RESEARCH PAPER


International Arbitration in Oil and Gas Agreements Disputes

Abstract

One of the most important trends in international economic and commercial relations in the late 20th century was the rapid and unprecedented growth of arbitration, which can be simply defined as a consensual agreement between parties to refer their dispute to a third neutral party, arbitrator(s), who is authorized to render a binding decision after a hearing at which both parties have an opportunity to be heard. In other words, arbitration is a private justice system which operates, at least with the tolerance, or preferably with the support and assistance of national and international legislation and national courts. In many countries arbitration has become the favored method of settling disputes between parties in commercial matters with or without an international element. The increase in disputes which have been resolved by arbitral tribunals, whether by ad hoc or institutional arbitration, highlights the fact that arbitration plays an indispensable role in the effective resolution of commercial disputes.

Key words: International Arbitration, Oil and Gas Contract, ADR

Introduction

Over the course of the 20th century, the commercial world became international in every sense of the word, and no other industry reflects this globalization better than the energy sector. It is as common to find a major Nigerian oil company contracting with a large French exploration organization as it is to find an English construction firm dealing with a Russian power plant owner, or a Chinese state-owned enterprise setting up a joint venture with a Chilean mining company.

The oil industry illustrates why energy disputes need a dispute resolution procedure that takes into account the international flavor of commerce. Historically, oil-rich countries may not have had the technology, capital and management skills to find and extract oil and the major corporations had greater power to insist on disputes being resolved in the courts of the home nations. The creation of the Organization of the Petroleum Exporting Countries in the 1960s allowed petrostates to start their own state-backed national oil companies to take charge of reserves, and the sector has seen the emergence of the likes of Saudi Aramco, National Iranian Oil Company and Kuwait Oil Company as dominant players in the industry. This shift in the balance of power means that the international community is operating on a markedly more level playing field.

In addition to securing a neutral venue, choosing arbitration creates greater opportunities for the enforcement of awards than can be obtained in relation to national court litigation. The reason for this is the enforcement framework provided by the New York Convention on the
Recognition and Enforcement of Foreign Arbitral Awards 1958. Parties can select arbitrators with expertise in the relevant industry or subject matter of the underlying commercial contract; they can choose the language in which the proceedings will be conducted. Arbitration also offers greater procedural flexibility compared with court proceedings, and is generally private and confidential; disputes can be resolved faster because the possibility of appeals is limited, and sometimes the costs can be lower.

Therefore, parties regularly demand dispute resolution procedures that recognise the international context of their industries and do not favour one party over another. Submitting disputes to the national courts of either party can now be an unpalatable option for both sides. The public forum of court litigation may also prove undesirable in the competitive world of energy, where commercial terms need to be kept secret.

Redfern and Hunter note that “there is now a consensus in the business International arbitration community that arbitration is the principal method of resolving international disputes”.

States have modernised their arbitration laws to accommodate this growing trend and parties are including arbitration clauses in high-value contracts with increasing regularity.

The International Chamber of Commerce Court of Arbitration (ICC) received:

- 529 requests for arbitration in 1999, involving 1,354 parties from 107 different countries and territories and arbitrators from 57 different countries;
- 593 requests for arbitration in 2006, involving 1,613 parties from 125 different countries and territories and arbitrators from 71 different countries; and
- 793 requests for arbitration in 2010, involving 2,145 parties from 140 different countries and territories and arbitrators from 73 different countries.

**Arbitration in the Oil and Gas sector**

Arbitration is the dispute resolution mechanism of choice in the oil and gas sector. Parties regularly include arbitration clauses in joint venture agreements, joint operating agreements, production sharing contracts, construction contracts and commodity export contracts. The Association of International Petroleum Negotiators also has arbitration as the standard form of dispute resolution in all of its main standard agreements, including:

- the Study and Bid Group Agreement 2006;
- the Farm-Out Agreement 2004;
- the Joint Operating Agreement 2002;
- the Unitisation and Unit Operating Agreement;
- the Gas Sales Agreement; and
- the Gas Transfer Agreement.

