THOMSON REUTERS
PRACTICAL LAW™

Dispute resolution in the oil and gas sector: Q&A

by John Gilbert, Bracewell (UK) LLP

Status: **Law stated as at 19-Oct-2021** | Jurisdiction: **United Kingdom**

This document is published by Practical Law and can be found at: **uk.practicallaw.tr.com/w-032-7055**
Request a free trial and demonstration at: **uk.practicallaw.tr.com/about/freetrial**

A Q&A guide to dispute resolution in the oil and gas industry.

This Q&A gives a high-level overview of the typical types of claims in the sector, who the parties to a dispute tend to be, dispute resolution methods used, costs and funding issues, settlement, judgments and remedies, and any specific dispute resolution issues in the oil and gas sector.

Claims in the sector

1. Are there typical claims within the sector?

The range of disputes in the oil and gas sector is broad and it is difficult to say whether there are typical claims within the sector. Types of oil and gas claims include, for example, maritime boundary disputes between states in relation to offshore fields, investor claims under bilateral investment treaties (BITs) and multilateral investment treaties (MITs) such as the Energy Charter Treaty (ECT), disputes between joint venture partners, disputes with service providers and claims made by employees.

However, the disputes that are most specific to the oil and gas sector arise:

- Between oil and gas companies and the host government regarding rights and obligations under licences, concessions or production sharing contracts (PSCs).
- Between the companies exploring for hydrocarbons and then producing them under a joint operating agreement (JOA).
- From contracts for the supply of equipment or services, such as a drilling rig contract.
- In relation to sales arrangements for crude oil, natural gas and liquefied natural gas (LNG).

2. Are there any wider economic, regulatory or political factors that make disputes of any kind more or less common in the sector?

The price of crude oil is the factor that has the biggest influence on how frequently disputes arise in the sector.

Periods of volatility in price or sustained high or low prices tend to give rise to more disputes. For further information, see Article, Avoiding unpredictable results in gas price disputes: helping tribunals to spot the best outcome.

Changes in the attitudes of host states towards the exploration for, and terms for production of, hydrocarbons can also give rise to disputes. There have been periods of resource nationalism which have made disputes with governments more prevalent.

The energy transition away from hydrocarbons has already led to several disputes. This trend is likely to continue.

3. Which issues give rise to the most disputes in the sector?

Given the breadth of potential disputes in the sector, it is hard to identify issues which give rise to the most disputes. The issues vary according to the nature of the dispute. However, at a high level, most disputes arise in relation to the right to hydrocarbons produced, price and risk allocation.

4. Approximately what proportion of disputes become the subject of dispute resolution proceedings?

In the past, a low proportion of disputes would become the subject of dispute resolution proceedings. One reason for this was that the players in the oil and gas sector tended to deal with each other frequently, have established relationships and be involved in multiple projects with each other at the same time. As a result, disputes were often resolved through negotiation.

This has changed over time as new entrants become involved in the sector. Disputes are now more likely to become the subject of dispute resolution proceedings but, nevertheless, the proportion of all differences and controversies that are resolved through formal dispute resolution proceedings is still low.

5. Are there any unusual time limits for starting a claim?

Yes, some contracts provide for shorter time limits than those that would otherwise be imposed by law. Examples include time limits for:

- Claims arising out of any audit of the costs of joint operations under a JOA.
- Claims under a contract with a service provider.
- Claims relating to the sale of crude oil or gas, particularly where standard supply terms apply.

The express terms of the contract in question should be checked. Additionally, potential claimants under investment treaties or investment laws should check those instruments for time limits.

For information on limitation periods under the Limitation Act 1980, see Practice note, Limitation periods: an overview.

Parties to a dispute

6. Who are typically the opposing parties in disputes in the sector?

The opposing party depends on the nature of the dispute. There may be a state or regulator involved in some cases. Frequently, the parties to the dispute are in different jurisdictions and it is often the case that there are more than two parties to the dispute. Typically, apart from governments or regulators, the parties are normally corporate entities.

7. Are parties usually balanced in terms of bargaining power and financial circumstances?

Often, commercial disputes in the sector are between substantial corporate entities with significant financial resources. However, that is not always the case and there are instances of imbalance. These can occur between corporate entities of different scales and where the dispute is between a corporate entity and a state.

