

January 2024

CIF Weekly – issue 62

Premier Oil UK Limited v Shell International Trading and Shell Company Limited (for and on behalf of Shell Trading International Limited)

In Premier Oil UK Limited v Shell International Trading and Shell Company Limited¹, concerning a dispute as to the ambit and instructions to be provided to a referee relating to a dispute on changes to the contractual pricing structure, the High Court of England and Wales (the "**Court**") summarised the existing law and provided new guidance as to when it is appropriate for a court to express a view as to the ambit of the powers of a contractually appointed expert **before** those powers have been exercised.

Facts

The case concerned two contracts for the sale and purchase of crude oil between the applicant ("**Premier**") as seller and the defendant ("**Shell**") as buyer (the "**Contracts**"). Both Contracts contained a detailed (and in all relevant respects, identical) pricing structure under which the price was to be calculated, amongst other things, by reference to "*the average of the high and low daily quotations for Urals Rotterdam versus Med Dated Brent Strip as published in Platts (AAGXJ00)*" (the "**Urals Assessment**"). The Contracts further provided that if Platts made a material change to the heading or contents of assessments used within the pricing structure (such as the Urals Assessment), the parties were to agree an alternative source of price information. If the parties were unable to agree, a referee would be instructed to determine the alternative source.

In response to European sanctions having been placed on Russia, Platts made a material change to the methodology used to calculate the Urals Assessment. The parties were not able to agree an alternative source for the price information and

therefore agreed that a referee should be instructed. The parties also agreed that the scope of the referee's powers should be confined to determining an alternative source of price information for the Urals Assessment.

However, the parties could not agree on the instructions for the referee. Whilst Shell sought to give the referee further guidance as to the exercise of its powers, Premier argued that no further explanation or guidance was required for the referee to perform its function under the Contracts and was concerned that Shell's approach might unduly influence the referee to adopt a restricted approach. To resolve this impasse, Premier made a Part 8 application seeking a declaration that, inter alia, no further explanation or instructions were necessary.

The relevant principles to be applied

In its judgment, the Court has examined the relevant authorities concerning the correct approach a court should take when construing expert determination clauses² and the extent to which a court should or can supervise the expert determination process. In doing so, the Court identified the following principles from case law:

- i) *"The court will apply the ordinary principles of contractual construction to determine the effect of the words used by the parties to express the terms of their agreement that relevant disputes should be referred to expert determination.*
- ii) *If the issue for determination is within the matters remitted to the expert, then the court should not interfere with the determination unless the determination is tainted by fraud or collusion.*

¹ <https://www.bailii.org/ew/cases/EWHC/Comm/2023/3269.pdf>

² It should be noted that although this case concerned the appointment of a referee (rather than an expert) both parties

accepted that the applicable principles were those that would apply to an appointment of an expert.

- iii) *If the parties have agreed the principles or procedures pursuant to which an expert is to make their determination, the court does have jurisdiction to decide whether the expert has correctly applied those principles or procedures and can and will set aside a determination made contrary to the agreed principles or procedures, because the expert has acted outside the scope of their authority.*
- iv) *The fact that the issue which the expert is required to determine requires the expert to reach conclusions on the proper construction of the contract does not prevent the expert from reaching those conclusions but, subject to the wording of the contract, the expert's conclusions are open to review by the court even if the contract otherwise provides that the expert's decision is to be final and binding on the parties.*
- v) *The court will not usually intervene before an expert has completed their task even if one or other party fears that the expert may go wrong because, unless there are strong grounds for thinking that the expert is likely to go wrong, the court's intervention is likely to result in a waste of time and the incurring of unnecessary costs.*
- vi) *The decision as to whether to intervene before the expert has made their determination is ordinarily one for the discretion of the court. There do not need to be exceptional circumstances to justify the court reaching its conclusions on the issues of construction first and the court may well do so if the issue in dispute is real, rather than hypothetical, and if it is in the interests of justice and convenience for the court to do so.*
- vii) *The fact that one party may face evidential difficulties in establishing that an expert has gone outside their authority is not usually a legitimate reason for the court to give a pre-emptive ruling. The parties have agreed to submit to a particular form of decision-making with whatever evidential difficulties that might entail.*
- viii) *The court should be careful not to re-write the terms of the dispute resolution mechanism even if one party may no longer regard that regime to be satisfactory.*³

Judgment

It was noted that the parties did not dispute the Court's jurisdiction to construe the relevant provisions before an expert has made its determination in the appropriate case. The question to be resolved was therefore whether this case was an appropriate case.

The Court held that this was not an appropriate case, granting Premier's request for a declaration that the ambit of the referee's powers was prescribed and circumscribed in the relevant clauses of the Contracts.

The Court noted that it did not have to be satisfied that there were exceptional circumstances, but it did have to be shown that there was a real (as opposed to hypothetical) dispute. If there was, the Court was to then consider whether it was in the interests of justice for a court to decide the issues now, or whether the referee should be allowed to make its determination first.⁴

Although there was clearly a dispute between the parties, this was a hypothetical dispute. The dispute was born out of the parties' fears as to the motives of the other party and there was no evidence that the referee would fail to properly understand the exercise it was required to take under the Contracts.⁵

In any case, the Court held that it was not in the interests of justice to decide the scope of the referee's jurisdiction before the referee had reached its determination because, inter alia, the parties were experienced and sophisticated commercial operators that could have chosen to incorporate more detailed guidance for the referee in the Contracts if they had felt it necessary to do so. In addition, there was no evidence to suggest the referee would not be able to apply the relevant clauses and the Court felt that if there were construction issues to be resolved, it would be assisted by having the expert's determination first. The judgment also reinforced the position that a court should be reluctant to make a pre-emptive ruling.⁶

³ See paragraph [34] of the judgment

⁴ See paragraph [42] of the judgment

⁵ See paragraph [43] of the judgment

⁶ See paragraph [44] of the judgment

Comment

Parties should ensure that expert determination clauses are carefully considered and that the ambit of any expert/referee's powers is sufficiently clear and detailed. The Court is unlikely to interfere with the contractual provisions negotiated by sophisticated parties. In particular, in relation to the timing of any Court involvement, it is unlikely that the Court would give input or guidance as to the exercise of the expert/referee's powers before that expert/referee has made an initial determination.

Contact us

We hope that you find this update both useful and interesting. If you have any comments or would like to learn more about this topic, please get in touch with either your usual SH contact or any member of our commodities team by clicking [here](#).

Authors



Rebecca Crookenden

Managing associate, Singapore

D: +65 6622 9560

E: rebecca.crookenden@shlegal.com



Anna Purvis

Trainee solicitor, London

D: +44 20 7809 2107

E: anna.purvis@shlegal.com