CHAPTER 1
INTRODUCTION

1.1 Introduction

In many Asian countries, settlement of international oil and gas disputes still poses various problems. Although in the wake of recent global movement towards modernization and internationalization of arbitration many Asian countries have not lagged behind, various difficulties in the context of arbitration still persist.\(^1\)

There are many problems such as: cultural, legal, industrial, educational and legal infrastructural. Despite recent positive response to the global movement towards modernization and internationalization of arbitration in Asia, there still persist many difficult in some countries like India and central Asian region, which merit special consideration.\(^2\)

There is no denying that many Asian countries have adopted or followed the United Nations Commission on International Trade Law (UNCITRAL). Arbitration Rules\(^3\) in their legislative enactment, ratified the ICSID International Center for Settlement of Investment Disputes Convention 1965 and the New York convention\(^4\) 1958, and above all there has been recently a proliferation of national and international arbitration centers with impressive case loads on the Asian horizon.\(^5\)

The problems facing international arbitration of oil and gas dispute and for that matter international commercial arbitration, in general, are not going to go away overnight. Many of

\(^2\) Ibid.
\(^3\) UNCITRA Arbitration Rule 1976.
\(^4\) Convention on the Recognition and Enforcement of foreign Arbitral Awards-The “New York Convention 1958, the convention is widely recognized as a foundation of international arbitration and requires courts of contracting states to give effect to an arbitrate when seized of an action in matter covered by an arbitration agreement and also to recognize and enforce awards made in other States, subject to specific limited exceptions.
These problems are well ingrained in Asia culture itself, and such problems can be avoided if international commercial arbitration can be tuned in the cultural needs and expectations.\(^6\)

It has to be knowledge especially in the context of India and Central Asian region that certain culture norms and value must be given due attention. With the adoption of the (hereafter UNCITRAL) Model Law and becoming parties to the New York Convention, these countries seem to have gone a long step from their own traditional culture of informal dispute settlement process to embrace formal western norms and values in the field. However, it has to be appreciated that, in fact, India and central Asian countries and many other Asian countries stick to their traditional values in the matter of dispute settlement.\(^7\)

Here the way of settling dispute tends to be more “consensual” rather than “confrontational”.

The target of the consensual approach is to reach a “harmonious” solution preserving the relationship of the parties, this is what the Asian culture prefers to the western confrontational approach which is legalese and formalistic and may adversely affect the relationship of the parties involved.\(^8\)

This Asian attitude has been reflected in other legal arrangement in the region. Thus, the Association of Southeast Asian Nation, 1997 (ASEAN) Free Trade Area, 1999 (AFTA) provides in Article 7 that concern dispute settlement that “different between members countries are to be settled amicably between the parties concerned”.

It should also be mentioned that while considering the suggestions of creating a regional dispute settlement mechanism for international trade dispute in India and Central Asian countries to supplement the World Trade Organization 1995 (WTO) mechanism, Asia-Pacific Economic


Corporation, Australia 2007 (APEC) seemed to prefer a mediatory body to the legal one as under (hereafter WTO).\(^9\)

For the combination of conciliation and arbitration in the same proceeding the concerned parties agreement or consent seems to be the common requirement in some institutional rules in the Asia. Thus, Article 45 of the China International Economic And Trade Arbitration Commission (CIETAC) Arbitration Rules\(^10\) provides that “if both parties have a desire for conciliation or one party so desires and the other party agrees to it when consulted by the arbitration tribunal, the arbitration tribunal may conciliate the case under its cognizance in the process of arbitration.”

Quick decision of any commercial dispute is necessary for smooth functioning of business and industry. Internationally, it is accepted that normally commercial dispute should be solved through arbitration and not through normal judicial system. This is more relevant under the international oil and gas contract.

One of the most important trends in international economic and commercial relations in the late 20th century was the rapid and unprecedented growth of arbitration,\(^11\) which can be simply defined as a consensual agreement between parties to refer their dispute to a third neutral party, arbitrator(s), who is authorised to render a binding decision after a hearing at which both parties have an opportunity to be heard.\(^12\) In other words, arbitration is a private justice system which operates, at least with the tolerance, or preferably with the support and assistance of national and international legislation and national courts. In many countries arbitration has become the favoured method of settling disputes between parties in commercial matters with or without an international element.\(^13\)

\(^9\) Ibid.
\(^10\) As revised and adopted on September 5, 2000 and effective from October 2000.
The increase in disputes which have been resolved by arbitral tribunals, whether by ad hoc or institutional arbitration, highlights the fact that arbitration plays an indispensable role in the effective resolution of commercial disputes.\(^\text{14}\)

However, the success of arbitration has been mainly in the field of commercial disputes where the parties to the disputes arguably have an equal bargaining position, being in the same line of business and having similar levels of experience. Where the arbitral tribunal finds an initial consent between parties to refer their dispute to arbitration, then as a matter of course the parties should avoid resort to any national courts and should be compelled to arbitration; the parties are bound by the decisions of the tribunal, the arbitral award. Yet, in the field of petroleum, the situation is entirely different to both the pure commercial arena, and arbitration between states.\(^\text{15}\)

Where petroleum is concerned, the situation is frequently complex because the parties to the contract are invariably a state or a state entity on the one side and a private company on the other side. This relationship would have generally started during the period of colonialism when developing countries were dominated and controlled by western countries.\(^\text{16}\)

This type of international arbitration involving disputes between sovereign states and foreign private companies is a relatively recent phenomenon.\(^\text{17}\) The international arbitration of disputes between states and foreign companies started at the beginning of the 20th century, first in relation to concession agreements between private entities and the succession state of Tsarist Russia.\(^\text{18}\) It then exploded in the second half of the twentieth century when colonialism was

\(^\text{14}\) For example, the case load of the International Chamber of Commerce (ICC) increased from 250 in 1980 to 466 in 1998; a similar trend can be observed with the London Court of International Arbitration (LCIA), where there were 70 new cases in 1998, see Julian D. M. Lew, “Achieving the Potential of Effective Arbitration” 65 Arbitration 283-290 (1999); it was reported that there are well over 2000 arbitrations a year under the auspices of the better known arbitration institution, Julian D. M. Lew, Loukas A.et.al , Comparative International Commercial Arbitration, 33 (The Hague: Kluwer Law International, 2003).

\(^\text{15}\) F. A. Mann, “State Contracts and International Arbitration”, 42 BYIL 1-37,6 (1967).

\(^\text{16}\) Ibid.


retreating and the use of gunboat diplomacy to settle investment disputes was unwise in the context of the nationalist movements sweeping Asia and Africa. At that time western countries supported international arbitration as the preferred method to provide a new form of protection for international investment contracts.

The consequence of this protection was to tie up the natural resources sector of the economies of developing countries in chains of “unequal contracts.” Under such agreements, petroleum companies received the exclusive rights to explore, produce market and transport petroleum. Moreover, these agreements were extended for a long period of time, typically between 40 and 75 years, and the royalties due to the host state were commonly so ridiculously low that they did not exceed 3 Indian Rupees (75 cents) per ton or about 10 cents per barrel. For instance, such a clause found in the Agreement of 1937 between the Sultan of Oman and a petroleum company, provides that: “In consideration of the payments described in Article (***) the Sultan hereby grants to the company for the remainder of the period of this Agreement the exclusive right to explore, search for, drill for, produce, win, refine, transport, sell, export, and otherwise deal with or dispose of the substances and to do all things necessary for all or any of the above purposes within the Leased Area.”

Petroleum contracts have fundamental effects on the economic and social life of developing countries, in particular, in view of the fact that the petroleum sector is considered a

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20 Ibid., at 9.

21 Virtus C. Igboke, “Developing Countries and the Law Applicable to International Arbitration of Oil Investment Disputes: Has the Last Word been Said”, supra note 6, at 100; these contracts were described as following: “The classical contractual framework in the extractive sector (petroleum, hard minerals, timber, etc) was the concession [... ] It excluded the host government from participating in the ownership, control, and operation of the undertaking. The transnational corporation was given exclusive, extensive, and plenary rights to exploit the particular natural resource and was in effect assured ownership of that resource at the point of extraction.” Samuel K. B. Asante, “Restructuring Transnational Mineral Agreements”, 73 AJIL 335-371, 338 (1979).


