (ii) ensure the good performance of the Project; (iii) provide advice and opinions on the works to be performed as part of the Production Phase; (iv) decide on the Disputes that may be raised by the Parties, either by way of discussions, advice and informal means, or by way of a Written Decision, following a Hearing.

Article X.2.b. Functioning of the Dispute Review Board

The Dispute Resolution Board shall meet once every quarter/trimester, although this number of meetings can be decreased or increased upon mutual agreement of the Parties, without being less than once every semester. Each meeting shall be concluded with a progress report to be communicated by the Parties to the Dispute Review Board within one (1) week from the end of the meeting.
The Parties shall fully cooperate with the Dispute Review Board. They must provide all necessary information in order for the Dispute Review Board to be informed of the progress of the Project. The Parties shall comply with any request of the Dispute Review Board to communicate documents and evidence on the Project. The Dispute Review Board can request onsite visits, call meetings, question the Parties, issue decisions and overall take any measures to fulfil its role pursuant to Article X.2.a.

Article X.2.c. Dispute Resolution before the Dispute Review Board – Advice and opinion

The Parties may raise any Dispute between them before the Dispute Review Board, for the Dispute Review Board to give an opinion or advice. The Dispute Review Board shall be entitled to enquire as to the performance of the Production Phase and as to whether there are unsettled ongoing Disputes. If the Dispute is not settled following the advice or opinion of the Dispute Review Board, one or both Parties may request a Hearing before the Dispute Review Board (the "Request").

Article X.2.d. Dispute Resolution before the Dispute Review Board – Hearing

The Hearing shall be held within fifteen (15) days from the date the Request has been received by the Dispute Review Board. The Dispute Review Board shall hear both Parties on the Dispute, and may request additional documents and evidence, as well as testimonies of any person it deems necessary.

Article X.2.e. Dispute Resolution before the Dispute Review Board – Decision

The Dispute Review Board shall render its Decision on the Dispute no later than ninety (90) days after the date the Request was received by the Dispute Review Board. The Decision shall be in writing.

In the event where a Party does not comply with the Decision of the Dispute Review Board, the other Party may start arbitration proceedings under Article X.3 to seek enforcement of the Decision.

Article X.3. Arbitration

If the Dispute is not resolved by negotiations, Technical Advisory Committee and Sole Expert determination within the periods set out in Article X.1 or by the Dispute Review Board pursuant to Article X.2, the Dispute shall be referred to arbitration with the seat of the arbitration being London, under the UNCITRAL Rules. The number of arbitrators shall be three. Each Party shall nominate one arbitrator, who shall in turn nominate the President of the Arbitral tribunal. The language of the arbitration shall be English, and the seat of the arbitration shall be London. The law applicable to the arbitration proceedings is English law.

7.4.2. Application of the proposed MTDR clause to practical examples

7.4.2.1. Application of the MTDR clause for Exploration Phase

The MTDR clause designed for the Exploration Phase of oil and gas projects will be discussed in the context of the case of *Gujarat State Petroleum v. Yemen*.[1161] In this case, a dispute arose as to whether Yemen was entitled to invoke the bank guarantees for failure of the Claimants to perform their Minimum Work Obligations (hereafter MWO) and Minimum Expenditure Obligation (hereafter MEO) under the Production Sharing Agreements (PSAs) concluded in 2009.[1162] According to the PSAs, the Claimants had several MWO, including reprocessing and acquiring 2-dimension and 3-dimension seismic data.[1163] The Claimants sustained that they were unable to perform their MWO, and subsequently their MEO, because the Respondent failed to deliver relevant data.[1164] In addition, the political situation in Yemen led to a Force Majeure event according to the Claimants, which prevented them to comply with their obligations and ultimately forced them to terminate the PSAs.[1165] The Claimants started arbitration proceedings immediately after terminating the PSAs.[1166] The arbitral tribunal had to consider both the question of the breach of the MWO, and the subsequent drawdown of the bank guarantees, and the termination of the contract. With regards to the subject of the thesis, only the first question will be examined in this section.

The arbitral tribunal went on examining whether the Respondents were entitled to withdraw the bank guarantees based on the Claimants' failure to comply with their data reprocessing obligation under the PSAs. In order to provide scientific relevant information to the tribunal, both parties presented expert testimonies.[1167] The tribunal relied heavily on these testimonies to find that the Respondent had

[1161] *Gujarat State Petroleum Corporation Limited, Alkor Petroo Limited, and Western Drilling Constructors Private Limited v. the Republic of Yemen and the Yemen Ministry of Oil and Minerals* (Award) [2015] ICC Case No. 19299/MCP (*Gujarat State Petroleum v Yemen*).
[1162] *Gujarat State Petroleum v Yemen*, para 45.
[1163] *Gujarat State Petroleum v Yemen*, para 15.
[1164] *Gujarat State Petroleum v Yemen*, para 20.
[1165] *Gujarat State Petroleum v Yemen*, paras 21-26.
[1166] *Gujarat State Petroleum v Yemen*, para 27.
[1167] *Gujarat State Petroleum v Yemen*, paras 257 and following.

indeed not provided the Claimants with the sufficient underlying data, the support files to the seismic lines, allowing them to process the raw data.[1168]
This aspect of the dispute could have been dealt with faster and more efficiently had the parties provided for a Technical Advisory Committee and a Sole Expert Determination clause. Firstly, it is the main role of the TAC to discuss the progress of the MWO during the Exploration Phase. If a TAC had existed, it is more than likely that the issue of missing support files would have been raised in due time, allowing the parties to settle on this matter or to organise their contractual obligations as to prevent the dispute to escalate further. Furthermore, as noted above, the tribunal relied only on the experts' testimonies. This therefore means that a Sole Expert would have had the same function as the arbitral tribunal in this specific instant. In addition, a Sole Expert Determination would have taken a few months to solve the dispute, instead of more than two years. As a result, it would have been less costly, and the parties could have focused on the more complex aspects of their dispute.

In these technical issues, reliance on a TAC and SED is more efficient than going to arbitration. Parties should consider, if it is possible, to submit the factual aspects of their disputes to these former means of dispute resolution, and keep arbitration for the most complex cases or features of their dispute.

