

# Table of Contents

1.	Introduction.....	2
2.	Expert determination.....	3
	<i>Campbell V Edwards</i> .....	4
	<i>Jones v Sherwood Computer Services Plc</i> .....	4
	<i>Jones (M) v Jones (RR)</i> .....	4
	<i>Shell UK Ltd v Enterprise Oil Plc</i> .....	4
	<i>Veba Oil Supply &amp; Trading GMBH v Petrotrade Inc</i> .....	5
3.	Challenge to Expert determination in <i>Begum v. Hossain &amp; Anor</i> [2015].....	5
4.	Conclusion.....	7
5.	Bibliography .....	8

# 1. Introduction

Alternative dispute resolution has developed significantly in the last four decades<sup>1</sup>, its adaptability to resolving conflicts stems from its various sub-divisions and the desire to circumvent litigation, at least from the onset. Oil and Gas industry disputes often arise over the contracting parties' disagreement regarding technical issues<sup>2</sup> or valuation of hydrocarbon resources. The tools provided under alternative dispute resolution methods in such instances are considered more apt than arbitration per se and indeed litigation proceedings. A plethora of ADR methodologies are in use internationally, expert determination being one which is commonly stipulated as a mechanism in hydrocarbon agreements. It is more cost effective and straight forward<sup>3</sup> yet as finite and binding, as the more unilateral litigation approach. An expert determination clause at drafting stage, suggests an affinity and desire to resolve disputes in an efficient manner in lieu of lengthy legal proceedings. In principle, the decision of the expert is final<sup>4</sup>, thus challenging it in a court of law would necessitate the third party to have failed to meet their obligations under the agreed terms, and for this failure to compromise his or her methodology<sup>5</sup>. Requesting court involvement under English law, provided ED has been previously agreed on as a modus operandi for resolving dispute between the parties is not common practice since it innately prolongs an otherwise fast and relatively cheap process<sup>6</sup>. Principally a court would only become involved in matters of pure law<sup>7</sup>, and where fraud, or concern over the expert trespassing the remit of their assignment can be reasonably challenged.

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<sup>1</sup> Henry J Brown and Arthur L Marriott, ADR Principles And Practice (Sweet & Maxwell 2011).

<sup>2</sup> Expert Determination In International Oil & Gas Disputes: The Impact Of Lack Of Harmonization In Reserves Classifications Systems And Uncertainty In Reserve Estimates (Society of Petroleum Engineers 2007).

<sup>3</sup> *ibid* 1

<sup>4</sup> *ibid*, p. 142.

<sup>5</sup> Hew R. Dundas, Arbitration (2015)

<sup>6</sup> *ibid*

<sup>7</sup> *ibid* 1

## 2. Expert determination

Expert determination is an alternative dispute resolution method, by which an expert in the specific milieu of the dispute, is given independent decision making power to resolve a matter of contention. The expert is chosen by all parties and his decision is legally binding<sup>8</sup> and confidential. The instructions with regards to what information to base the determination on are submitted jointly by the parties, who also submit these to each other<sup>9</sup>. Its characteristics provide an attractive solution to resolving conflict in the oil and gas industry. It may be used to resolve multi-party conflicts<sup>10</sup>, without putting a strain on pre-existing relationships whilst simultaneously offering a cost effective and fast resolution, in comparison to litigation. Out with the standard contractual conflict resolution processes, expert determination is one, which by design keeps bureaucracy to a minimum. Disruption to daily oil and gas business activities is more financially damaging, than other industry sectors due to the immediate nature of generating cash-flow. Delays to operations must further be avoided due to the ripple effect they may have on various stakeholders, and in turn, their lateral agreements.

The expert is given complete freedom as to the process by which he arrives at his or her findings, he is not obliged to follow a set of rules and the final decision is not held to a standard other than professional experience in the field of dispute and if applicable – the professional charter or body the expert is a member of<sup>11</sup>. It is generally accepted that the expert, in his impartial decision making powers provided under the dispute resolution mechanism, shall conclude the process similarly to someone with the his expertise credentials would, in a different context.

Expert determinations' greatest advantages are also the root cause of its drawbacks – providing the expert with autonomy over the process, mostly proves effective, however disputing their decision, should one party feel the verdict was unsatisfactory, is limited by the same characteristics<sup>12</sup>. The parties cannot challenge the expert's choice methodology in a court of law, ED is not a judicial or quasi-judicial process<sup>13</sup> and as such no legal procedure exists to support the right to appeal the decision. Despite this, there are examples of successful challenges under English Law. The likelihood of success is arbitrary, irrespective of the circumstances, however the court has the authority to disregard expert determination and set aside the findings<sup>14</sup>.

