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Dispute Resolution in Oil and Gas Contracting - CW:1

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1.0 Introduction

There are circumstances in which the use of Alternative Dispute Resolution (ADR)[1] as an instrument for dispute resolution maybe more suitable than litigation.[2] Although "international arbitration has become the principle method of resolving commercial disputes",[3] its legal incidents may not meet the needs of the parties in all the situations—other forms of ADR have developed i.e. Expert determination (ED).[4] While, ED has been used by the oil and gas industries in various ways and has for long been crystallized by the English courts, it has been widely defined under the Scottish jurisprudence. However, It is has been argued that "ED is no less adversarial than adjudication, and the parties have virtually no control over the outcome from which there is no appeal, meaning there is more at stake".[5]

This paper discusses Expert determination as an ADR process in the oil and gas industry. The aim is to show 1) why the process of expert determination would appear to be suitable for oil and gas disputes; 2) how the Scottish legal system has received expert determination.

Therefore, with reference to case laws and statutes, including academic sources, the paper will conclude that 1) ED appears suitable to the oil and gas industries, largely because it is less expensive and speedier, avoids the rigours of the application of the rules of evidence but issues of enforceability may render ED less attractive; 2) "whatever might have been the position in the past, the Scottish legal practice has now recognised ED as an alternative to arbitration".[6] And, ED process is now broadly distinguished from arbitration in not being judicial in character.[7]

2.0 Expert Determination (ED) and ED Clauses:

ED can be defined as "a means by which the parties to a contract jointly instruct a third party to decide an issue between them".[8] A good example is Article 37.3 of the Iraq Model Production Oil Field Technical Service Contract which provides that disputes arises between the parties (with respect to relevant technical matters) may, at the election of either party be referred to an

[1] Henry Brown and Arthur Marriott: ADR Principles and Practice (3rd edn, Sweet & Maxwell, London 2011) 9.
[2] Dyson LJ, *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; *Yorkshire Electricity Distribution plc v Telewest Ltd* [2006] EWCA Civ 1418 at [47].
[3] Alan Redfern and Martin Hunter, 'Redfern and Hunter on International Arbitration', (5th edn, Oxford University Press, New York 2009) p 1.
[4] *Macdonald Estate pls v National Car Park Ltd* [2009] CSIH 79A, Para 20.
[5] Murray Armes, "Everybody has won and all must have prizes": how the Dispute Board process could improve UK adjudication", (2011) Legal Information Management, 552.
[6] *Holland House* [2008] S.L.T.36, para 19.
[7] *Supra* note 4 [21].
[8] J. Kendall, C. Freedman and J. Farrell, Expert Determination, 4th edn (Sweet & Maxwell, London 2008), p1.

independent expert for determination.[9] Accordingly, the ED clause made provisions regarding Expert's appointment and cost, neutrality, qualification, and decision time frame.[10] By providing that "the Expert shall act as an expert and not as an arbitrator",[11] the Model sought to distinguish the two methods.[12] Whether or not the ED clause will in practice be suitable for the settlement of potential disputes between Iraq and IOC's is for now a hypothetical question; however, what is true is that parties need to decide the basis of appointment for the independent third party since [*some commercial contractual*] issues are more suitable for determination by a third party acting as expert rather than arbitrator and vice versa.[13] It follows that ED is widely used in the oil and gas industry as a dispute resolution mechanism where the issue is primarily technical or commercial in nature.[14]