7.4.2.2. Application of the MTDR clause for Production Phase

With regards to the MTDR clause applicable to the Production Phase of oil and gas investment projects, it will be tested against the case of *EnCana Corporation v Ecuador*.[1169]

The claim concerned measures taken by Ecuador in respect of two subsidiaries of EnCana (fully owned). In 1993, Ecuador amended its Hydrocarbons Law, permitting the conclusion of participation contracts for the exploration and exploitation of oil and gas in Ecuador. These contracts provided for the exploitation of the subsoil at the own risks and costs of the investor. The

[1168] *Gujarat State Petroleum v Yemen*, para 272.
[1169] *EnCana Corporation v. Republic of Ecuador* (Award) [2006] LCIA Case No UN3481 (*EnCana v Ecuador*).

contractor had a right to a share in the production of the contract area, depending on the volume of produced hydrocarbons.

The subsidiaries of EnCana, AEC and City Oriente Limited (not yet subsidiaries at the time because EnCana only acquired Pacalta Resources Limited in May 1999, which owned AEC, which in turn indirectly owned City Oriente Limited) entered into participation contracts:

- On 29 March 1995: COL for “Block 27 Participation Contract”;
- On 25 July 1995: AEC for “Tarapoa Participation Contract” (which modified an older association contract concluded on 23 October 1973);
- On 27 October 1995: AEC for “18B Fanny Unitization Agreement”;
- On 25 November 1999: AEC for “Mariann 4A Unitization Agreement”.

All of these contracts provided for the companies to retain a share of the oil produced, according to a factor named “X Factor”. These factors were set on low levels as the production at the time of the conclusion of the contracts was estimated to remain low. The X Factor was then increased when oil production in 18b Fanny and Tarapoa increased. Agreement between the parties was reached on 12 December 1997, and finally approved by State bodies for 18B Fanny on 14 July 1999 and Tarapoa on 2 August 2001.

A dispute arose following the change in Ecuadorian Law regarding VAT refunds for oil exploration and extraction under participation contracts, after a Reform of the Ecuadorian Tax Regime of 30 April 1999. After executive acts, judicial decisions and an Interpretative Law, Ecuador decided that VAT payable by oil companies was not refundable as the companies were not engaged in manufacture under the terms of the applicable law (Article 69A ITRL). This position was only reached after disagreements between the different State actors (PetroEcuador, tax administration and President of Ecuador) and after the companies sought readjustment of the Participation Contracts.

The arbitral tribunal found in favour of the State. However, it appears that such a dispute could have been at least partly resolved by a Dispute Board. First, the existence of a DB would have forced the parties to communicate regularly on the performance of the contracts. Second, had a formal complaint been put forward

before the DB, it would have been competent to determine whether the activities undertake by the Claimants constituted manufacture and were subject to VAT refunds. The decision that would have been issued by the DB could have led to the Respondent being ordered to repay the VAT, or simply dismissing the claims of the Claimant, which was in any case the only decision that could have been reached and has been reached by the arbitral tribunal in this case. Furthermore, the decision of a DB can always be challenged or enforced before an arbitral tribunal. Should the parties unable to settle after the decision of the DB is rendered, they could have gone to arbitration. It is likely that the arbitral tribunal would have been able to issue an award rapidly in this regard, as the ground-work would have been completed by the DB.

7.5. Conclusion

Muli-tiered dispute resolution clauses, or escalation clauses, are very common in long-term contracts such as hydrocarbons exploration and production contracts. They indeed act as a filter, limiting access to arbitration to the most complex disputes.[1170] As a consequence, the efficiency of the resolution of disputes is increased and costs are reduced.[1171] Moreover, by creating a sequence of ADRMs from cooperative to adversarial, they allow to preserve the relationship between the parties at a dispute stage.[1172] The compulsory character of each step will depend on the wording of the clause and on the timeframe provided for each mechanism.[1173] Regarding this latter element, parties should rely on objective means of calculation of time, such as days and months. Using terms such as ‘failure of negotiations’ may not have the same meaning for the parties, hence creating another dispute as to whether progression to the next dispute resolution mechanism is possible.[1174]

Unconventional ADRMs are often found in oil and gas contracts as part of a multi-tiered dispute resolution clause. The classical dispute resolution clause consists in negotiation or amicable settlement, SED, and finally arbitration. TACs are also implemented in five contracts. However, they are not included as a proper step

[1170] Tevendale and others (n 1099) 32-33; Berger (n 1098) 1.
[1171] Michael Pryles, ‘Multi-tiered dispute resolution clauses’ (2001) 18(2) *Journal of International Arbitration* 159, 159
[1172] Berger (n 1098) 2.
[1173] Berger (n 1098) 4.
[1174] Pryles (n 1171) 160.

of the dispute resolution process. They are generally implemented through a specific clause, at the beginning of the contract. It stems from this observation that TACs have yet to be considered as a real ADRM, able to settle technical but also legal disputes at their earliest stage. A possible way to involve TACs in the dispute resolution process would be to link the TAC's procedure to another mechanism, which would then act as an 'appeal' or second-step mechanism.[1175] Unlike TACs and SED, none of the contracts provide for DBs. Their efficiency is recognised, but their insertion in an escalation clause may seem redundant if there already is a TAC or a SED clause included. DBs and SED are too close in their dispute resolution aspect to be used conjointly. Furthermore, if implemented together, the high success of DRBs would leave a residual role to SED. In this regard, DBs should be used not as a supplementary step in an escalation clause, but as an alternative to SED and TAC at the production stage of an oil and gas investment contract. The solution is therefore a modulable escalation clause between the exploration phase and the development/production phase. DBs could be a great asset in petroleum contracts, as they are a tested and approved method for construction disputes. Resort to arbitration for unresolved issues is always possible, and given the precedents of DBs, it will be reduced to the most complex issues.

[1175] Greek contract (n 41) art 4.10.

8. CHAPTER 8. CONCLUSION

The oil and gas industry is highly specific and cannot be compared to any others. Oil and gas operations are the result of an intricacy of different contracts, different legal regimes, different nationalities. There are three major groups of oil and gas contracts. First, the investment contracts, or Host State contracts, are concluded between an oil company and the State (or its representative). Their purpose is to attract investment in order to develop oil and gas operations in this State, either because it lacks the financial means or the technical and technological knowledge to undertake these operations by itself. The second type of contracts is solely private, as they are concluded between companies. These contracts can be sub-contracting, by which the IOC delegates the works it has to undertake under the investment contract to another company. They can be concluded to pursue and deliver an environmental study, to manufacture materials for the spudding of the well, to analyse geological and geophysical samples. The contracts can also be consortium contracts: these establish a contractual structure between different investing companies. The consortium will be the entity bidding to obtain the oil and gas investment contract and then realise the oil and gas operations. Finally, treaties and agreements are signed between States to delimitate their maritime and land boundaries. This multiplicity of contracts and parties entails a diversity of disputes, specific to the oil and gas industry.

