CHAPTER 4
EXPERT DETERMINATION IN ENERGY SECTOR

4.1 Introduction

Expert determination is widely used as a dispute resolution mechanism in energy-related contracts.\(^1\) Expert determination clauses can be found throughout the energy value chain, from upstream exploration and production agreements to wholesale power contracts. Many of the characteristics which make expert determination an attractive dispute resolution mechanism are particularly relevant to energy disputes.\(^2\)

The long-term nature of many energy agreements (e.g., oil or gas sales or transportation agreements, long-term power purchase agreements, and many agreements relating to project financed assets) means that expert determination is often prescribed for appropriate disputes which arise during the currency of such agreements. It enables such disputes to be resolved without a more adversarial, and potentially public, process.

4.2 What is Expert Determination?

Expert determination is a dispute resolution mechanism wholly founded on the law of contract.\(^3\) Put simply, by using an expert determination clause in a contract, the parties have agreed to refer the resolution of a particular dispute to a third party (usually having specified technical or other expertise), and have agreed to accept his determination as final and binding. The clause will need to set out in sufficient detail how the particular dispute is to be formulated and the process and procedure by which the expert is to determine the dispute.\(^4\) The level of complexity of the procedure is up to the parties and in theory can involve several rounds of submissions and evidence and/or oral hearings before the expert. In practice, most expert determination procedures do not involve a hearing and provide for only limited exchanges of submissions. There are no statutes or

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\(^2\) *Ibid*.

\(^3\) Margaret Hughes, Expert Determination: A Suitable Dispute Resolution Technique For Offshore Construction Project Dispute? Part II, *Journal of International Trade Law, Policy*, vol 3, no 1, 4 (June 2004).

\(^4\) *Ibid*. 
civil procedural rules; the expert determination procedure (and its workability and success) is entirely dependent on the terms which the parties have agreed.\textsuperscript{5}

Whether the parties can enter into such an agreement, and whether it will be effective, will depend on the governing law of the contract. This chapter addresses the position from the perspective of English law. Under English law, parties can bind themselves to the determination of a third-party expert and, subject to various parameters which have developed in case law (particularly if issues of law are being determined), the courts will not interfere with that determination and will facilitate its enforcement.\textsuperscript{6}

The position in other jurisdictions varies considerably and it is essential when drafting international agreements that local law advice be taken as to the effectiveness of an expert determination clause and the enforceability of any determination. Perhaps unsurprisingly, many common law jurisdictions (eg, Canada, Australia and New Zealand) support procedures similar to English expert determination. In several European civil law jurisdictions there are mechanisms which bear similarities to English expert determination (eg, schiedsgutachten in Germany, bindendadvies in the Netherlands and periziacontrattuale in Italy). On the other hand, in a number of jurisdictions there appears to be no concept of expert determination (eg, China (excluding Hong Kong)), and an attempt to operate a binding dispute resolution mechanism outside the procedures of the local courts or an appropriate arbitral tribunal may fall foul of public policy and be of no legal effect.\textsuperscript{7}

Expert determination, or its local equivalent, does feature in international energy contracts. In relation to oil and gas agreements, this is sometimes for historic reasons, where relatively standard form contracts which may have started out life in the North Sea have been exported and adapted in new international developments.\textsuperscript{8}

\textsuperscript{5} Ibid.
\textsuperscript{7} Kendall, Freedman and Farrell, \textit{Expert determination} (Sweet and Maxwell, fourth edition, 2008) provides brief comparative guidance on the existence of dispute resolution processes similar to English expert determination in some 36 jurisdictions.
\textsuperscript{8} Supra note 6 at 40.
4.3 Advantages and Disadvantages of Expert Determination for Energy Disputes

Expert determination enjoys a number of advantages as a dispute resolution mechanism when compared with litigation and many arbitration procedures. Some of these are particularly relevant in the energy sphere, where disputes arise in long-term agreements and are often technical in nature. There are also certain potential disadvantages.9

