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An Evaluation of the legal and institutional framework governing insurance of upstream petroleum operations: a case study of Ghana

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Strathmore University
Law School

2019

MASTERS OF LAW THESIS

**AN EVALUATION OF THE LEGAL AND INSTITUTIONAL
FRAMEWORK GOVERNING INSURANCE OF UPSTREAM
PETROLEUM OPERATIONS: A CASE STUDY OF GHANA**

**SUBMITTED IN PARTIAL FULLFILMENT OF THE
REQUIREMENTS OF THE MASTER OF LAWS DEGREE,
SCHOOL OF LAW, STRATHMORE UNIVERSITY**

BY

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DECLARATION

This thesis is my original work and has not been presented for a degree in any other university.

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This thesis has been submitted with my approval as university supervisor.

TOM MITRO

SIGNATURE: _____ DATE _____

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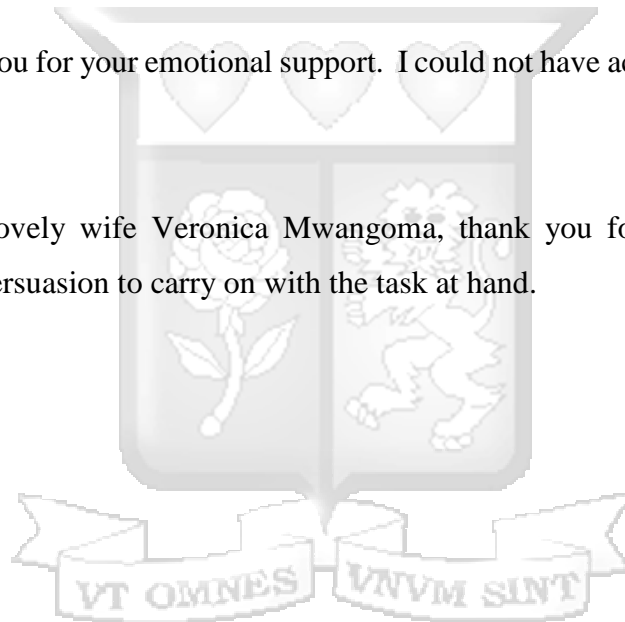
To God, all glory and honor is to you Lord.

To my Lecturers, Dr John Ambani, Dr. Melba Wasuna, Mohamed Ruwange, and Tom Mitro thank you for teaching and guiding me towards formulating this topic.

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ABSTRACT

This study explores the legal and institutional framework pertaining to upstream oil and gas insurance and the strides made by the Government in realization of this objective. The research will review key drivers of placement of oil and gas insurance with local companies and the legislative framework in place. This research will study the factors that inhibit successful implementation of oil and gas insurance provisions in Kenya. This study examines other jurisdictions which have succeeded in this space with an emphasis on Ghana. I have reviewed the mechanisms put in place to measure and monitor implementation by identifying Ghana's success story in domestication of upstream oil and gas insurance. In particular, the research analyses the legal and institutional framework that promotes placement of oil and gas insurance in Ghana for a possible legal transplant to Kenya.

Having recently discovered commercially viable quantities of oil and gas, Kenya is still at the nascent stages of oil and gas operations. With a diminishing economy, soaring cases of corruption and high unemployment rates, evaluation of laws that foster economic prosperity for the welfare of all Kenyans are key to achieving the government's big four agenda. Therefore, it is paramount to review the current law and improvise ways of building Kenya's industries and create employment opportunities by capitalizing on available resources which follow suit upon oil and gas discoveries in developing economies. Key among them is insurance services. The risk of capital flight and 'dutch disease' are imminent in an emerging oil and gas producer such as a Kenya.

The key findings of my research was that there is a lacuna in the regulatory framework governing upstream oil and gas insurance in Kenya. The provisions of the Petroleum Act and in particular Section 50 (3) requiring IOC to submit a local content plan on insurance inter alia , cannot be enforced due to lack of enactment of Petroleum Regulations which are supposed to operationalize the Petroleum Act. Further, Insurance Act which regulates insurance business in Kenya is silent on regulation of upstream oil and gas insurance.

This study was conducted through analysis of primary and secondary data such as journals, statutes, books, reports and audits. This study hopes to inform the Government of Kenya and policy makers on how best to implement these insurance provisions for the country to derive the benefits of the oil and gas sector.

LIST OF ABBREVIATIONS

AIPN	Association of International Petroleum Negotiators
AFRICA RE	Africa Re Insurance
BRICS	Brazil, Russia, India, China and South Africa
CAR	Contractors All Risks
COW	Control of Well
EAR	Erection All Risks
ECT	Energy Charter Treaty
EPRA	Energy and Petroleum Regulatory Authority
GDP	Gross Domestic Product
GOK	Government of Kenya
GOGIP	Ghana Oil and Gas Insurance Pool
IAIS	International Association of Insurance Supervisors
IOC	International Oil Company
IRA	Insurance Regulatory Authority
JOA	Joint Operating Agreements
JV	Joint Venture
LOK	Laws of Kenya
LOPI	Loss of Oil Production Insurance
MINTS	Malaysia, India, Nigeria, Turkey and South Africa
NAICOM	Nigeria Insurance Regulatory Commission
NIC	National Insurance Commission
OPRC	International Convention on Oil Pollution Preparedness Response and Co-operation
PC	Petroleum Commission
PSA	Production Sharing Agreement
PSC	Production Sharing Contract
WIBA	Workmen Insurance Benefit Act

LIST OF STATUTES

Constitution of Kenya 2010

Insurance Act Cap 487 [Rev. 2017] Laws of Kenya

Petroleum Act 2019

Local Content Bill 2018 (Kenya)

Insurance Act 2006, Ghana

Petroleum (Local Content and Local Participation Regulations) 2013, Ghana

LIST OF CASES

Department of Trade and Industry V St Christopher Motorists' Association Ltd [1974] 1 All E.
R 395

Prudential Insurance Company V Inland Revenue Commissioner (1904) 2 KB 658

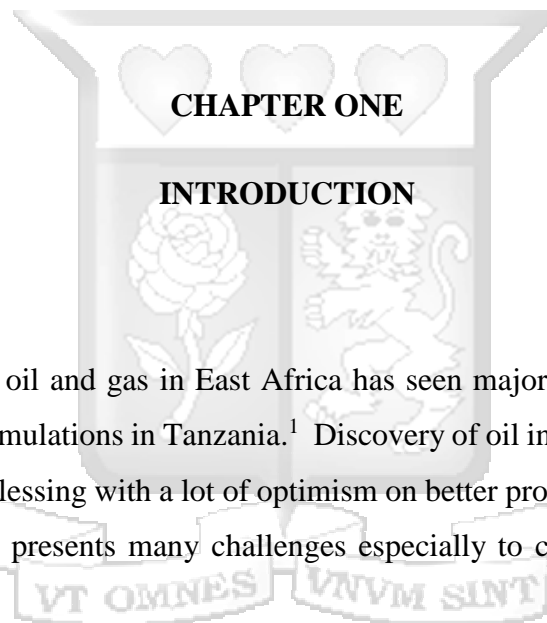


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1.1 Introduction

The latest exploration of oil and gas in East Africa has seen major oil discoveries in Uganda, Kenya and giant gas accumulations in Tanzania.¹ Discovery of oil in most African countries has been termed as a mixed blessing with a lot of optimism on better prospects to stabilize and grow a country’s GDP. It also presents many challenges especially to countries that have recently discovered oil.²

One of the main challenges that Kenya faces in the wake of latest discoveries of fossil fuels, is the ability of her insurance companies to insure upstream oil and gas risks. Oil and gas exploration present unique and complex risks, which are likely to arise during exploration, appraisal and development stages in the oil and gas life cycle.

Kenya Reinsurance Corporation, in its annual report (2013) recognized new opportunities presented by oil and gas discovery in Kenya. The report states that the oil and gas sector is a new frontier that brings with it numerous prospects for Kenya’s economic growth and opens up

¹ ‘Oil and gas exploration history in Kenya’ *National Oil Corporation of Kenya* (2013)

² Akosua D, ‘The impact of oil and gas discovery and exploration on communities with emphasis on women’ Department of Sociology, University of Ghana Legon 14 January 2018

employment opportunities.³ In addition, Kenya Reinsurance will provide secure and competitive reinsurance as well as capacity building by training underwriters to guarantee risks in the sector and looks forward to its growth and success.”⁴

The nascent oil and gas industry is forecast, by the Ministry of Petroleum and Mining, to reach Kshs 100 billion annual value in the next few years.⁵ This forecast affords the Kenyan Insurance industry an opportunity to tap into the prospects that oil and gas exploration presents. However, majority of insurance firms are yet to put up structures and policies to build their expertise and financial capacity to underwrite oil and gas insurance. This lack of financial capacity and expertise has stalled actualization of providing insurance coverage for oil and gas related risks in Kenya.

The volatile oil market, financial capital required to adequately offer insurance services, complexities involved in underwriting oil and gas risks, has resulted in most Kenyan insurance firms shunning this lucrative yet untapped area of insurance. Kenya has potential to grow and transform its economy through industrialization, jobs creation and ensuring equitable distribution of wealth. The goal is to maximize the use of locally produced materials, personnel, financing, goods and services rendered in the petroleum industry value chain that can be measured in monetary terms.⁶

Every policy and enactment of laws on the petroleum sub-sector should be geared towards guiding the development and management of the emerging oil and gas sector as a catalyst for economic transformation.⁷ It is paramount for Kenya’s insurance industry to move with speed and set up proper policies and structures to insure oil and gas related risks locally.

Swiss Re (2014) states that insurance penetration rate is very low in Africa and accounts for about 3.65 per cent with total premiums US\$71.9 billion, which is lower than the global average of about 6.5 per cent. This suggests that the African insurance market will have to wait a bit longer in addressing low insurance penetration. Although the 3.65 per cent penetration rate is low, it is far above the rates in other continents, like Central and Eastern Europe, Middle East and Central America.⁸

³ Shaping insurance for a brighter future: the sky is just a beacon on the journey’ *Kenya Re Annual Report & Financial statements* (2013)

⁴ ‘Shaping insurance for a brighter future: the sky is just a beacon on the journey’ (2013)

⁵ Ngunjiri J, ‘CIC to sell mining, oil and gas insurance’ *Business Daily*, 23 November 2017

⁶ ‘Shaping insurance for a brighter future: the sky is just a beacon on the journey’ (2013)

⁷ ‘Shaping insurance for a brighter future: the sky is just a beacon on the journey’ (2013)

⁸ Swiss Re, *Global insurance review outlooks report*, (2014/2015)

Most insurance firms in Kenya are owned by individuals. A few insurance firms are listed as public companies. These insurance firms mainly rely on premiums from their clientele to carry on their day to day operations. Majority have diversified their portfolio and ventured into real estate and stocks investments. Insurance penetration in Kenya is at 3.2%, which is very low compared to Nigeria and South Africa.⁹ The premiums collected are meager and cannot match the huge capital investments injected in oil and gas exploration activities. It follows therefore that majority of insurance firms in Kenya do not have enough capital to insure upstream petroleum activities in Kenya.

Upstream operations in the oil and gas industry are capital intensive. The equipment used for exploration activities are very expensive. For an insurance firm to adequately insure both upstream operations and drilling equipment it must have a capital base which surpasses the value of the equipment and exploration expenses to enable them to compensate the insured when a risk giving rise to a claim occurs.

Oil and gas insurance is relatively new to the insurance industry in Kenya. Until recently, Kenya was predominantly an agricultural country and as such, there was little or no interest in venturing into oil and gas insurance. Majority of insurers in Kenya were therefore not keen in honing their skills in this emerging area of insurance. This has led to lack of Kenyan experts with the ability to identify and underwrite oil and gas related risks.

Lack of insurance coverage for oil and gas in Kenya, dates back to the 1950's when the maiden journey of oil exploration in Kenya began.¹⁰ Most of the wells drilled then came up dry. The outcome of these explorations may have had an impact in underwriting of oil and gas related risks in Kenya.

Subsequent exploration quests in the 60s, 70s, 80s and 90s yielded the same results with most of the wells drilled turning up dry.¹¹ This diminished the prospects of Kenyan insurance firms venturing into oil and gas as its future was uncertain.

⁹ 'Insurance market trends in Kenya: Insurance penetration in Kenya' *Association of Kenya Insurers Report* (2017)

¹⁰ 'Oil and gas exploration history in Kenya' 2013

¹¹ 'Oil and gas exploration history in Kenya' 2013

Kenya is under-explored and has enormous potential, making it attractive for investors.¹² In the entire history of Kenya, only 50 wells have been drilled.

The current enactment of the Petroleum Act 2019 has provided a legal framework for placement of upstream oil and gas insurance with Kenyan Companies. However, as I have outlined in the subsequent chapters of my research, this may not be the curative measure the industry needs since the enactment of this law has created a legal risk in both petroleum and insurance operations.

1.2 Problem Statement

After decades of disappointing results, investments in Kenya hydrocarbon exploration waned until 2010 when offshore gas finds in Mozambique and Tanzania and onshore oil finds in Uganda attracted investors back to Kenya.¹³

However, despite the huge capital investments in oil and gas exploration projects, Kenyan Insurance companies have not been active in this area. This has instigated international insurance companies overseas, to take center stage in insuring oil and gas related risks in Kenya.

The Government of Kenya identified this gap and recently promulgated the Petroleum Act 2019. The Petroleum Act has set provisions of placement of insurance with local insurers for upstream oil and gas related risks.

Whereas the implementation of the Petroleum Act 2019 was timely, there is an inconsistency with the Insurance Act Cap 487 [Rev. 2017]. The Insurance Act which governs insurance business in Kenya is silent on implementation and regulation of oil and gas insurance. Further, the Cabinet Secretary in charge of Petroleum and Mining is yet to promulgate petroleum regulations which operationalize the Act thus creating a legal risk.

¹² 'A marketing feature from taipan resources: international oil stocks finding success' *Financial Post* 24 October 2013

¹³ 'Oil and gas exploration history in Kenya' 2013

This study evaluates the insurance provisions under Section 50 (3) of the Petroleum Act 2019 to the extent in which it is inconsistent with the Insurance Act Cap 487 LOK. This inconsistency has created a legal risk which will affect implementation of Section 50 (3) of the Petroleum Act on insurance of upstream operations in Kenya's oil and gas sector.

The second issue that this study seeks to address is whether there are adequate policies and legal framework in place that enables Kenyan insurance companies to build capacity to offer insurance coverage for oil and gas related risks.

Thirdly, the study outlines other factors which affect uptake of insurance coverage for upstream oil and gas operations. This factors include; inadequate financial resources by Kenyan insurers to underwrite and lack of technical expertise which have hindered advancement in this type of insurance.

Lastly, this study will do a comparative analysis with the Ghanaian insurance industry that faced similar issues in insuring upstream oil and gas related risks. This analysis will provide foresight on how to tackle the issues raised above. I will explore the remedies enforced to cure the problem in Ghana and whether Kenya can borrow a leaf from Ghana's experiences.

1.3. Research Objectives

The aim of this research is to illustrate how insurance provisions on upstream oil and gas insurance can be streamlined and implemented to minimize disputes through specific Laws as well as strong legal and institutional frameworks that prioritise development of the country's insurance participation. Particularly, the study aims:

- a) To analyse the legal and institutional framework underlying the introduction of insurance provisions in Kenya's oil and gas industry.
- b) To establish whether the requirements in law match international best practice standards by drawing comparisons from Ghana.
- c) To analyse the challenges that are likely to be encountered in implementing the provisions of sections 50 (3) of the Petroleum Act 2019.

1.4. Justification

Kenyan insurance companies have not explored the option to come up with a platform to ensure that a reasonable percentage of the oil and gas risks are insured locally. Oil and gas insurance market is largely dominated by foreign insurance companies.

This raises concerns on successful implementation of Local content plan as outlined in Section 50 (3) of the Petroleum Act 2019 which requires IOCs to take up insurance coverage with domestic insurance companies.

Globalization has been widely accepted and it comes with its merits, such as enhanced capital mobility, transferred knowledge and interconnection with the world. However, it comes with a reservation that has led to the decline of industries in developing countries, as these local/domestic industries are not yet matured to compete with their international counterparts (Ovadia, 2013).¹⁴

The need to reduce capital flight and encourage the use of local capacity prompted the government to enact the Petroleum Act 2019 with specific emphasis on Local Content Plan as outlined under Section 50 (3) of the Act. This policy requires that a reasonable amount of insurance of oil and gas risks be placed within the country.