In addition to any contractual rights to arbitration, bilateral investment treaties (and multilateral investment treaties) provide investors in contracting nations with the opportunity to bring an arbitration against a state (or state entity) for any acts that breach the agreement to protect investments in that state by investors from the counter-signatory state.

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1 Alan Redfern, Martin Hunter, et. AL, “Redfern and Hunter on International Arbitration”, 439 (oup oxford, 2009).
Claims relating to project management have also been referred to arbitration. In ICC Case 11663 a company had failed to pay cash calls and to provide letters of credit on time or in the correct form to the oil ministry of the country in which the oil exploration and production project was being carried out. Its counterparties in the shared management agreement and participation agreement successfully sought a declaration that it had forfeited its interest in the project as a result.

In Joint Venture Yashlar v Government of Turkmenistan a joint venture partner claimed (unsuccessfully) that its partner’s drilling of two exploratory wells was so incompetent that it constituted a repudiation of the joint venture agreement. The tribunal was also asked to consider whether the contract had been frustrated by macroeconomic and geopolitical changes which made it impossible for the joint venture to sell gas on the international markets.

**What is international arbitration?**

Arbitration is a consensual and binding procedure for resolving disputes. It serves as an alternative, rather than a supplement, to litigation through the courts and provides autonomy to the parties over all aspects of the proceedings. As the parties control the manner in which the dispute will be resolved, they are free to agree on the law that will govern the arbitration, the venue of the hearing, the procedural rules (if any) that will guide them through the dispute and, importantly, the identity of the individual or individuals who will decide on the dispute.

As arbitration is consensual, it arises only out of an agreement between the parties that a particular dispute will be resolved by arbitration rather than through the courts. Typically, that agreement may be contained in the main contract (e.g., the joint operating agreement, the production sharing contract and the engineering procurement and construction contract). More rarely, after a dispute has arisen the parties may agree to refer that particular dispute to arbitration.

Once the parties have agreed to refer disputes to arbitration, they cannot unilaterally withdraw their consent. Furthermore, an arbitration agreement will survive termination of the contract in which it is contained so that if that contract comes to an end, the right to arbitrate any dispute that arises from that contract will still exist.

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5 In English law, this was established by Heyman v Darwins [1942] 1 All ER 337 and confirmed in Fion Trust & Holding Corporation v Yuri Privalov [2007] EWCA Civ 20. It is also in Section 7 of the English Arbitration Act 1996. It is further recognised in Article 16 of the United Nations Commission a International Trade Law (UNCITRAL) Model Law. All of the major procedural rules recognise the principle - for example, see Article 6.9 of the ICC Rules; Article 23 of the London Court of Internations Arbitration (LCIA) Rules; Article 15.2 of the American Arbitration Association (AAA) Rules; Article 23 of the UNCITRAL Rules; and Article 21.2 of the Swiss Rules.
The terms of the arbitration agreement are critical and most national arbitration laws require the arbitration agreement to be in writing in order to ensure certainty of those terms. This reflects the fact that the terms of the arbitration, in relation to (both the procedure and the choice of law, derive from the parties’ agreement, and (therefore those terms must be clearly defined. In particular, an arbitration agreement should make clear which national laws will govern the substance and procedure of the dispute and identify which procedural rules (if any) the parties wish to adopt.

The effectiveness of arbitration depends largely on the willingness of the court to accept the parties’ decision to refer their dispute to arbitration. As a result, countries have ratified the New York Convention. Notable exceptions to the list of contracting states in the energy sector are Libya, Iraq and a large number of central and eastern Africa states.

The New York Convention is the bedrock of international arbitration. It obliges contracting states to recognise a written arbitration agreement, and therefore, at the request of one of the parties, to stop any proceedings that are brought in the courts in breach of a due process arbitration agreement. The New York Convention also obliges the national courts of contracting states to enforce awards that are made in other contracting states, unless:

- those courts deem the award to be against public policy;
- the subject matter of the dispute is not capable of settlement by arbitration in that state; or
- the award is invalid for one of the reasons set out in Article V.