4.3.1 Advantages

(a) Expertise

It is very common for only certain disputes arising under a contract to be carved out for reference to expert determination. These include disputes of a technical nature where the particular expertise of the expert makes expert determination a more efficient and effective mechanism than the residual litigation or arbitration provisions. A good example of this is the appointment of an inspector or independent surveyor to measure and assess the quantities and qualities of cargoes such as gasoil and LNG.10

(b) Alternative Dispute Resolution

Expert determination is seen as a type of alternative dispute resolution (ADR). Although originally in England the term ‘ADR’ was used to refer to non-binding dispute resolution techniques (most importantly mediation), the broader US usage of the term is now more widespread. Expert determination in general is a less adversarial process than arbitration or litigation, and the usual absence of a hearing and protracted inter-party communications assists in making expert determination generally a less aggressive process.11 This is not to say that expert determinations cannot be combative; but what it does mean is that it is often a very suitable p to resolve disputes under an ongoing long-term contract or where there is a broader relationship between the parties in dispute, as is often the case in many e disputes.12

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9 Available at: www.herbertsmithfreehills.com, (Visited on March 2015).
10 Ibid.
11 Ibid.
12 Ibid.
(c) Speed

In general, expert determination is a streamlined and speedy process. Often, determination clauses will set out a timetable for the determination, although practice this may be extended by agreement.\textsuperscript{13} In appropriate instances the timetable will be very short - perhaps giving the expert 30 days from receipt of submission make a determination. In some energy disputes speed is important as the co may still be in operation and the answer to the dispute is needed so as to enable to parties properly to continue the commercial relationship.\textsuperscript{14}

The ability to have a speedy expert determination process is usually a result simple procedure, without formal hearings and with limits on the number and of written submissions to the expert. The very fact that - particularly in determinations involving technical issues (eg, an oil or gas field equity determination dispute) - the expert is technically qualified will significantly reduce the amount of expert witness evidence or other explanatory technical materials that will have submitted to the expert (as compared with a lay arbitrator or judge).\textsuperscript{15}

(d) Cost

Many of the reasons which make expert determination a speedy process also n a less expensive process than arbitration or litigation. As with all procedural issues an expert determination, the question of who bears which costs needs to be s in the contract.\textsuperscript{16} The parties will have to bear the costs of the expert (unlike those of a judge). The expert determination clause will often provide for such costs to b between the parties. While the parties often bear their own legal costs, the co may have provided for some variation on a ‘loser pays’ principle. Overall, given the generally less formal process and shorter timescales, expert determination relatively cheaper dispute resolution mechanism than the alternatives.\textsuperscript{17}

(e) Confidentiality

Expert determination is usually a confidential process and even if the of contract does not state this expressly, it is likely that the expert will be required keep the subject matter of the

\textsuperscript{13} Ibid.
\textsuperscript{14} Supra note 6 at 41.
\textsuperscript{15} Ibid.
\textsuperscript{16} Ibid.
\textsuperscript{17} Ibid.
determination confidential. As with the posit relation to arbitrations, this confidentiality will be lost in the event that the related court applications. Confidentiality can be extremely important to involve in a dispute, particularly in the context of long-term energy contracts where the dispute concerns commercially sensitive information such as pricing.

(f) Power to Draft Contract Terms

One of the advantages of expert determination is that the parties can request expert to undertake a task which a court (and many arbitral tribunals) simply does not have jurisdiction to undertake. The most important example is the ability of experts, if the parties request it, to draft new provisions of a contract, or ‘fill in the blanks’. This is commonly found in ‘change in circumstances’ clauses. Such clauses will usually prescribe that in the event of a relevant change in circumstances, the parties will endeavour to renegotiate certain terms of the contract; but that in the absence of such agreement the task of redrafting those terms will fall to an expert (having heard the parties’ various proposals and submissions). This is not something which a court has any jurisdiction to do, even if the parties wished a judge to undertake the task. Similarly, unless an arbitrator has been given express powers to issue an award on this basis, drafting new terms will not be within the power of many arbitral tribunals. (Some institutional rules do expressly give arbitrators the power to ‘fill in the blanks’ — for example, the Electricity Arbitration Association Rules give arbitrators such a power in certain circumstances.) In 2001, when the New Electricity Trading Arrangements (NETA) were introduced in England and Wales, many ‘change in circumstances’ clauses were triggered in long-term power purchase agreements, resulting in a significant number of expert determinations where experts were being asked to redraft provisions so as to make the contracts (hereafterNETA) compliant.