23 Mana Saeed Al-Otaiba, The Petroleum Concession Agreements of the United Arab Emirates, (London Canberra: Croom Helm 1982), at 3; or as Asante argued that “in many cases the companies paid a nominal rent of, say, £150 for a whole concession, plus one or two bottles of rum,” Samuel K. B. Asante, “Restructuring Transnational Mineral Agreement”, supra note 10 at 339.

24 Supra note 22 at 59.
vital resource to these countries and most of them rely upon it as a sole resource as will be explained below.

Unequivocally, the contractual relationships between host states and transnational corporations were badly negotiated, and the two parties were arguably of unequal bargaining power. As a consequence, this apparent inequality and the scepticism of western investor states towards the courts of the host state impacted upon the attitude of developing countries towards international arbitration in investment contract disputes, especially in petroleum disputes. Arbitration was unwelcome by developing countries, since these countries perceived international arbitration to be biased in favour of western countries or investor companies. The refusal of Latin American countries to settle disputes by tribunals other than domestic courts is the best example of developing country scepticism and suspicion towards international arbitration.

The success of arbitration in other fields, such as the sale of goods as Sornarajah argues, cannot be transferred to petroleum disputes. Nor can the trade, investment or commercial relationships between private parties from different countries be transferred to the area of petroleum where the disputing parties are in different positions. Indeed, it may be argued that petroleum contracts and petroleum disputes have their own features which distinguish them from the familiar investment agreements and consequently from normal international arbitration.

The lack of success in state contract arbitration, notably in petroleum disputes ascribed by some scholars to the bias of the early arbitration cases such as the Abu Dhabi case, and the Aramco case, towards the private investor. Thus, an advocate of arbitration concedes that, "it

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25 Supra note 19 at 5.
26 Id., at 5.
28 Supra note 19 at 5.
30 See, Petroleum Development Ltd. v. The Sheikh of Abu Dhabi (1951) 18 ILR 144.
31 See, Saudi Arabia v. Arabian American Oil Co. (ARAMCO) (1963) 27 ILR 117; see also the Ruler of Qatar v. International Marine Oil Co. Ltd. (1953) 20 ILR 534.
may be true that in the beginning of this century, and until the 1950s, arbitrations conducted by various international tribunals or commissions evidenced bias against developing countries. It is an understatement to say that international arbitration in petroleum disputes was unwelcome in the 20th century as far as developing countries were concerned. However, in the 21st century, with all the legal and economic developments that have occurred, especially in developing countries, has the attitude of these countries towards international arbitration remained the same? Is the fear and uncertainty which prevailed throughout the 20th century in petroleum arbitration still present and if so, why? More precisely, what was the main conflict factor in previous petroleum arbitrations? Moreover, has the discussion in the context of petroleum arbitration been completed?

At the same time, other questions must be raised from another point of view, such as whether western countries are still suspicious of the legal infrastructure and the legal systems in developing countries, and whether petroleum companies still fear unilateral amendments in the petroleum contracts by legislative reforms in the host state. Are such fears justified? It is necessary to examine the relationships between developing petroleum countries and petroleum companies in the present day and in the light of economic and legal reforms world-wide. Undoubtedly better, more equitable relations than the past regime are required.

Some western lawyers and arbitrators suggest that such contracts between states and a foreign company for exploitation of mineral resources must be governed by laws other than those of the host state. The consequence would be that the terms of the contract cannot be changed unilaterally by the legislation of the host state. The same lawyers and arbitrators have further argued that the violation of these contracts would be considered a violation of (public) international law, since these contracts may be characterised as international treaties. Therefore, a "stabilisation clause" is considered to be implied in state contracts, especially in petroleum

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35 Id., at 187.
contracts, in order to provide a guarantee that such contracts will not be subject to any unilateral change.\textsuperscript{36}

The significance of the above in legal terms must be assessed; scholars of western countries were expressing the view that concession agreements were to be treated as an international treaty, rather than a mere commercial agreement or contract.\textsuperscript{37} The power of petroleum companies and their home states to make this assumption a reality, in terms of imposing their conditions on the petroleum industry, is clear. Yves Dezalay and Bryant Garth argue that, “these huge companies became so much the bastions of the establishment that they considered themselves in one sense above the state and in another quasi-statelike.”\textsuperscript{38}

In addition those lawyers and arbitrators think that the host state governments while applying their municipal law may not at any time act impartially toward foreign investors, so that foreign companies felt that relying on host state's law exposed foreign companies investment to a variety of risks.\textsuperscript{39}

Because of this side-lining of the host state’s law as well as the creation of a very strong aegis to protect state contracts, which ultimately protects foreign companies, a form of “delocalisation” or “internationalisation” of investment contracts has emerged.\textsuperscript{40}

The justification for such delocalisation is based on the assumption that a number of smaller countries lack a comprehensive legal system which is appropriate for the settlement of

\textsuperscript{36} Id., at 187.
\textsuperscript{39} Jeswald W. Salacuse, “Bit by Bit: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries”, 24 International Lawyer 655-675,659 (American Bar Association,1990); Professor Brigitte Stem for instance, stated at her lecture “International Law as Applicable Law under ICSID” which was introduced at a conference on 'Public International Law in Commercial Disputes' held at the British Institute of International and Comparative Law, London on 7-8 June 2002 that the application of public international law is only to protect the foreign companies in contracts between states and private parties even with sufficient of the home state’s law. This statement was an answer to a question raised by a participant at the conference.
\textsuperscript{40} Ibid.
disputes between foreign investors and governments, as well as on the widespread fear of foreign investors of local allegedly biased, court and administrative procedures. Foreign investors argued that host states would fail to perform their obligations under the contract by invoking their own legislative or executive law to justify non-performance. These assumptions were articulated in the famous petroleum arbitrations namely the Abu Dhabi case, the Qatar case and the Aramco case. In these three tribunals, arbitrators agreed unanimously that these developing countries do not have any legal principles which can be employed to deal with complex contracts.

For instance, in the Abu Dhabi case, Lord Asquith of Bishopstone after asking “what is the 'proper law' applicable in constructing this contract”, he stated that “This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would prima facie be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.” He later added that, “I have no reason to suppose that Islamic law is not administered there strictly, but I am satisfied that the law does not contain any principles which would be sufficient to interpret this particular contract.” Consequently, arbitrators applied other laws and principles, such as general principles of law and public international law. This premise, as Sornarajah argues, is based on a false assumption which implies some sort of racial superiority.

If we examine petroleum contracts between European or American states or state entities and petroleum companies, the law of the host state is normally applied. As Somarajah points out: This reasoning concedes that in foreign investment disputes which arise in western states, the law of the host state is the only relevant law but that the situation is different in the case of developing

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43 Petroleum Development Ltd. v. The Sheikh of Abu Dhabi (1951) 18 ILR 144.
44 The Ruler of Qatar v. International Marine Co. Ltd. (1953) 20 ILR 534.
46 Petroleum Development Ltd v. The Sheikh of Abu Dhabi (1951) 18 ILR 144,149.
47 Id., at 545.
48 Supra note 37 at 107.
49 Id., at 108.
countries. The justification for this is said to be found in the policy reason that flow of foreign investment into developing countries will not take place unless such investment is given a better standard of protection than is to be found in uncertain local law.\(^{50}\) That simply means “Take it or leave it.”\(^{51}\) Delaume explained “if one of the parties is in a strong bargaining position, the temptation is great to solve the problem in its favour. One judge, one law, preferably my own.”\(^{52}\)

Any validity in this line of reasoning must be based on the asserted inadequacies of local law. However, this law has developed and can offer nowadays an adequate framework to govern the merits of petroleum disputes. In any event, the conviction of western arbitrators and scholars of the incapacity or incompetence of the host state's law to deal with petroleum contracts, and the 'need' for other norms to deal with this matter, provided the origins of what is today called internationalisation of foreign investment contracts.