In addition to the above, there is a knowledge gap and financial incapacity from Kenyan Underwriters to underwrite oil and gas insurance.

The issue of domestication of insurance is key in developing a country's economy such Kenya. As a result of the fragile nature of our economy, the government has promulgated the Petroleum Act to safeguard domestic industries in the economy.

This study is justified on the basis that although there is scarcity of literature relating to oil and gas insurance in Kenya, there is a gap in implementation of the current insurance provisions provided under the Petroleum Act, 2019.

There are no specific laws drafted in the Insurance Act Cap 487 to regulate and monitor compliance of insurance provisions outlined under the Section 50 of the Petroleum Act 2019.

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1.5.Hypothesis

The provision in Section 50 (3) of the Petroleum Act 2019, requiring an IOC to provide a local content plan for insurance services, and the inconsistency of laws governing insurance of upstream petroleum operations will frustrate the performance of the Production Sharing Contracts.

1.6.Research Questions

This research will be anchored on the following question:

- 1) What is the nature of insurance contracts in upstream petroleum activities?
- 2) What are the prevalent risks in upstream petroleum operations?
- 3) What are the legal provisions governing insurance of upstream petroleum operations in Kenya?
- 4) What lessons can Kenya learn from Ghana for effective enforcement & implementation of insurance of upstream of upstream petroleum operations?

1.7.Definition of terms

Some key terminologies used in this study have been defined below.

Chairman/chairperson

Means the person for the time being presiding over the board of directors of or other governing body by the member of the insurance industry.¹⁵

Capacity

Capacity in insurance or reinsurance terms means the percentage of surplus or the Kenya Shillings amount of exposure that an insurer or reinsurer is willing to place at risk.

Gross Domestic Product (GDP)

¹⁵ Section 2, Insurance Act Cap 487,

This is the broadest quantitative measure of a nation's total economic activity. GDP represents the monetary value of all goods and services produced within a nation's geographic borders over a specified period.¹⁶

Insurance business

Means the business of undertaking liability by way of insurance (including reinsurance) in respect of any loss of life and personal injury and any loss or damage, including liability to pay damage or compensation, contingent upon happening of a specified event.¹⁷

Economic Definition of Insurance

The concept of insurance is seen to have relevance in businesses and lives globally. It is perceived as a means of transferring equitable risk, usually in terms of loss from one entity to another entity. This risk is transferred in exchange for payment, which is regarded as premium.¹⁸

Therefore, the idea of insurance is fundamental in production processes, as it helps to secure the survival and sustainability of businesses and lives in case of uncertainty. According to Chartered Insurance Institute (2014)¹⁹, insurance is a component of risk management that is used primarily to hedge against contingency of risk. Globally, insurance market is an essential market to which the survival and sustainability of the economy is anchored in order to attain economic growth and development.²⁰

In modern economy, the insurance industry plays an important role, as it helps to smoothen and mobilize resources for efficient uses in the economy. In addition, insurance is seen as a strategy to mitigate economic losses such that the parties involved make an agreed payment to the insurer in exchange of getting reimbursement in case, they suffer losses, such as fire hazards, accident and death.²¹

Nduka's definition is more descriptive than practical, from the insurance practitioners' point, as it does not bring out the issue of indemnifying the insured of his loss –which is one of the basic

¹⁶ <https://www.investopedia.com/terms/g/gdp.asp> on 3 February, 2018

¹⁷ Section 2, *Insurance Act*, Rev (2016)

¹⁸ Laniyi S., 'Challenges on the domestication of oil and gas insurance in Nigeria'

¹⁹ Chartered Insurance Institute, *Insurance, legal and regulatory, Study Pack Text 2013 -2014*

²⁰ Ezirim B and Muoghahu S., *Contending with the Challenges and Imperatives of marketing Insurance Services in a Sub-Saharan Africa Country: The case Nigeria*, *Journal of Economics and Business Sciences*, Vol. No. 1(2002), 121-130

²¹ Nduka U, *Handbook of insurance terms*, Bell Publishers (2006)

principles of insurance. Oba (2003)²² states that the performance of insurance is dependent on the social, economic and political environments in which it operates,²³ views insurance from two perspectives. The first perspective emphasizes the need that insurers make provision to protect lives and businesses against financial losses. The second perspective focuses on combination of persons and firms to contribute funds out of which claimants are paid. This gives a clearer picture of what insurance does, or rather what the people expect to get from insurance when they buy such forms of protection from the insurance industry.

Whichever way we look at it, insurance provides a means for compensation for an insured loss. Through this way, it makes it possible for the burden of loss to be shared by larger members of a pool,²⁴ observes that insurance means protection or security against the effects of certain future losses or misfortunes, such as losses caused by theft, fire, motor accident, and damage of goods while in transit. It is this security in the form of insurance cover for losses caused by fire, explosion, collapse of oil wells, and so on that should compel the Kenyan government regarding the insurance industry to extend coverage for oil and gas risks to domestic insurance companies.

Legal Definition of Insurance

The statutes dealing with regulation of insurance business have never contained a definition of insurance law. This is largely due to the risk of inadvertently excluding contracts that should be within their scope. Definition of insurance law is premised on judicial precedents. Lord Templeman J held that “contracts of insurance are not confined to contracts for the payment of money but may include a contract for some benefit corresponding to the payment of money.”²⁵

It follows that, this gives the regulator a considerable discretion. This discretion can be challenged effectively only by a body going to court in order to seek a declaration that it is not carrying on insurance business or having to defend an application by the regulator that it is or a petition by the regulator to wind up the company.²⁶

However, the fundamental reason for defining the meaning of an insurance contract is because the business of providing insurance is closely regulated. Therefore, for purposes of regulation, a

²² Oba O., Insurance a vehicle revitalising the economy. The insurers perspective. The Nigeria Insurer; *Lagos, Insurance Association* (November 2003)

²³ Oluoma, R., *Elements of insurance*, Impressed Publishers, Lagos (2004)

²⁴ Chiejina, O., *Foundation of Insurance*, NkemChiejina Book Fair Ltd (2010)

²⁵ *Department of Trade and Industry v St Christopher Motorists' Association Ltd* [1974] 1 All E.R. 395

²⁶ Birds J, *Birds, Modern Insurance Law, 8ed*, Thomas Reuters (Legal) Limited, 2010

contract of insurance is defined as any contract whereby one party assumes the risk of an uncertain event which is not within his control, happening at a future time, in which event the other party has an interest, and under which contract the first party is bound to pay money or provide its equivalent if the uncertain event occurs.²⁷

This definition is critical to this research as it will shed light on upstream oil and gas insurable risks and provisions of the law giving credence to this form of insurance.

Insurer

Means a person, registered under the Insurance Act Cap 487, who carries on insurance business and includes a reinsurer.²⁸

Kenya Reinsurance Corporation

Kenya Reinsurance Corporation means the Corporation means the public limited liability company by that name, incorporated pursuant to the provisions of section 3.²⁹

Oil and gas insurance

Oil and gas insurance is an insurance policy that covers human life, the environment and property from any accidents and oil and gas activities.³⁰

Oil and gas risks

These are situations involving exposure to danger during oil exploration

Premium

Includes the consideration for granting of an annuity.³¹

Reinsurer

Means a person who carries on reinsurance business and includes retrocessionaire.³²

²⁷ Birds J, *Birds, Modern Insurance Law*,

²⁸ Section 2, *Insurance Act*, Rev (2016)

²⁹ Section 2, *Kenya Reinsurance Corporation Act*, Rev (2012)

³⁰ <http://www.petropedia.com/definition/9835/oil-and-gas-insurance> on 3 February 2018

³¹ Section 2, *Insurance Act*, Rev (2016)

³² Section 2, *Insurance Act*, Rev (2016)

Risk

According to the Business Dictionary, risk in general is defined as “A probability or damage, injury, liability, or any other negative occurrence that is caused by external or internal vulnerabilities, and that may be avoided through preemptive action”.³³

In insurance, risk means danger, peril, hazard, chance of loss, amount covered by insurance, person or object insured. The risk is an event or happening which is not planned but eventually happens with financial consequences resulting in loss.³⁴

Legal risks refer to the risk financial, reputational or investment loss; legal liability; or dispute settlement costs to a company or institution that may arise from defective contractual arrangements or transaction.³⁵

IOC

The abbreviations relate to International Oil Corporations/Companies and it's a term commonly used in oil and gas industry.

1.8.Literature Review

The reflection and collection of the literature review to this research attempts to present a review of various studies that have been undertaken in regard to having a robust insurance system for oil and gas related risks.

1.8.1. Capacity to underwrite oil and gas insurance

Capacity in insurance or reinsurance terms means the percentage of surplus or the amount of exposure that an insurer or reinsurer is willing to place at risk.

Studies done by Oil and Gas financial Journal (2017)³⁶ have shown that for the first time in several decades, the insurance savings on energy insurance came to a grinding halt in 2017. The energy insurance market has been rife with capacity. This means that a surplus of capital has

³³ <https://www.scribd.com/document/132601916/Business-Dictionary-pdf>

³⁴ <https://uslegal.com/>

³⁵ McCormick, R. 'Legal Risks in the Financial Markets' Oxford University Press, Oxford, (2010) pp 1-3

³⁶ J.R. Pierce, Energy insurance market in 2017: Understanding the future requires appreciation of the past, *Oil & Gas financial Journal*, (2017)

been committed to the energy industry, amid investor expectations of a steady return on investment. That return on investment disappeared years ago. Underwriters have been pricing energy insurances on a break even or marginal loss basis since 2015.³⁷

According to James R. Pierce, the resulting low rates for buying and insuring energy insurance has been driven by excess capital committed to the space. Insurance companies in the United states and in Lloyds of London have maintained loss leading rate levels in order to secure market share.³⁸

It is widely estimated throughout the insurance industry that aggregate losses emanating from the myriad natural disasters amount to a figure in excess of \$ 100,000,000,000. In essence, this amount of loss will influence virtually every segment of the insurance industry. These losses will affect the insurance companies in their 2018 cycle. Insurance companies usually have a defined amount of capital to employ.³⁹

The insurance company decides how much capital is committed to the different industries and product lines it offers to consumers. Insurance companies just like any other business intend to maximize on profit. Therefore, insurance companies will shift capital around each fiscal year to capitalize on the best possible returns.⁴⁰

In Africa, most insurers shun oil and gas insurance. According to Rosemary Onuoha, insurance firms have expressed apathy to underwriting oil and gas risks thus undermining efforts by National Insurance Commission of Nigeria to ensure that local capacity is exhausted before oil and gas risks are taken abroad.⁴¹

In their investigation, Financial Vanguard reveal that the apathy of the firms was borne out of fear that claims emanating from such risks could impact negatively on their balance sheet or outrightly wipe out their capital. Consequently, such companies have concentrated more on small businesses especially third-party motor insurance.⁴²

³⁷ J.R. Pierce, Energy insurance market in 2017: Understanding the future requires appreciation of the past, 2017

³⁸ J.R. Pierce, Energy insurance market in 2017: Understanding the future requires appreciation of the past, 2017

³⁹ J.R. Pierce, Energy insurance market in 2017: Understanding the future requires appreciation of the past, 2017

⁴⁰ J.R. Pierce, Energy insurance market in 2017: Understanding the future requires appreciation of the past, 2017

⁴¹ R.Onuoha, Local Content: Insurance firms shun oil and gas risks, *Vanguard* August 21, 2017

⁴² R.Onuoha, Local Content: Insurance firms shun oil and gas risks, 2017

The constant refusal by insurance companies, especially the fringe players, to partly underwrite big risks, have been a source of worry for the Nigeria Insurance Regulator (NAICOM), forcing the regulator to subtly persuade some of them to submit themselves for mergers and acquisition. NAICOM, expressed concerns over practices in which insurance practitioners fail, neglect or refuse to consider and fully utilize relevant in-country capacities of insurance/reinsurance institutions such as pools, reinsurers and other approved local/recognized insurance capacities.⁴³

A.M. Best which is a global insurance rating company, stated in one of its reports that, “Insurance markets in Africa’s 54 countries are diverse, reflecting disparities in economic conditions and the approaches of policy makers’ individual countries and regional. The report describes how the African (re) insurance market offers potential for growth given anticipated development of gross domestic product (GDP) in the region. Each country has different drivers for heightened insurance demand, ranging from economies dominated by the oil and gas and mine industries, to large populations.⁴⁴

The A.M. Best report identifies challenges faced by Africa (re) insurers which include competitive environments, ongoing global financial uncertainty and political risk in many parts of the region. Increases in minimum capital levels have resulted in some industry consolidation.⁴⁵ Unfortunately, few writers especially in the Kenyan insurance sector share this optimism as there are no extensive writings or reviews concerning oil and gas insurance coverage and the challenges insurers are likely to face in Kenya.

However, there have been snippets of oil and gas insurance discussions among industry players through annual financial reports and occasional insurance conventions organized by reinsurance firms both locally and internationally.

The issue of financial capacity of local insurance firms to underwrite oil and gas insurance has not been discussed thoroughly. The managing director of Kenya Reinsurance while delivering his annual statement, stated the need for the Kenyan insurance industry to pool their resources to enable them cover part of the upstream activities.⁴⁶

⁴³ R.Onuoha, Local Content: Insurance firms shun oil and gas risks, 2017

⁴⁴ ‘Africa’s diverse insurance markets offer growth opportunities’ *A.M Best Report* (2013)

⁴⁵ ‘Africa’s diverse insurance markets offer growth opportunities’

⁴⁶ Mwarania J, ‘Let us eye a chunk of the oil and gas market’

There is a lot of literature touching on the economic benefits of discovery of oil and gas in Africa and the optimism that follows suit with such discovery. According to Akosua, a writer working for the department of geology in Ghana, there are a lot of financial benefits that accrue with discovery of oil in African countries.⁴⁷

1.8.2. Lack of technical expertise

Most developed economies such as Europe, former Soviet Union, Asia, United States and the Middle East have been drilling oil for decades. As such, they have perfected the skill of drilling and the associated insurance risks that follow suit.

In Africa, this is not the case even for oil exporters such as Nigeria who have been drilling oil since 1956 when oil was first discovered. According to Anton Pretorius, despite the existence of the Nigerian Oil and Gas Industry Content Development Act of 2010, which empowers insurers in Nigeria to underwrite up to 40 percent of risks in the oil and gas sector, operators still cannot carry more than five per cent of such risks.⁴⁸

According to a special report by A.M. Best Company, Nigerian insurance companies still act as fronts to international insurers in underwriting of oil and gas risks. The report states: “Considering the scale of corporate risks such as oil and energy projects in the region, and the desire for additional expertise, Nigerian insurers tend to act as fronting companies, retaining less than five per cent of each risk.”⁴⁹

A.M. Best believes that, given the expected demand for insurance driven by the oil and energy sector, particularly in West Africa, there is potential for higher levels of risk retention locally or regionally. Increased capacity, however, is unlikely to materialize by relying exclusively on higher amounts of capital.

The report further states that “greater technical expertise and increasingly sophisticated underwriting skills, a more developed regulatory and legal framework, and increased access to international retrocession markets are key ingredients in achieving increased retention levels.”⁵⁰

⁴⁷ Akosua D, ‘The impact of oil and gas discovery and exploration on communities with emphasis on women’ Department of Sociology, University of Ghana Legon 14 January 2018

⁴⁸ A. Pretorius, *Risk Africa Magazine*, December 11, 2012

⁴⁹ ‘Africa’s diverse insurance markets offer growth opportunities’ (2013)

⁵⁰ ‘Africa’s diverse insurance markets offer growth opportunities’ (2013)

Insurers operating in Africa rely heavily on reinsurance, for corporate risks, although some regulators are encouraging higher retention ratios. Insurers in Africa commonly act as fronting vehicles, ceding majority of risks. African insurers rely on local, regional and international reinsurers.⁵¹

In East Africa, discovery of oil and gas is still a new phenomenon. Most of the countries are still struggling with revenue allocation and sharing from oil and gas proceeds. In the interim, there is a gap of skilled labor to underwrite and properly evaluate oil and gas related risks in the Kenyan insurance industry.

1.8.3. Policies and legal framework

Ghana has formulated robust policies and legal framework that require compulsory placement of all oil and gas related risks with the host country's insurance firms.

In Africa, Nigeria has the most comprehensive legal framework. The Nigerian Oil and Gas Industry Content Development Act of 2010 requires that 40 per cent of oil and gas insurance should be placed with Nigerian insurance firms.⁵² This ensures and promotes in-country value.