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18 Ibid.
19 Ibid.
20 Ibid.
21 Ibid.
22 Ibid.
4.3.2 Disadvantages

(a) Enforcement

The determination of an expert is not of itself directly enforceable in the same way that a court judgment or an arbitral award might be enforceable. In the event that a losing party fails to comply with the terms of an expert’s determination, the successful party will need to pursue a breach of contract claim under the relevant jurisdiction clause in the original agreement (this is likely to prescribe litigation or arbitration as the appropriate mechanism). The losing party is, in effect, being sued for a breach of its agreement that it would be bound by and comply with the determination of the expert. In international energy contracts, this also raises the question of whether an expert determination award would be enforceable under the relevant governing law and in the relevant jurisdiction; and as indicated above, considerable care will need to be taken at the drafting stage to ensure that the mechanism will work. That said, in long-term energy contracts when a dispute arises during the life of the agreement, enforcement may in practice not be so much of a problem. Some expert determination provisions provide that failure by a party to comply with an expert’s determination will automatically be a default under the agreement (eg, in relation to a joint operating agreement for an oil or gas field). This could have potentially dire consequences for the party resisting enforcement, unless it was already in default.

(b) Challenge

The determination of an expert can be open to challenge in certain circumstances; this is addressed in more detail below.

4.4 Key Elements of an Expert Determination Clause

As noted above, expert determination is based on the law of contract. There are no institutional arbitral rules or statute law to plug the gaps should an expert determination clause be deficient in failing to provide for one or more elements of the procedure. It is therefore critical

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24 Supra note 6 at 42.
25 Ibid.
26 Ibid.
27 Supra note 6 at 43.
that an expert determination clause fully permits the operation of the disputes process, from the appointment of an expert through to enforcement of a decision (by one party alone in the absence of any cooperation on the part of the other party).\(^{28}\) If the other party’s agreement is required at any stage and it refuses to give it, there is a risk that the clause may not function (albeit that the uncooperative party may well be in breach of contract in not participating). Having drafted a clause, it is helpful to walk through the operation of the entire mechanism and at each stage to check that it is usable by one party without the other party’s involvement.\(^{29}\)

The following are some of the key provisions of an expert determination clause, together with some of the pitfalls that need to be looked out for when drafting a clause.

### 4.4.1 Appointment of and Identity of Expert

Expert determination clauses almost always provide that the expert will be appointed by agreement between the parties, in addition to setting out the details of a default institutional appointing authority to be used in the absence of agreement. Usually, the clause will set out a timetable for the parties’ appointment of an expert and/or reference to the institutional appointing body.\(^{30}\) Consistent with the theme that the clause must be operable by one party alone, the clause should provide that either party can instruct the appointing authority. It is important to ensure that the chosen appointing authority will actually appoint an expert; otherwise, the appointment cannot be made and the clause may be inoperable.\(^{31}\) It is equally important in long-term energy contracts to ensure that you have selected an appointing authority which will still be around towards the end of the life of the agreement (perhaps 15 or 20 years away). In a long-term contract it may be good practice to include a reference to ‘X’ or any successor organisation’ to cover the circumstances where an authority either changes name or status or merges with another body. For example, in 2003 the Institute of Petroleum (which functioned as an appointing authority) combined with the Institute of Energy to become the Energy Institute.\(^{32}\)

Many expert determination clauses also make some provision for the nature of the expertise required. For example, the Association of International Petroleum Negotiators (AIPN) Unitisation

\(^{28}\) *Ibid.*

\(^{29}\) *Ibid.*

\(^{30}\) Supra note 6 at 43.