Alternative dispute resolution in the international oil and gas sector

The international oil and gas sector, together with the related construction industry, has been noted as forming “the largest portfolio of international commercial and state investment disputes in the world”. Given that energy projects generally involve a variety of stakeholders (both private and government), significant investment and programmes that span years, if not decades, it is unsurprising that they present unique challenges when it comes to dispute resolution, and that parties are increasingly seeking alternatives to more formal dispute resolution mechanisms such as litigation or arbitration. Energy sector participants commonly provide in their contracts for methods of dispute management that promote the continuation of amicable business relationships and enable the project to continue unimpeded and without delay through any dispute process.

What is ADR?

ADR is the label generally given to dispute resolution procedures that do not involve traditional court processes. While there is some debate as to which forms of dispute resolution fall within the ambit of ADR processes, commonly accepted examples include negotiation, mediation, early neutral evaluation and dispute review boards. There are differing views as to whether arbitration and expert determination can be considered to fall within the broader spectrum of ADR processes. Expert determination and arbitration are generally part of a more binding, rather than

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6 A notable exception is France, which has no formal requirements for arbitration agreements (Article 1507 of the French Code of Civil Procedure).

consensual, process. While ADR processes can be binding or non-binding, the ADR processes focused on in this chapter are generally non-binding. Further, arbitration is now increasingly considered to be a more formal dispute method, and references to ADR are often intended to exclude both litigation and arbitration. ADR is a collective term for the range of procedures that serve as alternatives to litigation for the resolution of civil disputes with the assistance of a neutral and impartial third party. The courts recognise the benefits of ADR, and if appropriate, the parties may be referred to ADR. For example, Emmott v Michael Williams & Partners Ltd\(^8\) clearly showed the court's support for and reluctance to intervene in the arbitral process. O'Donoghue v Enterprise Inns Plc\(^9\) demonstrated the willingness of the court to uphold the arbitrator's decision provided that there have been no serious irregularities. Further evidence of the court's support is found in the Civil Procedure Rules 1998 (CPR)\(^10\) r.1.4 (2):

“Active case management includes ... (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure.”\(^11\)

In addition, a party can seek a stay of proceedings for ADR to take place under CPR r 26.4(1): “A party may, when filing the completed allocation questionnaire, make a written request for the proceedings to be stayed while the parties try to settle the case by alternative dispute resolution or other means.”\(^12\)

Furthermore, the Pre-Action Protocols\(^14\) under the CPR stipulate that:

“Starting proceedings should usually be a step of last resort, and proceedings should not normally be started when a settlement is still actively being explored. Although ADR is not compulsory, the parties should consider whether some form of ADR procedure might enable them to settle the matter without starting proceedings. The court may require evidence that the parties considered some form of ADR.”

The LOGIC standard contract has developed clauses for the resolution of disputes and addressing the processes by adopting an escalating approach whereby disputes are initially dealt with by an informal ADR mechanism, for example through negotiation or mediation between representatives from each party, before looking at more formal ADR mechanisms such as expert determination or arbitration.\(^15\)

**Litigation**

In the event that a dispute arises between those engaged in the oil and gas industry and they have no agreed contractual provision for dispute resolution, it will be referred to the national courts.


\(^{10}\) SI 1998/3132.

\(^{11}\) See also Part 36—both are available in full via ttp://www.justice.gov.uk/civil/procrules_fin/menus/rules.htm (visited on 8 July, 2014).

\(^{12}\) See also Part 36–both are available in full via http://www.justice.gov.uk/civil/procrules_fin/menus/rules.htm (visited on 8 July, 2014).

\(^{13}\) Ibid. Also, the Arbitration Act 1996 ss.9 and 12 provide similar rules.

\(^{14}\) Section III (8) available via http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_preaction_conduct.htm#IDANBFT (visited on 8 July, 2014).

