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Legal Issues around the Unilateral Decision of Amending or Terminating Production Sharing Contracts Concluded by the Kurdistan Regional Government of Iraq and Legal Mechanisms of Settling their Disputes

Analytical study

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Abstract*:*

It is not unusual that changes of circumstances may occur during the life of the petroleum contract that alter materially the parties' expectations with respect to the outcome and the desirability of the continuation of the contract. The change of circumstances may be of such magnitude that it may either render the execution of the contract fully or partially impossible, or make the performance onerous for a party to the contract. According to article 56(second) of the Federal State Budget for the Republic of Iraq No.23 for the Fiscal Year of 2021, both federal government and Kurdistan Regional Government shall review and modify their contractual relations with international oil companies for oil and gas exploration and production across Iraq in order to provide a better deal for the region toward the contractors. Despite the fact that the KRG might benefit from such modifications or early termination to the contracts, it has no absolute authority in conducting such action due to legal terms and restrictions. There are many legal issues need to be taken into consideration before making such decisions and there is certain legal mechanism to settle any disputes between contracting parties. The KRG signed a series of Production Sharing Contracts with international companies by which it is bound to respect the content of the agreements toward contractors within the legal duration. This paper seeks to answer the question of whether the KRG has legal authority to take any unilateral action toward amending or terminating the petroleum contracts? How can any disputes be settled between contracting parties, particularly if the disputes arose as a result of such unilateral actions? It argues that Kurdistan Regional Government does not have free will to conduct changes or terminate the agreements unilaterally as the rules of English Law (applicable law) do not allow this. It also explained the major dispute resolution mechanisms outlined in the signed Production Sharing Contracts including negotiation, mediation and arbitration. The research paper sheds light on the legal issues under the valid contracts and applicable rules under the Iraqi legal system and English Law.

Key words: Unilateral Decisions, Amendments of Contracts, English Law, Production Sharing Contracts, Arbitration, Lex Mercatoria, Doctrine of Frustration, English Case Law, Dispute Resolution.

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الملخص:

ليس من غير المعتاد أن تحدث تغيرات في الظروف خلال مدة عقد البترول والتي تغير بشكل جوهري توقعات الأطراف فيما يتعلق بالنتيجة ومدى الرغبة في استمرار العقد. قد يكون تغيير الظروف من الحجم الذي قد يجعل تنفيذ العقد مستحيلًا كليًا أو جزئيًا ، أو يجعل الأداء مرهقًا لأحد أطراف العقد. وفقًا للمادة 56 (ثانيًا) من موازنة الدولة الاتحادية لجمهورية العراق رقم 23 للسنة المالية 2021 ، يتعين على كل من الحكومة الاتحادية وحكومة إقليم كوردستان مراجعة وتعديل علاقاتهما التعاقدية مع شركات النفط العالمية للتنقيب عن النفط والغاز. والإنتاج في جميع أنحاء العراق من أجل تقديم صفقة أفضل للمنطقة تجاه المقاولين. على الرغم من حقيقة أن حكومة إقليم كوردستان قد تستفيد من مثل هذه التعديلات أو الإنهاء المبكر للعقود ، إلا أنها لا تملك سلطة مطلقة في تنفيذ مثل هذا الإجراء بسبب الشروط والقيود القانونية. هناك العديد من القضايا القانونية التي يجب أخذها في الاعتبار قبل اتخاذ مثل هذه القرارات وهناك آلية قانونية معينة لتسوية أي نزاعات بين الأطراف المتعاقدة. وقعت حكومة إقليم كوردستان سلسلة من عقود مشاركة الإنتاج مع الشركات الدولية التي تلتزم بموجبها باحترام محتوى الاتفاقات تجاه المقاولين خلال المدة القانونية. تسعى هذه البحث للإجابة على سؤال ما إذا كانت حكومة إقليم كوردستان تتمتع بالسلطة القانونية لاتخاذ أي إجراء من جانب واحد تجاه تعديل أو إنهاء عقود البترول؟ كيف يمكن تسوية أي نزاع بين الأطراف المتعاقدة ، خاصة إذا نشأت الخلافات نتيجة لهذه الإجراءات الأحادية؟ وتجادل بأن حكومة إقليم كوردستان ليس لديها الإرادة الحرة لإجراء تغييرات أو إنهاء الاتفاقات من جانب واحد لأن قواعد القانون الإنجليزي (القانون المعمول به) لا تسمح بذلك. كما أوضح آليات تسوية المنازعات الرئيسية الموضحة في عقود مشاركة الإنتاج الموقعة بما في ذلك التفاوض والوساطة والتحكيم. تلقي الورقة البحثية الضوء على المسائل القانونية بموجب العقود السارية والقواعد المعمول بها في ظل النظام القانوني العراقي والقانون الإنجليزي.

الكليمات المفتاحية: القرارات الأحادية، تعديلات العقود، القانون الإنجليزي، عقود تقاسم الإنتاج، التحكيم، ليكس مركاتوريا، مبدأ الإحباط، السوابق القضائية الإنجليزية، حل النزاعات .

پوختە:

چەندین گۆڕانکاری لە بارودۆخ دا ڕوودەدات لە ماوەی گرێبەستە نەوتیەکاندا کە وادەکات لایەنەکان خوازیاری گۆڕانکاری بن لە بەردەوامبونی گرێبەستەکاندا. هەندێک جار ئەم گۆڕانکاریانە وادەکات جێبەجێکردنی گرێبەستەکان ئەستەم بن بە شێوەیەکی لاوەکی یان تەواوەتی یاخود جێبەجێکردنی گرێبەستەکە دەکات بە ئاستەم بۆ لایەنێکی گرێبەستەکە. مادەی ٥٨ بڕگەی دووەم لە میزانیەی حکومەتی فیدراڵی عێراق ژمارە ٢٣ ی ساڵی ٢٠٢١، داوا لە حکومەتی هەرێمی کوردستان و عێراق دەکات کە پیاچونەوە بکەن بۆ گرێبەستە نەوتیەکانیان لەگەڵ کۆمپانیا نەوتیەکان بەمەبەستی باشتر کردنی ناوەرۆکی گرێبەستەکان. لەگەڵ ئەوەی کە حکومەتی هەرێم سوود وەردەگرێت لەو گۆڕانکاریانە، بەڵام دەسەڵاتی تەواوی یاسایی نیە بۆ ئەنجامدانی گۆڕانکاریەکان. چەندین لایەنی یاسایی هەن کە پێویستە بە هەند وەربگیرێن پێش ئەنجامدانی هەربڕیارێک و میکانیزمی یاسایی دیاریکراو هەیە بۆ چارەسەرکردنی ناکۆکی نێوان لایەنەکان. حکومەتی هەرێم چەندین گرێبەستی هاوبەشی بەرهەمهێنانی ئەنجامداوە کە پێویستە پابەندی ناوەرۆکەکەی بێت لە ماوەی یاساییدا. ئەم توێژینەوەیە وەڵامی ئەو پرسیارە دەداتەوە کە ئایا حکومەتی هەرێمی کوردستان دەتوانێت تاکلایەنە گۆڕانکاری لە گرێبەستەکاندا بکات. حکومەتی هەرێم بە دەسەڵاتی یەک لایەنە ناتوانێت ئەو گۆڕانکاریانە بکات کە ویستی لەسەرە. بە گوێرەی یاسا کارپێکراوەکە.

کلیلە وشە: بڕیاری تاکلایەنە، هەموارکردنەوەی گرێبەستەکان، یاسای ئینگلیزی، گرێبەستەکانی هاوبەشیکردنی بەرهەمهێنان، ناوبژیوانی، لێکس مێرکتۆریا، دۆکترینی نائومێدی، یاسای کەیسی ئینگلیزی، بڕیاری ناکۆکی .