\(^{32}\) *Ibid.*
and Unit Operating Agreement 2006 provides that an expert to be appointed in relation to a field redetermination dispute should be “well-qualified, by technical training and experience, in geological and reservoir assessment, economic and subsurface evaluation”. However, there is a balance to be struck between ensuring that a person is appointed with the right qualifications to determine the dispute properly and avoiding being so specific that you narrow the pool of available potential experts to such an extent that it subsequently creates practical difficulties for the parties.\footnote{Ibid.}

It is often sensible for the clause expressly to enable the expert to engage third-party professionals (these may include advisers with a particular technical expertise in a narrow specialist area or legal advisers). Such a provision not only enables the parties to clarify where the cost of such additional professional assistance falls, but may also avoid arguments that if the expert does seek third-party assistance, he is wrongfully delegating part of the determination which he should be undertaking.\footnote{Supra note 6 at 44.}

### 4.4.2 Terms of Reference

Once a dispute has arisen, the usual practice is for formal terms of reference to be drawn up and agreed between both parties and the expert. This then forms a tripartite contract setting out the procedures for the reference, the exact nature of the issues to be determined and practical matters such as the fees and the detailed terms of appointment of the expert.\footnote{Ibid.} It is open to the parties to elaborate on or vary the procedures for the expert determination as compared with those set out in the original contract. Alternatively, if there is no need or desire to do so, or in the event that one party is refusing to cooperate with the expert determination process, there will be no tripartite terms of reference and the determination should be undertaken on the basis of the terms and procedures agreed in the original contract.\footnote{Ibid.}

\footnote{The AIPN Unitisation and Unit Operating Agreement and other AIPN model contracts, \textit{available at:} www.aipn.org. (Visited on 8 July, 2014).}
4.4.3 The Issue

Given that expert determination clauses are almost always accompanied by another dispute resolution mechanism in a contract (whether litigation or arbitration), it is essential that the agreement makes clear which issues fall to be determined under which mechanism. While the precise wording of the particular issue for determination by an expert may well not be known until the dispute has arisen, the clause should at least make clear which types of issues are for expert determination and which are to be resolved under the residual dispute resolution clause.

4.4.4 The Determination

The expert clause should provide that the expert is acting as an expert and not as an arbitrator, and that the decision will be final and binding. Many expert determination clauses also state that the determination should be final and binding ‘save in the event of manifest error’. There has been a certain amount of case law on the meaning of manifest error, but at the least it will mean an error which is ‘plain and obvious’. Some expert determination clauses expressly state that the decision is final and binding unless challenged in an arbitration or the courts within a certain timeframe.

Care should be taken to ensure that the answer which the expert is being asked to produce in his determination actually provides the parties (or again, one party alone) with the desired outcome to resolve the dispute (whether that be the payment of money, a revision to an agreement or a specific action).

If the determination relates to the payment of money and it is desired that the expert be able to award interest, then this needs expressly to be agreed in the expert clause (perhaps with a provision for interest to be payable on late payment as well).

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38 Ibid.
39 Ibid.
40 See also the analysis in Veba Oil Supply Sr Trading GmbH v Petrotrad Inc [2002] 1 All ER 703.
41 Supra note 213 at 44.
42 Ibid.
43 Id at 45.
The clause should state whether the expert should give his reasons when making his determination.\footnote{Ibid.} If the expert is not required to give his reasons, the determination itself can be very short, possibly even only a few numbers (in the case of a valuation or pricing dispute). The less detail contained in a determination, the harder it is to challenge it. However, sometimes the parties will consider that they wish to get some comfort from seeing how the expert got to the answer and will require reasons. International energy contracts it may be worth considering requiring reasons to be given on the basis that enforcement outside the United Kingdom of a court judgment or arbitration award based on the expert determination might have easier passage if the determination contains reasons rather than bare numbers.\footnote{Ibid.}