In Ghana, the Petroleum Commission (PC) and National Insurance Commission (NIC) supported by industry stakeholders have developed a protocol for placing oil and gas insurance in Ghana in line with the Petroleum (Local Content and Local Participation) Regulations 2013 and the Insurance Act 2006. The protocol has opened a window of opportunities for underwriting companies and insurance brokers to actively participate and play a lead role in the oil and gas business in Ghana.⁵³

In Kenya, we are in the process of enacting Local Content Bill 2018 which is currently before the Senate.

The Local Content Bill 2018 main purpose is to create a framework to facilitate local ownership, control and financing activities connected with the exploitation of gas oil and other mineral resources. It intends to increase the local value along the value chain in the exploration of gas, oil and other mineral resources.⁵⁴

⁵¹ A. Pretorius, *Risk Africa Magazine*, 2012

⁵² *Nigerian Oil and Gas Industry Content Development Act of 2010*

⁵³ Petroleum commission, Ghana & National Insurance Commission Protocol: Oil and gas insurance placement for the upstream sector

⁵⁴ Local Content Bill 2018

The intent of the Local Content Bill is to promote Kenyan companies and ensure they derive value from upstream activities in Kenya which is a step in the right direction.

1.9. Methodology and approach

1.9.1. Introduction

Oil and gas insurance is a new concept in Kenya. Few scholars have written on this topic in Kenya. Insurance is an integral part of risk management and ensures economic growth and stability of a countries economic.

This research is hinged on review and scrutiny of primary, secondary and tertiary sources of literature. Data sources array are from books, journal articles, statutes, newspapers, magazines and internet material on oil and gas insurance, placement of insurance for risks related to oil and gas, regulatory framework requiring placement of oil and gas with Kenya insurance companies.

The research will benefit the insurance industry and government in formulating policies that are geared towards domestication of oil and gas insurance in the country.

1.9.2. Research Design

This research has is largely anchored on qualitative analysis of information.

1.9.3. Research strategy

I adopted a comparative study approach with emphasis on Ghana. Ghana has a lot of socio and economic similarities with Kenya making it the ideal for this study. Both countries were British colonies and experienced similar struggles during the clamor for independence.

The laws for both countries mirror each other. The Constitution of Kenya 2010 and The Ghanaian Constitution have a lot of similarities. The Kenyan Mineral Act, 2016 is a replica of Ghana's mineral Act.

Another distinctive similarity is that Ghana discovered commercially viable fossil fuels in 2007. The oil industry in Ghana is still at its nascent stages. However, good governance and implementation of sound policies regulating oil and gas industry, has significantly contributed to growth of the country's socio and economic pillars.

Ghana has made remarkable progress in domestication of upstream oil and gas insurance thus making the lessons learned during this implementation relevant to this study.

1.9.4. Research Approach

The two major research approaches I employed for the work were deductive and inductive (Collins, 2010; Saunders et al., 2012).⁵⁵ The deductive approach emphasizes hypothesis testing to accept or reject the tested statement of facts. The deductive approach focuses more on theory in validating or revalidating. The inductive approach concentrates more on data collected and analysed to know and understand the patterns that emerge and then make statements and suggestions from it. This is good because it allowed me not to jump into hasty conclusions but rather base the assertion on findings. The inductive approach was the most suitable because it helped me to consider in-depth knowledge and perception of uptake of oil and gas insurance in Kenya and the challenges of domesticating it, which formed the basis on which the solution and conclusions of this study were based.

In addition, this approach will shed more light on understanding and interpreting the provisions set out in Section 50 (3) of the Petroleum Act 2019. The ultimate goal is to determine if the adoption of the Petroleum Act 2019 has enhanced oil and gas underwriting in Kenya or not. I will apply the inductive approach in view of its considerable relevance.

The approach for this study will focus on case study and comparative analysis. While acknowledging that it is nearly impossible to conduct an in-depth analysis, this thesis will be restricted to the study of Ghana.

1.9.5. Limitations of the methodology

I encountered some limitations in carrying out this research, especially in data collection. In a research of this nature, the industry players were either unwilling to share data or in the case of insurance fraternity there is no data on oil and gas insurance in Kenya as currently there is no insurer underwriting this class of business.

Scarcity of published statistical data and literature on the subject in Kenya posed some challenges to me during the work. This statistical data from Energy Petroleum Regulatory Authority formerly (ERC) and Insurance Regulatory Authority would have provided a more realistic an actual analysis on the current trend of oil and gas insurance.

1.10. Limitations of the study

Whilst there is scarcity of content in this subject area, there are hurdles particularly in engaging local oil industry players. Obtaining sample data locally on insurance trends for oil and gas insurance has been a challenge. This data would have been instrumental in this study.

The data acquired through primary and secondary sources will suffice. This data will go a long way in highlighting the financial and technical inadequacy of the insurance sector in Kenya to insure oil and gas related risks and the economic potential in terms of premiums, which this country fails to realize.

There is limited material relating to uptake of oil and gas insurance in Kenya. There were challenges in obtaining current statistics on uptake of oil and gas insurance, risks covered and projected annual premiums. I did not have an opportunity to interrogate the following institutions;

- a) **Energy Petroleum Regulatory Authority (formerly Energy Regulatory Commission)**

It was difficult to get any statistical data on upstream operations from the regulator due to the fact that by the time of doing my research, the initial Authority was disbanded and reconstituted to regulate upstream activities in March 2019 through enactment of the Petroleum Act 2019.

In view of the above, it was difficult to obtain information on upstream operations in Kenya.

- b) **Insurance Regulatory Authority**

Currently there is no insurer underwriting oil and gas insurance Kenya. Therefore, there is no data or information of uptake of insurance services by IOCs. In view of this, it is difficult to pinpoint the performance of oil and gas insurance and its impact on the insurance industry.

- c) **National Oil Corporation of Kenya (NOCK)**

I didn't get a chance to interrogate NOCK on the matter due to lack of data in my area of research in Kenya.

A direct interaction with these agencies would have given a more realistic feel and actual trends on the lack of domestication of upstream insurance operations.

This study has also been subjected to time limitations with the data contained herein being restricted to the prevailing conditions up to June 2019.

1.11 Chapter Breakdown

Chapter 1: Introduction to the Study

The aims of this study are expounded within five distinct chapters. The current chapter is introductory. It elaborates on the historical background, statement of the problem, research problem, justification, conceptual framework, hypothesis, research questions, definition of key terminologies, literature review, the methodology and approach and finally the chapter layout used in this thesis.

Chapter 2: Conceptual Framework

This chapter will provide the conceptual framework on insurance contracts in the oil and gas industry. Various aspects such as nature of insurance contracts, principles that govern insurance and how risk relates to this aspects of insurance in the Kenyan context.

Chapter 3: Upstream Oil and Gas Risks and The Role of Insurance

This chapter outlines the economic and legal risks that are prevalent in upstream oil and gas operations. It also outlines the financial and legal implications that are caused by these risks.

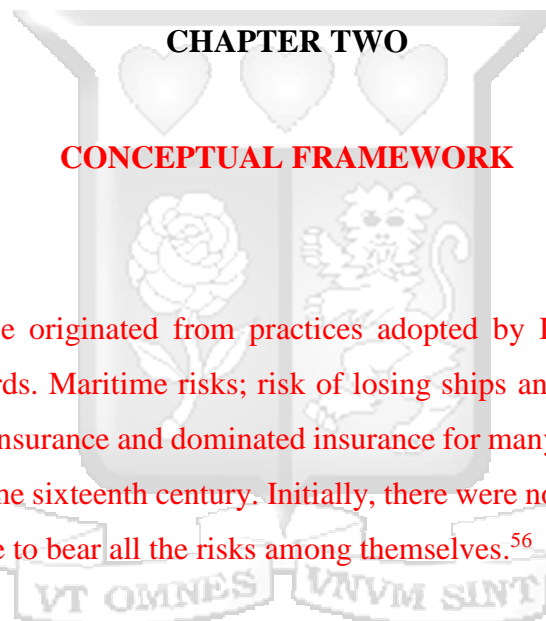
Chapter 4: Legal & Institutional Framework in Kenya

This chapter analyses the legal and institutional framework within which the government seeks to introduce insurance provisions in upstream oil and gas operations in Kenyan. The first part will scrutinize Kenya's legislative and institutional frameworks. The last part will examine factors that impede successful implementation of oil and gas insurance in Kenya.

Chapter 5: Case Study of Ghana

Identifies factors that determine successful oil and gas insurance outcomes, this chapter will analyse key elements that promote oil and gas insurance against the achievement of positive outcomes in Ghana's oil and gas industry for a possible transplant to Kenya. The logic is that, if the research identifies key elements present in the promotion of upstream insurance activities in Ghana, then it is possible to identify factors that can explain what leads to the achievement of positive outcomes. This will form a basis for recommendations of Kenya's upstream insurance implementation strategy.

Chapter 6: Key Finding, Recommendations and Conclusion



2.1. Introduction

The concept of insurance originated from practices adopted by Italian Merchants from the fourteenth century onwards. Maritime risks; risk of losing ships and cargoes at sea, instigated the practice of medieval insurance and dominated insurance for many years. This habit extended to London merchants in the sixteenth century. Initially, there were no separate insurers. A group of merchants would agree to bear all the risks among themselves.⁵⁶

For a long time, common law played little or no part in the regulation of disputes concerning insurance. Considering this, the merchants established chamber of assurance in 1601 which acted outside the normal legal system. However, with appointment of Lord Mansfield as Lord Chief Justice in the mid eighteenth century, the common law courts took interest in insurance contracts. Lord Mansfield applied principles derived from the law of merchants as well as more traditional common law concepts to resolve insurance disputes.⁵⁷ Most of the current principles of insurance developed due to Marine insurance.

From the above history of insurance law, it is evident that insurance was introduced to mitigate and minimize risks in business transactions. Nonetheless, the relationship between the insured

⁵⁶ Birds J, *Birds, Modern Insurance Law*

⁵⁷ Birds J, *Birds, Modern Insurance Law*

and the insurer is outlined in insurance contracts which are subject to the general rules that govern validity of contracts. However, this is where the similarity ends. Insurance contracts go a notch higher as there are guided by principles of insurance which are specific to these contracts. The principles of insurance were created through judicial precedents due to the unique nature of insurance contracts.

This chapter will elaborate the interplay between the concept of insurance, nature of insurance contracts and risk with the latter being an integral part of insurance business.

2.1.2. Concept of Insurance

Hardy Ivamy writes in his work - "General Principles of insurance Law" that a contract of insurance is a contract whereby one person called the 'insurer', undertakes in return for the agreed consideration called the 'premium' to pay to another person, called the 'insured' a sum of money or its equivalent on the happening of a specified event.⁵⁸

In the case of *Prudential Insurance Company -Vs- Inland Revenue Commissioner*⁵⁹ Channel J said "there must be either some uncertainty whether the event will ever happen or not, or if the event is one which must happen at some time or another, there must be uncertainty as to the time at which it will happen".

For an insurance agreement to be termed as a valid contract it must;⁶⁰

- a) Contract between an insurer and insured
- b) The contract is based on the loss due to happening or not happening of a future incident
- c) A consideration in the form of payment of an amount by the insured
- d) The insurer promises to make good the loss in so far money can do it, in case the loss occurs on the happening of the contingency.

In most cases, the subject matter of insurance is the compensation in the form of money to be paid to the assured on happening of a risk.

⁵⁸ Law of Insurance, MBL -Part II, (Distance Education Department, National Law School of India University, Bangalore) Pg 13

⁵⁹ (1904) 2 KB 658

⁶⁰ Law of Insurance, MBL -Part II, (Distance Education Department, National Law School of India University, Bangalore) Pg 14

2.1.3. Nature of Insurance

Insurance means the act of securing the payment of a sum of money in the event of loss or damage to property, life or a person by regular payment of premiums. Insurance is a method of spreading over many persons, a possible financial risk too serious to be conveniently sustained by an individual. The aim of all types of insurance is to protect the owner from a variety of risks which he anticipates. The happening of the specified event must involve some loss to the insured or at least should expose him to adversity which is, in the law of insurance, commonly referred to as 'risk'.⁶¹

The nature of insurance depends on the nature of risk required to be protected. An insurance contract makes available the risk coverage to the insured. The buyer of insurance pays a fixed premium in exchange for a promise of compensation in the event of some specified loss.⁶²

2.1.4 Legal Nature of Insurance Contract

The concept of insurance as an effective mechanism of transferring risk was first introduced in the marine trade. Later, the utility of the concept was realized in its expansion to the non-marine types of insurance e.g. life and fire insurance. Until mid-nineteenth century, these were the three types of insurance which obtained prominence in insurance law. The applicability of principles of insurance have broaden their boundaries.⁶³

The law of insurance forms part of the general law of contract. Irrespective of the type of contract of insurance, it always represents the agreement between the assured and the insurer. The essential ingredient of a contract under law i.e. offer and acceptance, consideration, capacity of the parties, mutuality of understanding and legality of the object are of equal application to a contract of insurance. However, there is existence of a separate set of principles distinctly applicable to a contract of insurance that furnishes the correct appraisal of the insurance contract.⁶⁴

⁶¹ Dr. G.Gopalakrishna, Essentials and Legalities of an insurance contract available at https://www.insuranceinstituteofindia.com/.../Journal08_%20pg06-14_ess.pdf accessed on 27/06/2009 at page 6

⁶² Ibid

⁶³ Dr. G. Gopalakrishna , “Essentials and Legalities of an insurance contract” available at <https://www.insuranceinstituteofindia.com/Indiainsurance/insurance/insurancemain/earlierIssues> accessed on 27/06/2009 at page 7

⁶⁴ ibid

2.1.5. Basic principles of insurance

These general principles serve as a guide to the sound interpretation of the purpose of the insurance contracts in their diversified forms.

To understand the intricacies surrounding oil and gas insurance, it is paramount to mention the core tenets of insurance law which play a pivot role in risk evaluation and underwriting this class of insurance. The following are some of the important principles of insurance;

a) Existence of risk

It is essential for every contract of insurance that the subject matter should be exposed to the contingency of loss or risk. Risk involves the happening of an uncertain event adverse to the interest of the assured. It can either be an uncertainty as to the outcome of some events, or loss as the result of at least one possible outcome. The promise of the insurer is to save the assured against uncertain consequences.⁶⁵

b) Principle of indemnity

An insurance is a contract of indemnity. It is implied in every contract of insurance that the assured in case of a loss against which the policy has the actual loss, is to prevent fraud on the part of the assured. It controls the temptation to gain by unfair means and the intentional cause of a loss. However, the factual basis for the application of the principle of indemnity is not the prevention of crime or consideration of public policy but it derive from the inherent nature of the bargain.⁶⁶

In assessing the amount payable on a contract of insurance, the principle of indemnity is a guiding principle. The norm is that insurers restrict their limit of liability to an amount of money known as the 'sum assured'.⁶⁷

c) Principle of insurable interest

The test of a valid insurance contract is the existence of the insurable interest. Insurable interest entails an interest in the nature or occurrence of the event insured against which would result to

⁶⁵ *ibid*

⁶⁶ Dr. G. Gopalakrishna, "Essentials and Legalities of an insurance contract" available at <https://www.insuranceinstituteofindia.com/Indiainsurance/insurance/insurancemain/earlierIssues> accessed on 27/06/2009 at page 7

⁶⁷ *ibid*

a financial loss to the insured and such an interest is protected by a contract of insurance. This interest is considered as a form of property in contemplation of the law.⁶⁸

Insurable interest should exist at the time of occurrence of an event under general insurance contracts e.g. oil and gas insurance. If the assured has no interest at the time the loss occurred, then he/she cannot be compensated under the policy as he/she has not suffered any loss and therefore does not have a right to seek indemnity.