Dispute resolution methods: how are disputes typically resolved in the sector?

8. Which courts, arbitral bodies or other organisations commonly deal with disputes?

Given that many disputes in the sector are multi-jurisdictional, it is common for disputes to be referred to international commercial or investment treaty arbitration. For general information on commercial and investment treaty arbitration, see Practice notes, Arbitration: a ten minute guide and Investment treaty arbitration: overview.

For commercial matters, arbitration agreements often refer disputes to institutional arbitration under the arbitration rules of one of the major arbitral institutions such as the International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA) or to ad hoc arbitration under the UNCITRAL Rules. For information on institutional and ad hoc arbitration, see Practice notes, A quick guide to the rules of the leading arbitral institutions and Ad hoc arbitrations without institutional support.

However, in some areas, jurisdiction is typically given to the courts (such as claims relating to projects in the UK Continental Shelf (UKCS)).

For contracts with states, in some cases the relevant government requires disputes to be resolved through the national courts. Where that is not the case, disputes are often referred to investment arbitration under the arbitration rules of the International Centre for Settlement of Investment Disputes (ICSID) or the ICSID Additional Facility.

For information on ICSID and ICSID Additional Facility arbitration, see Practice notes, ICSID arbitration: a step-by-step guide and Procedure in ICSID Additional Facility arbitration and other ADR mechanisms.

Disputes between energy investors and states may also be referred to investment arbitration under BITs or MITs such as the ECT. The ECT provides for arbitration under the ICSID Rules and the UNCITRAL Rules, among others. For information on investment arbitration under the ECT, see Practice note, Investment arbitration under the Energy Charter Treaty. The ECT is in the process of being reformed. (To keep abreast of these developments, see Practical Law Arbitration: What to expect: tracker: Possible revisions to the ECT.)

For a list of materials on arbitration, see The arbitration toolkit. For information on drafting international arbitration clauses, see Practice note, Drafting international arbitration agreements: an overview and Standard clauses, Gas price disputes: arbitration clause with drafting notes.

9. What factors are most likely to influence the choice of dispute resolution method?

Most contracts in the oil and gas sector nominate a dispute resolution method. The most significant factor in choosing a dispute resolution method is that often oil or gas disputes tend to be multi-jurisdictional. The parties are likely to be resident in different countries and, further, the subject matter of the contract may be in a third country. Arbitration is frequently selected as a dispute resolution mechanism that is effective and acceptable to the parties because the parties are often resident in different countries and the contract may relate to activities in a third country.

Arbitration is also often preferred because it is relatively easy to enforce arbitral awards due to the ubiquitous membership of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the fact that arbitral proceedings are generally private and confidential (with the exception of ICSID arbitration, where awards are often published on the ICSID website and certain proceedings where the Mauritius Convention on Transparency applies). For further information, see Practice note, Transparency in arbitration.

For information on arbitration, see Practice note, Why arbitrate?.

10. What are the most commonly used alternative dispute resolution (ADR) methods (adjudication, mediation, ENE, expert determination, dispute boards)?

Again, this varies according to the nature of underlying contract. The most frequently used ADR methods are mediation and expert determination. In some contracts in the oil and gas sector, certain technical or accounting disputes are referred to expert determination with the remainder of disputes referred to arbitration or the courts. Tiered or multi-stage dispute resolution mechanisms are also frequently seen. They tend to provide for a notice of dispute to be given, followed by negotiation between senior executives and then, or alternatively, mediation, before the matter can be referred to arbitration.

For information on the various ADR mechanisms, see Practice note, Overview and comparison of ADR processes. For an example of a multi-tiered dispute resolution procedure clause, see Standard clause, Multi-tiered dispute resolution procedure. For further information on these clauses, see Practice note, Hybrid, multi-tiered and carve-out dispute resolution clauses.

11. Are there any requirements in the sector for a particular type of dispute resolution regime?

As noted above, tiered dispute resolution mechanisms are often used to try to resolve disputes before they result in formal dispute resolution proceedings. Additionally, some companies in the sector have policies requiring that ADR is attempted either before formal proceedings begin or before the final hearing is reached.