The thesis has provided an extensive legal analysis of the dispute resolution system of oil and gas investment contracts. The study undertaken permitted to cover and discuss four main questions:

- What is the impact of *lex petrolea* on the emergence of new mechanisms of dispute resolution and dispute prevention?
- What are “unconventional” ADRMs and why should they be favoured over “traditional” ADRMs?
- Is arbitration still an adequate dispute resolution mechanism?
- Is there a model dispute resolution clause adapted to the oil and gas industry specifically?

The thesis was built upon the consideration that the dispute resolution system currently used in oil and gas investment contracts is not effective enough yet.

There are still a lot of arbitrations, which therefore means that the previous steps in the dispute resolution process are not working properly. The choice hence is to either not provide for ADRMs in the contract, besides arbitration. Or to decide to use ADRMs that are proven to be effective.

The system should be reviewed taking into account the products and developments of *lex petrolea*. The dispute resolution and avoidance mechanisms arising out of *lex petrolea* often emerge from judgements and arbitral awards.

For instance, the ICJ and international arbitration have developed a reliable corpus of rules applicable to delimitation disputes, partly based on existing international regulations.
Boundary and delimitation disputes primarily arise from overlap between the UNCLOS zones. These disputes, although principally involving neighbouring states, have an impact on oil and gas operations and therefore oil and gas investment contracts.
This impact is substantive, meaning that boundary and delimitation disputes have created a new set of rules, designed and applicable to this specific type of disputes. Resultantly, boundary disputes and their solutions through agreements or arbitration and litigation have created and established principles for the delimitation. Furthermore, the different conventions applicable to boundary issues as well as the conduct of practice have led to the emergence of ADRMs for the resolution of such disputes. Indeed, resort to amicable means of dispute settlement is the basic rule of the UNCLOS.

Clear delimitation of a state's boundaries stems from the need of protection of its territory and of the possible resources of the subsoil. The first means to ensure integrity of the soil, airspace and subsoil of a state is by concluding boundary treaties with their neighbours. Boundary treaties are agreements by which the states delimit together the outer boundaries of their own territories. These treaties are the result of negotiations or mediation/conciliation procedures when the parties were unable to reach an agreement by themselves. The use of ADRMs in boundary delimitation is generalised and is the basis for all dispute resolution. The conciliation services of the Permanent Court of Arbitration have helped

Australia and Timor-Leste to solve their maritime delimitation issue.[1176] Similarly, resort to good offices of institutions enhance the implementation of boundary agreements, whilst upholding peaceful relationships between countries. However, and as for oil and gas investment disputes, ADRMs are not always successful and resort to final means of dispute resolution can be unavoidable. In the context of boundary disputes, parties can present their claim before an arbitral tribunal or the International Court of Justice.

Resorting to a court of justice for delimitation disputes does not suffer the same reluctance as for investment disputes. This stems from the fact that for delimitation disputes, the parties will access international courts such as the International Tribunal for the Law of the Sea and the International Court of Justice. The participation of ICJ and ITLOS judgements to the *lex petrolea* has at times be questioned, due to the apparent limitation of sources of *lex petrolea* to arbitration awards. Nevertheless, ICJ judgements, more so than arbitral awards, create precedent in international law. Binding on the parties, judgements must be directly implemented and therefore ICJ judgements create precedent. Furthermore, states may also implement previous decisions and provisions of ICJ's tribunals in their delimitation treaties and agreements or in their national petroleum laws. In the same manner as arbitral awards, ICJ judgements influence the methods and rules to solve delimitation disputes which can themselves impact oil and gas operations. Resultantly, the decisions and the provisions of ICJ's judgements form a source of *lex petrolea*, alongside arbitral awards.

Furthermore, the practice of the ICJ in delimitation disputes has reached a certain level of consistency and predictability. It prompts states to find a solution through diplomatic means rather than resorting to international courts. As a result, the consistent precedents of the ICJ participates to the evolution of diplomatic means and ADRMs in delimitation disputes and therefore, of *lex petrolea*.

[1176] Permanent Court of Arbitration 'Report and Recommendations of the Compulsory Conciliation Commission Between Timor-Leste and Australia on the Timor Sea' (2018) PCA Case no 2016-10.

The ICJ has developed the rules applicable to boundary delimitations, building on the principles set out in international conventions. This interpretation has had an impact on oil and gas operations.

The main principle for delimitating a maritime boundary is to follow an equidistant line between the two countries, when the zones are opposite or adjacent. But for delimitation of EEZ and continental shelf, the silence of the UNCLOS has forced the ICJ to establish principles. The ICJ considered that an equidistance line should be followed in this context as well, but equitable principles and relevant circumstances should be taken into account as well. The ICJ has a three-step process: it first draws the equidistant line and then alter it depending on equitable principles and special circumstances. Finally, the court will verify that the areas are proportional. The notion of special circumstances for delimitation cases involving oil and gas issues relies on the conduct of the parties. The ICJ will take into account the existence of petroleum laws, a pre-existing delimitation line determined by borders of oil and gas fields, or an agreement between the parties as to the exploitation of these oil and gas fields to modify the principle of an equidistant line.[1177] In the absence of such elements, hydrocarbon concessions are not considered special circumstances mandating alteration of the equidistant line of delimitation. Such position is also held by the ICJ in relation to land delimitation. The basis for excluding oil and gas fields from criteria of delimitation is practically sensible. Using the outer limits of oil and gas fields as a blueprint for border delimitation would end in intricate lines, increasing the risks of violating the newly established border.

The consistency and reliability of the ICJ judgements with regards to boundary delimitation must be considered as creating substantive rules applicable to the oil and gas field. The mechanism of borders' delimitation has therefore entered the realm of *lex petrolea*.

The non-relevance of oil and gas concessions in boundary delimitation has had for consequence a change in practice. IOCs tend to not intervene nor undertake exploration and exploitation in disputed areas. However, as delimitation disputes can arise at any moment, contractual mechanisms such as force majeure clauses

[1177] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 18 paras 96 and 133(C)(2).

have been included in investment contracts in order to protect the IOC. Their use has been generalised in investment contracts, with scopes of different wideness. The *lex petrolea*, through the arbitral award *Guyana v Suriname*, recognised the right for an IOC to use a force majeure clause to escape boundary disputes over the oil and gas field it operates within.[1178] Force majeure clauses are however limited in their effects and parties should not rely exclusively on them to prevent or avoid consequences of boundary disputes.