The concept of insurable interest primarily is an invention of the courts. It may be necessary for the assured to show interest, but common law contains no general prohibition of contracts in which no insurable interest exists.⁶⁹

d) Principle of utmost good faith

Parties to a contract of insurance must observe utmost good faith. The principle of uberrima fide requires the parties to the contract to conform to a higher degree of good faith than in the general law of contract. Good faith and honesty though principles of equity and justice are applicable to every agreement.⁷⁰

Insurance is a devise of risk transfer. Non- disclosure of a material fact by the insured whether fraudulent or innocent, has the same effect of voiding the contract. A stringent duty is imposed on the assured to provide all material facts that might influence the decision of the insurer. The materiality of a fact will be considered independently of the belief of the assured.⁷¹

The onus of good faith lies equally on both parties to the contract. However, the insured is duty bound to pay more attention to the observance of the principles. It follows that, the propose has within his knowledge all facts pertaining to the subject risk and as such is held to a higher level of accountability.⁷²

⁶⁸ ibid

⁶⁹ ibid

⁷⁰ ibid

⁷¹ ibid

⁷² ibid

Under this principle, a fact is considered material if it will influence the judgement of a prudence insurer in fixing the premium or taking up the risk.⁷³

2.2. What is risk in insurance?

Every day, we are surrounded by risk that threatens our lives and property (Almer, n.d.).⁷⁴ According to Roeser et al. (2013).⁷⁵ risk is the framework that ensures mitigating uncertainty with respect to unexpected and unanticipated events. Risk reflects on the available decisions and options that people take when faced with uncertainty about their future (Delee, 2017, p.6).⁷⁶ Risk is perceived as part of human behaviour that makes provision against uncertainty. The more competitive and harsh business environments in which organizations operate are, the more they are exposed to risks (Spikin, 2013, p.90).⁷⁷ This idea has awakened the level of risk awareness among organizations, especially in the oil and gas industry.

The oil and gas industry is characterized with equipment and driven by technology in order to meet the ever-increasing demand. This exposes the industry to new threats and risks that cut across operational, market, and other associated risks. Although different authors (such as, Campbell, 2005; Willis, 2007; Terje and Ortwin, 2009; Hermans et al., 2012; Zhang et al., 2013) have defined risk based on their various perspective and disciplines, the position is that organizations embrace insurance to mitigate the uncertainty that might threaten their survival and sustainability either from internal or external circumstances (Hillson, 2006; Spikin, 2013, p.90-91).⁷⁸

Risk is the potential of losing and gaining value. It helps to reflect the degree and optimal exposure to risks attached while making business or investment decisions and especially to oil and gas that is highly associated with risks and uncertainties. There is a wide difference between risks and uncertainties. Concern of not knowing for sure what will happen is regarded as risk, whereas not knowing the odds of what will happen is perceived as uncertainty (Hermans et al., 2012, p.3; Spikin, 2013, p.92). The two notions are dominant in oil and gas operations.

⁷³ *ibid*

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It has been established that most decisions are characterized with uncertainty (Delee, 2017).⁷⁹ For instance, the price of oil and gas fluctuates, which affects the operations of the industry as well as the expected premium to be earned by the insurance companies. In practice, this has compelled both individuals and organizations, especially those involved in oil and gas to buy into insurance policies. Although this argument does not specify where and how to buy these insurance policies, greater concern now is where to buy (foreign or domestic market).

In summary, all that the risk theory emphasizes the need to plan, evade and reduce the effects of uncertainty through insurance policies.

2.3. Development of insurance industry in Kenya

The development of the Kenyan insurance industry has been slow and sluggish. The Kenya insurance industry is playing catch up to the rest of the world on oil and gas insurance. The Insurance Act Cap 487 Laws of Kenya which is the governing law regulating insurance business and products in Kenya is silent on supervision of upstream of oil and gas insurance in Kenya.

The recently enacted Petroleum Act, 2019 provides a provision of compulsory placement of insurance services by IOC with domestic insurance companies. However, the regulations to operationalize this Act have not been passed by the Cabinet Secretary in charge of Petroleum thus creating a gap in successful implementation of uptake of insurance services in the country.

Lack of harmonization with the Insurance Act regarding the above implementation creates a legal risk as the Kenya insurance companies are handicapped in offering these upstream insurance services and the IOC are unable to take up insurance locally as the provisions of the law regulating this venture are vague.

2.3.1. Insurance of Upstream Petroleum Operations

Insurance relates to every aspect of our day-to-day businesses and lives. The relevance of any given sector to the economy is measured through the employment generation and contribution of the sector to the overall gross domestic product (GDP). In Kenya, the insurance sector has contributed towards the country's GDP on other classes of insurance with the exception of oil and gas insurance which is a new frontier in the industry (Egerue, 2010).⁸⁰ The insurance sector

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has remained a vital component of the financial sector in mobilizing resources and funds. Yet, as good as insurance policy is, most Kenyans and institutions perceive it as unnecessary. (Kenya Re, 1989).⁸¹

Adebisi (2006)⁸² states that insurance is an intricate subject that revolves around economic and social values in handling risks of life and non-life (such as assets and property). The cooperation of several individuals to pool financial resources together is needed to fight against and reduce the effect of a common cause, which is the risk in insurance. As the unforeseen circumstances keep happening, insurance companies design insurance products to address such risks. This implies that, for a new set of risks, a new insurance set of packages will emerge to address such risk exposures. Also, insurance is a legal contract that reflects a form of agreement between two or more entities that are bound under obligation as contained in the contract deed. In this way, insurance provides guarantee of compensation for loss, damage, illness, death and so on.

Once a regular payment, known as premium, is paid, a policy is incepted to the insured (Oxford Dictionary, 2016).⁸³ This is only possible where there is pooling of risks by people with homogeneous risk exposure so that, in the event of loss, from the pool, they are compensated by the insurer who serves as managing agent of the pool.⁸⁴

Furthermore, Aslan and Kucukaksoy (2006)⁸⁵ state that the insurance sector helps in mobilizing funds into the financial system. How the funds are used will be effectively monitored and planned to ensure the profitability of such projects. As the insurance industry develops, it tends to strengthen the financial system through risk transfer and compensation, financial intermediation and distribution of various risks effectively, which will translate to economic growth. Hence, the insurance industry fosters investment through capital accumulation and mobilizes direct domestic savings to domestic investment.

Similarly, Hammound et al. (2006)⁸⁶ view insurance as a means of assembling funds from different insured entities to mitigate losses and damage that can happen at any time. This is done with the expectation that the insurance companies can guarantee part or full cost for the losses

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and damage incurred. Insured entities are charged a specified fee called premium to protect against risks. This depends on the frequency and severity of the occurrence of the events. This brings to the fore the fact that the insurance industry is an integral part of the financial sector in any given economy (Encarta, 2010).⁸⁷

Regarding the academic perspective in recent times, there is growing awareness towards risk management, resource allocation and customer loyalty owing to the ever-changing business environment that has created a niche and demand for insurance products in the last decade. Unexpected events or happenings tend to be increasing the insurance companies' or industries' performances with respect to hedging of risks and promotion of investment and subsequent economic growth (Njegomir and Marovic, 2012).⁸⁸

Also, insurance activities are a vital tool of mobilizing resources, particularly funds to facilitate investment that is made available through the financial markets. These investments are pronounced by inducing economic growth in which the risk attached to this investment is transferred to the insurance companies (Alhassan and Fiador, 2014).⁸⁹ However, the low penetration of insurance in Africa, except for South Africa, has denied African countries the opportunities to mobilize funds for development (Swiss Re, 2015).⁹⁰

Generally, as the insurance penetration keeps increasing, it tends to influence insurance premiums, which are the major drivers in emerging markets. This has attracted much investment from developed countries to the emerging ones, which guarantee risk from insurance companies (Alhassan and Fiador, 2014).⁹¹

In addition, the level of the growth of the economy most times determines what happens to the insurance industry and its relevance. This suggests that the insurance products that exist in an economy is largely influenced by the environment and economic activities. It follows that the insurance sector does not stand alone in an economy but is influenced by economic activities such as the number of contracts awarded, business enterprises, number of cars, property and resources, as all these activities will pay premiums on their resources and assets. Therefore,

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insurance density and penetration is a function of the aforementioned factors (Vacarel and Bercea, 2000; Firtescu, 2014).⁹²

Insurance market is viewed from diverse perspectives based on each country's operating environment. This depends on countries, regions, the level of economic development and the insurance industry in the country of focus. For instance, Firtescu (2014) identifies the salient features of most insurance markets to include insurance market transparency, products homogeneity, insurance market atomization, decision-making process in the insurance industry as well as the entry and exit of participants and agents in the insurance industry in the prevailing country with different features for different countries. So, to a large extent, the level of economic growth directly determines the pace of development of the insurance industry, which can be positive or negative. (Firtescu, 2014).⁹³

In summary, evidence from these scholars show that insurance is identified as a channel of transferring and evading risks with the intention of mobilizing resources, especially funds to complement existing investment to enhance economic growth and development. This has positioned the insurance market as a key integral part of the financial services that exist in any given economy.

During this study, I considered insurance market and the regulatory framework in place to monitor, supervise and coordinate upstream oil and gas insurance in Kenya. Thereafter, I have explored the African perceptives with a special concentration on Ghana's oil and gas insurance industry which is the focal point of this research. I have studied the history and transition of the upstream oil and gas insurance industry in Ghana and the existing insurance coverage.

2.4. Conclusion

Insurance contracts are unique. Oil and gas insurance is regulated by the same provisions required to validate insurance contracts. Principles of insurance are also applicable to upstream oil and gas insurance. It is therefore paramount to highlight the interplay that exist between insurance law and oil and gas law in so far as oil and gas insurance is concerned.

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CHAPTER THREE

UPSTREAM PETROLEUM RISKS AND ROLE OF INSURANCE

3.1. Introduction

Africa provides unique opportunities for international oil and gas companies to lead oil exploration and production in emerging markets, and to acquire interests in fields with unexplored economic potentials. Despite these investment opportunities, entrants into oil and gas markets in African often face legal risks that pose monumental threats to economic viability of oil and gas investments. These include nationalism; lopsided contractual provisions in oil production contracts that confer unfair advantages on national oil companies; arbitrary change in contract terms; delays in operational approvals, complex local content requirements and high corruption potentials, among others.⁹⁴

These risks have the potential to reduce the positive economic prospects and gains in a hitherto profitable investment venture. Legal risks play a fundamental role in kick starting upstream oil and gas activities. These cadre of risks are perceived as disincentives to oil and gas investments not only in Kenya but Africa as a continent.

African countries continue to provide international oil and gas companies with opportunities to spearhead new oil and gas frontiers and to consolidate on oil and gas exploration and production in previously explored fields.⁹⁵

⁹⁴ Olawuyi.D, ‘‘Legal Strategies and tool for mitigating legal risks associated with oil and gas investments in Africa, *OPEC Energy Review* (2015)

⁹⁵ Mercier T, Olawuyi D, Nigeria: Oil and Gas Licensing round for marginal fields, 2013

Countries such as Egypt, Nigeria, Libya, Algeria and Angola continued to attract significant oil and gas investments, while Ghana, Tanzania, Kenya and Uganda increasingly appear to be the next great oil and gas market prospects in Africa.⁹⁶

Despite these opportunities, oil and gas investments in Africa have been tainted with the lack of being forthright. This lack of being upfront from the onset has caused economic turmoil and, in some cases, uprising due to lack of transparency on their dealings from respective parties i.e. Host government – IOC, Host Government – Citizenry, Host Government & IOC – Host communities. These transactions which are shroud and covered under a lot of secrecy are a major source of armed conflict.⁹⁷ A case in point is the Niger Delta where extremist militia have been advocating for proper use of natural resources for the benefit of the community.

I cannot understate the importance of oil and gas in my country. In most developed and developing countries like Kenya, oil and gas have been identified as an essential source of energy for many activities and act as a catalyst for social economic development.⁹⁸ This is a productive input that facilitates economic growth process by its direct influence on the productivity of other factors of production.

The level of energy consumption closely reflects the level of economic development of a nation, as exemplified by Brazil, Russia, India, China, and the emerging world economies.⁹⁹

The oil and gas industry is characterized by unpredictability, risk and complexities. The decreasing oil prices have raised the global demand for fossil fuels in emerging markets and this situation poses more challenges to oil and gas industry.¹⁰⁰

Attempts at meeting the world's growing energy demand has forced most of the oil and gas companies to seek and operate in harsh and remote environments.¹⁰¹

⁹⁶ Katsouris C, 'Africa's oil and gas potentials' *Energy Intelligence* (2012)

⁹⁷ http://www.globalnegotiator.com/blog_en/wp-content/uploads/2012/Africa-New-Opportunities-for-Business-Economic-Intelligence-Unit [accessed on 2 April 2019]

⁹⁸ Laniyi S., 'Challenges on the domestication of oil and gas insurance in Nigeria' Published DProf Thesis, Middlesex University (April 2018)

⁹⁹ Laniyi S., 'Challenges on the domestication of oil and gas insurance in Nigeria'

¹⁰⁰ Massie D., Nygren K and Kern J, Army Energy Strategy for the End of Cheap Oil, *United States Military Academy West Point, NY* (2006)

¹⁰¹ LLody's, 'Drilling in extreme environments: Challenges and implications for the energy insurance industry, *Lloyd's Class of Business and Exposure Management Department*, (2011)

In most developing countries, the insurance industry has remained the link between commerce and industry. Globally, the insurance sector plays a significant role in mitigating risks and this is ever increasing, as businesses operate in competitive environment, though oil and gas companies operate in harsh environment.¹⁰²

The emergence of new geographical and technological frontiers and risks in exploration and development activities, has necessitated the need for a risk bearer-the insurance company, in this volatile industry.

3.2. Insurance in Oil and Gas

Insurance companies have always received a negative attitude from Kenyans when it comes to holding insurance policies. This has led to low patronage and slow performance owing to the poor attitude of insurers in no claims payment. This has created a bad image and publicity about insurance industry. It is believed that insurance companies are major defaulters of claims. This has significantly eroded people's confidence and trust in the insurance industry. The resultant effect of this confidence crisis is strong apathy for insurance industry and their products. The insurance industry has remained the same, as most of the insurance policy documents still contain some clauses and ambiguity that raise distrust amongst customers sentiments shared among may Africa Countries.¹⁰³

As briefly explained above on the history of insurance, insurance concept was established a long time ago as a concern for the protection of human lives and property values. World economy witnesses one or more catastrophic hazards in business environment, especially in the oil and gas sector that might result in human and financial losses. Some of the catastrophic hazards include earthquake, hurricane, fire, flood, and nuclear risks, which have affected insurers and the insureds.¹⁰⁴

The oil and gas sector operate in volatile environment, with catastrophic hazards occurring frequently. Between 1970 and 1989, insurance covered catastrophic losses on an average cost of about \$8.3 billion dollars a year, and \$32 billion a year between 1990 and 2007. Owing to the capital intensiveness and volatility of oil and gas, the sector is highly exposed to high risk in terms of operations. The oil and gas sector is a vital sector to any economy. Despite this attribute,

¹⁰² LLody's, 'Drilling in extreme environments: Challenges and implications for the energy insurance industry,

¹⁰³ Obasi, N., Policies, Challenges, Reforms and Nigerian disposition to insurance contracts, *The Frontier Post*, (2010), 1-6

¹⁰⁴ <http://www.iii.org/media/hottopics/insurance/xxx> [Accessed 12/4/2019]

it receives less attention in terms of risk and exposure to hazards than other sectors of the economy. Generally, the business environment and mode of operation of the oil and gas sector is the main determinant of its risk exposure.¹⁰⁵

The mode of operation has been identified as the core hazard driver in the oil and gas industry. This cuts across the hazard involved in exploration, drilling, rigs, explosion, plant, pipeline, freight of manpower and goods. According to Swiss Re, if the hazard in the mode of operation is extremely high, the longer process of turnaround maintenance might be altered. This might have led to a higher number of risk-prone circumstances due to mode of operation. Because of these factors, the overall risk increases and, on the aggregate, all these factors of safety in the oil and gas industry are at the core of risk management.¹⁰⁶

The operators in the sector have raised concern about improving safety awareness at all levels of the value chain of operation, as suggested by insurance experts. This is to mitigate property losses, as well as prevent and reduce injuries and fatalities at the workplace and emergency procedures. The insurance firms that venture into underwriting for the oil and gas sector must understand the fundamentals and peculiarities of the oil and gas sector. Insurance companies must be able to carry out risk assessment for the oil and gas companies that cut across all the envisaged operational hazards.¹⁰⁷

Swiss Re (2011) gives the following fundamental elements that must be considered before any insurance company underwrites for any oil and gas risks:¹⁰⁸

- Mode of operation: This reveals the extent to which the systems limit is explored.
- Turn around interval: This shows the scheduled, strategic or periodic total or partial shutdown for repair or inspection or maintenance of the plants.
- Number of changes during steady state operations: This entails changes to improve operations while the plant is running at its peak
- Maintenance intensity during steady state operation
- Organizational changes, manning levels and staff fluctuation
- Extent of contractor use

¹⁰⁵ Swiss Re, *Insurance Information Institute* (2011), No 3/2100

¹⁰⁶ Swiss Re, *Insurance Information Institute*

¹⁰⁷ Obasi, N., Policies, Challenges, Reforms and Nigerian disposition to insurance contracts, *The Frontier Post*