Most BITs and MITs provide that the parties must seek to reach a settlement for a period of time (usually six months from the date of a notice of dispute), a so-called "cooling-off period". The parties should comply with these provisions to ensure that the case is admissible and that the arbitral tribunal has jurisdiction to hear it.

12. Are there sector-specific procedural rules that apply to any of these dispute resolution regimes?

Disputes arising in relation to the UKCS are most commonly referred to the English High Court, and a significant number of international parties also choose to refer disputes to the English courts.

For these cases, the Pre-Action Practice Direction on Pre-Action Conduct and Protocols (Pre-Action PD) applied by the Civil Procedure Rules should be followed. In some cases, the Pre-Action Protocol for Construction and Engineering disputes may also apply.

Once proceedings are commenced, they are normally started in or allocated to the Commercial Court or the Technology and Construction Court, each of which have their own guides that should be followed.

Where disputes are referred to arbitration, the applicable arbitral rules should be followed (although these are not sector specific).

For information on the Pre-Action PD and the Pre-Action Protocol for Construction and Engineering disputes, see Practice notes, Practice Direction on Pre-Action Conduct and Protocols and Complying with the Pre-Action Protocol for Construction and Engineering Disputes. For information on litigating in the Commercial Court and the Technology and Construction Court, see Practice

notes, Guide to litigating in the Commercial Court and Technology and Construction Court (TCC).

Litigation, arbitration or ADR

13. Whatever the method of dispute resolution, to what extent do the parties expect to be able to control the procedure and timetable for disputes in the sector? How quick is the process?

Parties in the sector are usually knowledgeable about, or have experience of previous involvement in, dispute resolution. Consequently, they are often highly engaged with the process and want to influence control over the procedure and timetable for disputes. The speed of the process varies considerably depending on the parties involved, the amounts at stake and the complexity of the issues as well as the form of dispute resolution chosen. There is often a need to balance a desire for speedy dispute resolution with the time required to address complex issues in a multi-party dispute.

Generally, arbitration affords the parties greater autonomy and control over the process, among other things, because under most arbitration rules, the parties may nominate their own arbitrators. For information on nominating arbitrators, see Checklist, Appointing an Arbitrator to an International Arbitration.

14. How common are interim applications (such as applications for interim injunctions) and without notice applications?

Urgent issues can arise and, as a result, interim applications and without notice applications sometimes occur. However, given that arbitration is often selected, they are not particularly common due to enforceability issues related to measures ordered by an arbitral tribunal. The parties frequently request advice on the measures they can seek in court in support of arbitration, especially where protective steps are needed before the tribunal is constituted. Emergency arbitrations are also sometimes used.

For information on the court's powers to support arbitral procedure, see Practice note, Supportive powers of the English courts: an overview. For further information on obtaining interim measures from an arbitral tribunal, see Practice note, Interim, provisional and conservatory measures in international arbitration.

For information on emergency arbitrators, see Practice note, Emergency arbitrators in international arbitration.

15. Are expert witnesses used in the sector?

Expert witnesses are often used. Expert evidence can be needed on a wide variety of topics and most cases involve at least one discipline of expert evidence. The types of expert witnesses that are used include geologists, reservoir engineers, drilling engineers, safety specialists, highly experienced operational personnel, scheduling and delay experts, economists, accountants and quantum experts.

For information on expert evidence in international arbitration, see Practice note, Expert evidence in international arbitration. For information on how to appoint an expert, see Standard document, Party appointed experts: letter of instruction (with drafting notes).

For information on expert evidence for use in hearings and trials in the Technology and Construction Court, see Practice note, Technology and Construction Court: witness evidence. For information on expert evidence generally, see Practice note, Expert evidence: an overview.

16. Are appeals possible and common in the sector?

The prevalence of arbitration reduces the number of appeals in the sector since arbitral awards under most national laws are generally subject to very limited appeal. However, challenges to arbitral awards are sometimes seen and disputes that are resolved in court can give rise to appeals.

For more information on appealing English arbitral awards under the English Arbitration Act 1996, see Practice note, Challenging awards in the English courts: an overview.