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I. Introduction

Any contract between two parties or more, entirely depends on the free will of contracting parties provided that this agreement does not contradict an applicable rule or public moral within a particular community and as Hewitt indicated, "the final shape of the contractual relationship will depend on the parties respective negotiating position in the changing market situation and circumstances concerning each similar project" (Hewitt, 2008, p.180). Contracts will be defined as International when the concluding parties come from two or more different states (Article 1(1) of the United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980). Moreover, the Principles on Choice of Law in International Commercial Contracts (2015) (the "Hague Principles") sates that "a contract is international unless each party has its establishment in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State." (Article 1(2) of Hague Principles). According to these definitions the Production Sharing Contracts signed by the Kurdistan Regional Government with International Oil Companies are considered international in nature and they cannot be subject only to a domestic legislation of Iraq. Applying two or more set of rules on a contractual relationship will subject the contracting parties to legal risks. Parties of international contracts are usually trying to agree on every single detail of their transaction and leave tiny space for the application of domestic law to be a governing rule of their contractual relation (Emery, 2016).

International companies, in particular petroleum companies, entering into international agreements have at their disposal several tools to enhance the strength and credibility of their commitments, including the ability to make the agreement a formal contract rather than soft law, provide for mandatory dispute resolution procedures, and establish monitoring mechanisms (Burr & Castro, 2016, p.309). Each of these strategies increase the costs associated with the violation of an agreement and, therefore, the probability of compliance. Petroleum agreements are characterized by three main features, high level of dangerousness and risks, high contract values and high complexity which make contracting parties very keen to insert maximum number of guarantees. Moreover, petroleum contracts are rarely concluded between only two parties, instead, it rather includes multiple contractors conducting different sets of activities (Hewitt, 2008, p.178). A set of petroleum contracts signed by Kurdistan Regional Government of Iraq is considered the main international commercial contracts involve foreign companies compare to other sectors such as construction and tourism. The KRG has adopted a certain kind of petroleum contract known as Production Sharing Contract under which two parties of the contract are sharing the production of oil. These contracts have been signed between petroleum companies and Ministry of Natural Resources represented by minister who has right to negotiate and sign contracts (Article 6(second) of KRG's Oil and Gas Law No.28 of 2007). Foreign companies are very cautious in undertaking investment in host countries. They are looking for maximum sort of safeguards to avoid political, economic and legislative instabilities. As long as the contracts need mutual agreement, any changes to the terms and conditions of the contract also need agreement by the contracting parties. The amendment of Production Sharing Contracts either takes place by mutual agreement with international oil companies, or by a unilateral decision of the Kurdistan Regional Government and if any disputes arise out of this process, there are certain mechanisms to be followed to resolve the disputes.

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Research objective

To fulfil the legal obligations under the Federal State Budget for the Republic of Iraq No.23 for the Fiscal Year of 2021 which calls upon modifying and reviewing terms and conditions of the current petroleum contracts with international oil companies, Kurdistan Regional Government shall take necessary steps in this regard. The main thrust of this article is to explore the underlying issues regarding the unilateral decision by the Kurdistan Regional Government to amend or terminate the Production Sharing Contracts with international oil companies. The article also highlights the gap filling provisions of the petroleum contracts that need most consideration from the KRG's side in taking such decisions. Additionally, it is examining the relevant contractual provisions, and to highlight the consequences of such amendment to termination of contracts. The research also considers the implied obligation of the parties to implement the contracts in the light of relevant principles of contract and practice. Most importantly, it looks into the perspective of English law, which the applicable law on Production Sharing Contracts in cases of conflict, to seek the legal consequences of unilateral decision of amending or terminating contracts. Furthermore, the paper illustrates the main mechanisms to settle disputes between contracting parties if any conflict arose as a result of amending or terminating the Production Sharing Contracts.

Research question

The main question that is asked here is that shall Kurdistan Regional Government unilaterally amend or terminate the terms of the valid Production Sharing Contracts with the contractors (International Oil Companies)? What are the legal mechanisms for settling disputes between contracting parties, particularly if the conflicts arose as a result of such unilateral actions? There are many legal issues need to be taken into consideration in answering these questions. The paper focuses on these issues and provide enough legal evidences to support the discussions.

Research outline

Apart from introduction and conclusions (finding and recommendations), the research has been divided into three main sections. In the first section, parties' mutual agreement to amend (modify) or terminate Production Sharing Contracts has been addressed. In the second section, English Law as an applicable law has been discussed. Followed by legal disputes on amending the terms of Production Sharing Contracts which is explained in the third section.

II. Parties Mutual Agreement to Amend (modify) or Terminate Production Sharing Contracts

The natural resources industry had experienced many incidents of renegotiations of the contracts during the 1960s and 1970s as the newly emerged developing countries wanted to restructure, and revise the natural resources agreements on the perception that such agreements concluded during the colonial era, were inequitable and exploitative arrangements or sometimes they revised these contracts purely as a result of inspiration of nationalistic sentiment. As host governments have taken a more active role in the international oil industry, a number of issues have emerged as recurrent sources of controversy between these governments and the transnational oil companies (Hart and Moore, 1988, p.761). The Kurdistan Regional Government who is represented by the Ministry of

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Natural resources has entered into many Production Sharing Contracts with the international petroleum companies since the enactment of Oil and Gas Law No.28 in 2007. The discussion here is focusing on the production contracts (not exploration contracts in which the company is searching for oil and there is no obligation toward the KRG whatsoever). The natural way of terminating the production contracts is by the completion after the end of contract duration which is determined by 20 years and the possibility of 5 years' extension based on the new agreement between the two parties (article 37(4) of the KRG's Oil and Gas Law No.28 of 2007). After the end of 20 years, the parties might agree on up to five years' extension on the same terms and conditions or any other terms the parties agreed upon. Here, there is a good chance for the KRG if they want to impose and negotiate new terms as the contractor (Oil company) has already established a decent foundation and it is not in its interest to leave the filed. However, any change request to the content of the contracts during the life cycle of the agreement shall be based on the consent of both parties. Despite having discrepancy in the two contractual system, the KRG could have adopted another approach similar to what have been decided by the Libyan Petroleum Law where there isn't any specific duration of the contract; Libyan Petroleum Law states that "The license shall be granted for a period of one year and may be renewed upon payment of the specified fees." (Article 6 (7) of the Libyan Petroleum Law No. 25 of 1955). This would allow the host country to impose new term after the end of the year.

The general principles of contracting under the Iraqi Civil Code No. 40 of 1951 are stated that if the contract is executed, it is necessary, and one of the contracting parties may not withdraw from it or amend it except in accordance with a provision in law or by mutual agreement of the contracting parties (article 146 (first) of the Iraqi Civil Code No. 40 of 1951). Thus, contract modification or termination cannot be conducted unless there is a mutual agreement on that. However, there is only one occasion when the court is intervening to ease the legal obligation of the parties which is the occurrence of unforeseen accident that make the implementation of the legal obligations burdensome for the parties (article 146 (second) of the Iraqi Civil Code No. 40 of 1951). Nonetheless, it should be stated that when it comes to the legal obligations of contracting parties of petroleum contract signed by the Kurdistan Regional Government, the Iraqi Civil Code is not an applicable law. Thus, if the law allows some sorts of contract modifications in some exceptional circumstances, it cannot be the legal basis for contracting parties to seek unilateral modification or termination decision in this regard. Therefore, the domestic law is excluded by the sake of signed Production Sharing Contracts. Moreover, the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG)[1], which is a multilateral treaty that establishes a uniform framework for international commerce and international contracts, has also emphasized on the necessity of mutual agreement for any contract modification or termination and it states "[a] contract may be modified or terminated by the mere agreement of the parties." (Article 29(1) of the CISG). Moreover, article 3.1.2 of UNIDROIT Principles on International Commercial Contracts states that "[a] contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement" (article 3.1.2 of UNIDROIT Principles on International Commercial Contracts 2016). As Snyder proposed "The basic purpose of making a contract-and the basic purpose of contract law-is to prevent change,

[1] Despite the fact that this convention is not directly applied to petroleum contracts, it established many general principles of international commercial contracts which can be considered a legal even for disputes in petroleum filed.