IOCs, instead of avoiding boundary disputes, can also be involved in the dispute resolution process between the two states. It can provide good offices as a support role and therefore participate to the dispute resolution mechanism. The support can also take the form of a technological, financial or legal assistance.

Also, Joint Development Zones as a mitigating mechanism are encouraged by the UNCLOS. These provisional agreements allow states to continue exploitation of oil and gas fields in disputed areas, whilst the dispute is being settled, and can be perpetuated.[1179] Just as for oil and gas fields in delimitation disputes, JDZs will not be taken into account in the delimitation. As a contractual mechanism, JDZs create a discussion pool for states and can lead, if not to the full resolution of the dispute, to a mitigation of its effects. Joint Development Agreements can be considered an element of the good oilfield practice and therefore a part of *lex petrolea*. Furthermore, their description as a peaceful mean of dispute resolution make them to some extent an ADRM, emerging from *lex petrolea*.

The inception of rules and ADRMs applicable to the oil and gas industry from arbitral awards is not limited to boundary disputes. Arbitral tribunals have made emerge a consistent interpretation of stabilisation clauses, transforming it from a simple contractual clause to a Dispute Prevention and Resolution Mechanism.

Like force majeure clauses, stabilisation clauses are risk-management mechanisms. Their aim is to provide to investors guarantees as to the stability of the legal framework applicable to the contract. In addition to this risk-managing facet, the consistent jurisprudence developed in arbitration awards have

[1178] *Guyana v Suriname* (Award of the Arbitral Tribunal) [2007] PCA Case No 2004-04, para 152.
[1179] UNCLOS arts 74.3 and 83.3.

transformed stabilisation clauses into an unconventional ADRM, presenting both dispute resolution and dispute prevention aspects. Indeed, this consistency has allowed parties to foresee the treatment that would be given to the breach of a stabilisation clause by the State.

The practice of arbitral tribunals has led to the emergence of rules regarding the legality of direct and indirect expropriations in spite of a stabilisation clause; the standard of compensation owed when an expropriation has intervened, and the contract included a stabilisation clause. The right for States to expropriate companies has been long recognised in international law but expropriation must follow certain criteria in order to be legal. Indeed, the expropriation must be for a public purpose, must not be discriminatory and be justly and promptly compensated to the investor. Generally, expropriation intervenes by virtue of a change in the law or regulations of the host State. However, the insertion of a stabilisation clause in an investment contract does not render an expropriation illegal.

Arbitral tribunals, through consistent rulings, have reached a balance between the right of a State to expropriate and the expectation of an investor to not be nationalised. A stabilisation clause is without effect on the expropriation itself, however its breach will trigger additional compensation. Arbitral tribunals have found that in the context of expropriations, stabilisation clauses introduce legitimate expectations of the investor. The expropriation creates a breach of the stabilisation clause, hence of the legitimate expectations created. This breach of legitimate expectations is the basis for additional compensation in the case of expropriation in spite of a stabilisation clause.

The characterisation of stabilisation clause as creating legitimate expectations is at the root of the relation between stabilisation clauses and the Fair and Equitable Standard (FET). Due to its more flexible conditions, the FET standard allows compensation where a claim for expropriation would have failed. Provided for in most BITs and MITs, the FET standard is however never defined. Its content has therefore been determined by arbitral tribunals, including it into the *lex petrolea*. As a result, the FET standard is now considered to encompass protection of good faith; transparency, consistency and non-discrimination; and legitimate expectations.

Stabilisation clauses have been recognised as creating legitimate expectations in the context of expropriations, and of FET standard. On this basis, a breach of a stabilisation clause necessarily amounts to a breach of the FET standard. Although this assertion was not given in an oil and gas arbitration, the ruling is applicable to all industries. Furthermore, this interpretation has been held in several arbitration awards, making it a reliable principle and therefore a customary rule. The recognition of the principle "breach of stabilisation clause equals breach of FET standard" allowed arbitral tribunals to establish the compensation owed to an investor on this basis, given that the compensation principles are not provided in BITs and MITs. In this regard, the compensation owed to an investor for breach of a stabilisation clause is full compensation of the loss suffered. As a result, the standard of compensation due in case of an unlawful expropriation or for FET breach is the same. Hence they are not cumulative. Cumulation of compensation for expropriation and breach of FET is only possible when the expropriation is unlawful for lack of payment of compensation, i.e. when all the other conditions have been met. Although not embodied in awards due to the FET claims being dismissed, a higher amount of compensation for cases presenting both a FET breach and an unlawful expropriation for non-payment of the just compensation is viable. Indeed, it has been the position of arbitral tribunals since the cases of *Kuwait v Aminoil* and *Amoco v Iran*, which are said to be the seminal cases of *lex petrolea*.

A stabilisation clause, as a mere contractual mechanism, is a guarantee for the investor that the contractual framework will not be affected, changed, during the performance of the contract. Arbitral practice has increased the effect and impact of stabilisation clauses in relation with investment claims, based on a BIT or MIT. The position developed in arbitral awards have helped creating a legal framework, in which the breach of a stabilisation clause entails the breach of the FET standard and therefore the right to full compensation of the loss suffered. The certainty and consistency of these awards warrant considering this position as an actual rule, emerging from the *lex petrolea*.

Furthermore, the fact that awards are consistent give predictability to the parties. Because the parties – and in this case the State especially – know the treatment that will be applied to the breach of a stabilisation clause in an investment

contract. If the state proceeded to an expropriation, the tribunal will observe whether the conditions for a lawful expropriation have been met. In the event where the expropriation is lawful, but just compensation has not yet been paid, it is admitted that the breach of the stabilisation clause will give rise to another compensation, to be added to the just compensation for expropriation. In the case where expropriation does not exist but changes in the legal framework have deprived the investor of part or all of its investment, damages can be claimed on the basis of breach of the FET standard. As for expropriation, the jurisprudence is constant: a breach of a stabilisation clause amounts to a breach of the FET standard, and full compensation for the loss suffered is owed.