### 1.2 International Energy Projects

Energy is one of the world’s most valuable resources\(^{53}\) and the main driving force of all economies.\(^{54}\) It is and will continue to be the world’s biggest, most important and profitable\(^{55}\) business, and a major factor in world economies;\(^{56}\) According to Organization of the Petroleum

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\(^{50}\) *Id.*, at 110.


Exporting Countries (OPEC) estimates, oil demand will continue to grow strongly and oil will remain the world’s single most important source of energy for the foreseeable future.\(^{57}\) The table below shows the importance of oil as a source of energy for the past, present and near future.

| Table 1.1. Will Oil Remain the Most Important Source of Energy?\(^{58}\) |
|---|---|---|---|
|   | 1998 | 2000 | 2010 | 2020 |
| Oil | 41.3 | 41.3 | 40.3 | 39.2 |
| Gas | 22.2 | 22.4 | 24.1 | 26.6 |
| Solids | 26.2 | 26.1 | 26.3 | 25.8 |
| Hydro/ |   |   |   |   |
| Nuclear | 10.4 | 10.3 | 9.3 | 8.5 |
| Total | 100.0 | 100.0 | 100.0 | 100.0 |

The table the share of oil as an energy source will fall slightly from over 40% today to 39.2% in 2020. On the other hand, oil will still be the world’s single largest source of energy. The reduction in oil’s market share is largely due to the stronger growth enjoyed by other forms of energy, particularly natural gas’.\(^{59}\) According to the table, it can be said that oil and gas are the world's most important sources of energy. In order to understand the importance of oil and gas, it is enough to look at the media to see everyday news related to them.

\(^{57}\) OPEC, ‘Frequently Asked Questions: Will oil remain the most important source of energy?’, Available at: www.opec.org/library/FAQs/PetrolIndustry/q6.htm, (visited on 22, January 2014).


\(^{59}\) Ibid.
The demand for energy is growing rapidly. The increasing demand for this product in the economy and consumer markets has increased investment into industry. Energy investors focus on the security of supply and the acquisition of new resources. The dramatic increase in demand also has had an effect on the way energy is brought to new markets, such as through cross-border pipelines and Liquid Natural Gas (LNG) transportation. In short, the increasing demand means that political risks and conflicts are likely to continue.

In the twentieth century, a large amount of capital has been invested in developing states in the form of so-called ‘foreign direct investment’ (FDI). Governments of developing countries enter into international investment agreements with international investors in order to obtain capital and technological expertise not found in their own country. In other words, for many less developed or developing countries, the energy sector provides significant opportunities for the influx of capital from abroad and for knowledge transfer. These countries generally lack the funds and the skills required to develop energy resources. International investors can provide both of these. Developing countries also provide great opportunities for investors, but these opportunities come with substantial risks, in particular political risks.

International petroleum investment is a complex phenomenon and creates political risk and other contemporary conflicts because of its peculiar nature. A petroleum investment contract

60 Lovells Law Finn, Supra note 55 at 3.
61 The world has seen increasing demand particularly from China, India and South America.
62 Lovells Law Firm, Supra note 55 at 3.
63 Examples of major projects: The Baku-Tbilisi-Ceyhan Pipeline, the Caspian Pipeline, the Nabucco Pipeline, the Chad-Cameroon Pipeline.

Investment opportunities come with several types of risks, such as commercial, financial, geological, technical, managerial and natural disasters. Those risks are difficult or sometimes impossible to manage by contract. On the other hand, political risk can be minimized by contract clauses; See, M.T.B. Coale, Supra note 53 at 220.


can be described as a state contract, so it differs from a standard contract in that one of the parties is generally a sovereign state or a state entity. In this type of contract, parties have fundamentally conflicting interests. There are several reasons which may cause conflicts; for example, the main one is that while host states are interested in making use of investment to develop their natural resources, improve tax revenues and diminish dependence on foreign oil suppliers, international investors are interested in making economic benefits from the investment. Conflict between the host states and international investors is inherent in the nature of the system itself:

During the normally relatively long duration of such contracts economic or political circumstances are likely to change. Natural resources are not renewable, and... a nation, especially if it has recently emerged from a colonial past, will watch closely over the use of irreplaceable assets. There might be... ‘an imbalance in the economic equilibrium of the contract’ ab initio due to lack of reliable data at that time or to differences in the bargaining power or negotiating skill of the parties. External circumstances such as changes in technology and market conditions, or in the political situation within the host country, may at a later point in time make one or the other of the parties unable or unwilling to carry out its obligations under the contract.\(^{68}\)

In addition to above mentioned reasons that may lead to a conflict, long-lasting and insufficient dispute resolution methods may make circumstances worse.

Historically, petroleum ‘has been the subject of the most important international agreements\(^{69}\) and these agreements have resulted in various forms of disputes. It could be fairly said that the energy business has always affected international politics. ‘Moreover, no other commodity, either historically or currently, can match the importance of petroleum to the world’s political and economic order’.\(^{70}\) For that reason, political risk management is one of the main jobs for international energy investors.


\(^{70}\) *Ibid.*
There is a wide range of political risks that may interfere with investors’ property rights.\textsuperscript{71} To put it differently, political risk shows itself in a variety of ways; however the more significant of these risks are, namely, unilateral change of the contractual terms, forced renegotiation, expropriation, and creeping expropriation.

Petroleum projects need stability, owing to their particular characteristics. First, these projects are characterized by long duration, with each project period lasting many, years. Second, these projects cost tens to hundreds of millions (or billions) of dollars. The investor has no guarantee that the host country\textsuperscript{72} will not arbitrarily decide to change its laws at the time of the initial investment or subsequently. For example, one of the most important trends in the petroleum sector in the late twentieth century was the unprecedented growth of expropriation. A significant number of expropriations and nationalizations occurred in host countries in the energy sector.\textsuperscript{73} The last decades have witnessed new concerns for international energy investors. The new issue is indirect expropriation. One of the main risks for international investors in energy investment is unpredictable regulations. Indirect expropriations include these government actions: (1) raising the amount of export duties; (2) increasing taxes; (3) imposing new regulations. Such arbitrary regulations may lead to a conflict between the contracting parties and also these regulations may result ‘in increased unplanned costs and legal consequences that negatively impact investments’.\textsuperscript{74}

Political risks, especially indirect expropriation, are not easy to manage.\textsuperscript{75} This is obvious and well demonstrated by a question asked during a symposium on energy and international law: ‘Does James Bond have an effective means of reducing or removing political risk, other than cleverly eliminating the enemy?’\textsuperscript{76} It is a bit difficult to know whether James Bond has a magic method for this problem; however we know that there are effective and accepted strategies to

\begin{thebibliography}{99}
\bibitem{footnote72} The capital-importing country.
\bibitem{footnote73} E.E. Smith, John S. Dzienkowski \textit{et al.}, \textit{Supra} note 69 at 338.
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minimize or mitigate the political risks involved in international energy projects, such as treaties, national laws, insurance, and government guarantees.

Besides this legal and insurance protection, there are several other options to effectively manage the political risks involved in international energy projects. First, international energy investors should spread political risks among as many parties as possible. ‘Diversification through joint ventures... or investing in more than one country’ reduces political risk. International investors could also diversify their ‘assets and operations by acquiring production assets to balance their exploration assets’. Second, investors could defend against political risks through the use of economic political persuasion. Third, investors could reduce political risks through use of structuring and managing techniques. In this way, investors create.