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or at least to provide compensation for it. A simple example illustrates this fundamental point" (Snyder, 1999, p.608). Common to all of these contracts is the parties' desire to lock in their deal, whether that deal be simple, complicated, or limited (Snyder, 1999, p.609).

The right of host countries in modifying the terms of the contracts has been emphasized in OPEC's Resolution No. XVI. 90 of 1968 when it declared that governments have a right to renegotiate contracts when transnational corporations serving as operators receive "excessively high net earnings after taxes." Now, there is a claim by the Kurdistan Regional Government that their earnings are low compare to the privileges of international oil companies. However, as it is stated by the "Report of the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and on International Relations, United Nations Document coded as E/5500/Rev.l.ST/ESA/6 of 1974", despite recognizing the host state's power to modify the contract through legislation, they recommended for the inclusion of the renegotiation or review clause in the natural resource agreements in view of the unilateral action by the host state can entail disproportionately high costs in terms of the future flow of investments. In their view, by having such clauses, the host country would deviate the risk of jeopardizing their international reputation (The impact of multinational corporations on development and on international relations, 1974). On the other hand, despite the fact that in awarding contracts to private contractors, Minster of Natural Resources in KRG would directly enter into negotiation (Article 26/first (2) of the KRG's Oil and Gas Law No.22 of 2007), it can be noticed that according to the applicable laws in Kurdistan Region of Iraq, any contractor who wants to get authorization to operate in any oil field in determined area will not be subject to the Public Procurement Regulation No.2 of 2016; meaning that the contract has special nature and it will be dealt as a commercial contract not a governmental contract in which government has absolute sovereignty and power toward the other party. The instruction clearly states that "The provisions of these Regulations shall not apply to the award by the Ministry of Natural Resources of authorizations and contracts for petroleum operations in the Kurdistan Region. These contracts remain subject to the provisions of the applicable Kurdistan Region's oil and gas law." (article 3(third) of the KRG's Public Procurement Regulation No.2 of 2016). The same content has been mentioned in Instructions for Implementing Government Contracts No.2 of 2014 (article 1 (second) of Instructions for Implementing Government Contracts No.2 of 2014). These legal provisions conveys that the government cannot practice its sovereignty toward oil companies as they do toward private companies in other sectors. In other words, Production Sharing Contracts are not administrative contract in which government can unilaterally impose obligations toward private contractors.

In the following section, the rules and principles of contract modification or termination within English law (applicable law) will be discussed.

III. English Law as choice of Law (applicable law)

Any business transaction crossing a national border is subject to two kinds of law: that of the home country or domestic law; and that of the foreign or host country. This is referred to as a question of the choice of law. It is more complex issue from one nation to another and there are no universal rules for choosing the appropriate law to govern international business disputes (Hotchkiss, 1994, p.39). In order to pursue legal procedures to modify or even terminate any legal contract, before discussing

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any section of this article, it is vital to find out the choice of law (applicable law) on the terms and conditions of the Production Sharing Contracts signed by Kurdistan Regional Government. After identifying the choice of law, amending mechanisms can be determined. Within broad limits, contracting parties are free to choose the law that will govern their agreement. From the point of view of developing countries, the preferred choice of law clause is one which provides that all disputes are to be settled in accordance with the law of the host state where they are familiar with the legal system. Other governments, particularly in the early years of oil exploration on their territory, have sometimes agreed to choose of law clauses that applied the law of the investor's home jurisdiction. More typically, however, major natural-resource agreements provide for some wholly or partially internationalized choice of law. One typical formulation applies the law of the host state generally, but provides that international law shall apply whenever there is a gap in the host state's legislation. Another form of internationalization, less favorable to developing countries, applies international law or "general principles of law" whenever that law conflicts with the law of the host state.

Within the scope of signed Production Sharing Contracts by the KRG, the choice of law (applicable law) on the contract is the English law by stating that "This Contract, including any dispute arising therefrom, thereunder or in relation thereto, shall be governed by English law (except any rule of English law which would refer the matter to another jurisdiction), together with any relevant rules, customs and practices of international law, as well as by principles and practice generally accepted in petroleum producing countries and in the international petroleum industry." (Article 43(1) of the KRG's Model of Production Sharing Contracts). Further, the Iraqi legislations will only be applicable when the contractor has liability toward the third party. This has been mentioned in Article 35 of the KRG's Model of Production Sharing Contracts when it states "subject to the other provisions of this contract, the contractor, in its capacity as the entity responsible for the execution of the petroleum operations within the contract area, shall be liable to third parties to the extent provided under applicable law for any losses and damage it may cause to them in conducting the petroleum operations, and shall defend, indemnify and hold harmless the Government with respect to all claims for such loss or damage." (Article 35(1) of the KRG's Model of Production Sharing Contracts). However, this liability is deviated sometimes by adopting what is known as "knock-for-knock clause" which can be defined as a clause by which damage and loss to property or personnel suffered by a party's 'group' (as defined in the relevant contract) is borne by that party regardless of fault. The party's group can be extended to include, in the case of the contractor, its various subcontractors and affiliates, or, in the case of the operator (the entity responsible for the operations relating to an oil and gas well or concession), its various other contractors and affiliates (Meade and Neuberge, 2019). The application of Knock-for-knock clause is directly related to liability, in particular, civil liability as the clause aimed at replacing fault-based liability with bearing each party its loss (Storme, 2006, p.31). In case of companies' liability toward the government, knock-for-knock has been adopted in Production Sharing Contracts when it states that, "The contractor shall indemnify and hold harmless the government against all losses, damages and liability arising under any claim, demand, action or proceeding brought or instituted against the government by any employee of the contractor or of any Subcontractor or by any dependent thereof, for personal injuries, industrial illness, death or damage to personal property sustained in connection with, related to or arising out of the performance or non-performance of this Contract regardless of the fault or negligence in whole or in party of any entity

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or individual." (Article 35(3) of the KRG's Model of PSC). Beside contracting parties, liability toward third party is ruled by applicable laws in Kurdistan Region, including Iraqi Civil Code or any other related rules (Article 1(1) of the KRG's Model of PSC). For settling any other dispute, the parties have agreed on alternative dispute resolution, including arbitration and the governing law is English Law (Article 43(1) of the KRG's Model of PSC) and the court is the London Court of International Arbitration (Article 42(1)b of the KRG's Model of PSC). This will be discussed more later in the fourth section. In brief, it can be realized that foreign oil companies are preferring to exclude the rules of domestic legislation and trying to use many clauses to safeguard their legal status.

As far as English Laws are chosen to be applicable on the contractual relationship between the KRG and foreign oil companies, rules regarding contract modification, amendment and termination are discussed within the scope of English Laws. English law is to a large extend based on case law which is consisted of the rules and principles stated and acted upon by judges in giving decisions. The fact that English Law is mainly a system of case law means that the judge's decision in a particular case constitute a precedent. Thus, the former decisions by the judge are considered materials in which its current decision could be based (Rupert & Harris, 1991, p.3-4). Hence, in order to understand the rules applied to the unilateral decisions of modifying or terminating contracts, there should be a deep study of English case law in this regard. For this purpose, the judge's verdict in some cases will be discussed below.

Before giving illustrations of case law under English law, we should give a brief description on rules of the Doctrine of Frustration under English law which are relevant in this context.

In English law, "a contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of the entry into the contract." (Beale, 2004, p.23). The concept of frustration has been invoked to mitigate the onerous doctrine of absolute contracts where performance of a contract is prevented by supervening events for which neither party to the contract is responsible and loss allocation is required. As Friedmann indicated, it is mainly a reflection of the variations and uncertainties of a period of wars, international tensions, social revolution, and economic upheavals. The law recognizes that these factors, whether due to national or international policies, go beyond reasonable calculation of economic risk, which is the function of the law of contract to safeguard (Friedmann, 1951, p.39).