¹⁰⁸ Obasi, N., Policies, Challenges, Reforms and Nigerian disposition to insurance contracts, *The Frontier Post*

- Inspection environment

3.3. Risks in Oil and Gas Upstream Activities

3.3.1. Understanding risk in oil and gas Sector

The complex nature of the oil and gas sector makes it vulnerable to certain risks that are unique to this sector alone. In addition to the general risk associated with the oil and gas sector globally, some risks appear to be location specific. This means that oil companies within a certain geographical location are exposed to risk that can only be found in that area because they are caused by the geographical composition/layout of that area. Also, there are risks that are unique to developing economies. Oil companies in developed economies are not vulnerable to these types of risks.¹⁰⁹

Most oil and gas companies face a series of risks. They include operation and market price risks, which have a way of influencing and threatening the organizations, thereby compelling them to buy insurance policies.¹¹⁰

Globally, the economic cost of natural disasters and energy risk is on the increasing path. These heavy risks have become a burden for the human society and raised the question: Are catastrophes insurable? Given the risky nature of oil and gas upstream activities, the need to insure these risks should be a major concern to oil and gas companies.¹¹¹

The oil and gas sector accounted for nine (9) activities that resulted in loss among the topmost 20 incidents in 2013. This positioned oil and gas as one of the non-catastrophe top losses in 2013 accounting for about \$ 3.2 billion and 40 per cent of the top 20 total losses and one of the largest insured losses on the 2014 list. The oil and gas sector (energy) had the highest average value of claims of €20.8 million and it cuts across the energy line of business.¹¹²

The decline in the price of crude globally, accompanied with business interruption and the number of emerging risks, tends to make for a more challenging future environment for the oil and gas sector along with the insurance companies. Globally, oil and gas activities are exposed

¹⁰⁹ Laniyi S., 'Challenges on the domestication of oil and gas insurance in Nigeria'

¹¹⁰ Bigliani, R, 'Reducing risk in oil and gas operations' *IDC Energy Insights*, (May 2013) pp. 1 - 15

¹¹¹ Cooke, R. and Kousky, C. 'Are catastrophes insurable?' *Resource Journal*, (2009) Vol. 5, pp 21-23

¹¹² Bigliani, R, 'Reducing risk in oil and gas operations' *IDC Energy Insights*; Allianz, 'Global Claim Review, 2014: Loss trends and emerging risks for global businesses', *Allianz Global Corporate and Specialty Business Scope* (2014)

to several risks in business operation, which can be classified into transportation (pipeline), operator, equipment, environmental and weather- related risks.¹¹³

3.3.2. Economic Risks

Some of the risks likely to manifest during upstream petroleum activities include;

a) Transportation – related risks

This is a type of risks that is associated with the movement of vessels, bulk cargo, shuttle crews and chemicals in the areas of operation. This is one of the most essential processes of operation which ensure that supplier to drilling units are guaranteed. According to Fowler and Sorgard (2000), transport risk is one of the major concerns inherent in the oil and gas industry.¹¹⁴ In addition, bulk cargo poses a threat and additional risk to the personnel and vessels. Insurance must therefore be able to cover these risks. The total volume of oil pollution caused by marine oil transportation is 500,000 tons a year.¹¹⁵ It is viewed that as more goods and services are moved between offices and plants, the risk attached increases.

b) Operational – related risks

Oil and gas activities are inherently characterized by dangerous apprehensive risks that require a significant amount of human labor to execute. The nature of activities at the rigs, floating production and oil and gas plants draw human closely to chemicals and volatile substances that might affect people negatively.¹¹⁶

Despite the safety measures and conscious culture put in place by the companies in their operations, human negligence and errors still exist; this can be attributed to operator related risk that can affect the organization significantly.¹¹⁷

¹¹³ Lanayi S., 'Challenges on the domestication of oil and gas insurance in Nigeria'

¹¹⁴ Fowler, T. and Sorgard, E., 'Modeling Ship Transportation Risk' *Risk Analysis International Journal* (2000)

¹¹⁵ Akpan, M.S., 'Challenges of the local content policy' *Lagos: Vickman Ventures* (2011)

¹¹⁶ Bigliani, R, 'Reducing risk in oil and gas operations' *IDC Energy Insights*,

¹¹⁷ Bigliani, R, 'Reducing risk in oil and gas operations' *IDC Energy Insights: Ernest and Young*, 'Fraud risk management; oil and gas sector' EY (2015), pp. 1-12

In 2013, fire was the number one cause of energy losses both in terms of number and values, accounting for 45 per cent and 65 per cent, respectively. It was followed by blowout and explosion. Technological risks are also associated with operation risks, which comprise risks attached to operation and maintenance of rigs, floating production, storage and offloading units, onshore and offshore refineries and network management.¹¹⁸

Onshore wells are much cheaper to operate than offshore wells. By virtue of being on land, onshore wells tend to be less costly in operations. On the other hand, offshore wells are very expensive and more often than not are referred to as high risk due to the potential danger they pose to large water masses in the event of blow out or spillage. A case in point is the Deep Sea Horizon at the Gulf of Mexico, where a massive blowout occurred leading to spillage of crude in the open sea. The IOC was slapped with hefty fines which would have led to insolvency of the company save for insurance.

c) Equipment – related risks

Equipment related risks cannot be underscored in relation to risk in the oil and gas industry. These risks often attract high premiums due to the sophisticated machinery and equipment used in oil and gas upstream activities.

Equipment might get defects and malfunction at times, which creates hazards to the operating personnel as well as the insurance companies that insured the oil and gas companies against those risks. Most of the operators in the oil and gas industries employ up-to- date technologies and equipment to reduce the cost of exploration and production and mitigate preventable risks.¹¹⁹

With the adoption of up-to-date equipment certified by the regulators of operations in the oil and gas industry, there will be competitiveness and conformity with global best practices. The machinery breakdown risk accounted for six per cent (6%) by value and 14 per cent by number of claims in 2013.¹²⁰

d) Market Risks

¹¹⁸ Allianz, 'Global Claim Review,2014: Loss trends and emerging risks for global businesses'

¹¹⁹ Bigliani, R, 'Reducing risk in oil and gas operations' *IDC Energy Insights*: Ernest and Young, 'Fraud risk management; oil and gas sector'

¹²⁰ Allianz, 'Global Claim Review,2014: Loss trends and emerging risks for global businesses'

Market risks are fundamental in most business cycles, involving risks associated with losses arising from fluctuations in market prices. Usually, these risks are attributed to stock prices, inflation, currencies and commodity price.¹²¹

In the oil and gas industry, the price of crude oil at the international market has significant impact on the performance and profitability of the companies. For instance, in the early 2014, the price of crude declined from \$ 100 to about \$ 40 per barrel for both West Texas Intermediate and Brent Oil prices recently when it hovered around \$ 50 - \$ 52 per barrels.¹²²

This decline in prices has weakened and threatened the survival, operations, corporate policies, profitability as well as the insurance premium of the insurance sector activities.

e) Regulatory Risks

Regulatory risks are the risks that organizations are exposed to because of non-compliance to the rules and procedures of the regulatory agencies.¹²³ This proposes that, as organizations violate the rules of their operation, the regulatory agencies sanction them, giving penalties which might erode their financial statement and operational activities. A good example is the Nigerian government which sanctioned oil and gas companies for gas flaring up to the tune of \$500million to \$1 billion. Unfortunately, these sanctions were not effective due to negligence and inefficiency in the regulatory institutions in Nigeria unlike in countries such as Russia and Saudi Arabia (Vanguard, 2016).¹²⁴

f) Environment – related risks

Environmental risks are also referred to as natural hazards and other business interruptions in the oil and gas sector. The process of moving from onshore to offshore and deep-water raises a concern to the environmentalists and poses a great threat to the environment.

Environmental risks have far reaching and sometimes irreversible effects to the environment. Adverse environmental effects in Ecuador and some parts of the Niger Delta have left permanent scars on host communities and environmental degradation that will take many years to reverse the effects.

¹²¹ Deloitte Center for Energy Solutions, 'Oil and Gas reality check,' *Deloitte* (2015), 1-32

¹²² EY, 'Fraud risk management; oil and gas sector': Deloitte Center for Energy Solutions, 'Oil and Gas reality check

¹²³ Bigliani, R, 'Reducing risk in oil and gas operations'

¹²⁴ <http://www.vanguardngr.com/2016/12/gas-flaring-fg-accuses-oil-firms-of-fraud/> accessed on 15/4/2019

Environmental risks include air pollution, gas flaring, unintentional discharges, fires and explosions, pipeline strikes and failures, aftermath of blowouts, oil spillage and air pollution. Oil spillage and gas flaring are considered as risks with a heavy cost implication in mitigating risks and consequences that follow

According to Allianz, natural hazard risks constitutes two per cent of top causes of losses in the energy sector.¹²⁵

3.3.3. Legal Risks

a) Typical legal risks in African oil and gas markets

An oil and gas investor intending to do business in Africa would be concerned on the measures put in place to enable him to obtain prospecting permits and licenses, incorporate a local subsidiary, repatriate funds and ensure compliance with international foreign corruption conventions or acts. These requirements are key in doing business in Africa.¹²⁶ Kenya is not an exception to this. Potential legal risks that are synonymous with emerging markets compel companies to, in addition to meeting entry requirements, adopt proactive strategies that eliminate or minimize legal risks.¹²⁷

According to Allianz, the energy sector employs high valued assets which combine with complex risks which makes the cost of energy claims to constantly increase.¹²⁸

The weakness of legal systems in emerging markets is that they compel a broad-based proactive strategy to minimize legal risks but, only a portion of it can be managed through traditional contractual documentation. (Irwin, 1998).¹²⁹

Some of the general problems include the diverse ownership regimes that apply across part of Africa. While this by itself is not a problem, specific problems arise due to poorly formulated laws that grant regulators broad discretion to negotiate lopsided contractual arrangements and to impose stringent participation requirements. The risk of corruption is imminent which results to violation of diverse and increasingly more stringent anti-corruption requirements in many parts

¹²⁵ Allianz, 'Global Claim Review,2014: Loss trends and emerging risks for global businesses'

¹²⁶ Swiss Re, *Insurance Information Institute*

¹²⁷ Belligoli S, 'Chinese investments on the African continent and political risk: the ongoing debate in China' *Journal of Cambridge Studies* 7,3, 85-92

¹²⁸ Allianz, 'Global Claim Review,2014: Loss trends and emerging risks for global businesses'

¹²⁹ Irwin W, 'Political risks: a realistic view toward assessment, quantification, and mitigation', in Moran T. (ed), *Managing International Political Risk*, Wiley, Oxford, 1998, 57-69

of the world.¹³⁰ Contractual provisions alone are not enough to address all these legal risks. We cannot underscore the importance of including contractual terms that specify mitigation measures for these legal risks. However, understanding the risks and taking elaborate steps to avoid them will be instrumental in protecting the business interest in difficult emerging markets in Africa.¹³¹

b) Ownership rights over oil and gas

Ownership rights over oil and gas vary from one African Country to other, depending mainly on the country's socio-political culture, historical colonial background, the enduring legal regime and development framework.¹³² It is paramount for the International Oil Company to understand the specific oil and gas ownership structure for the target country: Who owns and controls oil and gas resources? Is it the central or federal government or in the case of Kenya is it the National or County government? Is there private ownership of oil and gas resources? Answers to the questions differ from one country to the other and at times fall outside the traditional ownership norms in other foreign jurisdictions.¹³³

In many African regimes, oil and gas ownership is vested in the state, while the rights of participating entities are limited to the right to use, manage, control or enjoy benefits of oil production. In African Countries, there is no private ownership of subsurface oil and gas.¹³⁴

In Kenya, minerals are owned by the National Government and this aspect will be dealt with extensively in the next chapter. In some African Countries, after an oil exploration license has been granted by the national oil company, the grant must be formally ratified by parliament before it becomes effective. This means that investments cannot commence until an oil license is granted through parliamentary¹³⁵ approval thus delaying the process further.

It is pertinent to understand the nature and scope of control and powers granted to local energy regulators and national oil companies in the host country. Several African countries have enacted

¹³⁰ Gerda du Toit, 'Political risk factors: what Chinese companies need to assess when investing in Africa' 2013

¹³¹ Belligoli S, 'Chinese investments on the African continent and political risk: the ongoing debate in China'

¹³² Graulau J, *Ownership of mines and taxation in Castilian laws, from the middle ages to the early modern period: the decisive influence of the sovereign in the history of mining*, Continuity & Change, 2011, 26, 14-15

¹³³ Olawuyi.D, 'Legal Strategies and tool for mitigating legal risks associated with oil and gas investments in Africa,

¹³⁴ Graulau J, *Ownership of mines and taxation in Castilian laws, from the middle ages to the early modern period: the decisive influence of the sovereign in the history of mining*, Continuity & Change,

¹³⁵ Olawuyi.D, 'Legal Strategies and tool for mitigating legal risks associated with oil and gas investments in Africa,'

constitutions and local laws that confer excessive powers on national oil companies to unilaterally cancel or amend petroleum contracts and licenses.¹³⁶

The ongoing volatility in the global economy means that governments increasingly look to oil companies to fund the shortfall in revenues and to regain control over natural resources through tax hikes, demand for greater state equity and indigenous participation, renegotiation of stability clauses in mining contracts and arbitrary imposition of additional levies and ‘super profits.’¹³⁷

A case in point is Tanzania where there have been instances of increased government participation, arbitrary confiscation and nationalization of oil mining licenses, unilateral modification of the oil license or contract, forced contract renegotiation, retroactive change in legislation and licensing regime after exploration rights have been granted. Other countries in Africa which have adopted such a strategy include Guinea, Democratic Republic of Congo and Sierra Leone.¹³⁸

To illustrate the effects of arbitrary change in law and nationalization of resources, I will use Guinea and Tanzania. In September 2011, Guinea adopted a new mining code which vests the state 15 per cent stake in all new mining projects with a right to purchase a further 20 per cent. This led to the exit of investors such as BHP Billiton from Guinea and a negative rating for the country as an investment destination. In the 2013 Resource Nationalism Index publication, Guinea was classified as being an ‘extreme risk’ country.¹³⁹

Similarly, in September 2012, Tanzania’s Energy Minister announced a review of all existing PSAs to ensure that they are in the country’s best interests. Additionally, the Tanzania Petroleum Development Corporation TPDC delayed a licensing round for nine deep sea oil and gas blocks, originally set for September 2012, until a parliamentary vote on the new gas policy takes place. These measures have created some uncertainty for investors on the future direction of Tanzania’s licensing regime.¹⁴⁰

¹³⁶ Baker J, *The changing role of national oil companies in international energy markets*, Baker III Institute for Public Policy, Rice University, United States, 2007

¹³⁷ Olawuyi.D, ‘Legal Strategies and tool for mitigating legal risks associated with oil and gas investments in Africa,’

¹³⁸ Olawuyi.D, ‘Legal Strategies and tool for mitigating legal risks associated with oil and gas investments in Africa,’

¹³⁹ http://maplecroft.com/about/news/resource_nationalism_index_2012 [accessed on 3rd April 2019]

¹⁴⁰ Olawuyi.D, ‘Legal Strategies and tool for mitigating legal risks associated with oil and gas investments in Africa,’

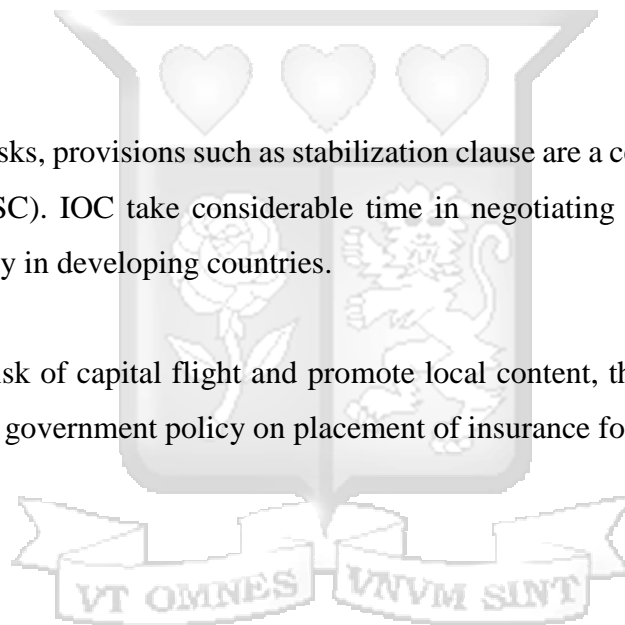
These resource nationalism trend in many parts of Africa often poses financial risks to investors that have committed resources to establishing oil operations. Resource nationalism increases the risks oil companies face and lowers the expected returns on investments.¹⁴¹

3.4. Conclusion

The importance of insurance cannot be underscored in upstream oil and gas activities. Insurance plays a pivotal role in risk mitigation in the oil and gas industry. Whereas economic risks are insurable, legal risks on the other hand tend to be difficult to insure as there are not quantifiable in monetary terms.