‘... Perceived “fairness” and domestic benefit[s] associated with [a] project, creat[e] a flexible investment regime for the project, in order to adapt to changing pressures and expectations’ The final way is that investors could reduce political risks through contractual mechanisms. This mechanism ‘may employ choice of contract with the government as preferred
[the] legal format, and design of specific contractual mechanisms\(^{91}\) such as stabilization clauses, renegotiation clauses, arbitration clauses, and choice of law clauses.\(^{92}\)

Petroleum investment contracts vary from the old type concession agreements to more recent types, such as joint ventures, production sharing agreements, and service agreements. Concession contracts, particularly of the old type, grant international investors an administrative authorization to explore, develop and produce hydrocarbons. The terms and conditions of concessions are mostly fixed by legislation and as such, the state remains at considerable liberty to modify them unilaterally, particularly the rate of taxation and royalty. ‘On the other hand, production sharing contracts (PSCs) are widely used for petroleum exploration and development agreements between international investors and host states\(^{93}\) whereby the investors are granted the rights to explore and develop a petroleum field with the investor covering all exploration costs and risks. When petroleum is discovered and produced, the exploration and production costs will be split between the international investors and host state in such a way that the international investor will recover its costs first and that both the investor and the host state will benefit from the remaining petroleum.\(^{94}\) To this end, the host state will not, in principle, unilaterally change the terms and conditions of the contract.

The types of petroleum investment contracts may affect the host states’ actions over the course of a project, however, there is no doubt that the absence of appropriate contractual clauses in any type of investment agreement may cause difficulties or even frustrate international investors during the investment period or in the future. Contractual clauses either directly help the parties to avoid conflict or are capable of having such an effect indirectly. Consequently, although there are

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\(^{91}\) Ibid.


several methods to manage political risks, a proper contract and ‘due diligence are most important’.  

In particular, stabilization clauses are used by international investors in order to ensure that the contract will not be unilaterally changed or terminated by the host state through legislation or administrative action. The aim of these clauses is to keep investment conditions stabilized.

When assessing stabilization clauses we need to highlight the use of renegotiation clauses. Renegotiation clauses are used in international petroleum agreements together with or without stabilization clauses in order to guarantee the security and the stability of the transaction by making the contract flexible and dynamic. Business people and lawyers know that signing a contract is just the beginning of a challenging relationship, not the end of negotiations. Even parties who have employed skilled lawyers and engaged in extensive contract negotiations at the outset, might find themselves at the table to renegotiate agreements again and again due to the peculiar characteristics of energy investments. Energy investments are expensive, complex and long-lasting projects. Indeed, it is more than probable that investment conditions will change over the life of an energy project in ways that affect the original contract. As a consequence, there is often a need to renegotiate the initial agreement. Therefore, possibly, a practical way to avoid potential problems is to allow renegotiation of the contract through renegotiation clauses.

Consideration should also be given to two other important types of clauses: choice of law and Alternative Dispute Resolution (ADR) clauses. These are used to eliminate political risks. International investors consider them as a protection against expropriation without compensation. Investors should determine, if possible, an appropriate law to govern the contract in order to ‘secure flexibility to the arbitrator in case of ambiguity or silence in the provisions of local law’.  

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1.3 Alternative Dispute Resolution (ADR)

The first rule for parties to an international dispute is to try to resolve the dispute for themselves. The parties are- or should be- in the best position to know the strengths and weaknesses of their respective cases. Indeed, it is increasingly common for a clause to be inserted in international contracts to the effect that, if a dispute arises, the parties should try to resolve it by negotiation, before proceeding to some system of dispute resolution. One particular formula, often found in long-term agreements, is to the effect that in the event of a dispute arising, the parties will first endeavor to reach a settlement, by negotiations “in good faith” The problem is that an obligation to negotiate “in good faith” is nebulous. Who is to open negotiations? How long are they to last? How far does a party need to go in order to show “good faith”? Is a party obliged to make concessions, even on matters of principle, in order to demonstrate good faith?

No negotiation is likely to succeed unless those involved are capable of looking at the crucial issues objectively, like an outside observer. However, objectivity is difficult to attain when vital interests (and perhaps the future of the business) are under threat. It is here that an impartial third party may help to rescue discussions which are at risk of getting nowhere. This is why international contracts often provide that, before the parties embark upon litigation or arbitration, they will endeavor to settle any dispute by some form of alternative dispute resolution (ADR).

1.3.1 What is meant by ADR?

The growing cost of litigation in the U.S gave rise to a search for quicker and cheaper methods of dispute resolution, and this cost was measured not only in lawyers’ fees and expenses, but also in management and executive time, made worse by procedural delaying tactics, overcrowded court lists, and the jury trial of civil cases, often leading to the award of hugely excessive damages against major corporations (and their insurers).
These alternative methods of dispute resolution are usually grouped together under the general heading of ADR. Some of them come close to arbitration in its conventional sense. Others—in particular, mediation and conciliation—are seen as first steps in the settlement of a dispute, to be followed (if unsuccessful) by arbitration or litigation.\footnote{Ibid.}

When something is described as an “alternative” the obvious question is: “alternative to what?” If alternative dispute resolution is conceived as an “alternative” to the formal procedures adopted by the courts of law as part of a system of justice established and administered by the State, arbitration should be properly classified as a method of “alternative” dispute resolution. It is indeed a very real alternative to the courts of law. However, the term ADR is not always used in this wide. (or, it might be said, precise) sense. Accordingly, for the purpose of this section, arbitration is not included:

Arbitration presents an alternative to the judicial process in offering privacy to the parties as well as procedural flexibility. However, it is nonetheless fundamentally the same in that the role of the arbitrator is judgmental. The function of the judge and the arbitrator is not to decide how the problem resulting in the dispute can most readily be resolved so much as to apportion responsibility for that problem.\footnote{Dixon, “Alternative Dispute Resolution Developments in London” 4 Intl Construction L Rev 436, 437, (1990)}

There are many different forms of ADR. The broad distinction, however, would seem to be between those methods—such as mediation and conciliation—in which an independent third party tries to bring the disputing parties to a compromise agreement and those in which, in one way or another, a binding decision is imposed upon the parties, without the formalities of litigation or arbitration.

1.3.2 Non-binding ADR

I. Mediation

Mediation lies at the heart of ADR. parties who have failed to resolve a dispute for themselves turn to an independent third person, or mediator, who will listen to an outline of the
dispute and them meet each party separately –often “shuttling” between them\textsuperscript{103}-and try to persuade the parties to moderate their respective positions.\textsuperscript{104} The task of the mediator is to attempt to persuade each party to focus on its real interests, rather than on what it conceives to be its contractual or legal entitlement.

**II. Conciliation**

The terms “mediation” and “conciliation” are often used as if they are interchangeable, and there is no general agreement as to how to define them. Historically, a conciliator was seen as someone who went a step further than the mediator, so to speak, in that the conciliator would draw up and propose the terms of an agreement that he or she considered represented a fair settlement. In practice, the two terms seem to have merged.

The UNCITRAL Conciliation Rules, which were recommended by the General Assembly of the United Nations in December 1980, may be considered very briefly as an example of how the conciliation process works.\textsuperscript{105} First, the parties agree that they will try to settle any dispute by conciliation. This may be done ad hoc- that is to say, once a dispute has arisen-or it may be done by prior agreement, by inserting a provision for conciliation or mediation in the contract,\textsuperscript{106} and the relevant Rules deal not only with the conciliation process itself, but also with important provisions such as the admissibility in subsequent litigation or arbitration of evidence or documents put forward during the conciliation.\textsuperscript{107}

\textsuperscript{103} He moves backwards and forwards between the parties: Chinese word for conciliator is said to be a “go-Between who wears out a thousand sandals”, Donaldson, “ADR” 58 JCL Arb 102 (1992).

\textsuperscript{104} These separate meetings are known as “caucuses”.

\textsuperscript{105} Arbitral institutions’, including the ICC and ICSID, have also drawn up rules designed to provide for Conciliation.

\textsuperscript{106} The Model Clause appears at the end of the UNCITRAL Conciliation Rules. The Rules themselves may be accessed on the UNCITRAL, \textit{available at}: http://www.uncitral.org, (Visited on April 2, 2014) The Model Clause recommended by UNICTRAL states: Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force.

\textsuperscript{107} It is obviously important to know, for instance, whether evidence produced or admissions made by a Party in the course of the conciliation proceeding can be used if conciliation fails and is followed by litigation or arbitration. In its International Arbitration Legislation, Bermuda has introduced statutory provisions for conciliation that deal with the issue by making it an implied term of the conciliation agreement that unless otherwise agreed in writing, the parties will not introduce in evidence in subsequent proceedings any opinion, admissions, or proposals for settlement made in the course of the
The role of the conciliator is not to make proposals for a settlement. The proposals need not be in writing, and need not contain reasons.