\(^{15}\) LOGIC standard contracts are available via http://www.logic-oil.com/contracts2.cfm (visited on 8 July, 2014).
to be resolved by litigation. Due to the international nature of the oil and gas industry, contracting parties are usually domiciled in different countries and usually have most if not all their assets and property in the country of domicile. The main concern for a company facing such a dispute is the prospect of the litigation taking place in the courts of a foreign country, where proceedings will be conducted in a foreign language and in line with a foreign system of laws. For many there is a worry that a foreign court may have a level of xenophobia against a foreign company. To exemplify this point, in 2009 Chevron issued an arbitration claim against the government of Ecuador citing violations of the country's obligations under the United States-Ecuador Bilateral Investment Treaty, investment agreements and international law. The general counsel for Chevron observed that: “Because Ecuador's judicial system is incapable of functioning independently of political influence, Chevron has no choice but to seek relief under the treaty between the United States and Ecuador.” This case is still pending to date.\(^{16}\) The only practical way to overcome the xenophobic issue is to insert an arbitration clause in the draft contract.

In litigation, the parties involved have no control over the timeline of the process. Therefore, a dispute may not be resolved for a great length of time during which the expenses involved will continue to spiral higher. As the parties have no control over the appointment of the judge, they will suffer uncertainty and worry that the judge and court involved may lack the necessary expertise to deal with the nature of the dispute. Time may be wasted in conveying the relevant knowledge or by referring the matter to third party for an expert opinion. In addition, litigation is usually public and all the proceedings and judgments will be recorded publicly. Depending on the nature of the dispute, this could be potentially damaging to the company's reputation and affect their investor relations and market shares. It would allow potential competitors an insight into the company's contract and perhaps give them a competitive edge in future bids. Moreover, the judgment in litigation can usually be appealed at first instance so there may not be immediate closure for a company and consequent greater expense. For the reasons outlined, litigation may not be a promising route to provide a clear jurisdictional path for resolving disputes in the oil and gas industry. However, litigation maybe the preferred option available to parties, depending on whether the sums of money involved are considerable or if any other dispute resolution processes have been agreed upon. There have been a number of key cases where litigation has been used. For example, *Amoco (UK) Exploration Co v Teesside Gas Transportation Ltd*\(^{17}\) where litigation was the preferred choice and resulted in a House of Lords judgment overturning a decision made in favour of the respondent in the Court of Appeal. The case revolved around the commencement date in a capacity reservation and transportation agreement. The significance of the commencement date was that the respondent would at that point become obliged to accept and redeliver the gas and make, send or pay payments at a rate of £8 million per quarter, whether it used the capacity or not. A further example is the judgment in *BHP Billiton Petroleum Ltd v Dalmine SpA*\(^{18}\) concerning the supply of pipe for a subsea gas pipeline from a gas field in Morecambe Bay, near Liverpool, to shore, where part of the pipe was discovered to be


\(^{17}\) [2001] UKHL 18.

\(^{18}\) [2002] EWHC 970 (Comm).
metallurgically defective; Dalmine admitted the defects and having submitted fraudulent
inspection reports with intent to deceive.

Nevertheless, choosing ADR over litigation does not mean that litigation will not eventually
occur. It is sometimes necessary to have a decision from the court on a point of law, on a
protective or injunctive remedy or when an order is necessary.19

**Arbitration**

In the oil and gas industry, the parties' relationships are characterised by long-term agreements
where success is highly dependent on co-operation. Arbitration has become the principal method
of dispute resolution in the industry, especially when there is an international contract spanning
many countries. However, the decision is not made in a vacuum and there are several major factors,
such as the nature of disputes, the identity of the parties, the choice of forum and choice of law,
the scope of the arbitration and the location of assets which must be considered while designing
the arbitration clause. Arbitration can be defined as the resolution of disputes between two or more
parties through a voluntary or a contractually required hearing with determination by an impartial
third party. The main attractions for using arbitration are:
The underlying principle of party autonomy. Parties can decide in which country the arbitration
will take place, the legal seat (the *lex arbitri*), and the language to be used for the purpose of the
dispute hearing. In other words, arbitration provides the parties with neutrality and relative
flexibility to resolve the disputes privately outside a national court system, although this flexibility
is limited by the extent that it needs to be associated with a legal system. The parties will decide
whether to follow an ad hoc arbitration or an institutional arbitration. Institutional arbitration will
be administered by an arbitral institute such as the International Chamber of Commerce (ICC) in
Paris or the London Court of International Arbitration (LCIA). Ad hoc arbitration gives the parties
freedom to decide on every aspect of the procedure. It must be noted that in contracts providing
for institutional arbitration, it is likely that the standard arbitration clause will be used. Parties
should refrain from any introduction of changes to the institutional rules (although allowed by
some institutions); arbitration can be refused if parties alter the rules considered essential for
institutional arbitration.20 For ad hoc arbitration a party can either use the United Nations
Commission on International Trade Law (UNCITRAL) model clause in line with the UNCITRAL
Rules or write their own. In England, where London is increasingly becoming a popular, preferred
arbitration location, arbitration in the LCIA will be subject to the English Arbitration Act 1996.
Scotland now has its own Arbitration Act 2010 which it is hoped will contribute to making
Scotland an attractive place for dispute resolution by providing a “modern, impartial and efficient
arbitration regime”; whether that will prove to be the case remains to be seen. If parties wish to
use ad hoc arbitration and write their own standard clauses, they should take a high level of care
and preferably refrain from making changes to institutional rules as the arbiter21 may refuse to
administer the arbitration if the parties have changed the very essence of arbitration to the point
that it no longer functions.22