This predictability is likely to make the parties consider breaching the stabilisation clause, proceed to unlawful expropriation, and going to arbitration. The consistency of arbitral awards is an incentive for parties to settle once a breach of a stabilisation clause has occurred. More so, it may act as a prevention mechanism, by which parties will refrain from breaching stabilisation clauses. This interpretation is further strengthened by the limited number of published arbitration awards on this question. As a result, the position held in this thesis is that arbitration, via constant and consistent awards, has transformed stabilisation clauses into an ADRM, promoting settlement between the parties in case of a breach of a stabilisation clause. Additionally, the predictability of arbitral awards has given to stabilisation clauses a role of DPM, as disputes are less likely to arise with the insertion of a stabilisation clause. Given the two aspects of stabilisation clauses, i.e. ADRM and DPM, it can be concluded that arbitral practice has elevated stabilisation clauses to an unconventional ADRM.

It is therefore sustained that stabilisation clauses should be generalised in oil and gas investment contracts as a Dispute Prevention mechanism, participating to a more effective global dispute resolution system

The almost automatic conclusion of Joint-Operating Agreements (JOAs) participates to the avoidance of investor-State conflicts as well. JOAs used to be concluded between investors and subcontractors only, but States have increased their participation in these contracts in order to gain further control on oil and gas operations. Although not mandatory, a JOA is considered necessary in practice,

and its absence operations is rarely the decision of the parties, but mostly the result of their failure to agree on one.[1180] JOAs are concluded for two main reasons. The first one is to determine and settle the basis for sharing rights and liabilities among the parties. The second is to create a legal framework for the regulation and the control of the petroleum operations with the designation of an operator, executing its duties under the supervision of a Joint Operating Committee (JOC). The JOC consists in a periodical discussion forum, where all parties to the petroleum operations, operators and non-operators, will bring forward questions and proposals on the conduct of the upcoming operations. All members are equal and can vote, guaranteeing a sustainable relationship between them. Resultantly, the cyclical negotiations realised within the JOC constitute a Dispute Prevention as the discussion allows to evacuate conflicts before they are disputes. A JOC is also a Dispute Resolution Mechanism, allowing to solve disputes before the situation degenerates by means of specific clauses and contractual provisions: Sole Risk and Non-Consent clauses. The generalisation of JOAs comes from the industry practice, and therefore from *lex petrolea*. The thesis has hence ascertained that *lex petrolea* is a creator of ADRMs and DPMs, by means of precedents and industry practice.

Practice should equally consider mechanisms it already uses and that are consequently part of *lex petrolea*, but in a different light. This assertion applies to Technical Advisory Committees, Sole Expert Determination and arbitration.

TACs are committees implemented at the start of the contract in order to present and if the case arises, resolve disputes relating to technical aspects of the oil and gas exploration and exploitation. They are generally provided for in oil and gas investment contracts, but there is no consistency in the name given to them: as a result, they can be designated as “Management Committees”, “Coordination Committees” or “Advisory Committee”. TACs are therefore more common in oil and gas investment contracts that it seems at first: the distinction is based solely on their denomination, and not their duties and functions.

[1180] Gray (n 141) 137.

TACs are composed of members appointed by both parties to the contract. The number of TAC members depends on the contracts, but they are equally nominated by the parties. If the state can designate six members, the IOC will be allowed the same number of representatives. Parties are therefore afoot and have the same force of presence in each meeting.
Investment contracts can provide for the qualification of TAC members, but usually it is not the case. However, the questions and subjects presented before a TAC tend to be technical and parties will mostly appoint scientists, geologists and engineers in order to guarantee a global coverage of the issues that may arise. Nonetheless, in the absence of specific provisions on the qualifications of TAC members, parties are free to nominate lawyers, economics or market experts.

Meetings of TAC are held regularly and periodically, generally every trimester. This regularity ensures that all matters and possible problems are discussed and settled in due time. The periodicity is the main criteria making TACs a Dispute Prevention Mechanism. Additionally, parties can request emergency meetings in order for the parties to discuss immediately any situation or difficulty regarding the petroleum operations. The creation of a cyclical discussion entails the parties to regularly exchange their ideas, their positions and their beliefs on the works undertaken. The presentation of issues in due time to both parties help tackling the problem and find solutions before it becomes a dispute.

The role of a TAC is to review and appraise the Work Programme and Budget of the IOC, as per the provisions of the investment contract. Both the Minimum Work Obligations and the Minimum Work Expenditures have been negotiated and determined by the parties in the contract, before signing it. These obligations have to be fulfilled yearly or by the end of the Exploration Period. Compliance with these obligations are mandatory in order for the IOC to progress to a second Exploration Phase or the Production Phase. The IOC will present to the TAC its work programme and the budget allocated to the programme. The TAC will consider these programmes and provide proposals and comments them. For instance, they can question the appropriateness of undertaking works at a certain period of time.

TAC members will vote on the work programmes and budget presented, and each member has one vote, as to preserve the equality of the parties and ensure the non-adversarial character of the procedure.
The ADRM role of TAC result from this system of vote: if the members agree at a majority (or unanimity depending on the contracts), the issue presented is said to be resolved and settled. Unanimous vote can be problematic. If all the parties do not agree, the issue presented before the TAC then becomes a dispute which will have to be solved using other ADRMs. On this note, some contracts, such as the Greek Model Lease Agreement, provide for a dispute resolution system within the TAC procedure. Failure to reach an agreement under this dispute resolution mechanism will lead to the escalation of the dispute to the next ADRM. As a result, the role of TACs is dual. They are a DPM thanks to the periodical meetings they create, from the moment the contract is concluded, and the non-adversarial nature of the procedure. Secondly, they are an ADRM per se, acting as a first step in the dispute resolution process.

This two-pronged role of TACs ought to be recognised and favoured, as it has also a high cost/effectiveness ratio. Indeed, because a TAC is composed of representatives of the parties, it is free. There are no third-party to pay, meaning that even in the event of a failure of the mechanism, there are no loss for the parties.

If the procedure before the TAC is unsuccessful, the contract can impose on the parties to resort to SED. SED is an ADRM by which the parties decide to refer their dispute to a specific person, the expert, for a final and binding decision on a matter, generally technical. The Sole Expert is nominated jointly by both parties, ensuring trust in the process and the person. Some contracts may request, as for TAC members, that the Sole Expert present certain qualifications and competence. However, too much detail in the person of the Sole Expert may lead to further disputes and prevent the Sole Expert to be nominated in due time. Furthermore, imposing that the Sole Expert is an engineer, for instance, could result in the dissociation of the dispute. This means that the Sole Expert will resolve one facet of the dispute, whereas the legal element will have to be submitted to another forum such as an arbitral tribunal. The dispute resolution process will be doubled, increasing the costs and time associated. Dissociation

of the dispute can also have consequences on the decisions. It is indeed possible that the forums disagree and issue conflicting decisions. The parties will then be facing two disputes: the first one they sought to have resolved, and a second one resulting from the disagreement between the two forums.