The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.\textsuperscript{108}

To what extent is a conciliator free to disclose to one party information given to him or her in private by the other party? The UNCITRAL Conciliation Rules provide\textsuperscript{109} that a conciliator may disclose the substance of any factual information he or she receives, “in order that the other party may have the opportunity to present any explanation which he considers appropriate”

If no settlement is reached during the course of the proceedings, the conciliator may formula the terms of a possible settlement and submit them to the parties for their observations. The process comes to an end either when a settlement is achieved or when it appears that no settlement is possible.\textsuperscript{110}

In 2002, UNCITRAL published its Model law on International Commercial Conciliation, which is intended as a guide for state that wish to implement legislation or conciliation.\textsuperscript{111}

An arbitration clause is a commonly used clause in a contract that requires the parties to resolve their disputes through an arbitrator process. Although such a clause may not specify that arbitration occur within a specific jurisdiction, it always binds the parties to a type of resolution outside of the courts, and is therefore considered a kind of forum selection clause.

This PhD research is study of the law related International commercial Arbitration relating to petroleum product agreements disputes under India and Asian Countries laws. Therefore it is

\textsuperscript{108} UNCITRAL Conciliation Rules, Art 7.1.
\textsuperscript{109} Art 10. However, the Rules also provide that a party may give information to the conciliator, subject to a specific condition as to confidentiality, in which case the conciliator is bound by that condition.
\textsuperscript{110} As a safeguard, it would be sensible to couple a conciliation agreement with an agreement to arbitrate.
\textsuperscript{111} This may be accessed on the UNCITRAL website, above. It should be noted that the development of ADR has led to the growth of organizations devoted to this method of resolving disputes (as opposed to organisations such as the ICC which are primarily concerned with arbitration, but which offer conciliation as an additional service). In the US, for example, there are various centres, including the Center for Public Resources in New York. In Europe, one of the best- Known organizations is the CEDR which is based in London and was established in 1990 with the backing of industrial and professional firms.
necessary to understand the detail of arbitration laws in India and other Asian countries and rules in this relation which is the area for the present research.

1.4 Problem Profile

The exploration and development of oil and gas in developing countries have often been conducted by international oil companies rather than the countries themselves. International petroleum companies and host governments and/or governmental agencies conclude agreements for this purpose. Such agreements have over time retained certain fundamental characteristics. They involve large, complex and risky investments. They involve a relationship between a host government and or governmental agency and a foreign private company. In addition, due to the strategic importance of petroleum to both consumers and producers, such agreements have always been politically charged. These characteristics help to understand why international petroleum agreements have almost always provided for arbitration as a method for the settlement of disputes.

In most Asian jurisdictions, the arbitration and conciliation appears to preferred method of oil and gas dispute settlement. In the practice of many countries such as China, Japan, Iran, Korea, India, Indonesia and Singapore there can be unique combination of conciliation in the same proceeding as opposed to the western tradition that conciliation and arbitration are two different routes to be kept separate from each other.

The foundation of arbitration is the arbitration agreement between the parties to submit to arbitrator all or certain disputes which have arisen or which may arise between them. Thus, the provision of arbitration can be made at the time of entering the contract of oil and gas, so that if any dispute arises in future, the dispute can be referred to arbitrator as per the agreement.

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113 Id., at 178.


115 Ibid.
Especially in oil and gas agreements, it is possible to refer a dispute to arbitration after the dispute has arisen. In this regard, the arbitration agreement may be in the form of arbitration clause in an agreement of oil and gas or in the form of a separate agreement.

“The general opinion amongst business men and lawyers is that arbitration proceeding in oil and gas agreements offer marked advantages over court proceeding. They are often cheaper, less dilatory and less formal, they take place in private, and no appeal and further appeal is possible." There are, however, some experienced business men who, for various reasons, are reluctant to submit arbitration, their objection can usually be met by appropriate provisions in the arbitration clause about the person and the place where the arbitration to be held."

The various national laws on arbitration regarding oil and gas dispute settlement differ in material aspects, in Dutch law, an arbitration clause appointing arbitrators in even numbers is invalid, in French law, an appeal to the ordinary courts is admitted against the award unless that right is expressly excluded in the submission, in Italian law an arbitration clause printed on the heading of the business letter is not binding upon the addressee unless he expressly agrees thereto, and so forth. Frequent attempts have been made to devise an international procedure of commercial arbitration which commands the confidence of business men living in different countries and being different nationality.

In international level it is the merit of the International Chamber of Commerce (ICC) to have met this demand to a large extent. This institution has created a court of Arbitration which administers a code of rules especially adapted to the settlement of international oil and gas disputes. This procedure enjoys deserved popularity amongst those engaged in foreign trade and should be adopted whenever the arrangement of English arbitration does not appear appropriate.

Particularly the arbitrator derives his or her authority from the contract and has no authority to change or add anything to the contract. In deriving a solution the arbitrator is limited to deciding

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117 Enfores v Miles [1955]2 Q8, 327, Brinkibon v StalageStabl [1983]2 AC 34
118 Netherlands Arbitration Act 1983
119 Section 15 of French Arbitration Code 1979
120 Arbitration and International Negotiable Act 1982
what the parties intended in their agreement. If the language in the contract is unclear, often the arbitrator has to decide the parties’ interest. He or she will usually refer to the parties past practices and history and those circumstances.

Among the permanent institutions of arbitration in England, the London Court of Arbitration is held particular esteem in the business world. But in contract made between traders in the UK and USA the British- American arbitration clause should be inserted.

Attention to rules that used in the interpretation of such contract by courts and arbitration and award that issued from contract and arbitration about contract term is very important and necessary for conclusion and ambiguous and simple contract.

However, the aim of all arbitration policies is to compensate the parties against disputes arises and anticipates, to reduce all the difficulty and protect their property and business.

Usually contracts of oil and gas are the contracts by which one party undertakes to make oil products, in consideration of a sum of money or buy back agreement.

1.5 **Objectives and Scope of this Study**

1. To identify the theoretical foundations of the arbitration laws under the Indian business laws.
2. To focus on the laws of arbitration related to international oil and gas agreements.
3. To peep into the various factors arise out of change in economic policies, business, industrialization and commerce affecting the oil and gas agreements in international level.
4. To analyze the oil and gas cases by examining the contentions of the parties and the arbitration tribunals awards in order to provide an exposition of the issues discussed along with the factual context of each issue in which it was raised and decided.
5. To identify and understand the notions and rationale underlying the legal practices reflected in the arbitral jurisprudence of international oil and gas agreements.
6. To identify the particular law applicable the oil and gas contract under the international trade law.
7. To study the implied condition in oil and gas agreements that would help courts and arbitration.
8. To make suggestion on the basis of the primary data collected for this study.
9. To identify and categorise the issues with each issue discussed on the basis of landmarks case-by-case\textsuperscript{122}.

1.6 Hypotheses

In Judicial proceeding the governments enjoy immunity from suit.

1.7 Research Methodology

Research methodology in this research is Doctrinal as well as Non Doctrinal research.

Doctrinal:

The researcher intends to rely on legal enactment in International Conventions, State statutes, with rules, order and notifications issued there under, judicial decisions, arbitral tribunal and authorities of the government and non-government organizations, as well as the international organizations such as OPEC, UNCITRAL and London Arbitration Tribunal in respect of oil and gas dispute settlements. Additions, standard commentaries on the selected Substantive and procedural statutes, research articles published by law journal, international organization and report of law commission (national and international) and judicial pronouncement websites, etc. will be referred to. The debates of the law makers and arbitrators would also provide additional source.

Non- Doctrinal

The researcher intends to pin the causative factor of conflict by conducting a field study of International petroleum agreements laws. It is common knowledge that the laws applicable in every country and legal system are not similar therefore it would be expeditious and more

pragmatic to concentrate on the international oil and gas agreement cases in India, another Asian countries and International level.