To mitigate on legal risks, provisions such as stabilization clause are a center piece in Production Sharing Contracts (PSC). IOC take considerable time in negotiating this provision with host governments especially in developing countries.

To minimize on the risk of capital flight and promote local content, the government of Kenya needs to incorporate a government policy on placement of insurance for upstream operations.



¹⁴¹ <http://www.thisafricaonline.com/Business/Legal-Bulletin/resource-nationalism-Senegal-Gunica-Burkina-Faso-and -South-Sudan-analysis/> accessed on 20th April 2019

CHAPTER FOUR

LEGAL AND INSTITUTIONAL FRAMEWORK FOR INSURANCE OF UPSTREAM PETROLEUM OPERATIONS

4.1. Introduction

The oil and gas industry is prone to high risk due to the nature of operations involved in upstream activities. The Government of Kenya is cognizant of the risks and has made insurance of upstream petroleum operations mandatory under the Petroleum Act 2019. The Petroleum Act 2019 requires contractors to give preference to Kenyan Insurance Companies. However, it has been argued that the capital of domestic insurance companies in Kenya is inadequate to insure oil and gas related risks forcing IOCs to rely on foreign insurance companies, leading to capital flight and leaving a minimal share to Kenya. This has hindered the country from optimizing the benefits of insurance activities to businesses in Kenya, especially in the oil and gas sector.

However, the government has offered a curative measure by attempting to protect its local industries through the introduction of local content in the oil and gas sector as stipulated in the Petroleum Act, 2019. It is debated that action by the government will redirect the activities of IOCs to start embracing the home-grown companies.

This chapter will analyze the legal and institutional framework for placement of oil and gas insurance in Kenya's upstream petroleum operations. The study will analyze the provisions of the Petroleum Act and the Model Production Sharing Contract as proxy on the assumption that, if the model PSC provides for insurance of upstream operations, then it can be argued that the concept of insurance has found its way in upstream petroleum operations through the binding legal document that governs the relationship between the IOC and GOK. I will also analyze joint operating agreements and the respective clauses on insurance requirements.

4.2. Legal Framework Governing Insurance of Upstream Petroleum Operations

As discussed in the preceding chapter, there are various insurable risks in upstream oil and gas operations which have been categorized as economic risks. Legal risks due to their unique

character may not be specifically insured except for political violence and terrorism cover which is offered by Kenyan insurance companies subject to support and acceptance of their respective re-insurers.

It is important to review applicable laws, international laws which govern upstream activities before proceeding to domestic laws on the subject matter.

a) International Laws

Though subject to domestic laws and national contracts, petroleum operations have many international aspects: upstream operations are often undertaken by international companies and investments are often protected by international law. Operations can have negative externalities that span beyond state border which require international regulation. As such, the regulatory framework impacting on petroleum operations includes rules of international law. I will briefly review those international law aspects that have a direct impact on upstream petroleum operations and have a proximity to insurance.¹⁴²

i) International Convention on Oil Pollution Preparedness, Response and Co-operation

The OPRC mainly applies to offshore units which means any fixed or floating offshore installation or structure engaged in gas or oil exploration, exploitation or production activities, or loading or unloading of oil. The impact of the convention on upstream operations under the jurisdiction of a contracting state lies mainly in the obligation to have oil pollution emergency plans or similar arrangements in place. These must be coordinated with national systems for responding promptly and effectively to oil pollution incidents.¹⁴³

ii) Energy Charter Treaty

The ECT is an energy-specific multilateral instrument covering issues such as free trade in energy -related products, freedom of transit, the protection and promotion of foreign investment and dispute settlement. The ECT's objective is to "establish a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter."¹⁴⁴

¹⁴² Eduardo P, *The Encyclopaedia of Oil and Gas Law*, Globe Business Publishing Ltd, 2014,253, 1

¹⁴³ Eduardo P, *The Encyclopaedia of Oil and Gas Law*,254,5

¹⁴⁴ Article 2, Energy Charter Treaty

The main impact of the ECT to the upstream petroleum operations lies in the investment protection provisions, prohibition of unlawful expropriation.¹⁴⁵

b) Domestic Law

i) The Constitution of Kenya 2010

Provisions of the Constitution 2010 have outlined what minerals are and who has the right of ownership to the minerals. The Constitution has also provided provisions on protection of environment by employing all necessary means possible. Suffice is to say that, insurance in its inherent nature is a mechanism of risk mitigation (Art 69 1 a) which resonates with the spirit of Constitution.

It is important to outline the legal character of minerals as codified under The Constitution of Kenya 2010. Interpretation of the Articles below, bring out the aspect of minerals being property. It therefore follows that minerals just like any other property are insurable. However, this dimension poses a legal issue on whether insurable interest as a core tenet of insurance lies with the Government of Kenya as a trustee for the citizenry or lies with the people.

To answer the above, the Government is the leviathan and it is considered to have vast resources at its dispose and hence no need for insurance. Be it as it may, as discussed in the previous chapter on risks, the Articles ascertain the Government's right as the owner of the resource.

Article 62 (1) (f) defines public land to include all minerals and mineral oils as defined by law.¹⁴⁶

Article 62 (2) states that public land shall vest in and be held by the national Government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.¹⁴⁷

¹⁴⁵ Eduardo P, *The Encyclopaedia of Oil and Gas Law*,254,6

¹⁴⁶ Article 62 (1) (f), *Constitution of Kenya* (2010)

¹⁴⁷ Article 62 (2), *Constitution of Kenya* (2010)

This provision of the Constitution is key in advancing socio-economic welfare of the people of Kenya. Domestication of upstream oil and gas activities will ensure that investments derived from oil and gas benefit not only the local communities but also the entire country.

Article 66 (2) Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies.¹⁴⁸

Article 69 (1) (a) The State shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits.¹⁴⁹

Article 69 (1) (h) Utilize the environment and natural resources for the benefit of the people of Kenya.¹⁵⁰

Article 260 defines natural resources to include (d) rocks minerals, fossil fuels and other sources of energy.¹⁵¹

ii) Petroleum Act 2019

This Act provides inter alia, legal requirements that an IOC should comply with the law on insurance of upstream petroleum operations. The Act requires upstream operations to be conducted in such a manner as to enable a high level of safety to be maintained and further developed in accordance with technological advancement, petroleum industry practices, the Occupational Health and Safety Act, 2017 and any other applicable laws.¹⁵² The Act requires a contractor to secure the requisite insurance cover to insure its employees working within the vicinity of the installations against any eventualities¹⁵³ and to protect the environment and natural resources, including taking precautions to prevent pollution.¹⁵⁴

¹⁴⁸ Article 66 (1) (2), *Constitution of Kenya* (2010)

¹⁴⁹ Article 69 (1) (a), *Constitution of Kenya* (2010)

¹⁵⁰ Article 69 (1) (h), *Constitution of Kenya* (2010)

¹⁵¹ Article 260, *Constitution of Kenya* (2010)

¹⁵² Section 65, *Petroleum Act* (2019).

¹⁵³ S. 67(1)(b) *Petroleum Act* (2019).

¹⁵⁴ Section 66(2) and Section 66(1) *Petroleum Act* (2019).

Interestingly, any person undertaking any operations under the act is required to comply with the local content requirements, prescribed in the Act, in all operations¹⁵⁵ and to give priority to services provided in Kenya.¹⁵⁶ Further, before engaging in petroleum operations, a contractor is required to submit a long term annual local content plan¹⁵⁷ which addresses inter alia, its plan for promoting local content in insurance services.¹⁵⁸ The legal requirement for local content in insurance implies that, IOCs are required to give priority to Kenyan insurance companies while undertaking upstream petroleum operations.

iii) The Model Production Sharing Contract (PSC)

The PSC stipulates that the Cabinet Secretary for petroleum may terminate the PSC if the contractor fails to provide or maintain *inter alia* insurance stipulated in the act.¹⁵⁹ Further, there's a requirement on the contractor to maintain appropriate and adequate third-party liability insurance and workmen's compensation insurance and provide evidence of these insurances before upstream petroleum operations begin.¹⁶⁰

The Model PSC lists specific insurable risks that contractor's shall among others, insure against in respect of upstream petroleum operations. These risks include loss or damage to all installations and equipment which are owned or used by the contractor in upstream petroleum operations; pollution caused in the course of upstream petroleum operations by the contractor for which the contractor may be held responsible; property loss or damage or bodily injury suffered by any third party in the course of upstream petroleum operations by the contractor for which it may be liable to indemnify the Government; the cost of removing damaged facilities and cleaning up operations following an accident in the course of the upstream petroleum operations by the contractor; and the contractor's liability for its employees engaged in upstream petroleum operations.

The Model PSC requires the contractor to submit to GOK a program for the provision of an "All Risks" insurance which may cover damage to the facilities under construction and installation of legal liabilities arising out of the development and production operations.¹⁶¹

iv) Insurance Act Cap 487

¹⁵⁵ Section 50(1) *Petroleum Act* (2019).

¹⁵⁶ Section 50(1) (b) *Petroleum Act* (2019); See also, Clause 18(2) of Model PSC.

¹⁵⁷ Section 50(2) *Petroleum Act* (2019).

¹⁵⁸ Section 50(3)(g) *Petroleum Act* (2019).

¹⁵⁹ Section 7(c) Model Production Sharing Contract.

¹⁶⁰ Section 10 (4) Model PSC

¹⁶¹ Clause 18(3) Model PSC

The Insurance Act is the governing law for all insurance business in Kenya. The Insurance Act is silent on regulation or oil and gas related risks. Though the Petroleum Act 2019 has made provisions for compulsory placement of insurance with Kenya companies, the parent Act does not compliment or give directions on the its implementation or capacity of the Kenya Insurance industry to underwrite oil and gas related risks.

This lacuna in the law poses a legal risk in insurance of upstream petroleum operations in Kenya. There is an urgent need to align the Insurance Act with provisions of the Petroleum Act in regard to uptake of upstream oil and gas insurance.

In its current form, the Insurance Act will undermine the spirit of the Petroleum Act 2019 and frustrate oil and gas investors since complex risks associated with upstream operations will not be adequately covered as explained further below on the challenges.

v) **Joint Operating Agreements**

As a rule, any company that seeks to explore for oil and gas must receive authorization from the relevant host government, as the State's natural resource usually belongs to the government. The authorization is usually in form of a petroleum license, a production sharing agreement (PSA), a service agreement or a hybrid form. All these instruments provide rights and duties to the contracting parties, so they can explore for and produce oil and gas in specific location, otherwise it would be illegal to conduct any such operations.¹⁶²

Hostile environments and high levels of expenditure are the ingredients that encourage companies to share and spread their costs and risks with other companies by establishing joint ventures (JVs).¹⁶³

This means that instead of processing 100% of a single project, the contracting parties take a share in many different projects. Consequently, if one area is not successful, the remaining assets might compensate the losses. The Deepwater Horizon accident in the Gulf of Mexico is a good example. If BP (the operator) and its co-ventures (the non-operators) had possessed only this asset, they would have gone bankrupt as the cost and damages were in excess of US \$ 20 billion.¹⁶⁴ However, they had other assets to offset and minimize such losses.¹⁶⁵

¹⁶² Eduardo P, *The Encyclopaedia of Oil and Gas Law*,103

¹⁶³ Tarrant J., 'Agreements to co-operate at Common Law' *Australia Resources and Energy Law Journal*, (2006)

¹⁶⁴ [http: www.google.com/hostednews/ukpress/article/](http://www.google.com/hostednews/ukpress/article/) accessed on 10 April 2019

¹⁶⁵ Wilkinson C, *Joint ventures & shareholders agreements* (3ed), 2009 Bloomsbury Professional, West Sussex

The goals of minimizing risks and sharing costs are at the heart of the JV. The JV plays a key role in providing the necessary interaction between the respective goals of the government and private parties.

In petroleum industry a JV commonly referred to as a joint operating agreement (JOA), is the document that sets out the rights and duties of the JV parties.¹⁶⁶ Most of the duties on a JV are placed on the operator, who is the person responsible for dealing with day-to-day activities of the JV. It is important to note that the venture is not exclusively owned by the operator, as it is also composed of non-operators, who contribute to and collaborate in the success of joint operations.¹⁶⁷

The AIPN 2012 Model International Joint Operating Agreement provides a standard working template for oil and gas industry holders. The JOA incorporates all the clauses that are vital in the oil and gas and its often used by industry players to guide and at times incorporated as is because drafting of oil and gas contracts is quite complex. AIPN is the industry's repository for all oil and gas related contracts.¹⁶⁸

The 2012 Model International Joint Operating Agreement, clause 4.7 states that insurance should be obtained by the operator. The section outlines the mandate of the operator as follows;¹⁶⁹

4.7.A. Operator shall procure and maintain for the Joint Account the types and amounts of insurance required by the Contract or the Laws

4.7. B. Operator shall procure and maintain any additional insurance, at reasonable rates, as the Operating Committee may require. If such additional insurance is, in Operator's reasonable opinion, unavailable or available only at an unreasonable cost, Operator shall promptly notify the Non-Operators so that the Operating Committee may reconsider such requirement for additional insurance.

¹⁶⁶ Martin T., "Model Contracts: A Survey of the of the Global Petroleum Industry" *Energy & Natural Resources* (2004)

¹⁶⁷ Eduardo P, *The Encyclopaedia of Oil and Gas Law*, 106

¹⁶⁸ 2012 Model JOA, AIPN, approved 12/2/2017

¹⁶⁹ 2012 Model JOA, AIPN, approved 12/2/2017

4.7.C. Each Party will be provided the opportunity to underwrite any or all of the insurance to be obtained by Operator under Articles 4.7.A and 4.7.B, through such Party's Affiliate insurance company or, if direct insurance is not so permitted, through reinsurance policies to such Party's Affiliate insurance company. Any Party exercising its rights under this Article shall furnish to Operator details of the proposed insurance. If Operator in its discretion is satisfied with the security and creditworthiness of such insurance or reinsurance arrangements, and that the premiums for such insurance or reinsurance will not be significantly higher than market rate and will be recoverable under the Contract, then Operator shall procure such insurance or reinsurance from such Party.

4.7.D. Subject to the Contract and the Laws, any Party may elect not to participate in the insurance to be procured under.

The above emphasizes on the need for insurance in sharing and mitigating risks.

4.3. Institutional Framework

The Petroleum Act establishes the **Energy & Petroleum Regulatory Authority (EPRA)** under section 9 of the Energy Act 2019, EPRA is independent in the performance of its functions, exercise of its powers and is not subject to the direction or control of any person or authority.¹⁷⁰ The functions of the Authority include the enforcement of local content requirements,¹⁷¹ regulating, monitoring and supervision of upstream petroleum operations in Kenya in accordance with the laws relating to petroleum, the regulations and the relevant petroleum agreement.¹⁷² Section 51 of The Petroleum Act 2019 mandates the Authority to supervise, co-ordinate, and manage the development of local content and prepare guidelines to include targets and formats for local content plans and reporting; make appropriate recommendations to the Cabinet Secretary for the formulation of local content regulations which includes insurance services and set minimum requirements for local content in local content plans as well as undertake local content monitoring, audit and enforcement among other functions.¹⁷³

The main regulator for insurance business in Kenya is **Insurance Regulatory Authority (IRA)**. IRA was established as a statutory government agency established under the Insurance Act (Amendment) 2006, CAP 487¹⁷⁴ to regulate, supervise and develop the insurance industry. It is

¹⁷⁰ Section 9(3) *Energy Act* (2019).

¹⁷¹ Section 10 (e) *Energy Act* (2019).

¹⁷² Section 10 (b) *Energy Act* (2019).

¹⁷³ See section 51(b-g) *Petroleum Act* 2019

¹⁷⁴ Section 3 *Insurance Act*.

governed by a board of directors which is vested with the fiduciary responsibility overseeing operations of the authority and ensuring that there are consistent with provisions of the Insurance Act. The authority is the successor to the then Office of the Commissioner of Insurance that came into existence with the enactment of the Insurance Act in 1986. IRA is mandated with ensuring the effective administration, supervision, regulation and control of insurance and reinsurance business in Kenya¹⁷⁵; formulating and enforcing standards for the conduct of insurance and reinsurance business in Kenya¹⁷⁶ as well as promoting the development of the insurance sector.¹⁷⁷ IRA also advises the government on the national policy to be followed in order to ensure adequate insurance protection and security for national properties.¹⁷⁸ Petroleum resources are national assets and national property hence it is the responsibility of IRA to advise government on ensuring adequate insurance for these resources and every operation that relates to petroleum as a national property.

