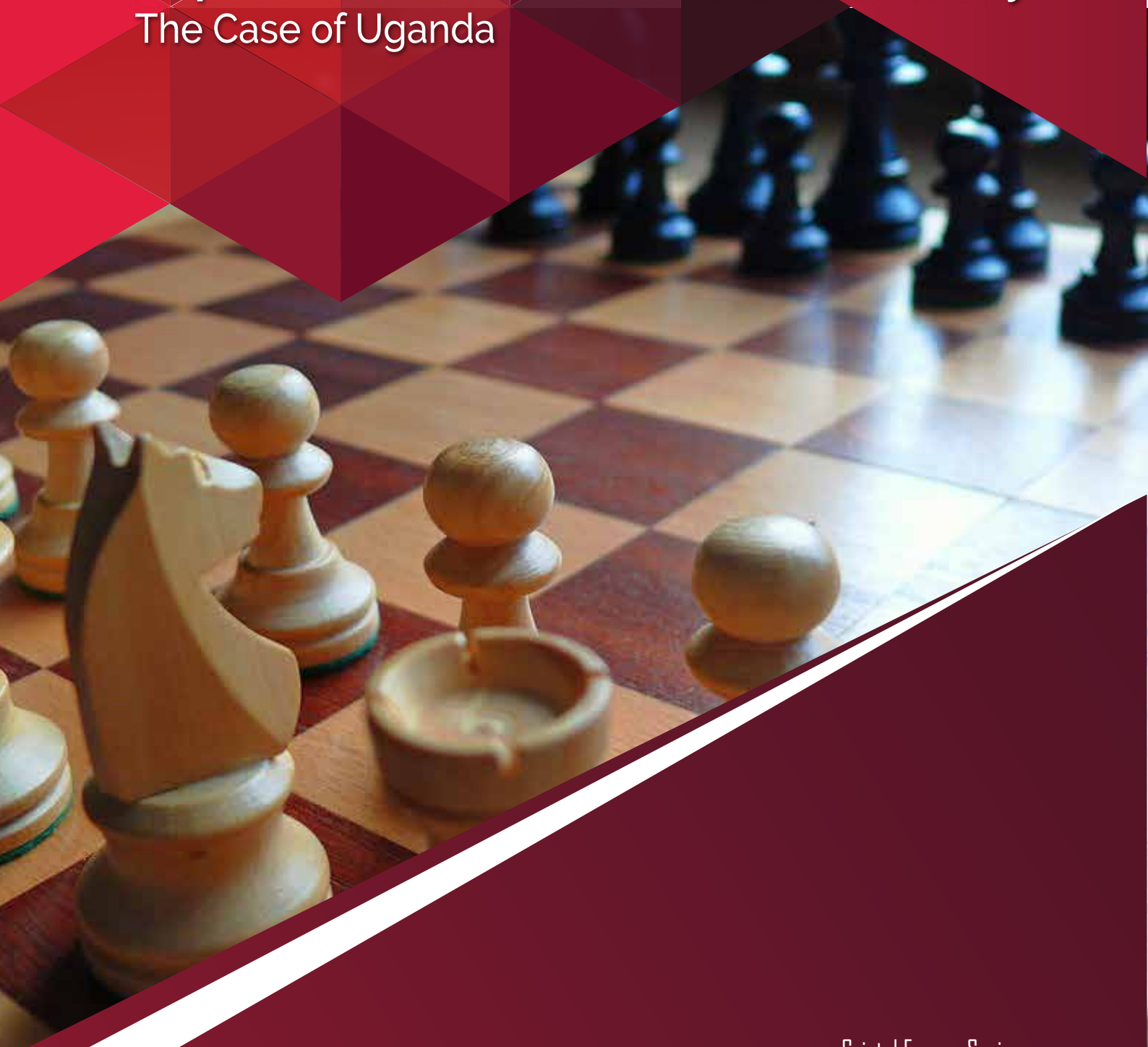
CRISTAL
'total solutions'

Cristal Advocates

Dispute Resolution in the Oil and Gas Industry

The Case of Uganda



Cristal Energy Series

February 2019

1. Introduction

Many challenges in the oil and gas industry are not unique but they loom large because of its special characteristics particularly the long life cycle of projects.