Finally, some expert clauses provide that the expert should hand determination down in draft to the parties so that they may correct any obvious errors. This has its advantages in avoiding some potential challenges to determination, but the expert will need to be careful that this does not encourage wholesale re-litigation of the issues by the losing party in an attempt to persuade expert to change his mind.\footnote{Ibid.}

\section{4.5 Jurisdictional Issues and Challenges}

Some disputes involving expert determination will end up before the courts. This usually for one of two main reasons: jurisdictional disputes and attempts to overturn the expert’s decision. The fact that expert determination is commonly used in energy contracts is reflected in the high percentage of reported decisions in English cases on expert determination issues which concern energy contracts.\footnote{Supra note 6 at 45.}

\subsection{4.5.1 Jurisdiction Disputes}

Typically, a jurisdictional issue will arise at the outset of a dispute. It may also possible for a party to reserve its position as to the jurisdiction of the expert determine a particular issue and for the determination then to proceed, subject that party’s ability to raise jurisdictional issues in the courts subsequently (although this may be seen as an inefficient way of resolving the issue). In an oil-fired determination case the parties expressly agreed in the expert clause that no act or legal

\footnotesize{\begin{itemize}
\item \footnote{Ibid.}
\item \footnote{Ibid.}
\item \footnote{Ibid.}
\item \footnote{Supra note 6 at 45.}
\end{itemize}}

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proceedings should be brought until the expert had undertaken all of “key steps” in the redetermination process. When one party tried to get a declaration from the court halfway through the process, the court found that the self-imposed prohibition on bringing challenges until the end of the process was valid and stayed the proceedings until the expert had decided the issues.\textsuperscript{48}

Jurisdictional challenges usually address questions concerning which issues parties have agreed should be resolved by the expert and which should be remit to the ‘catch-all’ dispute mechanism in the contract (litigation or arbitration).\textsuperscript{49} Often these questions are apparent only after a dispute has arisen when the breadth of matters in dispute means that the issues do not sit neatly within the particular areas carved out for resolution by the expert in the original agreement.\textsuperscript{50} Of course, the parties can agree after a dispute has arisen to redefine the expert’s role and to broaden or narrow the range of disputes which fall within his remit. However, in the absence of agreement such jurisdictional disputes will end up before the court or arbitral tribunal.\textsuperscript{51} One particular area for jurisdictional challenges involves the question of whether legal issues of contractual construction are to be determined by the expert. As with all jurisdictional issues, the question of whether the expert can determine the meaning of contractual terms will depend on the express wording of the parties’ agreement in the expert’s clause. However, often it is not clearly identified how questions of contractual construction are to be determined. Although in some cases the English courts have shown an inclination not to interfere, particularly if the contractual interpretation issues are closely bound up with the broader factual issues which the expert is determining, more recently there has appeared to be judicial reluctance to conclude that the parties intended non-legally qualified experts to determine legal issues.\textsuperscript{52}

4.5.2 \textbf{Challenges to an Expert’s Award}

Disgruntled losing parties will always consider whether they can challenge or overturn an adverse decision from a tribunal and expert determination decisions are no exception. The losing party has, of course, agreed in the contract to be bound by the expert’s determination; the main


\textsuperscript{49} \textit{Supra} note 6 at 45.

\textsuperscript{50} \textit{Ibid.}

\textsuperscript{51} \textit{Ibid.}

\textsuperscript{52} \textit{Ibid.}
route for challenge, therefore, is that the determination which has been made by the expert was not arrived at in accordance with the agreed contract terms.\textsuperscript{53}

As would be expected, if there has been fraud on the part of the expert or collusion with one of the parties, then the determination will not be binding. In addition, if there has been partiality in the sense of actual bias by the expert, then the decision will be open to attack.\textsuperscript{54} Whether the expert needs to be ‘independent’ of the parties will depend on the terms of the agreement, and there may be grounds for challenge if the expert was required by the agreement to be independent, but was not in fact so.\textsuperscript{55}