For this a review of statistical data of international trade and interstate trade of oil and gas disputes during last 10 years will be undertaken. Secondly the theories favoring an internationalization of state contract and state contract arbitrations have a direct impact, as shown by many of awards previously referred to, on the lexfori of arbitral tribunals. The arbitral procedure, powers of the arbitrators, binding force of the arbitral agreement and of the “internationalized” contract, the rights and obligations of the parties, or all these aspects simultaneously. According to the different theories these are totally or partially removed from the realm of national law right from the outset. Under such theories, for instance the arbitral agreement is subject to international law or is denationalized, as a result it becomes immune from national law provisions which govern the capacity to enter into the arbitral clause, and its validity and effects. The arbitral agreement leads to the internationalization of state contract to the extent that it isolated from the control and supervision of any national jurisdiction or authority. Both the capacity to contract and to enter into an arbitral agreement are govern by an “internationalized” lexcontractus or lexarbitri not by the personal law of parties including the state party and the contractual breach would directly give rise to international liability without any need for the prior exhaustion of local remedies before the court of the state party. Therefore, is taken of national public law governing the contracting powers of states and ensuring limitations including constitutionals and administrative law limitations on contracting and on entry into arbitration agreement.

1.8 Review of Literature

Encyclopedia of Petroleum Laws by Harbans Lal Sarin is a compilation of the updated Acts, Rules, Order, Notification, dealing with petroleum and its products. The book provides up-to-date information, i.e. petroleum procurement guide, renewed glossary of standard terms used in petroleum industry and Specimen Documents required at various levels for practical use, especially by players in the private sector. Further this edition provides for latest relevant cases arrangement topically for the quick reference, easier understanding and knowledge. The present

edition will be of immense help not only to the legal fraternity, Government Organization and research institutes but also to the petroleum industry.

International Oil and Gas Arbitration, Arbitrating International Petroleum Disputes\textsuperscript{124}: an Analysis of Key Substantive Law Issues by Dr. Zeyad A. Alqurashi, is a book divided into five chapters and each chapter deals with a separate issue. Chapter one provides an examination of the evolution of international petroleum agreements followed by a brief discussion of the major petroleum arrangements in existence today. The legal nature of international petroleum agreements is also examined in this chapter.

Chapter two examines the question of the risk faced by the foreign investor that the state may take all or a portion of the investor's property located in the host country. The aim of chapter three and chapter four is to examine the ultimate host state control mechanism over petroleum companies working within its territory and its legitimate - as distinguished from its illegitimate - exercise. The legal requirements for a lawful taking under international law are also discussed. This discussion is followed by an analysis of the response of the petroleum arbitral practice to the areas of conflict arising out of the limitations on the state's right to take foreign property under international law.

Chapter three scrutinises the question of state measures affecting foreign investment in an indirect manner. This question has become increasingly prominent for a number of reasons laid down in the chapter. The chapter examines the question of what kind of interference short of outright expropriation constitutes expropriation and how this question has been addressed by the international arbitral practice relating to the petroleum industry. A number of recent non-petroleum arbitral awards were also discussed in this chapter. The fourth and fifth chapters study the provisions inserted into individual petroleum agreements in order to eliminate the risk of state interference mentioned above. In particular, the two chapters address, among other thing, the question of the validity and efficacy of such provisions. The validity and effect of stabilisation clauses is examined in chapter four. The latter question is studied against both national law and

international law. Finally the chapter addresses the question of how the effect of stabilisation clauses as articulated by the petroleum arbitral practice.

In chapter five the question of renegotiation clauses is examined. A number of issues relevant to the question of the renegotiation of international petroleum agreements are dealt with in this chapter. Such issues include: the question of how such clauses can contribute to the stability of the international petroleum agreements; problem areas of the renegotiation clauses; the renegotiation in the absence of a renegotiation clause and other related issues. This is followed by an examination of the effect of such clauses as articulated by the petroleum arbitral practice.

There are many definition of petroleum but the relevant meanings has given by Mr James G. Speight. He has explain the “Petroleum”, meaning literally “rock oil,” is the term used to describe a myriad of hydrocarbon-rich fluids that have accumulated in subterranean reservoirs. Petroleum (also called crude oil) varies dramatically in colour, odor, and flow properties that reflect the diversity of its origin.

The author explain in chapter two of his book, Petroleum products are any petroleum-based products that can be obtained by refining and comprise refinery gas, ethane, liquefied petroleum gas (LPG), naphtha, gasoline, aviation fuel, marine fuel, kerosene, diesel fuel, distillate fuel oil, residual fuel oil, gas oil, lubricants, white oil, grease, wax, asphalt, as well as coke. Petrochemical products are not included here.

Mr, James G. Speight, has been explain in chapter two of his book about the Petroleum is perhaps the most important substance consumed in modern society. It provides not only raw materials for the ubiquitous plastics and other products but also fuel for energy, industry, heating, and transportation. The word “petroleum”, derived from the Latin petra and oleum, means literally “rock oil” and refers to hydrocarbons that occur widely in the sedimentary rocks in the form of gases, liquids, semisolids, or solids.

Patricia Park in second Edition of International Law for Energy and the Environment considers issues of regulation of the energy sector within an economic context and the need for

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protection of Intellectual property rights of those companies, which develop the technology that will help both the developed and the developing nations mitigate any environmentally damaging emissions. The scope of the book has enlarged and so the title has been change to more realistically reflect the development in the area to International Law for Energy and the Environment. This edition has been written for all actors within the energy sector.

Policymakers, CEOs, and senior managers of any company, working either upstream or downstream, within the energy sector will benefit from greater knowledge and understanding of the legal issues. Engineers working in research and development will have an understanding of the intellectual property rights and the broader legal context within which they and their company operate. The book will also benefit those who are studying at undergraduate level, but more so those at postgraduate level on an MBA or a legal course.

The book itself is divided into three specific sections that build one upon the other. Section I looks at the more general issues concerning the energy sector. Chapter 1 sets into context the interrelationship between international law, environmental law, and the energy sector. It considers international policy and the regulatory bodies, international standard setting, and the influence of science, it also looks towards the more ethical issues of corporate social responsibility within environmental management.

Chapter 2 is more theoretical in nature and considers regulatory theory within an economic context, as no regulated sector can operate without consideration of the economic imperatives.

Chapter 3 discusses the interrelationship between international regulation and state rules that companies must comply with. It also discusses the duties and liabilities of multinational companies operating in the energy sector who have subsidiaries operating in different jurisdictions. This chapter brings together all of the global imperatives with regard to the energy sector.

Chapter 4 completes the general section of the book by considering trade, competition, and environmental law with reference to the energy sector.

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Section II of the book addresses the individual regulation of the various energy sectors. This section of the book looks at the international law as it affects the different energy sectors. Unless an energy resources is found wholly within the territory of a single state, international law will affect what any one state may do with regard to the regulation of a resource that may cross the borders of more than one state. If the development of that resource has a trans-boundary effect on a third-party state, then international law will come into play.

Chapter 5 looks at the international law with regard to the regulation of the oil and gas sector, considering the different types of state regulation and ownership, liability in both the criminal and civil areas, and issues of decommissioning.

In chapter 6, the international regulation of the nuclear industry, control of nuclear risk, and liability for nuclear waste are considered.

Section III of the book considers some of the main energy producer/user jurisdictions within which any energy company may operate. It looks at the more developed systems around the world and identifies some areas of good practice. It looks at the new and emerging economics where the regulation of the energy sector is evolving but is not yet complete. A number case studies are used to identify problems and solutions that any enterprise operating in the energy sector needs to be aware of.

Chapter 7 considers the regulation of the energy sector in the United States, one of the major producers as well as users of energy. It considers the interrelationship between federal and state policy and regulations. Federal regulatory bodies and the different rules for the different energy sectors are considered. The chapter also uses case studies to illustrate some areas of the law.