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20 For example, in *Iran Aircraft Indus. v Avco Corp*, 980 F.2d 141, 145 (2d Cir. 1992), the ICC refused to administer arbitration
proceedings as arbitral clauses provided that the ICC Court

21 In England, and internationally in the English speaking world (apart from Scotland) an arbiter is known as an “arbitrator”.

22 This is evident in the US Lower Federal Court in *Iran Aircraft Industries v Avco Corp* 980 F.2d 141 (2d Cir. 1992).
Choice of arbiter. Arbitration is attractive to those in the oil and gas industry as the parties can choose a neutral arbiter or tribunal or arbiters based on their specialist knowledge. In litigation there is always the worry that a court will not have the necessary expertise and experience. The tribunal's decision will be binding on the parties and is final, so there is no right of appeal unless otherwise agreed by the parties.\(^{23}\)

Privacy and confidentiality. These are of paramount importance to the industry, not only with respect to the final award, but also in relation to information generated or produced in the course of proceedings. In some cases, parties may wish by the very existence of arbitration to be protected by an obligation of confidentiality.\(^{24}\) However, identifying and defining the extent of any obligation of confidentiality in arbitral proceedings has proved to be surprisingly controversial. For example, if arbitration is private and litigation is public, how does this private/public dichotomy resolve itself when a party to arbitration seeks to challenge or to enforce an arbitral decision in court? The status of an arbitral award is something that only the courts can determine. If, therefore, the judge gives a reasoned decision for enforcing or refusing to enforce an arbitrator's award, there is a serious potential for the details of the arbitration to leak out, meaning that confidentiality in those matters can be lost.\(^{25}\) This is notwithstanding that English courts are distinguished by following a strict Confidentiality policy. Irrespective of the fact that no final formulation of the confidentiality obligation can be found in case law, it is generally recognised that under English common law there is an enforceable and implied duty of confidentiality arising out of the nature of arbitration whereby the arbitral proceedings must be privately conducted and subject to the duty of confidentiality.\(^{26}\)

Enforceability. Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, arbitral awards are enforceable in most trading nations across the world. A national court may, however, refuse to recognise an award if the process or law used to reach the award does not conform to the procedure and law of the seat, in line with art.V para.1 of the Convention. It is generally seen that an arbitral award is more enforceable for international contracts than a court award, and that courts do not like to interfere with such determinations.\(^{27}\)

In addition, arbitration is perceived generally to be faster and less expensive than litigation and can lead to a more tailored and creative conclusion to suit the parties' interests than litigation. Arbitration has been utilised in many high profile oil and gas cases\(^{28}\) and is also used in industry and company standard contracts and model clauses. For example, under the Model Form International Operating Agreement prepared by the Association of International Petroleum Negotiators, which has become the seminal model for forming joint operating agreements for

\(^{23}\) Arbitration Act 1996 s.58(1).

\(^{24}\) See for example the discussion in *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10.

\(^{25}\) See for example the discussion in *Department of Economic Policy and Development of the City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314; [2005] Q.B. 207.