2.1 Expert Determination and the Oil and Gas Industry:

The oil and gas industry is an international market with those involved potentially having assets scattered in many different countries. Many of the contracts made are long term in their nature,[15] involving multiple stakeholders, and can be particularly complex, both technically and legally. Contractual disputes can cost oil and gas companies millions of pounds, not only in their profit but also in terms of damages incurred to reputation and the potential for ruining future joint ventures.[16] In electing ED as the primary method of dispute resolution, the Iraqi government seeks to avoid such consequences. The benefits of using ED was echoed by an Australian judge, held "on a practical level, ED has apparently been attractive, largely because it is less expensive and speedier, avoids the rigours of the application of the rules of evidence and procedure and offers a finality which avoids delays, potential re-hearing and appeals, which is particularly suitable where the parties may have a continuing relationship".[17] The principle applies to both the oil and gas industry and many other sectors where ED is popularly in use. However, this is not to say with absolute certainty that ED is a panacea,[18] as issues such as enforcement; complexity; immunity; and challenge of ED's decision has made the election of ED as a method of dispute resolution a crucial or even critical choice for the parties to the contract.

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[9] Platformlondon.org, http://platformlondon.org/documents/PFTSC-23-Apr-09.pdf Accessed 16/03/15.
[10] The Iraq Model Production Oil Field Technical Service Contract, Article 37.3.
[11] ibid.
[12] See *Taylor v Yielding* (1912) 56 S.J. 253: held, "the cases are quite clear that you cannot make a valuer an arbitrator by calling him so or vice versa".
[13] Emma Humphreys, "Masterminding the basics of PACT", (Landlord & Tenant Review 20114) Review 8.
[14] *Supra* note 8, p55.
[15] See *Thames Valley Power Ltd v Total Gas & Power Ltd* [2006] 1 Lloyd's Rep. 441. (contract to supply of gas over a 15-year period); Superior Overseas Development Corp and Phillips Petroleum (UK) Co v British Gas Corp [1982] 1 Lloyd's Rep. 262 (25 years gas supply contract).
[16] Mohammad Alramahi, "Dispute Resolution in Oil and Gas Contracts", ((2011), p 1.
[17] *The Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646 at [86].
[18] Justin Williams, "Expert determination: no panacea", (2008) I.E.L.R. 223.

2.2 ED, a Critical Choice for the Parties:

A major key to ED is speed. Commercially, "one cannot suspend drilling operations while the lawyers get to work on arguing the dispute but an expert can make a decision in minutes (if required) or days/weeks as appropriate".[19] So, whereas "arbitration can be (and too often is) slow and expensive",[20] the same cannot purely be said of an ED process, particularly, where the test or formula to be applied is clear and the question solely technical (for example, concerning quantities or quality of hydrocarbons).[21] Another advantage of an ED process is party autonomy. Accordingly, the first step must be to ascertain what the parties have (freely) agreed to remit to the expert.[22] Unlike, litigation where the Parties do not "own" the dispute in any material way,[23] the ED process is a matter of contract and the law of contract applies.[24] Furthermore, Expert's decision binds the parties; and unless the ED agreement provides otherwise, under the common law an ED can only be challenged on the grounds of fraud, bias or that the expert has answered the wrong question or has otherwise materially departed from his or her instructions.[25] This is the case, although "the issues of construction are ones which are not removed from the court's jurisdiction by the agreement of the parties".[26] Therefore, while in certain highly technical issues (as with oil and gas), a suitably qualified expert is more likely to produce a reliable answer than arbitrators (or a judge); it remains arguable to suggest that "ED is a poor substitute indeed for arbitration as a means of resolving disputes in a binding way".[27]

Additionally, ED determination is confidential.[28] It is in the interest of companies, both in respect to future investors, preservation of important trade secrets and public opinion, to be perceived as credible. More so the proceedings are normally informal and flexible. Normally, Expert has power to base his or her decision on his or her own enquiries and expertise.[29] Unlike, in litigation or arbitration, "there are no mechanisms by which one side may require the production of