There is significant upfront investment prior to oil production that is recouped over a long period of time compared to the other sectors. The industry is also highly sensitive to changes to the fiscal and regulatory regime that can adversely impact the commercial viability of projects as originally evaluated. This is the reason International Oil Companies ("IOCs") stress to governments how important the stability and predictability of a country's tax and regulatory regime is to their investment decisions. The potential for material disputes also arises in relation to the dealings between the IOCs and their subcontractors and amongst IOCs participating in joint ventures or buying and selling assets.

Given the huge amounts at stake, disagreements can become serious disputes unless there are robust means for addressing such. Unresolved disputes have the potential to derail oil and gas projects and this underlines to both governments and IOCs the importance of having in place clear strategies for settling disputes that must be incorporated in the respective project and investment agreements.

This publication provides an overview of dispute resolution in the oil and gas industry and cites Uganda's recent experience.

2. Disputes in the oil and gas industry

Though differences between the State and IOCs grab the most attention, disputes in the oil and gas industry take various forms and can involve other parties as we explain below.

a) **State versus IOCs disputes**

These represent disagreements between the government and IOCs in relation to agreements for petroleum exploration, development and production ("PSAs"). They are also referred to as state investment disputes. Disputes between IOCs and host governments can arise from several issues but more often if there are regulatory revisions that threaten to dilute the value of the project as earlier evaluated, for example resulting from changes to the tax and fiscal regime. Another area of potential dispute relates to acquisitions and disposals of interests in projects (either via direct asset sales or disposals of subsidiaries). The avenues provided to resolve such disputes are usually complemented by other techniques such as stabilization clauses that embolden substantive rights relating to the allocation of resource wealth between the state and IOCs.

b) **State versus State disputes**

State to state disputes are rarer but may arise with respect to petroleum fields overlapping international borders both onshore and offshore. Offshore maritime disputes arise largely in respect of who can exercise sovereign rights in the Exclusive Economic Zone. Disputes between states can also emanate with respect to the transit fees charges on throughput in cross border oil and gas pipelines.

c) **IOC versus Company disputes**

These represent disagreements between the IOCs or with their subcontractors and are also referred to as international commercial disputes. IOCs enter various agreements during the commercialization of oil and gas discoveries that include though are not limited to joint operations, cost allocation, production and allocation, crude oil offtake and purchase, crude oil transportation and lifting among others. The implementation of these agreements can trigger disputes between the IOCs. Service agreements between the IOCs and their subcontractors can also elicit disputes.

d) **Individuals versus IOCs**

The negative legacy issues of early oil and gas operations brought to the forefront of the industry agenda concerns of sustainable development and intergeneration equity. For example, under the provisions of the United States Alien Tort Statute, individuals outside of the US can institute judicial cases and claims against large corporations that engage in business activities that violate their human rights.

3. Dispute resolution techniques

Arbitration is often used to resolve oil and gas disputes but there are other methods as we set out below.

a) Negotiation involves direct and indirect communication between aggrieved parties discussing joint actions for resolving subsisting disputes. Negotiation happens as a matter of course and can be included in oil and gas agreements as part of the multi-step dispute resolution process.
b) With mediation, parties can resolve their disputes without going to court. With the help of a mediator, parties can come to agreement if they focus on

their long-term commercial interests without getting preoccupied with the details of asserting their legal rights and obligations under the relevant contract. Mediation is cheaper and faster than arbitration but is not commonly used in resolving international oil and gas disputes.

c) Expert determination is used in disputes requiring expert or technical input, but the parties need to agree in writing on the matters that are covered by this. Though not enforceable like arbitral awards, expert determinations contractually bind the relevant parties.

d) Litigation is the most common dispute resolution technique for lawyers. While it is practical in domestic energy disputes where all parties are from the same jurisdiction, litigation is not preferred for international disputes because of issues relating to neutrality and enforcement of judgements in foreign jurisdictions and the time it takes to conclude cases.

e) Arbitration is the technique of choice for dispute resolution in the international oil and gas industry. It is legally binding and the consequential awards enforceable in foreign jurisdictions. Parties can choose their arbitrators, the extent of their arbitration process as well as the venue and forum of arbitration. Arbitration is however fairly expensive.

4. Dispute resolution in Uganda

The techniques for dispute resolution discussed in 3 above are all embedded in the legal and contractual framework for oil and gas operations in Uganda as set out below.

a) **Arbitration**

Uganda is party to various International Agreements and deploys arbitration in the mix of dispute resolution techniques for oil and gas operations and other sectors of the economy.