The SED procedure is set within strict time limits, as to ensure that the dispute is solved in a timely manner. The nomination of the Sole Expert by the parties, the alternative appointment if the parties cannot agree on a Sole Expert, the acceptance by the Sole Expert of its mission must intervene within days. This organised timeframe also guarantees that the procedure will not end in a deadlock.

The Sole Expert exercises its mission depending on the description of the dispute made by the parties. To solve the dispute, the Sole Expert can request any document and information from the parties. Depending on the SED clause, parties can also submit these documents freely.

The decision of the Sole Expert, is, alike every other step of the procedure, subject to a time limit. In principle, the decision of the Sole Expert is final and binding on the parties, meaning that the parties are contractually bound by the decision and it is immediately enforceable. The parties are free to provide otherwise in the contract. These restrictions can be limited to appeals on point of law, manifest error and fraud, or larger and in that case provide a timeframe within which the parties can act against the decision issued. But such a choice would deprive SED of its effectiveness, already restricted. Indeed, the decision issued by the Sole Expert is only contractually binding between the parties, the same way a contract would be. The enforcement will depend on the law applying to the contract and to the Sole Expert Determination, as well as the courts before which enforcement is asked. The binding and final character is not solely applicable to the parties and is also a requirement for the Sole Expert. If the contract provides for a binding and final decision, the Sole Expert must issue a decision fitting these conditions. Its determination must be decisive and not give rise to possible challenges, unless in predetermined and specific cases.

The existence of an appeal procedure for Sole Expert Determination demonstrates that besides the “adjudicative” character of SED, it is at times still

considered a step in the dispute resolution process. All clauses provide for arbitration as the last means to solve their dispute. Although the opportunity to contest an erroneous or fraudulent determination must be preserved, considering SED as a first step towards arbitration only would deprive the whole procedure of its purpose. SED needs to be a final Alternative Dispute Resolution Mechanism, otherwise parties will directly go to arbitration and provide expert determination during the arbitral procedure instead. Or, in the absence of strict rules of appeal, they would challenge the Sole Expert's decision if they disagreed with it.

Arbitration is an incredible ADRM: it provides high quality dispute resolution, in a final and binding manner. Moreover, decisions are issued in a neutral and impartial forum by individuals skilled and competent in the matter at hand. For these reasons, arbitration has become the preferred final dispute resolution mechanism in oil and gas investment contracts.

Arbitration is an ADRM, involving consent of the parties to resort to it through a separate agreement or a clause in the contract. The arbitration clause is effective in the limits of its drafting. The scope of the arbitration clause is of most importance as it determines which disputes will be settled by arbitration. Failure in providing for a large scope could result, as in the case of SED, in a dissociation of the dispute resolution system. The part of the dispute included in the scope of the clause will be settled by arbitration, whereas the other part will have to be heard before a different forum, such as national courts. Another risk arising out of a poorly defined scope is the inception of a new dispute on the meaning and the extent of the clause itself. The parties will therefore be facing two disputes: the initial one that made them want to activate the dispute resolution clause; and the one on the clause.

The procedure of arbitration will be determined according to the institution the parties have chosen, or in the case of an *ad hoc* arbitration, to the provisions of the contract. Oil and gas investment contracts, based on the study undertaken in the thesis, tend to use arbitral institutions. Nevertheless, the arbitration procedure can be summarised in a few points. First, one of the parties will have to notify the other or the arbitral institution of its desire to start arbitration proceedings. If an institution is involved, the requesting party will have to pay a registering fee. Once

the case is registered, the parties must constitute the tribunal and appoint their arbitrators. Generally, each party appoint one arbitrator and the two party-appointed choose the third, who will be the president of the tribunal. Because disputes and disagreements are likely to arise during the appointment procedure, most arbitration rules have an alternative nomination system devolved to the institution or a third party once a certain time has elapsed without agreement of the parties. The parties will then exchange written memoranda supporting their positions, before the arbitral tribunal hears them on the issues. To provide further gravitas to their claims, parties can present experts and witnesses during the hearings. Once these steps have been completed, the arbitral tribunal will render its award in writing, exposing clearly its reasoning, the winning party and the costs associated with the decision. The award can be subject to correction and interpretation upon request of the parties or on the tribunal's own volition.

Although an arbitration award is final and binding on the parties, appeals are still possible unless the parties have provided otherwise in the contract. Right to appeal an arbitral award is anyway limited by the law of the country of the seat of the arbitration.

Arbitration hence appears to be an efficient dispute resolution mechanism, with a well organised procedure and pre-fixed delays to ensure resolution of the issue in a timely manner. However, the time-efficient aspect of arbitration, and with it its cost-efficient facet, have been affected. The strict procedure applicable, especially with regards to institutional arbitration, can cause delays and prevent arbitration to intervene in a swift way, right after the dispute has arisen. The process of sending a notice of arbitration, constituting the arbitral tribunal – with all the disagreements it may foster – and then pursuing with written memoranda and hearings, is heavy. Even the issuance of an award can intervene between 120 days and six months from the closure of the procedure, in the event where there are no corrections or interpretations requested. The nomination of arbitrators has sometimes taken 470 days, nearly a year and three months.[1181] The study conducted under the auspices of the Hellenic Hydrocarbon Resources Management has shown that the average arbitration time (for disputes relating to

[1181] Lee (n 1037) 79.

changes in the regulatory framework of the investment contract) ranged between 3 and four years, but one arbitration took 18 years.[1182]

It stems from the above that arbitration cannot intervene and resolve the dispute in a timely manner. Its characterisation as an unconventional ADRM hence is difficult as the first criteria is not met.

However, arbitration has developed sub-systems, namely the expedited procedure, the emergency arbitrator, and online arbitration (or e-arbitration) which present the advantage of solving a dispute in a shorter timeframe. The expedited procedure, also known as fast-track arbitration, has a lighter procedure than the "standard" arbitration. A sole arbitrator is appointed, and the delays to submit memoranda, hold hearings and issue the award are shortened. However, this procedure is only possible when the parties elected an arbitral institution. Furthermore, access to fast-track arbitration is restricted to low value claims, under two million dollars.