In *J. Lauritzen AS v Wijsmuller BV (The Super Servant Two*), Bingham LJ set out the following five propositions which he regarded as the essence of the doctrine:

- frustration mitigates the rigour of the common law's insistence on literal performance of absolute promises;
- the doctrine operates to kill the contract and discharge parties from further liability under it;
- frustration brings a contract to an end "forthwith, without more and automatically";

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- it should not be due to the act or election of the party seeking to rely on it, so that there must be some "outside event or extraneous change in the situation";
- a frustrating event must take place without a party's fault, i.e. it cannot be self-induced (J.Lauritzen A.S. v. Wijsmuller B.V. [1990]).

The Supreme Court of England states "Although various theories have been propounded by the Judges and jurists in England regarding the juridical basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based is that of impossibility of performance of the contract: in fact, impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility" (Satyabrata Ghose v. Mugneeram & Co., A.I.R. 1954 S.C. 44, p.46-4). In English law, impossibility, either physical or legal, which exists at the time of the formation of the contract and is obvious upon the face of it, makes the consideration unreal. The impossibility must, of course, be so obvious (Clifford v. Watts, L.R. (1870) 5 C.P. 577, per Brett, J., at 588). The Kurdistan Regional Government, however, is not in a frustration condition and the above-mentioned criteria could not be applied. The main argument that the KRG might claim is the low consideration (earning) toward the contractor and this was too obvious after the deduction of oil price after 2014. Nonetheless, this argument is not valid as the earnings were pre-determined (Article (25) of the KRG's Model of Production Sharing Contracts) and according to the content of the signed Production Sharing Contracts, any deduction of oil price, will also affect the oil companies as well. Additionally, based on their agreement with the KRGs, contractors have spent a huge amount of money (cost oil) during exploration phase (Article 6(3) of the KRG's Model of Production Sharing Contracts). Thus, it can be said that in some occasions, the oil companies are even more frustrated than the KRG in terms of earnings. Moreover, the essence of frustration doctrine is when the performance of the contract would be impossible or illegal, in the signed Production Sharing Contracts, the oil companies are the mere operators and any they are the ones who can get benefit from the doctrine under the English Law. Thus, the KRG cannot take benefit of the doctrine of frustration recognized in English Law to unilaterally change or terminate the contracts.

As for the English case law regarding the validity of unilateral decisions of contract amendment or termination, the ruling of some cases is briefly reviewed. By reviewing English case laws, it can be realized that they associate contract modification or amendment to economic duress of the parties. The effect of duress on the enforceability of contracts has grown in the context of rigidly defined and strictly applied categories. These categories were: actual or threatened violence to the person - a contract entered into under duress of this kind was voidable; improper application of the legal process - good faith suits and settlements were not included but transactions induced by the improper use of legal process would be set aside; duress of goods - the wrongful seizure of property, followed by the demand for some payment or performance of some other act by the rightful owner as a condition of its return; and, money paid pursuant to demands made by persons charged with the performance of public duties (Aivazian et al., 1984, p.180-181). None of these conditions can be met in the proposal of the KRG to quest any kind of contract amendments or termination. In North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd. (the "Atlantic Baron") the plaintiff contracted for the

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construction of a tanker. During construction, because of a devaluation in the US dollar, the defendant demanded a ten percent increase in the contract price. The plaintiff, requiring timely completion to fulfill its obligations under an advantageous charter contract with a third party, agreed to pay the increased amount without prejudice. Judge Mocatta J., again citing the Australian cases and recognizing that compulsion may take the form of "economic duress," held that the contract modification here had been procured by economic duress. A claim for damages, with all the uncertainties of litigation, was not a reasonable alternative to the plaintiff at the time, especially in light of the plaintiff's obligations to third parties. Nevertheless, recovery was denied because the plaintiff had failed to pursue its remedies promptly once the duress was no longer operative ([1978] 3 All E.R. 1170 (Q.B.D.); see Dadson, Comment (1980), Fac. L. Rcv. U. of T. 223).

Two other well-known cases involving modifications to long-term contracts are Central London Property Trust Ltd. v. High Trees House Ltd., and Raggow v. Scougall & Co. In the Central London Property Trust Ltd. v. High Trees House Ltd. case, a ninety-nine-year lease of an apartment block entered into force in 1937 was modified in 1940 by a reduction in rents when the lessee found himself unable to let many of the apartments on account of war-time conditions. This modification was held enforceable as long as these conditions prevailed (Central London Property Trust Ltd. v. High Trees House Ltd, [1947] K.B. 130). Comparably, in Raggow v. Scougall and Co. case, the plaintiff entered into a five-year employment contract for a fixed salary as the defendant's designer. The contract was entered into in 1913, World War I broke out in 1914 and many of the defendant's customers cancelled their orders, compelling the defendants to consider closing their business altogether. Instead, they agreed with most of their employees, including the plaintiff, on wage reductions for so long as the war continued. Despite this agreement, the plaintiff subsequently sought to enforce his original contract at the higher salary. The action was rejected (Raggow v. Scougall and Co. (1915), 31 T.L.R. 564). The content of the above-mentioned cases is quite similar to what is known as an economic Force Majeure. Often, events of a purely economic nature, such as decreases in oil prices which has a direct reverse impact on the economy of the Kurdistan Region, are also characterized as non-force majeure. The fluctuation of economic conditions is a recognized unpredictability against which International Oil Companies can protect themselves by assigning risk through the provisions of the relevant agreement. Therefore, even major changes in the economic climate should not justify judicial intervention as they could have been accounted for in the contract. It may also be argued that the doctrine of force majeure relieves a party of a contractual obligation only when a fortuitous event makes the performance impossible; thus, a decline in the market price of oil would not make performance 'impossible'; it would merely make the performance unprofitable. (Cavaleri, 2018, p.5-6).

While the arguments against implementation of economic force majeure clauses are compelling, some courts have given effect to them where economic factors make performance more difficult. In Jnterpetrol Bermuda Ltd. v. Kaiser Aluminum International Corp., Trako Energy Corporation ("Trako") contracted to purchase heavy oil from Occidental Crude Sales Inc. ("Occidental Crude"). Trako also agreed to sell specified quantities of oil to Kaiser Aluminum International Corporation ("Kaiser"). Kaiser was to sell to Interpetrol the oil products purchased from Trako. As a result of a dramatic rise in the price of oil, Occidental Crude sought a release from the contract with Trako to

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take advantage of favorable market conditions. Trako permitted the release, allowing Occidental Crude to sell the oil to a third party for a higher price. As a result, Kaiser could not complete its contract with Interpetrol, and sought to invoke the force majeure clause excusing its failure to perform due to loss of oil supply. While lnterpetrol claimed that the clause only excused unforeseeable, involuntary events, Justice Skopil for the Court of Appeal states that "In a relatively free and fluid wholesale market, a seller should be entitled to utilize the power of his position to contract to his best advantage. That might include, as here, the extraction of a force majeure clause from a buyer. If the seller's supplier is not able because of market forces to require a similar provision in the agreement between seller and supplier, the result is that the seller is excused but the supplier is not". The court excused Kaiser from performance under the clause.

In deciding whether a party may rely on an economic force majeure clause, the courts will look to its interpretation. Contracting parties should specifically agree to include economic force majeure clauses if they wish the courts to excuse non-performance resulting from economic conditions or constraints. If a contract's force majeure clause does not include a provision regarding economic fluctuations, it will be presumed that the parties intended to assign risk through the pricing mechanism contained in the agreement.