[19] H.R. Dundas; "Dispute Resolution in the Oil & Gas Industry: an Oilman's Perspective" OGEL 3 (2004), p 3.
[20] Hew R. Dundas, "Expert determination: recent developments and the effective way forward in energy disputes", (International Energy Law Review, 2008) IELR 162.
[21] Justin Williams, "Expert determination: no panacea", (International Energy Law Review, 2008) I.E.L.R. 223.
[22] *Supra* note 20.
[23] *Supra* note 19, p 3.
[24] Denning M.R. said in Campbell v. Edwards [1976] 1 W.L.R. 403, 407; *Holland House Property Investments Ltd v Crabbe*, 2008 SC 619; also see Lord Hodge in *MacDonald Estates Plc v National Car Parks Ltd* [2009] CSOH 130 (OH), held "[the] starting point should be to ascertain the meaning of the missives".
[25] See *Jones v Sherwood Computer Services Plc* [1992] 1 W.L.R. 277 [287].
[26] Lord Slynn in *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 W.L.R. 48 at [58]-[59].
[27] Douglas S. Jones, "Is expert determination a "final and binding" alternative?", Westlaw (Arbitration 1997) 226.
[28] Mark Clarke, Tom Cummins and Fran Worthington "The price isn't right - gas pricing disputes" Westlaw (2015) 14.
[29] Sir Peter Cresswell, "The future of arbitration in the changing world of dispute resolution" (2013) 285.

documents by the other".[30] Hence, while in observing the lex arbitri in arbitration, some certain matters may not be arbitrable,[31] in an ED process any form of dispute may be brought for determination.[32] Conversely, while an award given at arbitration is enforceable by the court,[33] and will be recognised in many foreign jurisdictions under the 1958,[34] the ability to enforce a decision reached by an expert is less certain (particularly in international contracts)[35] and can result in recourse to costly litigation, effectively removing one of the key benefits of ED.[36] This is the case although ED awards may be enforceable under limited circumstances where bilateral recognition and enforcement treaties exist.[37] The truth is that, careful thought should be given before using ED in international contract. That been said, the general view is that ED offers a faster, lower-cost alternative to arbitration in many commercial circumstances, offering a legally binding decision almost impervious to challenge.[38] This is true of its attractiveness and suitability to the oil and gas industry. It is therefore submitted that, the UK law of ED (particularly that of England and Wales) is well developed, with a line of leading authorities establishing its bases (although the law is all common law, there being no relevant statute) and defining its limit. So, how did the Scottish legal system received ED?

3.0 Scottish legal system and ED:

The boundaries between arbitration and other form of ADR, "although difficult sometimes",[39] are becoming more strictly drawn in the Scottish jurisprudence.[40] Historically, the Scottish courts have tended to define arbitration to include 'Valuer' (an Expert)[41]; however, recent decisions represent a break from the past.[42] For long, the question has been centred on the definition of arbitration i.e. whether third parties involve in "dispute settlement"[43] can be said to include those involve in "appraisement or valuation".[44] Accordingly, if the answer is yes, then, an expert is an arbiter. But, if the answer is no, then distinction has to be drawn between third parties whose

[30] Justin Williams, "Expert determination: no panacea", (International Energy Law Review, 2008) I.E.L.R. 223; *Amex Civil Engineering Ltd v Secretary of State for Transport* [2005] CILL 2228 and [2005] BLR 227 CA.
[31] For example, matrimonial settlements.
[32] *Supra* note 20.
[33] Arbitration Act 1996, section 66.
[34] The New York Arbitration Convention of 1958.
[35] *Supra* note 8, p 205.
[36] 'Expert determination - Uses, problems and pitfalls', (Commercial litigation journal, October 2006) http://www.rgl.com/pubs/xprPubDetail.aspx?xpST=PubDetail&pub=298 Accessed 16/03/15.
[37] *Supra* note 16.
[38] Dundas, H. R. 2008. 'Expert determination: recent developments and the effective way forward in energy disputes'. IELR 168.
[39] *Supra note 4*, para 20.
[40] Prof F P Davidson's book on Arbitration (2nd edition, W.Green) Chapter 2, section 3.
[41] See *Bottomley v Ambler* (1876) 38 LT 545, where the word "expert" appears in the law report with its current meaning.
[42] Supra note 40.
[43] See 'Definition of Arbitration' (Hg.org) http://www.hg.org/arbitration-definition.html Accessed 16/03/15.
[44] *Supra* note 29, 285-294.