Emergency arbitration tackles the issue of provisional measures before the constitution of the arbitral tribunal. Parties can request an emergency arbitrator to order provisional measures in five to fifteen days depending on the institutional rules, without having to resort to national courts. Albeit limited to provisional measures, the effect of the emergency arbitrator on the parties' behaviour is larger. The emergency arbitrator may give the parties a first appreciation on the success of their claims if they were to be brought before a "traditional" arbitral tribunal. Resultantly, some parties decide to abandon their claims and settle as they realise they will not obtain an effective remedy, even if successful on the merits. Emergency arbitration therefore presents an ADRM aspect, beyond its sole procedural role.

Finally, e-arbitration is claimed to reduce dispute resolution times by using technology to accelerate the procedure. By switching to an online process, availability, accessibility and case management are enhanced. Despite the legal and technological limits, the most important aspect of arbitration, the enforceability of the award, is not affected. Online arbitration could therefore appear as an efficient alternative to "traditional" arbitration for reducing procedure lengths and therefore costs.

[1182] *Murphy Exploration & Production Company-International v The Republic of Ecuador* (Final Award) [2017] PCA Case No 2012-16.

As a result, although “traditional” arbitration may not fit the criterion for being qualified as an unconventional ADRM, some subset of it do allow to make such claim. In addition, arbitration does present elements of a Dispute Prevention Mechanism. Indeed, and this was demonstrated in relation with emergency arbitration, the mere resort to the procedure can lead the parties to settle. This assertion is equally true with regards to “traditional” arbitration. In a second study conducted with the Hellenic Hydrocarbon Resources Management, the results showed that 33 out of 115 investment arbitrations in oil and gas were either settled or discontinued after being registered. An agreement between the parties was therefore reached without needing an award, and at times, without using the arbitration proceedings at all.

In light of the foregoing, arbitration can be considered to have an early settlement aspect and therefore as a Dispute Prevention Mechanism. Based on the fact that parties settle after starting the proceedings, it is fair to assume that some settle before starting them, either reluctant to use arbitration or once threatened to be dragged in the process.

“Traditional” arbitration is not a perfect Unconventional ADRM and it does not fit the criteria perfectly. However, it should be regarded as more than a dispute resolution mechanism only. Arbitration permits early settlement of disputes and therefore avoids parties’ relationships to be terminally severed.

As a dispute resolution mechanism, arbitration may be the most efficient system for oil and gas investment contracts, despite its issues on time and costs. It is indeed the only ADRM benefiting from global recognition and enforceability, making it a trusted and reliable mechanism.

Moreover, practice would be well advised to introduce and feed itself from other practices and industries presenting the same characteristics of capital intensive and long-term operations. This is for instance the case of the construction industry, which has made the choice several years ago to implement Dispute Boards in its contracts.

DBs are common in construction contracts but yet to be implemented in oil and gas investment contracts. Yet, DBs are a very effective unconventional ADRM,

and a hybrid between TAC and SED. Like a TAC, a DB is constituted at the beginning of the contract and meetings are held periodically, before a dispute even arose. And like SED, the members of the board are experts, chosen by the parties for their qualifications and competences. DBs are usually composed of three members, two of them chosen by each party and the last member to be appointed by the two others. Parties choose Board members presenting professional qualities as well as personal, as the DB will exist until the completion of the contract. The parties must therefore trust the Board, in order for them to comply with the decisions that could be issued. Board members are impartial and neutral.

The system of periodical meetings of the DB with the parties represents the Dispute Prevention facet of this mechanism. As for TACs, the Board will meet, on-site or in another place, on a pre-determined basis, cyclically, without the need for a dispute to exist. DBs hence create a discussion forum, in which parties can expose their problems, positions and proposals to go forward. These regular visits allow familiarity of the Board members with the project and with the parties. This is strengthened by the obligation made to all parties and to all DB's members to be present at the visit.

The Dispute Prevention aspect of DBs is further strengthen by the informality of the procedure before the Board. the Board may help the parties determine the scope of the disagreement and suggest means to settle it, without further involvement of the Board. The DB can give its opinion to the parties, on their request or not, following a discussion or after communication to the DB that an issue exists. The opinion given by the DRB at this stage is not compulsory, and should only be considered as an advice in order for the parties to settle their disagreement between them. Moreover, the DB is not bound either by the informal advice it has given and may provide another solution if the disagreement is later brought before it for a hearing. The fact that the conversation is non-adversarial and presented before the DB members enhances settlement between the parties as they can do concessions "without losing face".[1183]

[1183] Harmon (n 739) 'Construction conflicts and dispute review boards' 73.

DBs are an unconventional ADRM, meaning that they act as a dispute resolution mechanism as well. This facet is evidenced with the procedure applicable to disagreement that escalated into disputes. In that case, the DB will hold a hearing. Albeit still informal, DBs often require the parties to provide a written statement of their claims, a “position paper”. If the parties have provided for an institutional or a specific process in their contract, this procedure will have to be followed. In this instance, the procedure will be much more formal. Still, the parties are not required to follow a legal presentation of their dispute: rather, they should expose it in their view and why their opinion is the right one. In this regard, hearings are generally conducted in presence of all the parties but without legal representation. The dispute remains in the hands of the parties. During the hearing, DB members will usually ask questions to the parties, and once it has collected all necessary information to reach a decision, the hearing is adjourned.

The true nature of DBs as an ADRM can be seen in the decision issued by the Board. There are two types of Boards: Dispute Review Boards and Dispute Adjudication Boards. DRBs issue non-binding recommendations, whereas DABs render a decision binding on the parties. Binding recommendations issued by a DAB must be complied with immediately. An appeal is always possible, depending on the contract.

The non-binding character of a recommendation does not however affect the efficacy of the DRB procedure. Parties abide by the recommendation for several reasons. Firstly, they have confidence in the neutrality, professionalism and familiarity of the DRB members. Furthermore, recommendations are rarely affecting one party only every time: it is rare that the same party will always be losing.[1184] In addition, even if non-binding, the recommendation will be worded as an arbitral award, exposing the opinions presented and the reasons of the Board’s decision. Finally, a non-binding recommendation may still be admissible in further proceedings, such as arbitration. In these cases, there is another incentive for the parties to follow the recommendation, as arbitrators and judges of the subsequent proceedings themselves will be tempted to implement the recommendation in their judgment or award.

[1184] Chapman, 'The Use of Dispute Boards on Major Infrastructure Projects' (n 727) 224.