The main ground for challenges developed in the case law in England and Wales over the last 20 years is that there has been a material departure by the expert from the instructions given to him.\textsuperscript{56} A distinction may need to be drawn between legal issues and non-legal issues which are before the expert for determination. In relation to non-legal questions, it is clear that the courts will not generally intervene in a matter which falls properly within an expert’s jurisdiction, even if the expert appears to have come to the wrong answer. However, the expert will be open to challenge if he has not undertaken the task that he was required to do, such as answering the wrong question or not following the terms of the agreement which lay down how he is to conduct his determination.\textsuperscript{57} A number of relevant reported cases concern energy disputes, including a case where the inspector (acting as an expert) charged with testing a cargo of gasoil sold free on board Antwerp used the wrong American Society for Testing and Materials (ASTM) testing methodology, with the result that the determination was not binding.\textsuperscript{58}

In relation to legal questions, some expert clauses specifically give the expert jurisdiction to determine questions of construction. However, in a number of cases it has been held that -except where limited issues of construction are closely tied up with the broader non-legal issues which the expert is determining, pure legal questions should be referred to the court (or arbitral tribunal). That is essentially a question of identifying the jurisdiction of the expert, but may give rise to a

\textsuperscript{53} \textit{Supra} note 6 at 46.
\textsuperscript{54} \textit{Ibid.}
\textsuperscript{55} \textit{Ibid.}
\textsuperscript{56} \textit{Ibid.}
\textsuperscript{57} \textit{Ibid.}
\textsuperscript{58} \textit{Veba Oil Supply & Trading GmbH v Petratradelnc} [2002] 1 All ER 703 (CA)
challenge after the determination award has been made on the basis that the expert has exceeded his mandate. It has been suggested more recently (although the point remains undecided) that even in cases where certain identified legal issues are within an expert’s mandate, unless the parties have expressly or impliedly agreed that the expert’s decision on such questions is not “open to review or treatment by the courts”, the expert’s resolution of the issues of law may be capable of challenge in the courts.59

4.6 Energy Disputes which use Expert Determination

This section sets out, by way of illustration, some of the particular types of dispute in the energy sector where expert determination is used.

4.6.1 Power

Long-term electricity purchase agreements in the wholesale markets have for many years used expert determination for the resolution of certain disputes.60 These may include invoicing and pricing disputes, indexation issues and, importantly, change in circumstances clauses covering changes in law and changes to relevant industry documents.61 As mentioned above, expert determination provisions in change in circumstances clauses played an important role during the introduction of NETA in 2001. With the proposed introduction of long-term contracts for differences as a mechanism for the implementation of a feed-in-tariff for low-carbon generation under the UK Electricity Market Reform, and the possibility of changes to the structure of wholesale electricity markets in the United Kingdom and elsewhere, change in circumstances and law clauses will remain an important part of long-term power-related agreements.62

Technical issues such as disputes arising from output metering equipment are also often referred to experts. In power purchase agreements for the supply of renewable energy, disputes which arise from changes to renewable benefits and embedded benefits, and how the risk and reward in relation to any such changes is to be apportioned between the parties, can be referred to an expert. Similarly, in tolling agreements experts have been appointed to resolve a range of

59 BarclaysBank plc v Nylon Capital LLP 120111 EWCA Civ 826; see in particular the obiter dicta of Lord Neuberger MR.
60 Supra note6 at 47.
61 Ibid.
62 Ibid.
disputes, including financial audits such as of a generator’s fixed costs or outage losses, issues concerning the apportionment of transmission losses and engineering issues arising out of modifications to the generating station.\textsuperscript{63}

The nuclear power industry uses expert determination in long-term contracts in much the same way as other sectors of the energy industry. Expert determination clauses tend to be used for pricing and certain ‘technical disputes, as well as ‘change in circumstances/law’ provisions, and these can be found in agreements including fuel supply and logistics contracts.\textsuperscript{64}