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<sup>8</sup> Kim Lewison, *The Interpretation Of Contracts* (Sweet & Maxwell 2015).

<sup>9</sup> *ibid* 2, 143.

<sup>10</sup> *What Is Expert Determination?* (1st edn, The Academy of Experts).

<sup>11</sup> Andrew Tweeddale and Keren Tweeddale, *Arbitration Of Commercial Disputes* (Oxford University Press 2007).

<sup>12</sup> *ibid* 1, p. 145

<sup>13</sup> *ibid* 1, p.146

<sup>14</sup> Richard K Allen, Stanley A Martin and Robert Frank Cushman, *Construction Law Handbook* (Wolters Kluwer Law & Business 2009).

The circumstances which allow for an expert determination to be challenged, in absence of a legal dispute, have been established<sup>15</sup> via several cases presented to English courts according to Hew R. Dundas, a UK authority on ADR processes.

*Campbell V Edwards*<sup>16</sup> - a landlord and tenant have agreed to seek an expert decision in determining the cost of the remainder of a lease. The landlord, upon conducting a further two valuations, not warranted or agreed with in the contract with his tenant, established that the experts' valuation was overinflated in comparison. He requested to be released from the original expert determination and for the tenant to agree on a new one. The defendant applied for the statement of claim of her landlord to be struck out and that the court uphold her counterclaim. The tenant won on the grounds of the pre-existing agreement, the court agreed the ED cannot be withdrawn based on the other valuations alone and without evidence of fraudulent activity. Thus, even in circumstances where an expert determination is arguably incorrect, yet they have kept to their brief and fulfilled their obligation, the courts take a view that the determination is binding.

*Jones v Sherwood Computer Services Plc*<sup>17</sup> - The role of the expert in this case is an accounts professional. Two disputing parties had agreed that should an accounting firm review of their assets not give a definite share price, the matter be passed to an independent professional and his decision be legally binding to them. The accountant did come to the same result as the disputed initial valuation and did not disclose their methodology for arriving at same, however since this wasn't requested by either party the expert was under no contractual obligation to do. The court ruled that the expert had followed their brief and their decision was binding.

*Jones (M) v Jones (RR)*<sup>18</sup> - An expert was called upon to establish a fair and impartial valuation of a dissolved companies assets comprised of both land and machinery, which were to be transferred to another company in the form of shares. The expert was given explicit instruction to peruse specialist surveyors for the land and machinery valuation, which he was to base the value on thereafter. The expert valued the machinery himself, departing from the conditions of his mandate. By virtue of this, the challenging parties were given permission to set aside the expert determination.

*Shell UK Ltd v Enterprise Oil Plc*<sup>19</sup> - Expert determination was called upon in this instance between joint venture partners drilling an exploration well. The amount of hydrocarbon being an unknown at this stage of the operation, required a redetermination of shares to be actioned in predetermined intervals. Where one or more parties did not agree with the valuation, an expert determination clause was in place to mitigate larger conflict and minimise disruption to the venture. The parties explicitly advised the expert as to which software to utilise when conducting their research. The

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<sup>15</sup> Hew R. Dundas, 'A Rare Case: Expert Determination Is Set Aside'. (note)

<sup>16</sup> *Campbell v Edwards* [1976] Court of Appeal, 1 WLR 403 (Court of Appeal).

<sup>17</sup> *Jones v Sherwood Computer Services Plc*[1992] Court of Appeal, WL 895627

<sup>18</sup> *Jones (M) v Jones (RR)* [1971] 1 W.L.R. 840; [1971] 2 All E.R. 676

<sup>19</sup> *Shell UK Ltd v Enterprise Oil Plc* [1999] 2 All E.R. [1999]

expert departed from the instruction given to them, thus their findings were found to be non-binding to the plaintiff, and the appeal was upheld. The court did not consider whether the use of a different software, did in fact have an impact on the final share valuation.

*Veba Oil Supply & Trading GMBH v Petrotrade Inc*<sup>20</sup> - An agreement for the supply of oil gas between two parties required an expert determination process to take place prior to any sale, to a standard which has been mutually agreed upon by buyer and seller. The expert performed his duty and found the density to meet the contractual specification, but via a different method to the one he was instructed to abide by. The buyer, in the process of resale, found that when tested again the MGO quality failed the quality inspection and launched an appeal on the grounds of breach of contract. The court found that in choosing to employ a different test to the one advised, the expert did not merely make a mistake but departed from instruction thus invalidating their finding. In these proceedings the court makes a clear distinction between the experts choosing to disregard instruction in which case their findings are invalid. If the expert employed the method as specified and concluded the same, regardless of what further testing would have provided, the court would abstain from getting involved, since their expertise does not cover chemical additives and their deployment.