Chapter 8 looks at the European Union as it represents another large block of energy producers/users. There are European laws concerning the energy sector and climate change, which in some ways reflect the federal jurisdiction of the United States, and these are issues by way of Directives and Regulations. The European competition legislation and the use of “state aid” for environmental purposes are a major influence.
Chapter 9 considers the United Kingdom as a major producer and representative of a Member State of the European Union as these laws must be transposed into national laws of the European Member states. Again, issues of energy policy, the regulatory bodies, and the different energy sectors are considered.

Chapter 10 considers Norway as a large hydropower producer and a significant exporter of oil and gas. Norway is also a member of European Economic Area (EEA), which although not a full member of the European Union, follows most of the Directives and Regulations with regard to trade and competition, through the European Economic Agreement.

Chapter 11 turns to Australia, the major producer and user of energy in the southern Hemisphere. Australia also has very strong environmental credentials but has some difficulty in signing up to the framework convention on climate change lest it damage their international trade with the far eastern countries.

Chapter 12 considers the first of two major emerging economies, namely, India. India has a traditional and cultural empathy with nature and the environment, it has signed up to the major international treaties and has policies to support renewable energy sources. However, India dose have a problem with the enforcement of the law.

Chapter 13 considers the emerging policies of the second of these economics, namely, China, policies are being developed to consider the environment, as the main natural energy source is coal, and the mitigation of any environmentally detrimental effects of coal-fired power station is currently taken seriously by the Chinese government.

Chapter 14 provides a summary and discussion on the regulation of energy and the environment as discussion in greater depth in the earlier chapters.

*Petroleum Contract English Law* by Peter Roberts, purpose of this book is simply this- to explain the relevant principles of English law specifically as those principles are applied to and used in connection with petroleum contracts which have selected the laws of England and Wales as the governing law.\(^\text{127}\)

Chapter 1 of this book introduces the notion of English law (or, to put it properly, the laws of England and Wales), with an explanation of the sources of English law and the essential distinctions between common law and equity, common law and civil law, and contract and tort. Chapter 1 also examines certain key elements of English law which will make further appearances in this book - the principles of freedom of contract under English law (and how this translates into practice), the capacity of corporations to contract, the distinction between debt and damages, and the meaning of an indemnity.

The very necessary counterpoint to the introduction to English law in Chapter 1 is the introduction in Chapter 2 to the range of what are collectively in this book called “petroleum contracts”, so that some context for the considered applications of English law exists. For convenience the examination of petroleum contracts here is made by reference to the industry accepted distinctions between upstream, midstream, and downstream contracts (together with a consideration of what may be called the more “general” contracts which typically apply to most petroleum projects).

Chapter 3 considers how petroleum contracts are represented through what are often called preliminary contracts, entered into by parties as a precursor to a fully termed contract, including the extent to which obligations to negotiate are enforceable and whether a binding contract could be arrived at as a consequence of an intended preliminary contract.

Chapter 4 examines the role of conditions in petroleum contracts. The principal focus is upon conditions precedent but consideration is given also to promissory conditions, contingent conditions generally, and the manner in which conditions are defined and distinguished under English law.

Chapter 5 considers the role joint ventures play in the structuring of petroleum contracts. The chapter reviews the contrast between incorporated and unincorporated joint ventures, the role of the joint operating agreement, and the contrast between unincorporated joint ventures and partnerships.

Chapter 6 examines the roles played by the third parties in the discharge by contracting parties of their obligations. The principal focus is on vicarious performance (by contractors) and the role of agency in English law, together which a review of the status of the doctrine of the Privet
of contract as it presently stands. This chapter also examines the manner in which security interests in support of a contractual obligation can be created in favour of contracting parties and third parties.

Chapter 7 amplifies the examination of the various equitable rights and remedies introduced in chapter 1, with particular focus on the role of trusts in petroleum contracts, the consequences of the implications of fiduciary duties, the options for the specific enforcement of a potentially defaulted contract, and a review of the various other equitable rights and remedies which may apply between the parties.

Chapter 8 examines the specific content of contracts used for the sale and supply of petroleum, and also the interface between express contractual terms and terms which may otherwise be implied into such contracts by statutory intervention. This chapter also considers the issues associated with the transfers of title, risk, and custody between seller and buyer in such commodity contracts and the consequence of take or pay commitments, retention of title clauses, and the bailment of goods.

Chapter 9 recognizes the criticality of what is described generally as “collateral support” in the structuring of petroleum contracts. This chapter examines the content and application of guarantees in their various forms, the boundaries between guarantees and other forms of commitment, and the practical circumstances in which collateral support is called for in relation to petroleum contracts.

Chapter 10 examines the circumstances in which English law will afford relief from liability to a contracting party for a failure to perform a contractual commitment because of certain events of impossibility or impracticability. This chapter focuses on the application of the doctrines of frustration and force majeure, with consideration also of the relief which may be afforded by contractual devices such as hardship and material adverse change clauses.

Chapter 11 considers the role which damages play as a remedy for a breach of contract and how damages are assessed under English law. This chapter also examines the application of restitutionary remedies and liquidated damages in the protection of contractual rights.
Chapter 12 reviews the grounds for bringing a contract to an end, the consequences of such termination. There is a consideration of the circumstances in which a contract is discharged by proper performance, by agreement between the parties, or by the application of a contractually agreed termination right. Also considered are the grounds which may apply so as to enable a contract to be terminated because of an actual or anticipated breach or by operation law. The practical and economic consequences of a contractual termination are also reviewed.

Chapter 13 examines the options for the allocation between the contracting parties of liabilities which arise under or in connection with a contract. This chapter addresses the different potential models for the allocation of liability, the role of indemnities, exclusion clauses and liability caps, and the prospects for insurance and other recoveries. This chapter also reviews the application of popular industry definitions such as wilful misconduct and consequential loss.

Chapter 14 considers the manner in which a contracting party can transfer its rights and/or obligations to a third party (whether by contract or through the operation of law). Pre-emption and change of control provisions are examined, together with a review of how farm out agreements fit within the context of transfers of interests to third parties.

Chapter 15 recognizes the reality that disputes will be an inevitability in contractual relationships, and that consequently the contract should provide a satisfactory methodology for the resolution of such disputes. This chapter examines the role of governing law, jurisdiction clauses, and sovereign immunity clauses in petroleum contracts, together with the options for dispute resolution. Specific focus is applied to the role of industry custom and practice in defining the scope for disputes and their resolution, and also to price reviews in commodity sales contracts.

Finally, Chapter 16 examines the miscellaneous provisions which are essential to the proper functioning of any petroleum contract. That these various provisions are grouped together here at the end, like some sort of legal bric-a-brac, is by no means intended to diminish their importance. To the contrary, it is significant that they are the final word in this book.

*International Commercial Arbitration* by Garry B. Born, is book divided into 13 Chapter.¹²⁸ Chapter 1 provides an overview of the history and contemporary legal framework for

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international commercial arbitration. First, the Chapter sets out a summary of the history of international arbitration. Second, the Chapter considers the key objectives of contemporary international commercial arbitration. Third, the Chapter outlines the contemporary legal framework for international commercial arbitration, including international arbitration conventions, national arbitration legislation, institutional arbitration rules, international arbitration agreements and choice-of-law rules. Fourth, chapter briefly summarizes leading “theories of arbitration” developed principally in civil law jurisdictions. Finally, the Chapter reviews the main sources of information in the field of international commercial arbitration.

Chapter 2, the validity, effects and interpretation of international arbitration agreements depend in substantial part on legal framework of international arbitration conventions and national arbitration legislation. These instruments eliminate historic obstacles to the enforceability of arbitration agreements and provide a decisively “pro-arbitration” enforcement regime for such agreements. This chapter examines that legal framework, focusing particularly on the jurisdictional requirements which must be satisfied in order for this regime to apply.

