

## THE IMPACT OF COVID-19 ON OIL & GAS CONTRACTS: ANOTHER LOOK AT THE RELEVANCE OF RE-NEGOTIATION CLAUSE

Re-negotiation clauses allow parties to return to the bargaining table and renegotiate the terms of their agreements upon the happening of any qualifying event or events. With the advent of Covid-19 pandemic, an event that has undoubtedly adversely disrupted the performance of contractual obligations and attached expectations, one clause that provides a contractual life-line for parties is the re-negotiation clause. The clause generally offers parties to a contract an amicable method of plugging unfilled gaps in a contract; becoming a viable alternative to litigation (or arbitration), “Frustration” and or “Force Majeure”.

The use of re-negotiation clauses has gained tremendous importance in the oil and gas sector as it often serves as a practical and suitable alternative to the stabilisation clause whilst giving the parties flexibility to accommodate fundamental changes occasioned by unforeseen eventualities (like the Covid-19 pandemic) to the already existing agreement. The re-negotiation clause thus allows parties to modify the agreement between them to accommodate the exigencies of the times rather than outrightly terminating often high value contracts following a disruption or when a dispute arises. The beauty of the re-negotiation clause therefore lies in the flexibility it provides for parties to modify the terms of a contract thus reducing the risk of termination of the entire contract.

In production sharing contracts (PSC), the re-negotiation clause balances the State’s sovereignty with the investor’s need for assurance that it can renegotiate terms, which have become unfavorable or detrimental to the fair completion of the contract – particularly in the wake of unforeseen occurrences. Through it, parties are able to explore more favourable alternatives and adjust their contractual relationship accordingly.

Re-negotiation clauses are predominantly agreed by parties but may be statutorily imported – directly or indirectly – into PSCs as the case of *AG, Rivers State & Ors v. AG, Federation*<sup>1</sup> shows. In that case the Supreme Court was called upon to interpret the duty of the Federal Government of Nigeria (FGN) in relation to the collection of revenue under s. 16 of the Deep Offshore Act<sup>2</sup>. This provision required, among others, that “*...if the price of crude oil at any time exceeds \$20 per barrel, real terms, the share of the government of the Federation in the additional revenue shall be adjusted under the production sharing contracts to such extent that the production sharing contracts shall be economically beneficial to the government of the Federation...*” Although the case was determined by consent judgment, it is instructive that the Supreme Court held that it had jurisdiction despite the fact that the said section directly impacted existing PSCs and the rights of the parties to the PSCs who were not parties to the case.

Despite their obvious value and benefit, re-negotiation clauses suffer a number of draw backs. For instance, they may potentially reduce contract stability or increase transaction costs and may not be able to prevent litigation or disputes as the case of *AG, Rivers State & Ors v. AG, Federation* shows. Further, the question of enforceability of re-negotiation clauses as indeed their relevance in circumstances where the contract already requires parties to explore all

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<sup>1</sup> Suit No. SC964/2016

<sup>2</sup> The Deep Offshore and Inland Basin Production Sharing Contracts Act 1993; recently amended by the Deep Offshore and Inland Basin PSC (Amendment) Act 2019

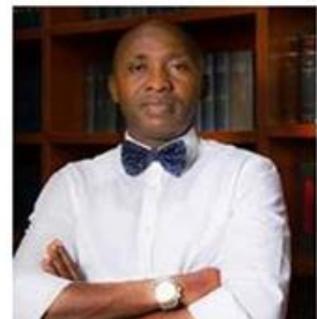
avenues of resolving a dispute before resorting to termination, litigation or arbitration is one which many view as undermining its relevance.

A lesson from this Covid-19 pandemic, however, is that the advantages of having a re-negotiation clause in contracts far outweigh the disadvantages. Where there is no express re-negotiation clause in an agreement, it may be difficult to bring the less vulnerable party back to the negotiation table. It would be of additional practical benefit, in relevant circumstances, where the re-negotiation clause contained parameters of re-negotiation as parties may find it challenging to agree new or alternative terms otherwise. It may however be advisable to limit the scope of its operation to unforeseen conditions outside the control of either of the parties.

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