Resolving petroleum disputes out of court in East Africa

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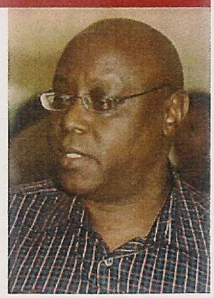

Like an engine, the petroleum industry is a complicated machine with many finely crafted parts, some of which move at a very fast speed. A breakdown in one part could stop the whole system or the entire network. Therefore, friction, heat and breakdowns must be avoided, kept to a minimum and fixed as fast as possible.

The entire supply chain from prospecting, importing, exporting, refining, storage, transportation, marketing, distribution and retailing is facilitated by contracts between various parties like investors, contractors, financiers, regulatory authorities.

Unfortunately, but predictably, some parties are unable or unwilling to perform their contractual obligations. The offended parties have the option of either going to court or resolving the matter out of court. Disputes in the industry resolve around quality of the product, the quantity, delivery times, payments and contract termination.

Courts in East Africa are very supportive of Alternative Dispute Resolution (ADR) because they believe it is in public interest that disputes are resolved as amicably as possible. Laws and court systems differ from one East African country to another. However, the fundamental principles like privacy, flexibility and finality are universal.

Types of ADR Procedures

The ADR methods most commonly employed in the industry are negotiation, mediation, expert determination, adjudication, dispute adjudication boards and arbitration. All these procedures are called Alternative Dispute Resolution methods because they offer alternative to the court process.

ADR has been referred to as "designer justice" as the parties themselves can determine the power of the dispute resolver, the venue, language and the procedure to be followed in the proceedings and even the qualifications the dispute resolver must have.

Courts are not as flexible. Parties must fit in the court diaries. Court records are also public documents. The judges are learned in law but might have limited technical skills, which may be required in the resolution of certain types of disputes. Therefore, parties who require separate treatment must seek resolution elsewhere.

Negotiation and mediation are ideal methods for resolving disputes between parties who have an on-going relationship, for example employers and employees, an oil company and its distributors or among company shareholders.

The process is called "negotiation" if the disputants are engaged directly and "mediation" when a third party gets involved to facilitate discussion. The mediator does not generally provide solutions: the parties themselves hammer out an agreement, which when signed binds both parties, like any other contract would.

Expert determination involves an independent expert in a particular field. Parties could, for example, agree that disputes about the quality of lubricants would be determined by a certain laboratory and that the findings of that laboratory would be final. Leases for filling stations typically state that a registered valuer shall determine the rent if the parties fail to agree.

Adjudication is commonly used in the construction of refineries, pipelines, storage facilities and filling stations. The consequences of work stoppage are so serious that parties would rather get temporary relief in a hurry and deal with the matter more substantively later should the need arise. Adjudication provides an interim outcome, which is binding unless challenged through arbitration or litigation. Many adjudication decisions end up being final by default.

Disputes in large construction projects are adjudicated by Dispute Adjudication Boards, which are involved in the project from commencement. Such boards are fast and efficient because they are already familiar with the project by the time a dispute arises. They are typically made up of three people – one appointed by either party and a third one appointed by the two. The adjudication costs are reasonable compared to the size of the project and to the losses that work stoppage for even a few days could cause.

Arbitration is a court-like procedure. The parties appoint an arbitration tribunal of one or three people, who listen to both sides and make a decision called an "award". It is the most thorough ADR mechanism but it takes time and is potentially expensive. An arbitrator's award is final and binding and can be challenged on very limited grounds, for example if the arbitrator has somehow refused to listen to one side.

Arbitration practice in Kenya is governed by the Arbitration Act of 1995, which was amended in 2010. It is a cut-and-paste job of a standardised arbitration law prepared by a United Nations agency for use worldwide. Uganda and Rwanda arbitration laws are from that source. The Tanzanian law is similar but not identical and serves the same purpose.

Specific East African Examples

Oil companies have been involved in arbitration with each other and with other parties for many years. Several real East African examples are given below without the names.

Two oil companies went to arbitration in early 2000s over the termination of a contract under which one was re-blending lubricants for the other. In another case, a judge ruled that there was in fact no dispute between the parties capable of being referred to arbitration.

Three arbitrators were appointed to resolve a dispute between an oil company and its transporter following termination of the contract. The losing party applied to court to set aside the award alleging that one of the arbitrators had exhibited bias and that the sum awarded was unduly high. The judge dismissed the application with costs and held, among other things, that the "court is not at all alarmed by the apparent largeness and volume of damages awarded by the arbitrators in this case".

An appeal court once faced the decision of a valuer who had over-stepped his mandate. The lease stipulated that an independent valuer would determine the rent payable by an oil company to a property owner of a filling station if the parties disagreed on the rent payable at lease renewal. The valuer set the market rent to be Ksh.167,000/= pm but also recommended that the rent should be going up by 20% every 2 years. The oil company accepted the new rate but went to court to dispute the recommendation of the automatic increase, since that was not provided for in the lease. The matter eventually went to the court of appeal, where three judges ruled in favour of the oil company.

Conclusion

Some of Kenya's Vision 2030 flagship projects, various regional projects and the exploitation of newly discovered oil and gas in Kenya, Uganda and Tanzania involve construction of fuel pipelines, storage facilities, etc. Any disputes arising from such mega projects are particularly suitable for resolution through ADR due to the fact that delays would be very expensive and could involve or affect many parties and several countries.

Many disputes arising out of contracts in the petroleum industry are resolved privately out of court through various ADR procedures chosen by the parties. The suitability of a specific ADR procedure or series of procedures depend on the nature of the dispute, amount of money involved, the parties involved and other related circumstances.

East African courts recognise and enforce the outcome of ADR procedures. As one judge has said, "it is self-evident that ...courts have adopted a decidedly benevolent attitude to the interpretation of arbitral awards".

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