- **New York Convention**

Uganda's arbitration regime is anchored on the 1958 United Nations Convention on Recognition and Enforcement of Arbitral Awards (the New York Convention) that it ratified in 1992. The Arbitration and Conciliation Act Cap 4 that was enacted in 2000 expressly incorporates the New York Convention. 159 states are party to this Convention.

Uganda's ratification of the New York Convention came with a declaration stating thus; *"The Republic of Uganda will only apply the Convention to recognition and enforcement of awards made in the territory of another Contracting State"*. Thus, foreign arbitral awards from contracting parties to the New York Convention are recognisable and enforceable in Uganda.

Where parties choose to adopt arbitration for the resolution of their disputes, the Arbitration and Conciliation Act expressly gives precedence to arbitration and requires Courts to suspend legal proceedings and refer a matter to arbitration where a defendant so requests. The Arbitration and Conciliation Act further preserves the integrity of arbitral awards by restricting judicial interference with an award only to points of law, meaning Courts cannot open up and re-hear a dispute which has been submitted to arbitration. The Arbitration and Conciliation Act established the Centre for Arbitration and Dispute Resolution ("CADR") to spearhead and conduct arbitration as well as perform supportive functions under the United Nations Commission for International Trade Law (''UNCITRAL'') Arbitration Rules.

- **ICSID Convention**

Uganda is also a state party to the Convention on Settlement of Investment Disputes between States and Nationals of Other States 1965 ("the ICSID Convention") which was ratified on 7th June 1966 and entered into force in Uganda on 14th October 1966. This enables the submission of investment disputes against Uganda for arbitration or conciliation at the International Centre for Settlement of Investment Disputes ("ICSID").

As far as enforcement of ICSID awards is concerned, the Arbitration and Conciliation Act expressly authorizes any party seeking to enforce an ICSID award in Uganda to apply to the High Court to have the award registered for purposes of enforcement.

ICSID in Washington DC, has already handled at least two claims involving the government of Uganda and IOCs though both were withdrawn prior to the arbitral award and involved tax disputes. These were Total E&P Uganda BV vs. Republic of Uganda ICSID Case No. ARB/15/11 and Tullow Uganda Operations PTY LTD vs. Republic of Uganda ICSID Case No. ARB/12/34.

- **Model Production Sharing Agreement**

In 2018, a new Model Production Sharing Agreement (MPSA) for petroleum exploration, development and production was adopted by the Ugandan Cabinet. Article 24.1 provides that where a dispute cannot be resolved within 120 days, it shall be referred to arbitration in accordance with the UNCITRAL Arbitration Rules. Such an arbitration is to be conducted by three judges

and the seat of arbitration is London, United Kingdom. This clause however excludes disputes relating to taxation, health and safety and environment which are determined only in accordance with the procedures set out in the applicable local legislation. An arbitral award/judgment obtained pursuant to this clause is final and binding and may be entered in any Court with jurisdiction for acceptance.

- **Other arbitrations**

More recent arbitrations have been commenced in the London Court of International Arbitration ("LCIA") by Heritage Oil and Gas Limited and Tullow Oil. The Heritage claim emanated from a decision by the Uganda Revenue Authority ("URA") to charge a 30% Capital Gains Tax ("CGT") on the sale of Heritage's PSA interests in Uganda to Tullow, a transaction which was valued at United States Dollar ("USD") 1.45 Billion. The dispute was also filed with the Kampala based Tax Appeals Tribunal ("TAT"). Both the LCIA and the TAT ruled that the transaction was taxable under Ugandan law.

In 2013, Tullow also lodged a claim at the LCIA in London. In this matter, which in 2011 had been filed at the TAT, Tullow disputed URA's assessment of CGT amounting to USD 467 Million on the farm down of its interests in Exploration Areas (EA) EA1, EA2 and EA3 to CNOOC and Total at USD 2.9 Billion. The TAT dismissed Tullow's appeal holding that the tax was payable while the LCIA arbitration was eventually resolved by the parties when Tullow agreed to pay USD250m in full and final settlement.

- **Litigation and recent taxation disputes**

As already highlighted, Uganda has been engaged in a number of taxation disputes with Heritage Oil and Gas Limited and Tullow Oil which went through the TAT and the High Court in Kampala as well as arbitration in the UK and the United States.

It should be noted that Heritage Oil and Tullow Oil were also locked in a dispute in relation to the CGT imposition by the URA on Heritage's farm down of its Ugandan oil blocks. This case decided in favour of Tullow Oil was heard by the UK High Court.