4.4. Key challenges in domestication of oil and gas insurance for operations in Kenya

Despite the government's effort to introduce the requirement for insurance of upstream oil and gas operations through the Petroleum Act, Kenya's insurance industry is still very far from maximizing the benefits of the oil and gas sector. This is attributed to various factors which shall be discussed in detail in this section.

a) Inconsistency of government policy and laws

The above analysis of the legal framework has shown that there is a legal risk created by the inconsistency or clash of laws. This inconsistency is a ticking time bomb which needs to be addressed as soon as possible. The core values of the Local Content as provided under the Petroleum Act should be pursued without compromise so as to enhance domestic capacity, increase productivity and allow Kenyan insurance companies to take part in upstream petroleum operations.

The intention of the Petroleum Act is noble and geared towards driving economic prosperity and domestication of insurable risks in upstream oil and gas sector. However, the question that is lingering is whether Kenyan insurance companies have the capacity to underwrite oil and gas risks. Until the issue of capacity is solved, foreign companies will continue placing their oil and gas insurance needs with insurance firms abroad.

¹⁷⁵ Section 3A (a) *Insurance Act*.

¹⁷⁶ Section 3A (b) *Insurance Act*.

¹⁷⁷ Section 3A (e) *Insurance Act*.

¹⁷⁸ Section 3A (f) *Insurance Act*.

Insurance Act is the parent enabling Act regulating insurance business in Kenya. The Act has not integrated enabling provision on oil and gas insurance. The mandate of IRA involves advising the government on protection of government assets. Suffice is to say that minerals are owned by the government as we have seen at the beginning of this chapter.

With elaborate requirement on placement of insurance services by IOC, s with Kenyan firms, the issue arises on which law will be enforced in monitoring and ensuring compliance of this provision of the Petroleum Act.

b) Financial Constraints

The oil and gas business is a capital intensive business which requires service providers like insurance companies to acquire strong financial muscle in order to insure oil and gas risks. Kenyan Insurance Companies are faced with finance constraints that have positioned them in a disadvantaged state. This lack of adequate finances to underwrite oil and gas related risks has deprived the local companies the opportunity to operate efficiently and compete effectively against their foreign counterparts.

Fragmentation of the insurance business and competitiveness and protection of trade secrets has seen the industry shy away from forging formidable partnerships at the backdrop of a small market. We currently have 50 insurance company which for a growing economy such as Kenya are too many. This presents an avenue of forum shopping thus promoting the culture of undercutting which makes insurance business unprofitable.

c) Lack of expertise and technology

Lack of technical manpower to underwrite specialized risks like oil and gas is a major challenge in Kenya's insurance sector. Insurance firms in Kenya lack the required capacity, technology and technical know-how to underwrite oil and gas risks. This suggests that Kenyan insurance companies lack the skills and exposure to oil and gas upstream activities, hence restricting pitching for potential business. Lack of adequate and sophisticated technology required to monitor and underwriting oil and gas related risks has been a hindrance to growth in this area of insurance. Local insurers need to come up with indigenous technology that is suitable for oil and gas operations.

d) Weak Institutional Capacity

It is important to ensure synergy between EPRA and IRA in order to regulate oil and gas insurance business.

IRA was established to regulate the insurance industry. However, there presence in implementation and regulation of the industry is yet to be felt. I can attest this in the wake of several companies being insolvent under the regulators watch in the last five years. Regulation of insurance premium rates collapsed leading to free market which is not adequately monitored

e) Lack of adequate reinsurance treaty to enable companies to take on risks beyond their capacity

Reinsurance treaties play a key role in ensuring that the insurance company is able to have strategic partnerships with reinsurance firms who are able to take the surplus risk through reinsurance arrangements.

f) Lack of training and manpower development of underwriters to underwrite oil and gas risks

Oil and gas is still a new phenomenon in most developing countries in Africa. This means that exposure of this class of insurance and technical capacity to underwrite oil and gas related risks is limited. Until the recent discovery of commercially viable oil reserves in Turkana, oil and gas insurance was just an illusion to the insurance industry thus rendering it unattractive.

4.5. Conclusion

The purpose of insurance is to mitigate loss and offer piece of mind against uncertain and unforeseeable risks. The recent discovery of oil in Turkana and offshore exploration activities in the coastal region, provide an opportunity for Kenyan insurance firms to capitalize on the gains.

The recent enactment of the Petroleum Act 2019 has provided a framework for provision of insurance services to be placed with Kenyan insurance firms. However, as discussed in this chapter, the Insurance Act does not compliment the new Act thus creating a lacuna in administration and regulation of insurance business in Kenya.

CHAPTER FIVE

CASE STUDY OF GHANA

5.1. Introduction

Ghana shares a lot of similarities with Kenya. Both countries were colonized by the British and adopted laws from their former colonizers. To a large extent statute in both countries are similar.

To identify factors that determine successful oil and gas insurance outcomes, this chapter will analyze key elements that were employed by Ghana's insurance and petroleum industries in promoting uptake of oil and gas insurance by foreign international oil companies. I will review the outcomes and lessons learned by Ghana during this quest. The main objective of this chapter is a possible transplant to Kenya's insurance industry.

5.2. Background

For the purpose of this research, oil and gas insurance outcomes are construed in terms of drafting implementation policies, forming of consortiums in the insurance industry to have capacity to underwrite risks related to oil and gas. The research will mainly focus on Ghana's framework and implementation strategy on one hand and the outcomes on the other.

This research will use different sources of information which include legislation, journals and other secondary sources such as reports, online publications, media articles and academic publications to inform the steps carried out by Ghana to issue insurance coverage for upstream oil and gas activities.

The research will analyze the presence of oil and gas insurance coverage in Ghana and the framework and mechanisms in place to measure and monitor implementation.

Ghana was the first Sub-Sahara country to gain independence in 1957. In the early 1990s after a long period of military rule, Ghana became a democratic state. It has been regarded as one of the most stable African democracies. The level of corruption is quite low, there are no violent conflicts and the macroeconomic structure is relatively strong.¹⁷⁹

In 2004 the country sold licenses for offshore oil exploration and production to different international companies. In July 2007, Tullow Oil and Kosmos Energy discovered oil in commercial quantities in the western region of Ghana. They named the area “Jubilee Field.” Development of the production site started right away and in December 2010 oil production was officially launched. Since 2007 further discoveries have been made with the Tweneboa field being a second major discovery.¹⁸⁰

The overview provides basic facts on Ghana’s emerging oil industry.

5.3. Ghana’s Upstream Oil and Gas Insurance Platform

Ghana’s insurance platform on upstream oil and gas insurance was launched through the concerted efforts of the Petroleum Commission of Ghana whose mandate is to regulate upstream activities in the oil and gas sector and the National Insurance Commission whose mandate is to manage and regulate the insurance industry in Ghana. A robust legal and regulatory framework tailor made for Ghana’s insurance industry put the necessary measures in place to facilitate formation of a consortium company to domesticate insurance of oil and risks in the country.¹⁸¹

Ghana has huge potential to grow and transform its economy through industrialization, jobs creation and ensuring equitable distribution of wealth. The fundamental goal of the Local Content Regulations 2013 is maximizing the use of locally produced materials, personnel, financing, goods and services rendered in the petroleum industry value chain and which can be measured in monetary terms. The direction of every policy on petroleum sub-sector is therefore

¹⁷⁹ Petroleum commission, Ghana & National Insurance Commission Protocol: *Oil and gas insurance placement for the upstream sector*

¹⁸⁰ Petroleum commission, Ghana & National Insurance Commission Protocol: *Oil and gas insurance placement for the upstream sector*

¹⁸¹ Petroleum commission, Ghana & National Insurance Commission Protocol: *Oil and gas insurance placement for the upstream sector*

intended to guide the development and management of the emerging oil and gas sector as a catalyst for economic transformation.¹⁸²

One of the main goals of the government in Ghana is to sustain and optimize the exploitation and utilization of Ghana's oil and gas endowment for the overall benefit and welfare of all Ghanaians, present and future. However, there was a major challenge in meeting this policy goal. Questions on how to develop the oil and gas industry with optimal local content and participation to enhance national development and create jobs emerged.¹⁸³

Despite the huge investment opportunities in projects and operations in the oil industry, there has been very little participation of indigenous Ghanaian companies, especially in the insurance sector. The fragmentation of the Ghanaian insurance market renders them uncompetitive and ineffective in underwriting oil and gas insurance. This has resulted in the practice where international insurance companies have taken the lead role in insurance placement in Ghana at the expense of the Ghanaian insurance market.¹⁸⁴

Low participation by Ghanaian insurance companies was one of the challenges that the industry had to overcome. Ghana's Insurers Association underwriting non-life insurance business formed a consortium- Ghana Oil and Gas Insurance Pool (GOGIP) to pull their resources together to underwrite oil and gas risks. In this regard, petroleum industry stakeholders will have regular consultations with GOGIP over the placement of insurance for the upstream oil and gas sector.¹⁸⁵

This move is a breakthrough for the industry as it offers avenues for spreading the risk involved in oil and gas insurance and presents an opportunity for training and developing capacity in the Ghanaian insurance market. The enactment of the Local Content Regulations 2013, and the formation of the consortium, ensured that all insurance in relation to oil and gas risks shall be placed locally through GOGIP. Any person who seeks to obtain insurance offshore service relating to petroleum activity must obtain written approval of the NIC, which shall ensure that Ghanaian local capacity has been fully exhausted.¹⁸⁶

¹⁸² Petroleum commission, Ghana & National Insurance Commission Protocol: *Oil and gas insurance placement for the upstream sector*

¹⁸³ Petroleum commission, Ghana & National Insurance Commission Protocol: *Oil and gas insurance placement for the upstream sector*

¹⁸⁴ Petroleum commission, Ghana & National Insurance Commission Protocol: *Oil and gas insurance placement for the upstream sector*

¹⁸⁵ Petroleum commission, Ghana & National Insurance Commission Protocol: *Oil and gas insurance placement for the upstream sector*

¹⁸⁶ Petroleum commission, Ghana & National Insurance Commission Protocol: *Oil and gas insurance placement for the upstream sector*

The Petroleum Commission (PC) and National Insurance Commission (NIC) supported by industry stakeholders have developed a protocol for placing oil and gas insurance in Ghana in line with the Petroleum (Local Content and Local Participation) Regulations 2013 and the Insurance Act 2006. The objective of the protocol is to open a window of opportunity for underwriting companies and brokers to actively participate and play a lead role in the oil and gas business in Ghana.¹⁸⁷

5.4. Review of Legal and Institutional Framework in Ghana

a) The National Insurance Commission (NIC)

The National Insurance Commission (NIC) was established under Insurance Law 1989 (PNDC Law 227), as amended by Insurance Act, 2006 (Act 724). The object of the Commission is to ensure effective administration, supervision, regulation and control of insurance business in Ghana. NIC is also responsible for making recommendations to the sector Minister for policy formulation, supervision of practitioners, enforcement of compliance and public education.¹⁸⁸

Some of NIC's functions include licensing of insurers and insurance intermediaries who transact insurance business in Ghana, approve and set standards of the conduct of insurance business and insurance intermediary business, encourage the development of and compliance with the insurance industry's code of conduct and perform other functions that are incidental to the carrying out of its functions under the Act.¹⁸⁹

b) Petroleum Commission (PC)

Petroleum Commission in Ghana was established in July 2011 by an Act of Parliament, Act 821, to regulate and manage the exploitation of petroleum resources and to co-ordinate the policies in relation to them. The commission is also mandated to promote planned, well executed, sustainable and cost-efficient petroleum activities to achieve optimal level of resource exploitation from the overall benefit and welfare of its citizens.¹⁹⁰

¹⁸⁷ Petroleum commission, Ghana & National Insurance Commission Protocol: *Oil and gas insurance placement for the upstream sector*

¹⁸⁸ Petroleum commission, Ghana & National Insurance Commission Protocol: *Oil and gas insurance placement for the upstream sector*

¹⁸⁹ Petroleum commission, Ghana & National Insurance Commission Protocol: *Oil and gas insurance placement for the upstream sector*

¹⁹⁰ Petroleum commission, Ghana & National Insurance Commission Protocol: *Oil and gas insurance placement for the upstream sector*

PIC mandate includes: promote planned, well executed, sustainable and cost efficient petroleum activities to achieve optimal levels of resource exploitation for the overall benefit of all citizens, recommend to the minister national policies related to petroleum activities, monitor and ensure compliance with national policies, laws; regulations and agreements related to petroleum activities, monitor petroleum activities and carry out the necessary inspection and audit related activities, promote local content and local participation in petroleum activities as prescribed in the Petroleum Exploration and Production Act 1984 and other applicable laws and regulation to strengthen national development, analyze petroleum economic information and submit forecasts on petroleum to the Minister and perform any other function related to the object of the commission or assigned to it under any enactment.¹⁹¹

5.5. Legal Justification for the Protocol

The Ghanaian insurance industry is governed by Insurance Act,2006 (Act 724). This Act complies significantly with the International Association of Insurance Supervisors (IAIS) core principles and gives better regulatory powers to the National Insurance Commission.¹⁹²

Insurance placement for upstream oil and gas sector is governed by the Insurance Act 2006, (Act 724) and the Petroleum Local Content and Local Participation Regulations 2013. In Ghana, insurers are regulated and supervised by the National Insurance Commission (NIC). It further stipulates that the Petroleum Commission, which has the mandate to ensure companies comply with the Local Content Regulations, shall collaborate with NIC to ensure compliance with respect to insurance placement in the upstream sector.¹⁹³

5.5.1. Enabling Provisions of the Insurance Act 2006 on Petroleum and Offshore Insurance

Ghana has codified specific provisions in their Insurance Act requiring IOCs to take up mandatory insurance services with GOGIP for both offshore and onshore petroleum activities. These provisions have gone a long way in building capacity for the Ghanaian insurance industry in underwriting upstream oil and gas insurance.

¹⁹¹ Petroleum commission, Ghana & National Insurance Commission Protocol: *Oil and gas insurance placement for the upstream sector*

¹⁹² Petroleum commission, Ghana & National Insurance Commission Protocol: *Oil and gas insurance placement for the upstream sector*

¹⁹³ Petroleum commission, Ghana & National Insurance Commission Protocol: *Oil and gas insurance placement for the upstream sector*

i) Restriction on Contract with Offshore Insurer

Section 37 states that;

- (1) Unless authorized by the Commission a person shall not enter into a contract of insurance with an offshore insurer in respect of;
 - a) Property situate in the country
 - b) Liabilities arising in the country, or
 - c) Goods other than personal effects, being imported into the country

- (2) A person who contravenes subsection (1) commits an offence.¹⁹⁴

Section 38 states that;

- (1) A person may apply to the Commission, or through an insurance intermediary, for authorization to enter into a contract of insurance of a type specified in section 37 (1) with an offshore insurer.
- (2) The commission may authorize the applicant to enter into a contract of insurance with an offshore insurer in respect of that risk subject to such conditions, as the commission consider appropriate.
- (3) In determining whether to grant an authorization under subsection (2), the Commission shall have regard to the local capacity available to insure the risk in respect of which the application is made
- (4) Where the Commission issues an authorization under subsection (2), the offshore insurer is considered not to be in breach of section 36.¹⁹⁵

ii) Approval of Reinsurance Arrangements by NIC

Section 53 of the Act deals with reinsurance arrangements by the parent insurer and states that;

- (1) An insurer shall have arrangements approved by the Commission in accordance with the Regulations for the reinsurance of liabilities in respect of risks insured by the insurer in the course of its business as an insurer
- (2) Insurer or re-insurer shall utilize the local capacity available in insurance business originating from the local market before recourse to any overseas re-insurance.