By reviewing the Production Sharing Contracts signed by the Kurdistan Regional Government, it can be observed that both parties have legal obligation to the duties assigned in the contract unless something take place outside either parties' control. This is explained in a section under Force Majeure. The contract states that "No delay, default, breach or omission of the contractor in the execution of any of its obligations under this contract shall be considered a failure to perform this Contract or be the subject of a dispute if such delay, default, breach or omission is due to a case of Force Majeure". (Article 40 (1) of the KRG's model of Production Sharing Contracts). For the purpose of this contract, Force Majeure has been clearly defined as any event that is unforeseeable, insurmountable and irresistible, not due to any error or omission by the contractor but due to circumstances beyond its control, which prevents or impedes execution of all or part of its obligations under this contract. The decline in the oil price is not unpredictable event and as the result, a decline in the market price of oil would not make the performance of the KRG 'impossible'; it would merely make the performance unprofitable which is irrelevant in this context.

Additionally, under lex mercatoria, which is also constitute a major body of English law on contract matters, the principle of sanctity of contract is essentially a presumption leaning against the existence of any right of unilateral termination or modification of the contract by the parties, but, like all presumptions, it may in some cases be successfully rebutted. In principle, modification or termination of the contract should be allowed by the mutual subsequent agreement of the parties to that effect. Such an agreement can be explicit or tacit depending on the circumstances of the case. Modification or termination without subsequent agreement can be admitted only when it is in conformity with the articulated rules, or on the basis of the qualifying function of the basic principle of good faith and fair dealing (Elcin, 2012, p.203). Two statutory rules within the common law have also emphasized on the necessity of not modifying the contracts unless there is an agreement between the parties. It is implied in Article 6:111(l) of the Principles of European Contract Law on change of circumstances, which provides that a party is bound to fulfill its obligations even if performance

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becomes more onerous. Similarly, article (2-209) (2) of the Uniform Commercial Code stated that "A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party."

Within the international context, there is a clear demand to not unilaterally amend or terminate contracts. For instance, in the LIAMCO Arbitration Award, the sole arbitrator, consolidating various materials including European civil codes, Common Law, Islamic Jurisprudence, Libyan Civil Code, United Nations Resolutions in relation to the subject matter and Convention of Vienna on the Law of Treaties, held that: "The right to conclude contracts … is protected and characterized by two important propositions couched respectively in the expression that "the contract is the law of the parties", and in the Latin maxim that "Pacta sunt servanda" (pacts are to be observed). The first proposition means that the contracting parties are free to arrange their contractual relationship as they mutually intend. The second means that a freely and validly concluded contract is binding upon the parties in their mutual relationship. In fact, the principle of the sanctity of contracts, in its two characteristic propositions, has always constituted an integral part of most legal systems… Consequently, one of the parties cannot unilaterally cancel or modify the contents of the agreement, unless it is so authorized by the law, by a special provision of the agreement, or by its nature which implies such presumed intention of the parties." (Ad hoc Award Liamco v Libya, April 12, 1977, Yearbook Commercial Arbitration, 6 (1981), at 101). Any act that harasses the international oil companies such as decreasing their financial earnings which push them to leave the country is considered a sort of expropriation. International practices have proven that host states shall refrain from not only actual expropriation of foreign investment's properties, but rather refrain from what is known as creeping expropriation that is a process in which a host government, through regulatory or fiscal measures, gradually reduces the profitability of a foreigner's investment to such a degree that the state can be said to have taken the property (Zorn, 1985, p.65).

It is also worth mentioning that even if the applicable laws in the Kurdistan Region are applied on the relationship between the KRG and oil companies, there is another legal barrier before the KRG in enacting any legislation or even altering the current ones that has a reverse impact on the relationship. In other word, the KRG cannot under any circumstance change or enact any legislation that allow it to make the unilateral decision to change the content of the Production Sharing Contracts in its own favor; all the changes in laws or issuance of new one that occur and deemed to be applicable on their relationship shall be mutually agreed upon. The example of this clause can be seen in article 43 of the KRG's model of signed Production Sharing Contracts when it states that the government has responsibility to guarantee the maintenance of the stability of the fiscal and economic conditions of this Contract, as they result from this contract and as they result from the laws and regulations in force on the date of signature of this contract. All the applicable laws at the effective date of the contract will remain the same. If any changes happen which has reverse impact on fiscal and economic condition of the contractor "the terms and conditions of the contract shall be altered so as to restore the contractor to the same overall economic position as that which contractor would have been in, had no such change in the legal, fiscal and/or economic framework occurred". Any action contradict to the content of this article would cause the KRG a heavy financial burden alongside

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subjecting the reputation of the KRG to a major risk for any future transactions with international companies. Many international resolutions and commercial conventions emphasized on the necessity of paying justice compensation for the damage resulted in a unilateral decisions of changing petroleum contracts. For instance, article 4 of the UN General Assembly Resolution, Permanent Sovereignty over Natural Resources, 1803 (XVII) of 14 December 1962 indicated that "expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercises of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the state taking such measures shall be exhausted. However, upon agreement by sovereign, states and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication." (Article 4 of the UN General Assembly Resolution, Permanent Sovereignty over Natural Resources, 1803 (XVII) of 14 December 1962). The Law of Nationalization of Operations of the Iraq Petroleum Company Limited, No. (69) of 1972 has also stated the need to pay compensation when the state take action that create imbalance situation resulting from government actions when it states "The state shall pay to the Iraq Petroleum Company Limited in compensation for what it has acquired to the state…". (Article 3 of the Law of Nationalization of Operations of the Iraq Petroleum Company Limited, No. (69) of 1972).

IV. Legal disputes on amending or terminating the terms of Production Sharing Contracts

If the concluding parties (KRG and contractors [international oil companies]) has a dispute over amending or early termination of the terms of the signed agreements or any other legal issues, they should recourse to dispute resolution clauses pre-agreed upon and respect the awards. As the general principle, parties of any contractual relation will determine methods of resolving disputes that might arise as a result of implementing the content of the contract. In the absence of such clause, the disputed parties might face two potential problems: they might recourse to a mutually agreed mechanism to solve the dispute by negotiating the process while the tension between the parties will decrease the chance of coming to the compromise. The second choice is when one party (most of the time the company) might resort to the local court of the host country; in this scenario, the foreign company is at the risk of language and unfamiliar legal system of the host state (Li, 2006, p. 791 – 792). Thus, it is highly agreed that parties of any international contractual relation shall determine methods of resolving disputes. There are multiple choices for the parties to international commercial contracts to be used when it comes to settle the potential disputes over the terms and conditions of the contract (Contini, 1959, p.285-287). The mechanisms of dispute settlement vary based on the mutual agreements of the parties; they can be separately adopted or on the proviso basis. Negotiation, mediation and arbitration are among the most prominent methods of dispute resolution.

The most commonly used tools of conflict resolution are negotiation as a non-binding way to the parties and it is considered to be the least costly mean compare to mediation and arbitration. Further, resolving the issues between the parties of the conflict by negotiation will produce a positive indication that parties have understood the essence of the problem and came to a mutual agreement (Holland, 2000, p. 453). Negotiation has been defined as "any form of direct or indirect

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communication whereby parties who have opposing interests discuss the form of any joint action which they might take to manage and ultimately resolve the dispute between them" (The Law Society of Upper Canada, 1992, p.6). Moreover, if the contract articulated a provision with regard to use such tool, the parties are bound to recourse to it without having any obligation to the outcome of the discussion. Hence, negotiation is seemed to be ineffective mechanism of dispute resolution outcome-wise. The KRG in its Production Sharing Contracts tracts with international oil companies have adopted negotiation as a first step to settle any dispute arise between the parties. It states that "…. in the event of any dispute between the parties (or between any entity constituting the contractor and the government) arising out of or relating to this contract, including a dispute regarding its existence, validity or termination, the parties shall first seek settlement of the dispute by negotiation" (Article 41(1) of the KRG's model of Production Sharing Contracts). This indicates that resorting to negotiation by the parties of the conflict is mandatory before seeking any other tools.

