

Expert Determination in the Energy Sector – When Will the Courts Intervene?

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It is not uncommon for parties to agree that certain disputes should be referred to an expert for determination. However, when those disputes arise, the parties may disagree about the scope of the exercise to be carried out by the expert or the powers of the expert, and this can lead to satellite litigation.

This was the situation underlying the recent English High Court judgment of Premier Oil UK Limited (part of the Harbour Energy plc group) (**Harbour**) and STASCO (Shell plc's oil trading arm) (**Shell**), in which we successfully represented Harbour.

The judgment is a useful reminder of how contractual provisions referring disputes to an expert should be interpreted and applied and when the court will intervene in the process. A copy of the judgment can be accessed [here](#).

What Was the Dispute About?

The dispute arose out of two contracts for the sale of North Sea crude oil by Harbour to STASCO. The price under both contracts was to be calculated, in part, by reference to a Platts quotation in respect of Urals crude (the **Urals Assessment**). Urals crude is the most common export grade of crude oil from Russia.

In November 2022, Platts made a material change to the methodology it used to calculate the Urals Assessment in response to the European Union's sanctions on Russia. This triggered a mechanism in the contracts pursuant to which a referee was to be appointed to determine an alternative source of price information for the Urals Assessment.

Harbour and Shell were unable to agree on the instructions that were to be given to the referee for the purposes of enabling him to exercise his decision-

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making powers. Harbour was concerned that Shell was seeking to instruct the referee in a way which would lead him to adopt a more restricted approach to the exercise of his contractual powers. Shell was concerned that Harbour was seeking to persuade the referee to undertake a more wide-ranging pricing review than the parties originally intended.

To avoid this derailing the referee process and delaying the referee's decision of the alternative source of price information for the Urals Assessment, Harbour commenced Part 8 proceedings seeking a declaration that no further explanation to or instruction of the referee is required before the referee is to perform his function under the contractual referee procedure. Shell sought contrary declarations.

What Was the Question for the Court?

The two key issues for the court to decide were:

1. should the court express a view as to the ambit of the referee's decision-making powers before the referee has exercised his powers?
and
2. if so, what guidance, if any, should be given to the referee in relation to the exercise of those powers?

What Did the Court Decide?

The court determined that it should not express a view on the ambit of the referee's decision-making powers and granted the declaratory relief sought by Harbour.

The judgment discusses the relevant authorities (including the recent decision in *Apache -v- Esso*, which we considered in our previous briefing [here](#)) and sets out a useful summary of the principles to be applied when considering the scope and application of expert determination provisions.

The key points arising from the judgment are:

1. the ordinary principles of contractual interpretation will apply to expert determination provisions;
2. if the issue referred to the court for determination is within the matters remitted to the expert, then the court should not interfere in the absence of fraud or collusion;
3. the fact that the issue which the expert is required to determine requires him/her to reach conclusions on the proper construction of the contract does not prevent the expert from reaching those conclusions, though they may be open to review by the court;

4. the court will not usually intervene in the process before an expert has completed their task;
5. the court may, however, intervene at its discretion if the issue in dispute is real, rather than hypothetical, and if it is in the interests of justice and convenience for the court to do so; and
6. the court should be careful not to re-write the terms of the dispute resolution mechanism even if one party may no longer regard that regime to be satisfactory.

Applying these principles, the court agreed with Harbour in determining that this was not an appropriate case in which to intervene in the process and provide advance guidance to the referee on the scope of his jurisdiction. This was, in particular, because there was no evidence to suggest that the referee's decision will be one which is or is likely to be outside of the scope of his jurisdiction.

Conclusion

The impact of the sanctions imposed on Russia has been far-reaching. Here they have affected the pricing of an agreement between two English companies for the sale of North Sea crude oil, triggering an expert determination process. In this decision, the court has confirmed that it will not usually intervene in an expert determination process and will not re-write the terms of the dispute resolution mechanism. If a contract provides for a matter to be determined by an expert, then that is what should happen and, in most cases, no further guidance or instruction is required.