\(^{27}\) As it was held in *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184; [2008] Bus. L.R. 1361 that judicial interference“should be kept to a minimum and the proper role of the court was to support the arbitral process rather than review it”.

international development throughout the world, the parties can choose ADR and arbitration for dispute settlement. The litigation option was removed from the model form as it was rarely used. Another example is under the UK Seaward Area Petroleum production module, clause 43, which states that disputes between the Minister and the licensee arising under or by virtue of the licence shall be referred to arbitration comprised of a single arbitrator appointed by Lord Chief Justice of England or the Lord President of the Court of Session (depending on the location of the licensed area). However, large companies who are often involved in joint ventures may be reluctant to engage in arbitration with each other and occasionally prefer a different method to resolve disputes. Moreover, in the event of arbitration against a government, there is a high risk that there will be retaliation and hence arbitration may not be the best option. It is argued that arbitration is time consuming, expensive and can be equally as formal as litigation. It can involve procedural complexity, unpredictability and legal challenges to jurisdiction or competence of proceedings. Dispute resolution clauses may, however, provide for ADR before arbitration is utilised.

**Expert determination**

This method is widely used in the oil and gas industry as a dispute resolution mechanism where the issue is primarily technical or commercial in nature. In the Unitisation and Unit Operating Agreement (UUOA) in addition to Joint Operating Agreements (JOAs) it has become common industry practice to use expert determination for the resolution of disputes pertaining to redeterminations and field extensions which may impact track participation. When this method is provided for in the contract, there will be other forms of resolution for addressing non-technical issues. The contract should define technical and non-technical issues to ensure that there is no ambiguity at the time of any dispute. Expert determination allows for the appointment of an “expert” to determine the outcome of disputes. The expert is agreed between the parties and is usually selected according to the nature of the dispute. The parties may decide on a method the expert must follow and insist that the reason behind a determination is revealed. A determination may be made in a matter of minutes or a few weeks, but it is generally faster than a dispute going through the national court. The expert's determination is final and binding on the parties unless the contract provides for procedures for appeal to a competent court. In terms of enforceability, as in domestic determinations it is only binding as a matter of contract. However, in international disputes, unlike an arbitration award for example, expert determinations do not benefit from enforceability under the New York Convention 1958 but may benefit from limited circumstances where bilateral recognition and enforcement treaties exist. Therefore, due to the significant costs of certain operations in the oil and gas industry, expert determination may not be suitable for overseas or highly complex disputes involving very large sums of money.

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29 The Petroleum (Current Model Clauses) Order 1999 (SI 1999/160), the Petroleum Licensing (Exploration and Production) (Seward and Landward Areas) Regulations 2004 (SI 2004/352) Sch.1 art.21, the Petroleum Licensing (Production) (Seaward Areas) Regulations 2008 (SI 2008/225) Sch.1 art.43.
31 Arbitration Act 1996 s.12.
32 For example, in Odebrecht Oil & Gas Services Ltd v North Sea Productions Ltd [1999] Adjud. R. 05/10 a performance bond accompanying a conservation contract for a motor tanker indicated expert determination to investigate the alleged breach of the contract and assess the damage.
Expert determination can be set aside only on limited grounds where there has been fraud or manifest error. There have been numerous cases where the definition of manifest error has been articulated: “oversights and blunders so obvious as to admit of no difference in the opinion”. Manifest error is restricted to cases where the expert has substantially deviated from his instructions, such as using different software from that stipulated in the contract or if the expert has valued machinery himself when the instructions were to employ a separate, independent expert of his choice to value machinery or assets.

In general, expert determination is a useful method to resolve oil and gas disputes due to expeditious proceedings, reduced costs, its binding nature and privacy. However, it is always advisable to consider carefully the nature and value of the dispute and the location of the parties before adopting this method.

Negotiation
This is perhaps the most common and basic dispute resolution approach in the oil and gas industry before any adjudicatory or non-adjudicatory mechanism can be applied. Negotiation is more informal than other forms of ADR and is primarily used where the relationship between the parties is equally as important as the resolution of the dispute. There are essentially three forms of negotiation strategy. The first is hard negotiation, where a commercial position is adopted by leaning on the opponent until they give in, with both sides starting in extreme positions, withholding their true views and making small concessions only to keep the negotiations moving. This strategy is extremely time-consuming, and can often keep both sides from achieving a compromise. The second type is soft negotiation, in which the relationship is valued by giving in to avoid being caught up in a non-negotiable position. Neither is practically suitable for oil and gas disputes.