DBs have been often criticised for their cost. Indeed, they are composed of three independent members who are not party representatives, contrary to TACs. Members must be paid. Also, as they are implemented at the inception of the contract and last until it is finished, DBs may be running for ten years or more depending on the project. The cost of a DB has however been extensively studied. All studies have demonstrated that a DB amounts to 0,1 to 0,3% of the overall project cost.[1185] The costs can be shared between the parties, as they would be for an SED procedure. Mitigation of the costs can also be done by appointing a one-member DB or by reducing the numbers of meetings per year. The advantages of a DB largely compensate its costs. DBs have a success rate comprised between 90 and 98%.[1186] This means that out of all issues and disputes submitted to a DB, only 2 to 10% need further proceedings, hence reducing the overall dispute costs, be it on the grounds of legal expenses, increased project costs and hidden costs.

Finally, the main issue in the dispute resolution system of the oil and gas industry is that the mechanisms chosen do not interact properly. Oil and gas investment contracts have two phases and therefore the dispute resolution mechanism, the multi-tiered dispute resolution clause should reflect this specificity. The proposal made in this thesis hence is a modulable multi-tiered dispute resolution clause (MTDR) clause. A MTDR clause, also called multi-step or escalation clause, is a contractual system implementing different ADRMs. The thesis, based on the previous chapters, proposes an innovative and flexible MTDR clause. The MTDR clause will evolve depending on the phase of the oil and gas investment contract. The proposition is that the MTDR clause for the exploration phase includes a TAC clause, a SED clause and an arbitration clause. This succession of ADRMs has been chosen due to the nature of the disputes arising during the exploration phase. The exploration phase consists in, for the investor, to undertake all operations required for discovering hydrocarbons. The disputes arising out of this phase are therefore highly technical. They regard questions of geophysical and geological studies, environmental studies and approvals, magnetotelluric surveys among others. Furthermore, new operations are realised frequently, and the

[1185] Agdas, Ellis (n 740) 126; Menassa, Peña Mora (n 785) 66.
[1186] Menassa, Peña Mora (n 785) 74libbey; Libbey (n 758) 844; Horner (n 787) 17.

issues change regularly. Resultantly, TAC meetings are necessary to ensure that the parties are able to exchange views and opinions on the different works realised and planned. For the same reason, resorting to SED in the case of failure of the TAC process appears to be the adequate mechanism. It provides the parties with a binding decision, issued in a short timeframe and by a skilled professional, specialised in the issue at hand. SED is the best mechanism to cover the versatility of the disputes that could arise.

For the exploitation/production phase, the thesis proposes a different interaction of mechanisms. During the production phase, disputes tend to be of a legal nature as well as technical. They will concern the relationship of the parties, for instance a renegotiation of the contract, issues regarding the quality of hydrocarbons extracted. The insertion of a DB from the inception of the exploitation operations guarantees a discussion and informal negotiation process. A DB, with its cyclical meetings on site, as well as the decisions that can be issued – binding or not – upholds the contractual relationship of the parties.

For each phase, the last ADRM is arbitration. It is indeed, to this day, the only final and binding ADRM, benefiting from global recognition.

It is hoped that this two-fold MTDR clause will allow parties to oil and gas investment contracts to first prevent the emergence of disputes, by implementing periodical discussions, either by means of a TAC or a DB. The insertion of Dispute Prevention Mechanisms participates to risk and dispute management, and therefore to savings for investors and States. Furthermore, an effective dispute management system permits to safeguard the contractual relationship of the parties. Due to the investment needed to undertake oil and gas operations, and the duration of the contracts, preserving this relationship is crucial to make sure oil and gas investment contracts are performed until their terms. Also, States and IOCs do not have the same objectives when entering into the contractual relationship. The State is looking for the most beneficial, extensive extraction of its resources. On the other hand, the investor wants to cover the costs of the investment and make profits. Providing for dispute resolution mechanisms with periodical discussions helps the parties to find common grounds and perpetuate the contracts in a collaborative manner. Another objective is for parties to solve

their disputes early, as to limit delays and costs. ADRMs and more so “unconventional” ADRMs are known to be extremely cost effective. This is either because the process is free, as in negotiation and TACs, or because the procedure is quickly expedited, as demonstrated with SED and DBs. Finally, resort to arbitration, hereby reduced, will be realised in the best conditions possible, providing a final and binding award in a short timeframe. Considering “unconventional” ADRMs as a filter and limiting access to arbitration to the most complex cases will benefit not only the oil and gas industry, but investor-State arbitration as a whole.

APPENDICES

Appendix 1 — Petroleum Agreement for the Development and Production of Petroleum in Gorisht-Kocul Field between Albpetrol Sh.A. and Stream Oil & Gas Limited (2007) <https://www.resourcecontracts.org/contract/ocds-591adf-4847279287/view#/>
(Albanian contract)

Appendix 2 — Model Exploration and Production Sharing Contract of the Republic of Cyprus (2012) <https://www.resourcecontracts.org/contract/ocds-591adf-1348839751/view#/>
(Cypriot contract)

Appendix 3 — Model Lease Agreement between the Hellenic Hydrocarbon Resources Management S.A. (HHRM SA) and companies […] for granting rights for exploration and exploitation of hydrocarbons at the offshore area of Block […] (2017) <https://www.greekhydrocarbons.gr/en/Ionian_en.html>
(Greek contract)

Appendix 4 — Exploration and Production Agreement for Petroleum Activities in Block 4 between the Republic of Lebanon and Total E&P Liban SAL and Eni Lebanon B.V. and Novatek Lebanon SAL (2018) <https://www.resourcecontracts.org/countries/lb>
(Lebanese contract)

Appendix 5 — Exploration and Production Sharing Agreement of the Republic of Libya <https://www.resourcecontracts.org/contract/ocds-591adf-9619723902/view#/>
(Libyan contract)

Appendix 6 — Contract for the Exploration, Development and Production of Petroleum between the Government of the Syrian Arab Republic and Syrian Petroleum Company and Loon Energy Inc. (Lattakia Contract) (2007) <https://www.resourcecontracts.org/contract/ocds-591adf-1212784561/view#/>
(Syrian contract)

Appendix 7 — Exploration and Production Sharing Agreement between Joint Exploration Exploitation and Petroleum Services Company and Canadian Superior Energy Inc for the "7th of November Block" (2008) <https://www.resourcecontracts.org/contract/ocds-591adf-2175879797/view#/pdf>
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