decisions are based mainly on their "knowledge and experience and those sitting in a judicial capacity".[45] While, the English Law has for long drawn a marked distinction between arbitration and valuation,[46] Scottish courts have either "avoided such distinction"[47] or "defined it widely".[48] In *Stewart v Williamson*,[49] where the court was invited to decide whether the word "arbitration" in section 11 of the Act[50] superseded a clause in a lease which allow for the appointment of a 'umpire'. Held, "the court is unable to say that upon the authorities the word "arbitration" is inapplicable to a clause of this kind".[51] Here, arbitration was given its ordinary meaning, and an Expert whose duty was to value stock on the farm for selling purposes was held to be the same as an arbitrator within the meaning of the act.[52] While, Lord Hope concludes that such distinction appear tenuous;[53] what is true is "that interpretation of Scottish legal terminology is not concerned with English law or English usages".[54]

3.1 ED development:

While this may be the case then, "the Scottish legal terminology and practice have not stood still since the period before the First World War".[55] The law relating to arbitration has developed, and this is evidenced in the cases of *Macdonald Estate pls v National Car Park Ltd*[56] and *MacDonald v Livingstone*.[57] While the cases answered strikingly different questions, they display distinct similarities as to what is or is not ED under the Scottish law. In *Macdonald Estate pls v National Car Park Ltd*[58] where parties disagreed as per the validity of the decision of an ED, the court was invited to interpret section 3 of the 1972 Act[59] (which provides a power to an arbiter to state a case for the opinion of the court on any question of law arising in the arbitration)[60] to include ED. In refusing the appeal, the court held, inter alia, that arbitration does not have wide meaning;[61] hence, s.3[62] applies not to ED.[63] It follows that ED could be distinguish from arbitration in not

[45] Cockburn CJ in *Re Hopper* (1867) L.R. 2. Q.B. 367; Mr Justice Cooke in *Bernhard Schulte GmbH & Co.KG v Nile Holdings Ltd* [2004] EWHC 977 (Comm), para 95.
[46] *Collins v Collins* (1858) 26 Beav. 306.
[47] *Graham v Mill* (1904) 12 S.L.T. 222.
[48] *Stewart v Williamson* (1909) SC (HL) 47.
[49] ibid.
[50] Agricultural Holdings (Scotland) Act, 1908.
[51] Lord Chancellor in *Stewart v Williamson* (1909) SC (HL) 47.
[52] Agricultural Holdings (Scotland) Act, 1908, s 11.
[53] Hope of Craighead (Lord), "Arbitration" in Stair Memorial Encyclopaedia: Laws of Scotland (Butterworths/Law Society of Scotland, 1999), Reissue 1, para 7.
[54] *Supra* note 48, pp461-462.
[55] Lord ReedLord in *Macdonald Estate pls v National Car Park Ltd* [2009] CSIH 79A, para 21.
[56] [2009] CSIH 79A.
[57] [2012] CSOH 31.
[58] [2009] CSIH 79A.
[59] Administration of Justice (Scotland) Act 1972.
[60] Administration of Justice (Scotland) Act 1972, s3.
[61] *Supra note 4*, para 17-20.
[62] Administration of Justice (Scotland) Act 1972.

being judicial in character.[64] While, the English courts have in more than one occasion invoked its inherent jurisdiction[65] to refuse a stay[66] or compel an ED to state its case,[67] the Scottish court's view is that "if the parties have agreed upon a particular form of dispute resolution, then that is what they intend"[68]—"it is simply the law of contract".[69] Clearly, the distinction between arbitration and ED was affirmatively drawn by the court.