ICSID awards are subject to only limited review under the ICSID Convention. The principal recourse for a dissatisfied party is an application to annul an award. For information on annulling investment treaty awards rendered under the ICSID Arbitration Rules, see Practice note, Annulment of awards in ICSID arbitration.

17. Is it common in the sector for disputes to receive third party funding?

The use of third party funding depends on the nature of the dispute. For commercial disputes in the sector, it is quite rare to see third party funding used. It is seen more frequently in relation to investment disputes with states. Use of third party funding is likely to increase as national and international regulatory frameworks for that funding develops.

For information on litigation funding, see Practice note, Third party litigation funding in England and Wales: an overview.

For information on third party funding in arbitration, see Practice note, Third-party funding for international arbitration claims: overview.

18. Who typically pays the costs of any proceedings in the sector?

Which party pays depends on the outcome of the proceedings, as the most common approach is that the loser pays. In some contracts, provisions are included which have the effect of each party bearing its own costs if a dispute arises. Whether such an agreement is effective depends on the law governing the contract and applicable to the dispute.

In arbitration, the tribunal has a wide discretion when considering the allocation of liability for costs, the approach to liability for costs and the quantum of any costs award. The rules and laws that govern the allocation and recovery of arbitration costs depends on the applicable national law and the arbitral rules the tribunal is following. For information on the principles governing the recovery of costs in international arbitration, see Practice note, Costs in international arbitration: overview. For an overview of costs in litigation in England and Wales, see Practice note, Costs: an overview.

Settlement

19. Is it common in the sector for disputes that are the subject of proceedings to settle? Why is this?

As in many sectors, a significant proportion of cases that are the subject of proceedings will settle. This is because the process of working towards a trial or final hearing helps the parties to understand with greater clarity the risks that they are facing, and other factors may come into play as time passes since the dispute first arose.

For more information on settling a dispute by negotiation, see Practice note, Settlement: an overview.

Judgment and remedies

20. What remedies are generally awarded in the sector?

The remedies sought and awarded depend on the nature of the case. Often, damages, or an indemnity in respect of a liability, is sought. However, it is also common to see declarations requested to clarify the parties' rights and obligations and sometimes orders for specific performance of contractual obligations.

For more information on:

- The law of damages for breach of contract, see Practice note, Damages for breach of contract: an overview.
- The English court's discretionary power to grant declaratory relief, see Practice note, Declarations.
- The equitable remedy of specific performance in English law, see Practice note, Specific performance.
- Damages in commercial and investment treaty arbitration, see Practice notes, Damages in international arbitration and Damages in investment treaty arbitration.
- Non-pecuniary remedies in commercial and investment treaty arbitration, see Practice note, Non-damages remedies in international commercial and investment treaty arbitration.

21. How are judgments and arbitral awards generally enforced in the sector?

As in most sectors, the parties tend to voluntarily comply with judgments or arbitral awards. For judgments, the route to enforcement depends on the reciprocal arrangements for recognition and enforcement between the country in which the judgment was given and the country where enforcement is sought.

For commercial and some investment arbitration awards, the New York Convention is relied on where applicable. Under the ICSID Arbitration Rules, the recognition and enforcement of ICSID monetary awards is automatic as is recognition (but not enforcement) of non-monetary awards. Non-pecuniary awards are enforced by other means, such as the New York Convention.

An aspect of enforcement in the oil and gas sector is that the currency used for the sale of hydrocarbons is usually US dollars. A first step in enforcing judgments and awards may be to investigate how funds flow for the sale or purchase of oil or gas and whether enforcement can be sought, for example, against sums in a bank account in New York. Consideration may also be given to whether it is possible to enforce over cargoes of crude oil or LNG while they are transported.

For information on:

- Enforcing arbitral awards under the New York Convention, see Practice note, Enforcing arbitral awards under the New York Convention 1958: overview.

- Enforcing English judgments in other jurisdictions, see Practice note, Enforcement of English judgments in other jurisdictions.
- Arbitrating under the ICSID Rules, see Practice note, ICSID arbitration: a step-by-step guide.