A third alternative to these negotiation methods is a model developed by Fisher and Ury, which is the principled negotiation, where the main strength lies in the fact that it is hard on problems, but soft on people. Principled negotiation focuses on the merits of the situation rather than the differences that may exist between the two parties involved. This problem solving approach involves the negotiator trying to resolve the dispute by suggesting resolutions that may be to the advantage of both parties by separating them from the problem, emphasising the importance of dealing with the parties and the need to handle the situation wisely. The negotiator does not take or adopt a position but seeks to overcome what may already be an entrenched position by developing a large range of possible solutions to the dispute. The criteria then used to select the resolution are separate from personal emotions and should be objective and fair. The proposed resolution is described as a wise agreement which should be efficiently reached, and at the very least it should be distinguished by not damaging, but hopefully further advancing, the relationship between the parties. Such an approach seeks to overcome the situation where the negotiating parties become immersed in the positions they have taken to the detriment of focusing on the interest they have in resolving the dispute. Adversarial, inconsiderate and strained situations can thus be avoided or minimised and professional relationships can be revived on the basis of accurate

34 Conoco (UK) Ltd v Phillips Petroleum Unreported, August 19, 1996.
37 Jones (M) v Jones (RR) [1971] 1 W.L.R. 840.
perceptions, good communication and sensible emotions, with a forward looking objective approach. In this approach, the problem encountered would be contained and the greater, more comprehensive benefit of mutual agreement and peaceful resolution would enable parties to sustain their relationship. Many other mutual interests may also be uncovered as a result of this process. The result can be binding if it results in a contract agreement that reflects negotiations, although it is unlikely that the courts will view negotiation as a means to stay proceedings in exercising active case management.

These approaches are not the only ones. There are degrees of approaches in between, as in fact during the course of a negotiation or series of negotiation the approach may alter, perhaps several times. One side may use one approach, and the other another. The question of which approach to use will vary according to a number of factors including the relative bargaining position of the parties. Many contracts in the oil and gas industry provide for dispute negotiation. For example, within the LOGIC standard form contract, a three-level negotiation approach is provided before proceeding to ADR processes. It has an escalated clause approach whereby disputes are initially dealt with by the representatives from each party; if no agreement is reached it then escalates to persons nominated in the form of agreement; then if no resolution is reached it will escalate to more senior negotiation at executive level. Executive negotiation is often used in industry contracts as part of an escalating disputes resolution process. The advantage of this is that it takes the dispute out of the hands of those that work together in the contract activity on a day-to-day basis, thus helping to maintain good working relationships. If the executive negotiation fails then either party can take the dispute to court, but only if the first stages have been completed.

The main advantages of negotiation are that disputants remain in control of the process, negotiated resolutions tend to have greater durability, reduced management of time and costs, confidentiality, and since negotiators were not involved in the original conflict, they have sufficient personal and emotional distance which allows impartiality.

In terms of enforceability, unlike litigation or a foreign arbitral award, the agreement to negotiate has traditionally been unenforceable due to the uncertainty of it having any binding force. In Walford v Miles a company agreed to be bound into negotiations with another company and to be bound with negotiations with any third party. However, there was neither indication of how long the two companies were obliged to continue to negotiate for nor were there indications of what, if anything, would end that obligation. The court held that an agreement to negotiate for an unspecified period was unenforceable.

Mediation

Mediation is an extension of direct negotiation and is also often referred to as a structured negotiation. It is a process where a neutral person is appointed to act as an intermediary between the negotiating parties. Mediation is usually initiated by the parties to the dispute but it can also be initiated by the courts and operated outside the judicial system. The mediator will typically talk to the parties to form an understanding of their respective positions. This will then enable the mediator to try to identify stumbling blocks to a settlement and help to explore solutions. The mediator does not have any power to proscribe a solution. The role is to bring the two parties to an amicable settlement.