It follows that Expert determination may be set aside under English law, should the expert have been found to depart from explicit instructions given by the parties, omitted submissions, not adhered to the methodology specified or acted out with his or her area of expertise. Challenging the ED process, without any of the aforementioned prerequisites and where the contract provisions agreed upon have been met is unlikely to be upheld, irrespective of whether the valuation or process, arguably did not produce accurate results. The expert is only bound to determine what was explicitly stated in the contract wording.

### **3. Challenge to Expert determination in Begum v. Hossain & Anor [2015]**

The *Begum v Hossain*<sup>21</sup> case provides a plethora of context for challenging the expert determination process. Notwithstanding the difficulty of the task, the plaintiff in this instance had their appeal upheld.

An expert determination was suggested as a course of action in reaching a settlement price over shares in a restaurant. The contractual parties submitted the company accounts, along with hand written takings. The expert was instructed to take into account all information he'd been passed on, including the notes, as explicitly requested

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<sup>20</sup> *Veba Oil Supply & Trading GmbH v Petrotrade Inc* [2001] EWCA Civ 1832; [2002]

<sup>21</sup> *Begum v Hossain* [2015] EWCA Civ 717 (CA (Civ Div))

in the terms of the contract. The expert instead omitted these, possibly in lieu of reaching a speedy resolution. He took the view that these should be examined by a further expert- a forensic accountant yet proceeded with the valuation, based on the official trade books, and which, for tax purposes were what the company takings could rightfully be based on. He would have been obliging to the terms of the contract and his professional duty to seek further expert opinion in evaluating the hand written takings upon identifying that he was unable to fulfil this task . Based on the notion of the fair price an objective party would be willing to pay for the shares, the expert failed to meet the basic premise of his duty. It was suggested that it was unlikely for a potential buyer to not take into account the hand written takings, thus the valuation he arrived at failed and could not be binding to the parties.

The judge's decision was based on the omission of the notes entirely, not the methodology employed. The instructions to the expert were clear yet he departed from those, he established the notes required further review yet failed to alert the parties, the settlement allowed for him to seek the aid of another expert but he did not feel compelled to do so. The terms of the settlement, did not state the expert could decide which company records to take into consideration and which to neglect. His failure to articulate the content of the notes regarding their impact on the share valuation is a breach of the terms of the powers entrusted in him by both parties.

A further dimension to the case, originating from the same notes is the fraudulent activities, implied by hand written record keeping in the first instance. It may be argued that since both parties willingly handed these over to the expert, in the knowledge that they do not reflect the values advised to the HMRC for tax purposes, they may be implicated in perpetrating VAT evasion under the Value Added Tax Act 1994 (VATA 1994)<sup>22</sup>. Tax evasion being a criminal offence under English law, and an expert had no remit to disclose his findings as part of the ED process may provide an explanation as to why an expert determination process was instigated over another ADR method. Dundas<sup>23</sup>, in his case analysis suggest that the specifics were not befitting to an expert determination – whether this was a mistake or deliberate course of action due to the sensitive information contained within the notes remains unclear, however the judge did pass the notes to the HMRC. Further to the court taking the view that the expert did not fulfil his mandate, it may be argued that his decision was based on the fear of what he may unveil and his unpreparedness to be complicit in such dealings. The court decision was in keeping with previous instances of departure and was regarded as an act of *unfair prejudice* by the expert.

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<sup>22</sup> Value Added Tax Act (VATA) 1994

<sup>23</sup> *ibid* 14

## **4. Conclusion**

Challenging an expert determination, where the parties have agreed to be legally bound by the decision, in an English court is likely to be a fruitless endeavour. The expert valuation is akin to an opinion and does not need to conform to any ethical consideration. Court involvement is limited where the plaintiff claims are more factual, than legal in nature. Court rulings on expert determination validity over the past two decades, have established a loose framework which may be called upon, where one or more contracting party is dissatisfied with the expert however there must be clear evidence the aforementioned acted contrary to instruction. An abdication from responsibility on the part of the expert can only be suggested if they have effectively breached the terms of their contract, their choice of methodology regardless of its effectiveness, does not constitute grounds for appealing their decision. In view of case history regarding expert determination under English law, parties who wish to include expert determination as a means of dispute resolution must ensure that their desired terms are specified and worded in no uncertain manner. Ultimately the construction of the terms of the settlement may provide grounds for appeal if the expert departed from their instruction, the more independence granted to them and not specifying particular criteria to be met, may prove an error which no court is likely to correct on the plaintiff's account. Expert determination is largely a final adjudication method.

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