The current MPSA excludes taxation disputes from arbitration proceedings by providing that taxation disputes shall be handled in accordance with the objections and appeals mechanisms under the laws of Uganda. Based on our experience, it is highly unlikely IOCs would agree to sign a PSA that excludes taxation disputes from arbitration.

Under the Income Tax Act and the Tax Procedure Code Act, a party dissatisfied with a tax assessment may lodge an objection with the Commissioner General of URA within 45 days of receiving the assessment. The Commissioner General hears and determines the objection and any party dissatisfied with his/her decision, may lodge an application for review of the decision to the Tax Appeals Tribunal within 30 days.

The TAT is a constitutional tribunal established to handle tax disputes. Decisions of the TAT are appealable to the High Court within 30 days from the date of the decision. Further appeals may be lodged to the Court of Appeal and all the way to the Supreme Court.

Litigation in Courts of Law and established tribunals remains the default position for dispute resolution unless parties, by agreement choose or the law prescribes, some other procedure as already highlighted. The principal forum is the High Court which is constitutionally granted unlimited powers to hear and determine all civil and criminal matters with appeals being proffered to the Court of Appeal and the Supreme Court.

As already alluded to, the tax dispute between URA and Heritage was handled by the High Court by way of appeal from a decision of the TAT. The High Court has also been the forum of choice for many claims by host communities involving land and compensations. There are concerns though that the Ugandan judicial system notoriously suffers from case backlog which delays the hearing and disposal of cases.

- **Matters for expert determination**

The MPSA further reserves disputes relating to health, safety and environment ("HSE") for determination by a sole expert. Such an expert is to be appointed by agreement of the parties and where the parties fail to do so, either party may petition the President, or the next ranking officer, of the Institute of Petroleum (London) to make the appointment. The expert would be required to deliver their decision within 60 days. This procedure makes for quick and expeditious decisions on urgent matters of HSE which enables project activities to move forward with minimal disruption.

- **Other mechanisms**

Mediation and negotiation too can be incorporated in the mechanisms for dispute resolution if the parties to the oil and gas agreements so agree.

- **Regional Mechanisms**

The East African Court of Justice ("EACJ") was created under article 9 of the Treaty establishing the East

African Community ("EAC Treaty"). The EACJ's primary mandate is to handle interstate disputes concerning interpretation of the EAC Treaty. However, article 30 empowers legal entities and natural persons who are resident in a partner state to challenge any action, directive, decision or legislation of a partner state on the ground that it violates the EAC Treaty. Article 32 empowers the EACJ to handle arbitration proceedings where parties, by agreement, decide to refer disputes to it for arbitration.

5. Conclusion

While disputes are bound to happen due to the inherently complex nature of the oil and gas industry, as this publication shows, there are mechanisms embedded in Uganda's legal and contractual documents for effective resolution of such disputes. Moreover, specific procedures are provided for each category of disputes. While the TAT and Ugandan judiciary have been involved so far in the determination of some of the oil and gas disputes, international avenues such as ICSID and LCIA are the preferred forums for dispute resolution by the IOCs.

It is also interesting that the current MPSA excludes taxation disputes from arbitration proceedings though our view is that it is highly unlikely IOCs would agree to sign investment agreements that exclude taxation disputes from arbitration. ■

Contacts for this Publication

Bill Page
bpage@cristaladvocates.com

Bill is a Senior Advisor with Cristal Advocates. He has concentrated on working with energy companies with a particular focus on cross border transactions and M&A since 1989 and is a leading global energy and tax practitioner with wide international experience. Between 1986 and 1998, he worked in London with the UK tax authorities and Big Four accounting firms. From 1998 to 2004, he was based in Kazakhstan working across the Caspian region with Deloitte. He was in the region at the time it was developing its infrastructure for crude oil production with international investment following the collapse of the Soviet Union.

From 2004 to 2008, he worked in Russia where he led Deloitte's oil and gas industry group and established Deloitte's office in Sakhalin. He moved to East Africa in 2009 leading Deloitte's energy and resources industry group in Uganda, Kenya, Tanzania, Rwanda, Ethiopia and Mozambique. He was initially based in Kampala, Uganda later relocating to Dar es Salaam, Tanzania. Bill returned to the UK in 2014 supporting Deloitte UK teams working on outbound projects investing in Africa and was a key member of Deloitte UK's energy and resource practice until his retirement from the firm in September, 2018.