Close in its premises, there is clause that will be inserted by international companies in their agreement allowing the parties to seek for reviewing the terms and the conditions known as renegotiation clause. The concept of renegotiation should not be mixed with negotiation of the contract as a tool of alternative dispute resolution or ADR, as negotiation is either a section before signing an agreement or a practice to be followed in time of dispute between the parties during the life of the agreement before resorting to litigation or arbitration. Renegotiation clause or Adaptation affords the parties of the contract with the needed stability and flexibility through the adaptation of the contract to new circumstances arising during the implementation of the agreement. (Nwete, 2006). Renegotiation clauses usually provide that any law, regulation or any

other government acts subsequent to the original contract that negatively affects the investor's contractual interests will entitle him the right to request for the contract renegotiation and that the host country will have the obligation of entering in such renegotiations in good faith. A typical renegotiation clause will provide that either the host government or foreign investor has the right to request for the contract adaptation if its equilibrium is negatively affected under the occurrence of an event that is beyond the control of both parties. (Macedo, 2015) As for negotiation, which has been discussed earlier, it is a dispute resolution mechanism after a conflict arose between the parties of a contractual relations.

In the KRG's Oil and Gas Law No28 2007 negotiation could be found for both purposes. For instance, in article 4, the relevant authority to sign any agreement with the contractor would be either the minister of natural resources or any other agencies appointed by the minster (Article 4(b) of the KRG's Oil and Gas Law, No.28 of 2007). In Indonesia, PERTAMINA (state Oil Company) is responsible of negotiations and preparing a draft of contract then the minister gives its advice and recommendations. This method will give opportunity to the host country for further scrutinizing and monitoring the terms and conditions of the contract (Fabrikant, 1975, p. 306-310). In the KRG, the minister of natural resources responsible for every procedures regarding negotiation and concluding contracts; giving such a sole discretion to the ministry (or the minister) may lead to corruption and the lack of transparency (Smith, 1991, p. 503-504). Regarding negotiation as a way to settle legal disputes between the parties of the agreement, the KRG in its petroleum act under resolution of disputes states that "…. If a dispute arises relating to the interpretation and/or application of the terms

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of an authorization between an authorized person and the minister, the parties shall attempt to resolve that dispute by means of negotiation" (Article 50/second (1) of the KRG's Oil and Gas Law, No.28 of 2007).

When parties of the dispute do not reach to an agreement after negotiating the surrounding circumstances of the conflict, there is another step that can be utilized as an advanced form of alternative dispute resolution which is known as mediation; merely asking the third party to resolve the problem based on the mutual agreement. As it has been mentioned by Sir Robert A. Baruch Bush and Joseph P. Folger, in the Promise of Mediation, "in any conflict, the principal objective ought to be to find a way of being neither victims nor victimizers, but partners in an ongoing human interaction that is always going to involve instability and conflict." (Robert A. Baruch Bush & Joseph P. Folger, 1994, p. 229). The process of mediation is considered as the voluntary and informal in settling disputes between the conflicted parties. Thus, it is the assigning of the third party, a neutral person by using specific negotiation and communication techniques and it is totally controlled by the parties themselves. The mediator behaves like a facilitator in reaching an agreement to end the disputes; hence, the mediator will not make any decision except the express of their views on the issue and leave the decision to the parties (Sheffield, 2014, p.29). In the KRG's model of Production Sharing Contracts, it is stated that parties of the dispute shall use the London Court of International Arbitration (LCIA) rules for mediation. Article 1 of the LCIA articulates that "where there is a prior existing agreement to mediate under the Rules (a "Prior Agreement"), any party or parties wishing to commence a mediation shall send to the Registrar of the LCIA Court ("the Registrar") a written request for mediation". Meanwhile, article 2 of the same rules specify the situation when there is no prior mutual agreement between the parties. It states that "Where there is no Prior Agreement, any party or parties wishing to commence a mediation under the Rules shall send to the Registrar a Request for Mediation, which shall briefly state the nature of the dispute and the value of the claim". Thus, all the mediation procedures will be derived from the LCIA rules in case of dispute settlement between the KRG and any other international oil companies. Both negotiation and mediation can be utilized in case of discussion between both contracting parties on amending or terminating the petroleum contracts; these mechanisms prevent the KRG from any unilateral decision in this regard. However, if they could not reach to an agreement on that, they can take their case to international arbitration.

A. Arbitration

The final resort for the disputed partied, who do not choose litigation in resolving their contractual disputes, is arbitration. When the parties of any contractual relationship agreed on having arbitration to resolve their disputes, they abandon their relationship to be ruled and subjected to the jurisdiction of the national court (Julian et al., 2003, p.5-6). Arbitration will give a wide authority to the arbitrators to determine the most appropriate measures and procedures in any arbitration trial. For instance, article 19 of the International Chamber of Commerce Rules states that "The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration." The Kurdistan Regional Government of Iraq, in both Oil and Gas legislation and its contracts with contractors, has

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adopted arbitration to settle its contractual disputes with the international oil companies. In the following part, the light will be shed on the KRG's oil and gas dispute resolution with the main focus on arbitration.

KRG's oil and gas dispute resolution

All parties of disputes have right to recourse to arbitration to resolve arisen conflicts, national or international. The International Chamber of Commerce has described the nature of business dispute of an international character between the disputed parties of international agreement by stating that "the international nature of the arbitration does not mean that the parties must necessarily be of different nationalities. By virtue of its object, the contract can nevertheless extend beyond national borders, when for example a contract is concluded between two nationals of the same State for performance in another country, or when it is concluded between a State and a subsidiary of a foreign company doing business in that State." (The International Solution to International Business Disputes-ICC Arbitration,1983). Further, the French Code of Civil Procedure has conditioned the international nature of arbitration when interest of international trade is involved (Article 1492 of the French Code of Civil Procedures). Thus, any dispute between the KRG and international oil companies are of international nature and the KRG has right to file arbitration claim against foreign parties and vice versa. By resorting to arbitration, the jurisdiction of the national courts in Iraq will be precluded and the arbitration clause in Production Sharing Contracts will replace the national court to settle any potential dispute with international oil companies.

In the KRG's Oil and Gas Law No.28 of 2007, dispute resolution has been ranged in chapter thirteen, article 50. The law determines two main mechanisms for dispute resolution, namely negotiation and arbitration; hence, mediation or conciliation have not adopted in the applicable law unlike the KRG's model of Production Sharing Contracts when it adopted mediation between the disputed parties if they fail to sort their issues by negotiation (Article 41 of the KRG's model of Production Sharing Contracts). According to the applicable law, the minister of natural resources in the KRG is authorized to settle all the disputes among the persons in case if dispute resolution tools have not agreed upon between the contracting parties or any other disputes in relation to other parties apart from the Kurdistan Regional Government (Article 50v(first) of the KRG's Oil and Gas Law No.28 of 2007). However, with regard to the disputes that arose out of the interpretation or application of the terms related to authorization between an authorized person (contractor) (Article 1(24) of the KRG's Oil and Gas Law No.28 of 2007, that defines authorized person as a Contractor; or the Person to whom the responsibility has been granted in accordance with the Authorisation and Access Authorisation.), and the minister, negotiation shall be taken as a mean of resolving the dispute. In case the dispute could not be resolved by negotiation, the dispute shall be submitted to arbitration (Article 50(second/1&2) of the KRG's Oil and Gas Law No.28 of 2007). Thus, it can be said that arbitration is the final step to be taken to settle the disputes.

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The following conventions include the recognized arbitration procedures and rules in conducting arbitration between Minister and authorized person (contractor):

"(a) the 1965 Washington Convention, or the regulations and rules of the International Centre for the Settlement of Investment Disputes (ICSID) between States and Nationals of other States;

(b) the rules set out in the ICSID Additional Facility adopted on 27 September 1978 by the Administrative Council at the ICSID between States and Nationals of other States, whenever the foreign party does not meet the requirements provided for in Article 25 of the Washington Convention;

(c) the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL);

(d) the arbitration rules of the London Court of International Arbitration (LCIA);

or

(e) such other rules of recognised standing (as agreed by the Parties, in respect of the conditions for implementation, including the method for the designation of

the arbitrators and the time limit within which the decision must be made)". Article 50(second/3) of the KRG's Oil and Gas Law No.28 of 2007).