3.2 Sottish current law on ED:

Furthermore, on the question of whether the decision of an ED is appealable and if yes, on what grounds; the Scottish legal approach is compatible with that of the English law.[70] In *MacDonald v Livingstone*,[71] it was submitted to the court that a decision by an ED that endowment policies paid for with company's money are private property is a manifest error. Held, contract between the parties providing for ED. Accordingly, it was obvious under the terms of the remit the ED was the elected method the decision of which were to bind the parties. The court considered the definition of "manifest error" under *Montgomery v Cameron*[72] held "exception applies to errors in figures and obvious blunders, not to errors in judgement". In refusing the appeal, the Court of Session held that "a challenge can only be allowed where the error is obvious and clear beyond reasonable contraction".[73] It follows that "it is not sufficient to argue and then prove that the ED decision is wrong".[74] Indeed, the court made it clear that "the use of ED will often be governed by the underlying contract between the parties".[75] In doing so, the principle that the decision of ED, unlike that of arbitration, is not subject to appeal unless "fraud" or "manifest error" is found was upheld.[76] It follows that "ED, as an alternative to arbitration is now well recognised in Scottish legal practice; whatever might have been the position in the past".[77]

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[63] *Supra note 4*, para 21.
[64] *Supra note 4*, para 21.
[65] The Supreme Court Act 1981, s.49 (3).
[66] *Thames Valley Power Ltd v Total Gas & Power Ltd* [2006] 1 Lloyd's Rep. 441.
[67] See *Halifax Life Ltd v. Equitable Life Assurance Society* [2007] 1 Lloyd's Rep. 528.
[68] *Taylor v Yieding* (1912) 56 S.J 253 at 254.
[69] See Lord Denning in *Campbell v Edwards* [1976] 1 W.L.R. 403.
[70] See *Norwich Union Life Insurance Society v P&O Property Holdings* Ltd [1993] 1 E.G.L.R. 164; *Jones v Sherwood Computer Services Plc* [1992] 1 W.L.R. 277; and *Nikko Hotels (UK) Ltd v. MEPC Plc* [1991] 2 E.G.L.R. 103.
[71] [2012] CSOH 31.
[72] Lord Reed in *Montgomery v Cameron & Greig and Others* [2007] CSOH 63.
[73] *MacDonald v Livingstone* [2012] CSOH 31, para 9.
[74] *Galaxy Energy International Ltd (BVI) v Eurobunker S.p.A.* [2002] 2 Lloyd's Rep 725, page 730.
[75] 'Expert determination - Uses, problems and pitfalls', (Commercial litigation journal, October 2006) http://www.rgl.com/pubs/xprPubDetail.aspx?xpST=PubDetail&pub=298 Accessed 16/03/15.
[76] Mr. Justice Ungoed-Thomas in *Jones (M.) v. Jones (R.R.)* [1971] W.L.R 840.
[77] *Supra* note *6*, para 19.

Conclusion

We live in days when alternative dispute resolution (in whatever type or form) is increasingly in fashion,[78] and among the options available to parties is ED. While ED has been used by the oil and gas industries in various ways, and has for long been crystallized by the English courts, it has been widely defined under the Scottish jurisprudence. However, ED, although a reaction to the cost and delay of arbitration, is a poor substitute indeed for arbitration as a means of resolving disputes in a binding way.[79]

This paper has discussed Expert determination as an ADR process in the oil and gas industry. The aim was to show 1) why the process of expert determination would appear to be suitable for oil and gas disputes; 2) how the Scottish legal system has received expert determination.

Thus, it is submitted that 1) ED appears suitable to the oil and gas industries, largely because it is less expensive and speedier, avoids the rigours of the application of the rules of evidence but issues of enforceability may render ED less attractive; 2) "whatever might have been the position in the past, the Scottish legal practice has now recognised ED as an alternative to arbitration".[80] And, ED process is now broadly distinguished from arbitration in not being judicial in character.[81]

[78] Gordon Junor, "Expert and/or arbiter?", (2010) 5.
[79] Douglas S. Jones, "Is expert determination a "final and binding" alternative?", (1997), 226.
[80] *Supra* note 6, para 19.
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