22. To what extent is forum shopping likely to be relevant following the end of the Brexit transition period?

Most contracts used in the sector have express choice of jurisdiction or require the parties to refer disputes to arbitration, so forum shopping following the UK's departure from the EU at the end of the UK-EU transition period is less likely.

However, European investors wishing to bring proceedings against European states under the ECT or under BITs between the UK and other European countries may wish to consider restructuring their investment to take the benefit of those treaties. This is because of the 2018 Court of Justice of the European Union (ECJ)'s landmark decisions in *Slovak Republic v Achmea BV (Case C-284/16) EU:C:2018:158* (Achmea) and *Republic of Moldova v Komstroy LLC (Case C-741/19) EU:C:2021:655* which have held that intra-EU arbitrations under intra-EU BITs and the ECT contravene EU law (see Legal updates, ECJ: Arbitration clause in intra-EU BIT incompatible with EU law and Investor-state arbitration clause in ECT incompatible with EU law when applied to intra-EU disputes (ECJ) (Full update)). For information on intra-EU investor-state dispute settlement, see Intra-EU investment disputes: tracker.

Trends in the sector

23. Is there a shift in the sector away from more traditional methods of dispute resolution towards more collaborative ADR techniques?

As described above (see 10. What are the most commonly used alternative dispute resolution (ADR) methods (adjudication, mediation, ENE, expert determination, dispute boards)?), tiered dispute resolution mechanisms involving negotiation or mediation before formal dispute resolution proceedings are already a feature of dispute resolution in the sector. More companies are becoming open to the use of collaborative ADR techniques and it is common for mediation or negotiated resolution of disputes to be suggested before proceedings are commenced or trial or a final hearing reached.

24. What is the incidence of class actions in the sector?

Class actions (or group actions in England) are used in oil and gas disputes. They are most commonly seen where individuals impacted by a project bring a claim against the company behind the project. Several oil and gas companies have faced these claims in the English courts. The number of claims like this is likely to grow as there is a greater focus on the energy transition and litigation is used to put pressure on companies to move away from the production and use of hydrocarbons.

For information on some of the key issues and trends in climate change litigation globally, see Practice note, Climate change litigation.

25. Are there likely to be any significant developments in the near future that will impact on disputes in the sector?

Given the complexity of issues that arise in disputes relating to the oil and gas sector and the fact that corporate entities are often involved, the resolution of these disputes can require review of large amounts of data to identify relevant material. Data review using artificial intelligence is already frequently used and its use is likely to continue to grow.

During the COVID-19 pandemic, hearings have been conducted remotely or in a hybrid manner (with some people in the same room and others joining by video link). As disputes in the oil and gas sector are often multi-jurisdictional, with those involved as judges or arbitrators, counsel, factual or expert witnesses, and the parties themselves located in different countries, use of technology to allow hearings to take place virtually has for many been a welcome development. Even once travel restrictions are eased, video linking is likely to continue to be used to an extent as it offers cost efficiency, a reduction in the need for travel and a lower impact on witnesses in attending hearings.

For an example of how to draft a procedural order for a virtual hearing in arbitration, see Standard document, Procedural Order for Video Conference Arbitration Hearings.

Specific issues in the sector

26. Are there any other specific issues of note when dealing with disputes in the sector?

Disputes in the oil and gas sector may involve several parties. In some instances, the parties are all directly involved in the dispute. However, in others, although

parties are not directly involved in the dispute, they have an interest in it and in its outcome. For example, host governments and regulators may have an interest in the dispute. Alternatively, where there is a JOA in place in relation to a field, the operator under the JOA may be authorised to enter into contracts and pursue or defend claims with third parties, but the other participants under the JOA have an interest both economically and operationally in the outcome of the dispute. As a result, it is important when involved in a dispute in the sector to consider which other parties may have an interest in it and whether steps need to be taken as a result.

In arbitration, the general rule is that only parties to the arbitration agreement can be parties to the arbitration proceedings. For information on multi-party arbitrations and how to join third parties to an arbitration, see Practice notes, Multi-party and multi-contract issues in arbitration and When does an arbitration agreement bind a third party in English law? as well as Article, Joining non-signatories to an arbitration.