¹⁹⁴ Section 37 (1) (2), *Insurance Act* (2006), (Ghana)

¹⁹⁵ Section 38 (1 -4), *Insurance Act* (2006), (Ghana)

- (3) The commission may, by written notice, exempt reinsurance contracts of a type specified in the notice from the requirements for approval under subsection (1).
- (4) If any insurer contravenes subsection (1) there liable to pay to the Commission, the pecuniary penalty stated in the First Schedule.¹⁹⁶

iii) Reinsurance Statements and Documents to be filed

Section 54 deals with reinsurance statements and documents and when they should be filed with the NIC. The Section states that;

- (1) The commission shall examine the (a) retention policy of insurance companies, (b) securities of reinsurers, and (c) appropriateness of reinsurance contracts.
- (2) For purposes of subsection (1), an insurer shall, on or before a date each year determined by the Commission for that insurer, file with the Commission a statement setting out the details as to its reinsurance arrangement as may be prescribed.¹⁹⁷

5.5.2. Enabling Provisions of Petroleum (Local Content and Local Participation) Regulations 2013

i) Insurance and Reinsurance

Section 27 of the regulations supports domestication of insurance in oil and gas related risks and it states that;

- (1) a contractor, subcontractor, licensee or other allied entity engaged in a petroleum activity in the country shall comply with the provisions of the Insurance Act 2006.
- (2) The insurance risks relating to petroleum activity in the country shall be insured through an indigenous brokerage firm or where applicable, a reinsurance broker.¹⁹⁸

ii) Approval of Offshore Insurance

Section 28 of the regulations deal with approval of offshore insurance. It states that;

- (1) A person who seeks to obtain an offshore insurance service relating to a petroleum activity in the country shall obtain written approval of the National Insurance Commission.

¹⁹⁶ Section 53 (1 -4), *Insurance Act* (2006), (Ghana)

¹⁹⁷ Section 54 (1 -4), *Insurance Act* (2006), (Ghana)

¹⁹⁸ Section 27 (1-2), *Petroleum (Local Content and Local Participation) Regulations* (2013) (Ghana)

- (2) In granting an approval for procuring insurance services offshore, the National Insurance Commission shall ensure that Ghanaian local capacity has been fully exhausted.¹⁹⁹

5.6. Ghana's Protocol for Upstream Oil and Gas Insurance Placement

This protocol entails the rationale and principles underlying placement of insurance in the upstream petroleum sector in accordance with the Insurance Act 2007 and the Petroleum (Local Content and Local Participation) Regulations 2013. The protocol also lays down the procedures which must be complied with in placing upstream insurance. Key among these procedures are;²⁰⁰

- 1) All upstream petroleum sector contractors, subcontractors, licensees or other allied entities shall consider existing laws and regulations prior to signing the financing agreements regarding petroleum activities on the country.
- 2) The National Insurance Commission and Petroleum Commission require all insurance and reinsurance of a contractor, subcontractor, licensee or other allied entity to be in strict compliance with the Insurance Act 2006, the Petroleum (Local Content and Local Participation) Regulations 2013, and all other relevant laws and regulations.
- 3) All insurance risks of petroleum sector contractors, subcontractors, licensees or other allied entities shall be insured with Ghana Oil and Gas Insurance pool as the representative of all the licensed insurance companies in Ghana
- 4) No insurance shall be directly placed on the overseas insurance market by any contractor, subcontractor, licensee or other allied entity without the prior written approval of the National Insurance Commission in accordance with section 38 of the Insurance Act 2006, and Regulation 28 (1) of the Petroleum (Local Content and Local Participation) Regulations 2013.
- 5) The excess of all insurance covers over and above the capacity of GOGIP shall be appropriately reinsured overseas after exhausting available local reinsurance capacity in accordance with Section 53 (1) of the Insurance Act 2006.

5.6.1. Assets involved in Upstream activities to be insured through GOGIP

GOGIP is required to provide insurance for assets and liabilities in respect of all activities and/or operation directly relating to the exploration, appraisal, production, storage and transport of

¹⁹⁹ Section 28 (1-2), *Petroleum (Local Content and Local Participation) Regulations* (2013) (Ghana)

²⁰⁰ Petroleum commission, Ghana & National Insurance Commission Protocol: *Oil and gas insurance placement for the upstream sector*

crude oil and gas in Ghana, in accordance with the insurance Act 2006. These assets shall include but not limited to the following;²⁰¹

- Assets to be used directly in the exploration and production processes
- Plant, machinery and equipment used in the exploration and production stages
- Other assets such as wells and their accessories and oil and/ or gas processing and storage, gas pipelines and other allied facilities
- Remotely Operated Vehicles (ROVs) used in subsea operations
- Production Platforms, and Platform Support and Security Vessels
- Storage and transport of crude oil and gas

This section further states that all other insurable assets/properties and liabilities such as, motor vehicles, office buildings, machinery, equipment, workmen compensation, group life/accident shall be insured locally with individual insurers in accordance with provisions of the Insurance Act 2006.²⁰²

5.7. Conclusion

In conclusion, the information gathered from Ghana on oil and gas insurance placement with Ghana's insurance industry has provided some foresight on the immense economic opportunities that an emerging oil and gas producer such as Kenya can learn from the experiences in Ghana.

However, I noted that not all the insurance companies in Ghana bought into the idea of the merger since not all companies are equally endowed financially. The smaller players in the market feel left out as they risk being bullied by the market leaders who have an upper hand in negotiating apportionment of risks which is usually in tandem with premium share.

Despite this short coming, the positive aspect of the above arrangement out way the negative aspects.

The existence of structured oil and gas insurance for upstream activities in Ghana, has been instrumental in shaping positive outcome in insuring oil and gas related risks.

²⁰¹ Petroleum commission, Ghana & National Insurance Commission Protocol: *Oil and gas insurance placement for the upstream sector*

²⁰² Petroleum commission, Ghana & National Insurance Commission Protocol: *Oil and gas insurance placement for the upstream sector*



CHAPTER SIX
KEY FINDINGS, RECOMMENDATIONS AND CONCLUSION

6.1. Key Findings

This research outlines the key findings that are an impediment to the insurance industry Kenya in underwriting oil and gas insurance.

6.1.1. Lack of a Comprehensive Regulatory Framework

Kenya lacks a robust regulatory framework to monitor and regulate upstream insurance activities.

a) Insurance Act

Insurance Act is the parent enabling Act regulating insurance business in Kenya. The Act has not integrated enabling provision on oil and gas insurance. The mandate of IRA involves advising the government on protection of government assets. Suffice is to say that minerals are owned by the government as we have seen at the beginning of this chapter.

The Insurance Act has not codified specific provisions requiring IOCs to take up insurance with Kenyan Insurance firms.

The insurance Act, has not provided or established specific oil and gas insurance products which underwrites can package and offer IOCs. IRA is mandated to formulate and price such products to ensure uniformity and proper regulation of insurance products.

b) Petroleum Act, 2019

This Act has provided for insurance provisions by directing IOCs to provide a local content plan before commencing exploration activities in the country. However, the Act requires the Cabinet Secretary in charge of Petroleum to enact Petroleum regulations which is the procedural law that operationalizes the Act.

The regulations have not been enacted yet thus rendering Section 50 (3) requiring IOCs to take up insurance services locally ineffective. This gap has created a legal risk in implementation of this provision.

6.1.2. Inconsistency of government policy and laws

There is a legal risk created by the inconsistency or clash of laws. The core values of the Local Content as provided under the Petroleum Act should be pursued without compromise so as to enhance domestic capacity, increase productivity and allow Kenyan insurance companies to take part in upstream petroleum operations.

The intention of the Petroleum Act is noble and geared towards driving economic prosperity and domestication of insurable risks in upstream oil and gas sector. However, the question that lingers is whether Kenyan insurance companies have the capacity to underwrite oil and gas risks. Until the issue of capacity is solved, foreign companies continue placing their insurance needs with foreign insurance firms.

6.1.3. Lack of adequate financial capacity to underwrite oil and gas insurance

The oil and gas business is a capital intensive business which requires service providers like insurance companies to acquire strong financial muscle in order to insure oil and gas risks. Kenyan Insurance Companies are faced with finance constraints that have positioned them in a disadvantaged state. This lack of adequate finances to underwrite oil and gas related risks has deprived the local companies the opportunity to operate efficiently and compete effectively against their foreign counterparts.

Fragmentation of the insurance business, competitiveness and protection of trade secrets has seen the industry shy away from forging formidable partnerships at the backdrop of a small market. We currently have 50 insurance company which for a growing economy such as Kenya are too

many. This presents an avenue of forum shopping thus promoting the culture of undercutting which makes insurance business unprofitable.

6.1.4. Lack of expertise and technology

Lack of technical manpower to underwrite specialized risks like oil and gas is a major challenge in Kenya's insurance sector. Insurance firms in Kenya lack the required capacity, technology and technical know-how to underwrite oil and gas risks. This suggests that Kenyan insurance companies lack the skills and exposure to oil and gas upstream activities, hence restricting pitching for potential business. Lack of adequate and sophisticated technology required to monitor and underwrite oil and gas related risks has been a hindrance to growth in this area of insurance. Local insurers need to come up with indigenous technology that is suitable for oil and gas operations.

6.1.5. Weak Institutional Capacity

It is important to ensure synergy between EPRA and IRA in order to regulate oil and gas insurance business.

IRA was established to regulate the insurance industry. However, there presence in implementation and regulation of the industry is yet to be felt. I can attest this in the wake of several companies being insolvent under the regulators watch in the last five years. Regulation of insurance premium rates collapsed leading to free market which is not adequately monitored

6.1.6. Lack of adequate reinsurance treaty to enable companies to take on risks beyond their capacity

Reinsurance treaties play a key role in ensuring that the insurance company is able to have strategic partnerships with reinsurance firms who are able to take the surplus risk through reinsurance arrangements.

6.1.7. Lack of training and manpower development of underwriters to underwrite oil and gas risks

Oil and gas is still a new phenomenon in most developing countries in Africa. This means that exposure of this class of insurance and technical capacity to underwrite oil and gas related risks is limited. Until the recent discovery of commercially viable oil reserves in Turkana, oil and gas insurance was just an illusion to the insurance industry thus rendering it unattractive.

6.1.8. Summary

Based on the assessment of Ghana's legal and institutional framework governing insurance of upstream petroleum operations, this research has found that Ghana has made significant strides in insurance placement of oil and gas related risks. Kenya benefit from Ghana's experiences in implementation of a sound regulatory framework and foster a cohesive industry where majority of Kenyan insurance firms pool their resources to enable them create capacity to underwrite upstream insurance oil and gas operations.

6.2. Recommendations

The following recommendations will be instrumental in formulating a formidable platform for implementation of upstream petroleum insurance services. These include;

a) Partnership Between the Energy Petroleum and Regulatory Authority (EPRA) and Insurance Regulatory Authority

The partnership between these two regulators will enable successful placement of oil and gas risks with local insurance companies in Kenya. This partnership by the two regulators will promote cohesiveness between the two industries and eliminate any overlap regarding regulating of oil and gas insurance business.

The mandate of each regulator should be clearly stated to ensure there is a seamless transition in management of oil and gas insurance in Kenya. This move will create investor confidence and drive uptake of upstream insurance service with Kenyan insurance firms.

b) Establishment of a Government policy on Oil and Gas Insurance Placement for The Upstream Sector

There is need to formalize the above partnership between EPRA and IRA by drafting a government policy which outlines the duties and mandate of each regulator towards achieving the common economic objectives for Kenya in line with governments vision 2010 and big four agenda on manufacturing, afford housing, universal health coverage and food security. The first two agendas are driven largely by energy. These goals are geared towards economic prosperity through industrialization, job creation, maximize the use of locally produced materials,

personnel, financing, goods and services rendered in the petroleum industry value chain which can be measured in monetary terms.

The policy is intended to guide the development and management of the emerging oil and gas sector as a catalyst for economic transformation with the overall goal being to sustain and optimize the exploitation and utilization of Kenya's oil and gas endowment for the overall benefit and welfare of all Kenyans.

c) Formation of Consortium Company

Kenyan insurance firms need to review their current business model. As discussed earlier in my research, upstream oil and gas operations are usually capital intensive and a single insurance firm will not have the capacity to offer adequate insurance coverage. The purpose of the consortium is to build financial capacity by the underwriters and ensure they have the capacity to underwrite oil and gas related risks in line with the insurance provisions as outlined in the Petroleum Act 2019.

d) Codification of mandatory insurance placement with Kenyan insurers

Enacting provisions of the law which make it mandatory for IOC to insure oil and gas related risks with the consortium or Kenya insurance firms, will play a significant role in growth of the oil and gas insurance sector in Kenya. Creating a legal framework for placement of oil and gas insurance with local insurance firms, and provision for reinsurance facilities in cases where the resident insurer lacks capacity to fully insure the risk, will be an inch closer to achieving this objective.

This will ensure that Kenyan's economy benefits in macro-economic growth since the premiums levied for oil and gas insurance are taxable.

e) Monitoring of Compliance and Sanctions

The government policy has to incorporate a monitoring tool to ensure compliance by IOCs and the insurance industry. Compliance and monitoring include request for validation of information

contained in quarterly and annual reports, and submission of documentary evidence of insurance services utilized.

f) Building technical and technological capacity in upstream operations

This is a key area in successful implementation of upstream oil and gas insurance services. Transfer of knowledge, training and apprenticeship have been codified in both the Petroleum Act 2019 and Local Content Bill 2018.

Kenya Reinsurance which supports insurance business in Kenya, has already identified the gap in technical skill set in the industry. One of its recommendations to close this gap is to conduct extensive trainings on underwriting of oil and gas related risks.

Embracing technology is paramount. Use of innovation and automation of insurance processes in oil and gas insurance will assist the insurers to be efficient and settle claims faster. Any delay in indemnifying the IOC has serious financial ramifications since most of the equipment used for upstream operations is usually leased and charged by the hour. Any downtime in the drilling process is usually very costly to the IOC and more often than not is passed to the host government as cost recovery.

Local insurers need to come up with indigenous technology that is suitable for oil and gas operations.

g) Offering Upstream Oil and Gas related insurance products

All new insurance products in the market have to be approved by IRA. These include pricing, extent of coverage of the proposed cover and policy documentation. These products are a precursor to offering insurance coverage in oil and gas. Some of these insurance products are; Control of Well (COW) which is coverage for control of the oil well against blow out, Construction All Risks (CAR), which deals with the construction of rigs and any other construction at the site, Loss Oil Production Insurance (LOPI), Third-party liability insurance for injuries to third parties and Environmental Liability.

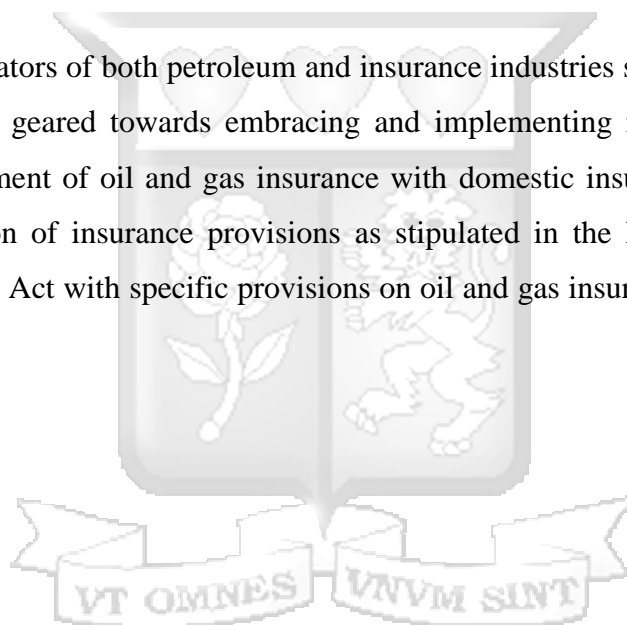
There are insurance products which are already operational and important for upstream activities. These include; medical insurance, Workmen Insurance Benefit Act (WIBA), Erection All Risks (EAR), Contractors All Risk (CAR), Machinery Breakdown insurance, Contractors Plant and Machinery, Fire, Group Personal Accident etc.

6.3. Conclusion

Having reviewed Kenya's regulatory framework on insurance provisions relating to placement of oil and gas insurance for upstream operations, I have deduced that there is a gap in the Insurance Act which needs to be addressed.

In addition to the above, the insurance business as currently constituted does not have the capacity to execute insurance provisions as set out under the Petroleum Act 2019. The insurance industry through the stewardship of Insurance Regulatory Authority needs to carry out a complete overhaul of their current business model to enable them take advantage of insurance prospects in upstream oil and gas operations.

Needless to say, regulators of both petroleum and insurance industries should take the initiative to spearhead changes geared towards embracing and implementing monitoring mechanisms which advance placement of oil and gas insurance with domestic insurance firms and ensure progressive application of insurance provisions as stipulated in the Petroleum Act 2019 by aligning the Insurance Act with specific provisions on oil and gas insurance to complement the former.



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