In addition, more details of arbitration rules and procedures can be found in the KRG's model of Production Sharing Contracts that have been signed with many international companies in the region such as Hunt Oil, GEP GKP/MOL and many others. Article 42 of the adopted model of Production Sharing Contracts provide more details on arbitration procedures. The agreement states that "In the event that any Notice of Dispute is given in accordance with this Article 42.1, the parties to the Dispute shall first seek settlement of the dispute by Negotiation"

In case, the disputes were not resolved by negotiation, the agreement set out mediation according to the mediation procedures of the London Court of International Arbitration (LCIA) (Article 42(b) of the KRG's model of Production sharing Contracts). Despite the fact that this mechanism has not been adopted by the KRG's Oil and Gas Law No28 of 2007, mediation can be followed as it will provide extra space to the parties of the conflict to settle their disputes. This does not create any impact on the enforceability of mediation as it has been agreed upon throughout contracts with the contractors. Moreover, if mediation cannot resolve the dispute within (A) sixty (60) days of the appointment of the mediator, or such further period as the parties to the Dispute may otherwise agree in writing under the mediation procedure under Article 42.1 (b), and (B) one hundred and twenty (120) days after the delivery of the Dispute Notice, each party has right to refer the case to arbitration according to the provisions of London Court of International Arbitration (Article 42(c) of the KRG's model of Production sharing Contracts). The arbitration will take place in London and the applicable law will be English law (Article 42(c/4) of the KRG's model of Production sharing Contracts). These terms have weakened the legal position of the Kurdistan Region as the disputes will be subjected to the English law the Iraqi legal system has been alienated totally. Thus, KRG needs to hire international legal consultants. More concerningly for the KRG as a host government is that the

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arbitration awards are not subject to any appeal, this is according to article 42(C/5) of the KRG's model of Production Sharing Contracts. The recent disputes between the KRG and Dana Gas have proven the fact that the KRG seems to be in a difficult position.

Recently, the Kurdistan Regional Government has concentrated its attention on exploring and producing gas as it is announcing that a 461-million-squarefoot as a reserve site for building the Kurdistan Gas City has been designed (KRG-MOP, A Report of The Republic of South Korea Course from 2004 to the End of 2008). In 2007, both Dana Gas and Crescent Petroleum were granted a service contract for exploring and producing natural gas in Chemchemal and Khor Mor gas field which resulted in producing gas for local power generation. Under the agreement, these two companies with both OMV and Mole who joint them in May 2009, are paid for LPG as by products (Robin Mills, 2016, p.8-9). However, many legal issues have come between the KRG and Dana Gas by which Dana Gas claims millions of US dollars throughout arbitration process via the London Court of International Arbitration. The case was filed with the London Court of International Arbitration in 2013 over payments for gas liquids production; in July 2015 the arbitration court confirmed the claimants' long-term contractual rights, and in November that year it awarded them $1.96 billion for outstanding unpaid invoices, the validity of which was confirmed by a judgement of 20 November 2015 (England v. Wales, 2015). On 29 November 2015, Dana Gas said that it had been awarded $1.981 billion for unpaid condensate and LPG, with a judgement on compensation for the delayed development of the Khor Mor and Chemchemal fields still to be made (Article 33 of the Regulations of the Abu Dhabi Stock Exchange). It can be realized that the KRG might face similar outcomes with other oil companies if they follow the same pattern in concluding the contracts. In the following part, the enforceability of arbitration clause in international contracts will be argued.

B. Enforcement of arbitration awards regarding amending or terminating petroleum contracts

When it comes to arbitration or any other alternative dispute resolution tools, enforcement is a major issue, particularly the obligations of the disputed parties toward the arbitral award. In international transactions between states and foreign companies, the latter's main concern is enforcement. Nevertheless, the establishment of such procedures is considered a milestone in resolving conflicts among the disputed parties. As Lauterpacht pointed out, it is for the first time when an arbitration system was designed by which non-state actors such as corporations and individuals are able to sue states directly without giving them the right to use immunity or sovereignty. In this relationship, international law is directly in application between the states and investors with the direct implementation of the tribunal's award within territories of relevant parties and the enforcement of domestic rules are excluded (Lauterpacht, 2001, p.11-12). Further, Lando has indicated that in some cases, the parties to an international contract will agree on not to have their dispute governed by domestic law. Instead, they recourse to international law by submitting it to the customs and usages of international trade, to the rules of law which are common to all or most of the States engaged in international trade or to those States which are related with the dispute. Where such common rules are not applicable, the arbitrator tries to apply the rule or chooses the solution which appears to him to be the most appropriate and equitable. In this regard, he considers the laws of several legal systems.

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Further, he calls this judicial process, which is partly an application of legal rules and partly a selective and creative process, an application of the lex Mercatoria (Lando, 1985, p. 747)

Arbitration can achieve some outcomes for the disputed parties when litigation cannot. For instance, dissimilar to courts, when it is possible that it refuses to hear a dispute despite the consent of the parties, in arbitration the dispute will be heard if the parties pay the fees. Besides, the court may refer the case to the third country where the whole legal system and legal procedures are unpredictable than the rules and procedures of the arbitration when it has been chosen by the parties based on their consent and familiarity (Volz et al.,1995, p. 867). Moreover, despite the fact that according to the survey by the World Bank the major concern of the contracting party in arbitration is neutrality of the Arbitration tribunals, (Le Sage ,1998, p.19). Arbitration has more privilege over litigation when it comes to enforceability. Enforcing an arbitral award is backed by three main international conventions namely: Panama Convention, The New York Convention and Washington Convention. For instance, the New York Convention forced the contracting states to implement the arbitration award when it states that "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon…" (Article 3 of the Convention on the Recognition and Enforcement of Foreign Arbitral Award, New York 1958). Further, the arbitration process was agreed upon by the contracting parties and the same agreement would enhance the possibility of enforcing the award. The enforceability of the arbitration award has also been supported in the local courts, for example the enforceability of a dispute resolution clause was definitively established by the Ireland High Court in *Health Service Executive v Keogh, trading as Keogh Software* (Health Service Executive v Keogh, 2009). However, Iraq does not ratify or even sign the convention, hence, the contracting parties cannot depend on the content of this convention to enforce the arbitration award. Nonetheless, there are other conventions that can be relied on; taken article 53 of The Convention on the Settlement of Investment Disputes as an instance which is also known as Washington Convention states that "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention." (Article 53 (1) of the Convention on the Settlement of Investment Disputes (ICSID Convention)).

The Convention on the Settlement of Investment Disputes (ICSID Convention) was formulated by the Executive Directors of the World Bank and entered into force in 1966 when it had been ratified by twenty countries; at present, it is ratified by 153 Contracting States, it has an essential role in underpinning arbitration between disputed states. The core of the convention is to establish a forum to resolve the disputes that arise out of investment between the host countries and foreign nationals of other countries. The convention allows the parties to submit their disputes to the International Centre for Settlement of Investment Disputes which is known as ICSID Centre. The Centre has jurisdiction to reconcile the legal disputes between a contracting state and a national of another state by stating that "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their

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consent, no party may withdraw its consent unilaterally." (Article 25(1) of the ICSID). Thus, this description will exclude the jurisdiction of the court over two kinds of disputes: First, a non-legal dispute and the second if the dispute was not resulted directly from investment (Blanco,2006). Iraq is a contracting state of the convention since November 2015 and the convention entered into force by December 2015; Which left Iraq as a subject to all the provisions of the Convention. With regard to Panama Convention, it is enforced only among the signatory of the convention and it is inter-America convention on international commercial arbitration. Kurdistan Region is part of Iraq and if the KRG recourse to unilateral decision of amending the contracts, the KRG might face a trial before international arbitrations and the rules are binding. The KRG shall be aware of the legal consequences of any unilateral decision that might have a reverse impact on the status of the oil companies. As it has been explained before, both English Laws and International practices are not allowing unilateral modification or termination of contracts.

