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Oil & gas disputes: time to conserve energy?

A world with a heightened focus on costs and cash-flow, project and payment delays and work scope changes brings with it increased potential for disputes. Given the expectations of greater co-operation and collaboration following the Wood Report and implementation of the MER strategy, is the industry's approach to resolving disputes still fit for purpose?

Many North Sea contracts provide only for **litigation**, often defaulting to the High Court in London. Although sometimes necessary, this is rarely an attractive option. Court proceedings are usually costly, swallow up management time and resources and will often take two or more years to get to a final conclusion. Under the burden of an ever-increasing workload, the High Court in England expects parties to raise proceedings only as a last resort. Court fees for commencing proceedings there are now 5% of the claim's value (up to a hefty £10,000 cap). Mandatory pre-action protocols require extensive pre-action engagement to encourage parties to settle before a writ is served. If proceedings are raised, then the emphasis is on costs management –the Civil Procedure Rules in England require case management decisions to take account of the proportionality between likely costs and the issues or amounts in dispute. The Scottish courts are also increasingly considering measures to encourage early settlement and keep costs under close control.

Litigation may not therefore encourage the collaborative approach to problem solving that the new OGA is keen should develop. The adversarial and public nature of a court process can be detrimental to business relationships. So what alternatives could the industry be considering instead?

Don't discount **negotiation**. Direct discussion frequently works. It is important to have the right people involved, and to fully brief them. The negotiators should also understand your best and worst case alternatives to a deal – as with most forms of ADR, a negotiated solution will require compromise so a realistic and commercial assessment is important before any 'red lines' are drawn. If relationships are difficult or discussions stall, then neutral third parties are increasingly involved to try to break the deadlock.

Mediation can help parties work together to identify a solution quickly and preserve relationships. The independent mediator's only role is to facilitate a mutual agreement. This confidential process can save time and costs and help parties understand each other's position. Historically mediation has been little used by the North Sea oil & gas industry. That is changing as awareness increases through successful participation in that process and the industry generally moves to working in a more collaborative way.

Arbitration provides for a third party determination but avoids the publicity of a court action. It can be helpful where specialist knowledge might assist the arbitrator understand the issues. Arbitration is well established in many jurisdictions and since the introduction of the Arbitration (Scotland) Act 2010 the Scottish Government has actively promoted that approach. However, arbitration is rarely significantly quicker or cheaper than court action. Its main advantages tend to be confidentiality, the appointment of a specialist as decision maker and minimising jurisdictional issues where contracting parties are based in different parts of the world.

Sometimes described as a 'pay first, argue later' solution, **adjudication** may appear attractive to some in the current economic climate. There is a statutory right for construction contract disputes to be referred to adjudication, but otherwise it can only be used with the agreement of both sides. Adjudication allows quick initial decisions on disputed payments to preserve cash-flow and ensure work continues during the course of a project. That contrasts with the current industry-standard LOGIC contracts where disputed payments are withheld pending resolution. But adjudication decisions are not final and the short time frames and simplified procedure mean it may not be well suited to high value or complex contract disputes.

Hybrid approaches are also appearing. A **structured negotiation** may bear similarities to mediation; the '**med-arb**' approach, where parties attempt mediation but, if unsuccessful, appoint the mediator to act as arbitrator to determine the issue, is growing in popularity in some industries, although still relatively unusual in the UKCS.

Of course, for some types of dispute there are other options. **Expert determination** may be useful for technical disputes but less so where broader issues are disputed. **Early neutral evaluation** is often suggested but used less in practice given the perceived risk in seeking a non-binding decision from a neutral third party which you cannot enforce if in your favour but is difficult to argue against if it is not. There are also sometimes **statutory options**. For example disputes around third party access to infrastructure can be referred to DECC for determination (although they rarely are). The new OGA will have **dispute resolution powers**, but we do not yet know how extensive those will be, how they will be exercised and to what extent parties will seek OGA assistance once those powers are in place.

With so much else changing in the industry, this is an ideal time to move away from a 'one size fits all' approach. A flexible approach, matching the circumstances of a dispute with the most suitable dispute resolution process at an early stage is likely to bring considerable benefits in costs, time and the preservation of business relationships.

This is the third Foresight article in our Transformation series looking at the future of North Sea Oil and Gas. Discussing various issues from technology to employment and disputes, our sector experts offer their commercial opinions on the future of the industry. Please feel free to forward this Foresight to a colleague or to subscribe to our mailing list here CMSEmployment.Team@cms-cmck.com.

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