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40 Available at http://www.logic-oil.com/contracts2.cfm [Accessed April 8, 2011].
41 Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd [1975] 1 W.L.R. 297 CA.
42 [1992] 2 A.C. 128 HL.
The main advantages of mediation over litigation are the timely proceedings, decreased cost, confidentiality and privacy, flexibility in terms of the degree of control enjoyed by the parties over the process and outcome. Mediation does not set precedents but each case can be treated on its own merit depending on the circumstances and the best solution for the parties, and either party can withdraw at any point whereby settlements cannot be unilaterally imposed. Mediation methods include facilitative and evaluative, transformative, and narrative, allowing advantages over litigation as the parties agree on structure and process. Whereas conciliation is usually more evaluative, mediation is a process which is more consensual in its approach and the mediator does not express an opinion and does not make any recommendations. However, in some instances parties in the oil and gas industry agree on evaluative mediators with specialist knowledge of the industry, in which case recommendations may be made. Although the parties concerned are not bound by any recommendations, such a process does set the scene for both parties to progress with greater understanding towards an agreed outcome. In most cases the mediator is not required to be an expert or to provide a determination on the matter. They will act as a non adversarial neutral person who helps the parties objectively reach a negotiated agreement.

In terms of enforceability, traditionally common law courts refused to enforce mediation agreements on the grounds of uncertainty, seeking to oust the jurisdiction of the courts, and provision of inadequate remedies. In order to be enforceable, the contract term must be certain. However, the position of contractual certainty for the parties to refer the dispute to mediation has been upheld: where there was a clear intention of the parties to use litigation as the last resort, an ADR clause was not an agreement to negotiate and public policy supported enforcing the ADR clause. The courts in the United Kingdom may grant a stay of proceedings pending the outcome of any mediation process that has been entered into. This has been evidenced in various cases including Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd\textsuperscript{44} The refusal to take part in mediation is also an important legal issue and a number of cases demonstrate this, including the judgment in the Court of Appeal Dunnett v Railtrack Plc\textsuperscript{45} where it was stated that mediation may sometimes be able to provide a better outcome and solution than it is within the power of the courts to provide. In the case of Hurst v Leeming\textsuperscript{46} a clearer line was drawn, defining the application of Dunnett principle in that the courts will not be willing to permit matters to proceed to arbitration or litigation if mediation is seen as a reasonable means of dispute resolution. What may appear to be outside the boundaries of being resolved by mediation has often proved otherwise if the parties concerned choose to enter into ADR and mediation in particular. That said, there is also case law to demonstrate that the courts will not support the use of ADR in a non-discriminatory Fashion as was demonstrated by Halsey v Milton Keynes General NHS Trust.\textsuperscript{47}

In terms of enforceability, unlike foreign arbitral awards, mediation lacks international enforceability. Therefore, those engaged in the oil and gas business prefer to use mediation as part of a multi-tiered dispute resolution clause rather than as a primary method for resolving disputes.

\textbf{Conclusion}

\textsuperscript{43} Cable & Wireless Plc v IBM United Kingdom Ltd [2002] EWHC 2059 (Comm).
\textsuperscript{44} [1993] A.C. 334; [1993] 2 W.L.R. 262 HL.
\textsuperscript{46} [2002] EWHC 1051 (Ch); [2003] 1 Lloyd's Rep. 379.
The neutrality and autonomy that arbitration offers make it an enticing option for parties in international energy disputes. The procedure under which the dispute will be heard can be adapted to suit the parties’ requirements and the identity of the individuals to resolve the issues can be tailored to the technical intricacies that are inherent in energy disputes.

Arbitration is no longer an unknown quantity in the energy sector and is becoming — or is already — the default form of dispute resolution for many companies. The infrastructure around the world to deal efficiently and effectively with disputes by way of arbitration is firmly established.

In many ways, arbitration has become more than an alternative to litigation and is in fact the better option for parties in a dispute. While it invariably has its limitations — most notably the power of tribunals to deal with recalcitrant parties and the potentially high costs that arbitral proceedings involve — the overall benefits that arbitration brings to parties in confidential, complex and international disputes mean that it should be given consideration when agreeing dispute resolution procedures.