Bill is a graduate of Oxford University and completed his inspectors' training with the UK Inland Revenue in 1989. ■

Denis Yekoyasi Kakembo
(Co-Author)
dkakembo@cristaladvocates.com
+256 751 834 168

Denis is the Managing Partner at Cristal Advocates where he also leads the energy and tax practice. He is qualified both as a Lawyer and Chartered Accountant with vast experience serving various industries in Sub Saharan Africa. Before joining Cristal Advocates, he had worked for close to 10 years with Deloitte and Touche where he started his career and rose to senior managerial positions.

At Deloitte, he lived and worked in Uganda, Kenya, Tanzania and the United Kingdom for over 6 years and subsequently became the firm's chief of staff for the Energy and Resources Industry Group seeing him play a lead advisory role in Uganda, Kenya, Tanzania, Mozambique, South Sudan, Somalia and Ethiopia.

Denis is widely published and a regular commentator in the local, regional and international media and speaker at various forums regarding the taxation and financing of energy projects as well as the protection of large capital projects within the framework of international investment law.

He holds a Master of Laws degree in Petroleum Taxation and Finance from the University of Dundee in the United Kingdom and various other qualifications. ■

John Teira
jteira@cristaladvocates.com
+256 704 493 997

John leads the public policy and advocacy practice at the firm and combines unique public and private sector experience.

Prior to joining Cristal Advocates, he had worked as a Private Secretary to the President of the Republic of Uganda. During this time, he participated in several public and private sector engagements that included advising and coordinating activities relating to oil and gas as well as infrastructural projects of national significance. John had earlier worked with the Post Bank Uganda Limited and Shonubi Musoke and Co. Advocates.

He holds a Bachelor of Laws degree from Makerere University and a Post Graduate Diploma in Legal Practice from the Law Development Centre and various other qualifications. ■

Dickens Asiimwe Katta
dasiimwe@cristaladvocates.com
+256 772 370 021

Dickens leads the oil and gas practice at Cristal Advocates. He has an in depth appreciation of Uganda's oil and gas sector having served as the maiden Company Secretary of the Uganda National Oil Company (UNOC) and the Uganda Refinery Holding Company Limited (URHC). UNOC represents the Government of Uganda commercial interests in the oil and gas sector while URHC represents government interests in the refinery project as well as managing the petrol based industrial park.

Dickens was instrumental in UNOC's formation and initial period of operation and also served as its head of Contracts, Negotiations and Advisory until May 2018. Prior to joining UNOC, Dickens was Legal Counsel at the Petroleum Directorate of the Ministry of Energy playing key legal advisory roles on the negotiation and implementation of PSAs, Joint venture and other oil and gas agreements. He was also part of the team that shepherded the process of enacting the current Ugandan oil and gas Legislations and Regulations including the local content requirements.

He is a certified project control specialist (IFP) and holds a Master of Laws Degree in Petroleum Law and Policy from the University of Dundee in the United Kingdom, a Post Graduate Diploma in Legal Practice and a Bachelor of Laws degree from Makerere University. ■

Francis Tumwesige Ateenyi
(Co-Author)
ftumwesige@cristaladvocates.com
+256 702 540 936

Francis leads the litigation and dispute resolution practice at the firm. He is an Advocate of the High Court of Uganda with expertise in oil and gas, infrastructure and dispute resolution. He has been part of teams advising on projects in Uganda, Tanzania, Mozambique and South Africa. He specializes in regulatory compliance, national content, health and safety and dispute resolution.

He joined Cristal Advocates from Kizza, Tumwesige, and Ssemambo Advocates. He previously worked with the Advocates Coalition for Development and Environment (ACODE). He also undertook a traineeship with the oil and gas division of Webber Wetzel in Johannesburg, South Africa.

He holds a Master of Laws degree in Petroleum Law and Policy from the University of Dundee in the United Kingdom and various other qualifications. ■

CRISTAL
'total solutions'

- Energy & Infrastructure
- Business support
- Employment
- Banking & Finance
- School of Professional Excellence
- Tax
- Company Secretarial & Trustee Services
- Public Law & Policy Advocacy
- Dispute Resolution
- Corporate and Commercial

Contact us

Cristal Advocates
32 Lumumba Avenue
4th Floor, Padre Pio House
Lumumba Avenue

P.O. Box 1769 Kampala, Uganda
Tel: +256 (414) 671 274
Email; admin@cristaladvocates.com
www.cristaladvocates.com