V. Conclusions

The issue of unilateral decisions by the Kurdistan Regional Government to amend the Production Sharing Contracts with International Oil Companies is a pure legal subject and needs a legal analysis under the light of applicable laws in Iraq, namely the KRG's Oil and Gas Law No.28 of 2007, signed petroleum contracts (Production Sharing Contracts), English law, international regulations and practices. International transactions are governed through the conditions of legal risk by using specific contract clauses and by adopting pre-defined default rules, which deal with almost all possible contingencies. The current paper has discussed the legal issues around any unilateral decisions by the Kurdistan Regional Government as a contracting party to change, amend or terminate the Production Sharing Contracts signed with the International Oil Companies. Under the KRG's Oil and Gas Law No.28 of 2007, the contract duration is determined by twenty years for production period. Any change to the terms of the contracts shall be made by the mutual agreement of the parties and there is no legal room for unilateral acts toward contract modification or termination. This condition is correct for any legal transaction between two or more contracting parties which is also emphasized by The United Nations Convention on Contracts for the International Sale of Goods of 1980. Moreover, the English law (case laws) are very relevant in discussing Production Sharing Contracts between the KRG and International Oil Companies as English las is the chosen law applied on the relation between the contracting parties. In particular, the doctrine of frustration and economic duress alongside lex mercatoria practices. Within these set of rules in English Law, there is no legal loophole to allow contracting parties to make any amendments during the lifetime of the contract unless certain condition take place under economic duress or frustration. Parties to international contracts, especially foreign investors, rarely choose domestic legislations of the host country. Although the signed Production Sharing Contracts adopt some terms that hold the contractors responsible toward the third party when they cause damages, international oil companies using some clauses such as knock-for-knock to avoid tort liabilities toward the third party and it is the case with Production Sharing Contracts with the Kurdistan Regional Government. Any dispute arises between the contracting parties regarding contract modification, there are certain mechanisms determined to settle them. The paper has outline in detail dispute resolution mechanism that can be used to solve any conflicts between the contracting parties and they are: negotiation, mediation and arbitration.

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Findings

- The best way to amend or terminate the valid Production Sharing Contracts is by a mutual agreement between the contracting parties, Kurdistan Regional Government and International Oil Companies.
- English law, in particular English case law is chosen to be the applicable law on the relationship between Kurdistan Regional Government and International Oil Companies in the signed Production Sharing Contracts. There are few situations when the Iraqi legal system is applied, especially in the relation between International Oil Companies and third parties.
- English law does not support unilateral decision of contract modification (amendment) or termination unless under the doctrine of frustration or economic duress which under certain circumstances allow contract modification or termination. The decline of oil price in the past and low financial income (earning from profit oil) are not considered frustration or economic duress for the KRG to call for the unilateral acts of contract amendments or termination.
- There is no clear explanation by the Kurdistan Region in agreeing on choosing English Law as an applicable law. It seemed that contractors (oil companies) had prevailed in this choice and Kurdistan Regional Government accepted that to attract the oil companies to work in the region.
- The Kurdistan Region should have assessed the choice of law and the fairness of its rules before accepting English Law as an applicable law.
- International commercial regulations and practices emphasizes the sanctity of contracts and encourage mutual agreements for any kinds of contract modification or termination.
- The Kurdistan Regional Government is bound to the terms and conditions of the signed Production Sharing Contracts for oil production purposes until the end of the legal duration which is determined by twenty years under the KRG's Oil and Gas Law No.28 of 2007.
- According to the signed Production Sharing Contracts, any amendments to the applicable laws in Kurdistan Region or enactment of new legislation by the Kurdistan Regional Government cannot be applied if it has a reverse impact on the financial status of contractors (International Oil Companies).
- Any unilateral decision to make amendments to the current Production Sharing Contracts will expose the reputation of the region to a great risk and huge amount of compensation.
- According to the nature of the signed Production Sharing Contracts by the Kurdistan Regional Government, any decline in oil price would damage the oil companies' earnings more than the KRG as the cost oil spent by the oil company during exploration period would be recovered from profit oil after the production of oil. Consequently, decline of oil price could not be considered a good excuse by the KRG to act unilaterally toward modifying or terminating the Production Sharing Contracts.

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- In case of dispute between the KRG and International Oil Companies, there are alternative dispute resolution mechanisms determined to solve the disputes; negotiation and mediation are two effective tools to be utilized in order to discuss the changes of the terms of production sharing contracts between the KRG and International Oil Companies to avoid disputes.
- Mediation mostly comes after the failure of negotiation process and contracting parties are free choosing any of these mechanisms. Based on different situation and surrounding circumstances, the parties desire to choose is varying.
- In case of not reaching to a mutual understanding regarding contract modifications, the parties of the dispute can recourse to arbitration and the rulings are final.
- Arbitration clause can found in the signed Production Sharing Contracts and London Court of International Arbitration is the arbitration court to settle the disputes.
- The Kurdistan Regional Government's production sharing contracts are considered commercial contracts, not administrative contracts which is a category of agreements between states and investors, permit some unilateral adjustment by the state.

Recommendations:

1.Article 37 (4) of the KRG's Oil and Gas Law No.27 of 2007 shall be amended by shortening the contract duration. The original article 37(4) is stating: "A development period, following discovery, to be twenty (20) years, with a right of the Contractor to a five (5) year extension, on the same terms and conditions, with possible further extensions to be negotiated."
This should be amending as the followings:
"A development period, following discovery, to be determined by contracting parties and not to exceed 10 years in any situation". The parts related to extension shall be removed and this right should be given to the government not the contractor by stating that "after the end of the contract, the government can initiate the extension based on the mutual agreement of both parties and new terms proposed by contracting parties.
This amendment allows the host government (KRG) to review the terms and conditions of the contract and gain more benefits toward the contractors.

2.The last section of article 43(3) of the KRG's model of signed Production Sharing Contracts which states that "the terms and conditions of the contract shall be altered so as to restore the contractor to the same overall economic position as that which contractor would have been in, had no such change in the legal, fiscal and/or economic framework occurred" shall be mended as the following:
"The terms and conditions of the contract shall be amended based on the mutual agreement of both parties taking into consideration the legal, fiscal and/or economic status of both contracting parties".
By this amendment, the legal status of the Kurdistan Regional Government would be strengthened toward the International Oil Companies.

3. The Kurdistan Regional Government of Iraq has adopted alternative dispute resolution in its related petroleum regulations and Production Sharing Contracts with international oil companies. However, Mediation was only adopted in the signed Production Sharing Contracts with no

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indication in the KRG's Oil and Gas Law No.28 of 2007 regarding mediation. Thus, it is recommended that the London Court of International Arbitration (LCIA) rules of mediation shall be used for any dispute between the KRG and oil companies.

4. The Kurdistan Regional Government shall establish National Oil Companies determined in Oil and Gas Law 2007 No.27 of 2007 to better manage and oversee the petroleum operations in the region and to negotiate the terms that benefit the Kurdistan Region.

5. In order to have a well-established entity for negotiating or amending petroleum contracts with international oil companies, the authority of concluding the contract shall be withdrawn from the ministry of natural resources. It should be granted to the Kurdistan National Oil Company (which has not been established yet) under the super vision of the Council of Ministers and Kurdistan Regional Parliament). Thus, section two of article 26 of the KRG's Oil and Gas Law which originally states that "The Minister may, where it is in the public interest to do so, elect to award Authorisations through direct negotiation" should be amended as the following:

"The Kurdistan National Oil Company, where it is in the public interest to do so, elect to award Authorisations through direct negotiation under the supervision of Council of Ministers and Parliament."

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