4.6.2 Coal

Contracts for the supply of coal, particularly on a long-term basis, sometimes use expert determination for a range of financial and technical disputes. Issues arising out of sampling and analysis (perhaps for sulphur content or other quality issues, or calorific value) and weighing are suitable for reference to an expert. Under a long-term take-or-pay coal contract, in the event of a shortfall in the offtake volumes, the producer will incur the expense of managing and maintaining the excess stocks until they are taken as make-up coal, and this cost may be passed on to the off taker. A disagreement over the amount of these costs is a good example of a dispute which would be suitable for speedy and cheap resolution by an expert with knowledge of the industry.\textsuperscript{65}

4.6.3 Oil and Gas

Expert determination is widely used as a dispute mechanism in oil and gas agreements. This is particularly the case in long-term agreements, but it is also used for technical issues such as quality assessment in oil and gas sales agreements.

(a) Unitisation and Operating Agreements

The long-term nature of unit operating agreements and the sometimes extremely technical geological issues involved in unitisation disputes mean that expert determination is commonly used. Issues such as changes to the unit area and redetermination of the tract participation of parties are often referred to experts for resolution.\textsuperscript{66} The unit operating agreement may contain detailed schedules setting out a variety of procedures for the redetermination, such as the expert guided

\textsuperscript{63} \textit{Ibid.}
\textsuperscript{64} \textit{Supra} note 6 at 48.
\textsuperscript{65} \textit{Ibid.}
\textsuperscript{66} \textit{Ibid.}
proposal, where the parties conduct the redetermination exercise under the full-time guidance of an independent expert who resolves the disputes as and when they arise. Other disputes which might be referred to an expert under a unit operating agreement include issues concerning a decommissioning work programme and budget, or disagreements between the parties as to the terms in which a non-unit facility should be tied into the unit facilities (in which case the expert could be instructed to ‘fill in the blanks’ and draft suitable terms in the absence of the parties’ agreement). A number of reported cases have related to redetermination disputes. In Shell v Enterprise an expert determination of an equity redetermination dispute in the Nelson field in the North Sea was held to be invalid because the expert had materially departed from his instructions in using the wrong computer mapping software package.

(b) Joint Operating Agreements

Joint operating agreements also make use of expert determination provisions. Oil and Gas UK Joint Operating Agreement 2009, for example, has a suggested (provision whereby a defaulting party’s interest is to be valued by an expert event that the defaulting party and the remaining participants that are wishing to acquire its interest cannot agree the price.

(c) Oil and Gas Sales Agreements

Many sales agreements use expert determination for disputes as to quality, invoicing and payment disputes and, importantly, pricing disputes.

Long-term sales contracts often include provisions by which the contract price is calculated using a formula which is linked to published price indices. In the event that a published price to which the contract price is indexed ceases to be published or is changed significantly, expert determination is often provided to resolve subsequent disputes if the parties cannot agree how to amend the price form Long-term contracts also often include price reopener clauses which allow a party to initiate a renegotiation of the price if a specified trigger event occurs.

67 See, for example, the AIPN Model Form Unit Operating Agreement, which includes the expert guided proposal as one option.  
69 Supra note 6 at 49.  
70 Ibid.  
71 Ibid.  
72 Ibid.
In long-term life of field gas or oil sales agreements, expert determination can be used for technical issues concerning the determination of economically recover reserves or, for example, disputes as to what the daily contract quantity should production declines towards the end of the life of the field.73

(d) LNG and oil Shipments

Contracts for the shipment of LNG, gasoil or other hydrocarbons can provide for disputes as to quantity and quality to be resolved by an expert (sometimes referred to as an ‘independent surveyor’).74

One reported decision75 concerned the delivery of a cargo of ultra-low sulphur auto diesel to Cardiff and whether the determinations as to quality and quantity issued by the independent inspector (acting as an expert) were valid.

4.7 Conclusion

The technical nature of many disputes which arise in energy contracts and the fact such agreements are often of a long-term nature mean that expert determination remains a valuable tool for those seeking to draft appropriate dispute resolution mechanisms in energy contracts. When used as a complement to litigation or arbitration, it can enable the effective resolution of issues in an efficient manner.

73 Ibid.
74 Ibid.