The First, Chapter introduces the presumptive validity of international commercial arbitration agreements under contemporary international arbitration conventions and national legislation. The Second, Chapter addresses the definition of an “arbitration agreement” again under both international and national instrument. The Third, Chapter examines a series of additional jurisdictional requirements applicable to arbitration agreements under leading international arbitration conventions and national legislation, including requirements that such agreements concern a “commercial” “international” and “defined legal” relationship, and that they apply to the resolution of “disputes.” Finally, the Chapter addresses the role of the arbitral seats location in determining the legal framework applicable to an international arbitration agreement.

Chapter 3, an international arbitration agreement is almost invariably treated as presumptively “separable” or “autonomous” from the underlying contract within which it is found. This result is generally referred to as an application of the “separability doctrine” or, more accurately, the “separability presumption.” This chapter discusses the development, current status, analytical bases and applications of the separability presumption.
Chapter 4, a recurrent issue in the arbitral process is the choice of the law governing an international arbitration agreement. This subject arises in most dispute over the existence, validity and interpretation of arbitration agreements, and continues to give rise to unfortunate uncertainty. This Chapter first discusses the historic treatment of these choices-of-law issues, and then addresses contemporary approaches and prospects for further development. It separately addresses choice-of-law issues arising in connection with issues of substantive validity, non-arbitrarily, formal validity, capacity and authority.

Chapter 5, the resolution of disputes over the enforceability of arbitration agreements is a subject of great practical importance for the international arbitral process, as well as an enduring academic challenge. This Chapter discusses the substantive legal issues arising in connection with the formation, validity and legality of international arbitration agreements.

Issues relating to the presumptive separability of international arbitration agreements, to the choice of the law applicable to international arbitration agreements, to the competence-competence doctrine and to the effects and means of enforcement of such agreements are discussed elsewhere.

First, this chapter introduces the historical development of legal standards governing the formal and substantive validity international arbitration agreements. The Second, chapter discusses issues concerning the formal validity of international arbitration agreements, including the “writing” requirement. The Third, chapter addresses the capacity of parties to enter into arbitration agreements. The Fourth, Chapter discusses the formation of arbitration agreements, including standards of proof, consent and defects in consent. The Fifth, chapter discusses the substantive validity of international arbitration agreements, including issues of fraud, mistake, illegality, unconscionability, waiver and the like. The Sixth, chapter addresses the non-arbitrability doctrine. Finally, chapter discusses procedural requirements imposed by arbitration agreements and the effects of non-compliance with these requirements.

Chapter 6, an issue of central importance to the international arbitration arbitral process is the authority of an arbitrator to consider and decide dispute over the arbitrator's own jurisdiction, including disputes over the existence, validity, legality and scope of the parties, arbitration agreement. This question is the subject-matter of the so-called “competence-competence” doctrine
(also referred to as “*kompetenz-kompetenz*” or jurisdiction to decide jurisdiction”). The competence-competence doctrine is closely related to rules regarding the allocation of jurisdictional competence between arbitral tribunals and national courts and to rules concerning the nature and timing of judicial consideration of challenges to an arbitral tribunal’s jurisdiction.

This Chapter first discusses the historical development and current status of the competence-competence doctrine. Second, the Chapter explores the allocation of jurisdictional competence between arbitrators and national courts under leading national arbitration legislation. Finally, this Chapter addresses the procedural issues arising within the arbitral process itself from arbitrators’ exercise of their competence-competence.

Chapter 7, International arbitration agreements have potentially significant consequences for the parties, legal rights. This Chapter examines these legal effects, including both the negative effect of denying parties the right to pursue litigation in national courts and the positive effect of obligating them to arbitrate their disputes in good faith. The Chapter also discusses the different mechanisms for enforcing these obligations under leading legal systems. Finally, the Chapter addresses the related subjects of antisuit and anti-arbitration injunctions.

Chapter 8, This Chapter examines the interpretation of international arbitration agreements. The Chapter first addresses the rules of construction which are applied in different legal system in interpreting the scope of arbitration agreements, and then addresses a number of recurrent interpretative issues that arise in practice. The Chapter also examines interpretative issues concerning the exclusivity of arbitration agreements.

Chapter 9, an issue which arise recurrently in connection with the enforcement of international arbitration agreements is the identity of the parties to such agreements: what entities are bound, and what entities may invoke, an international arbitration agreement? This chapter first discusses the basic principle that international arbitration agreements are, as consensual instruments, binding only on the parties to such agreements. Second, the Chapter examines the various legal doctrines that have been used to give effect to arbitration agreements vis-a-vis entities that did not execute such agreements (“non-signatories”), including theories of agency, alter ego status (or veil piercing), “group of companies,” *estoppel*, guarantor relations, third-party beneficiary rights, succession, assignment, assumption and miscellaneous other grounds. Third,
the Chapter examines the choice-of-law rules governing the foregoing issues. Fourth, the Chapter discusses the allocation of competence, between national courts and arbitral tribunals, to decide dispute regarding the identity of the parties to an international arbitration agreement. Finally, the Chapter addresses the subjects of arbitration in corporate context and “class arbitrations.”

Chapter 10, the efficacy of international arbitral proceedings in accomplishing the parties, objectives depends in substantial part on a complex legal framework of international arbitration conventions and national arbitration legislation. Taken together, these instruments guarantee the procedural autonomy of the arbitral process, materially limiting interlocutory judicial intervention by national courts in the arbitral proceedings, while providing defined judicial assistance to arbitral tribunals. This Chapter examines this legal framework for international arbitral proceedings.

The Chapter first summarizes the jurisdictional requirements necessary for the application of the pro-arbitration provisions of contemporary arbitration conventions and national legislation to an international arbitral proceeding. Second, the Chapter discusses the concept of the “arbitral seat” and its legal consequences for international arbitrations, including both the mandatory application of the arbitration legislation of the arbitral seat of the arbitral proceeding and possible international limitation on that legislation. Third, the Chapter addresses the closely-related subject of the “procedural law” governing international arbitration proceedings and the conflict of laws issues that arise in identifying the procedural law.

Chapter 11, one of the distinguishing aspects of international arbitration is the means of selecting the tribunal that will decide the parties, dispute. This Chapter examines how the selection of arbitrators is dealt with by leading international conventions, national arbitration legislation and institutional arbitration rules.

First, this chapter discusses the number of arbitrators. Second, chapter addresses the parties, autonomy to select arbitrators (or to agree upon a means of selecting arbitrators), as well as procedures for making such selections. Third, chapter consider various potential limitations on the choice of arbitrators, both by the parties and otherwise. Fourth, chapter considers the requirements of impartiality and independence of arbitrators. Fifth, chapter considers the procedures for challenging and replacing arbitrators. Finally, Chapter addresses “truncated tribunals” where a tribunal proceeds with less than its original full complement of arbitrators.
Chapter 12, This Chapter examines the rights and duties of arbitrators in international arbitrations. First, chapter addresses the status of the international arbitrator, including the contractual and other bases for that status. Second, chapter examines the obligations that are owed by international arbitrators and the remedies for breaches of such obligations. Third, chapter addresses the rights and protections of international arbitrators, including their immunities. Fourth, chapter considers choice-of-law issues relating to arbitrators rights and obligations. Finally, chapter briefly discusses proposals to license and otherwise regulate international arbitrators.

Chapter 13, a critical issue in any international arbitration is the location of the arbitral seat or place of arbitration. This chapter first examines the importance of the arbitral seat in international arbitration. Thereafter, chapter addresses the different means of selecting the arbitral seat, including by agreement of the parties, by the arbitral tribunal or arbitral institution and (rarely) by national courts.

1.9 Organization of the Chapters

The study has been divided in various chapters briefly discussed and described below:

Chapter 1: Introduction.
Chapter 2: The Development of Petroleum Arbitration
Chapter 3: International Arbitration in Energy Sector
Chapter 4: Expert determination in Energy Sector
Chapter 5: Alternative dispute resolution in Energy Sector
Chapter 6: Dispute Resolution: An Petroleum Industry Perspective
Chapter 7: Lexpetrolea in International Law
Chapter 8: Joint Venture disputes in Energy Sector
Chapter 9: Investment Treaty Arbitration in Energy Sector
Chapter 10: Political Risks Arising from the intervention of host state
Chapter 11: Conclusion & Suggestions