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Expert Determination and Arbitration

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1. INTRODUCTION

This paper examines the use of expert determination as an alternative form of dispute resolution to arbitration. In so doing, it considers the manner and extent of use of expert determination, and the reasons for and consequences of expert determination as an alternative to arbitration. The discussion focuses specifically upon *binding* expert determination, a term synonymous with binding expert adjudication and some dispute review board (DRB) structures. This is as distinguished from such non-binding forms as expert appraisals, expert assessments, and non-binding DRB recommendations, which will not be reviewed here.

The nature of expert determination discussed in this paper is, moreover, to be distinguished from traditional expert determination. In the traditional model, the role of the expert is one of valuation only, the parties having engaged the expert as a valuer or assessor to provide contractual certainty on particular issues.[1] The expert may, for example, be engaged as a share valuer in takeover situations; a certifier of value in construction contracts; or as an assessor to establish a market rental value. In contrast, a new and distinct category of expert determination has emerged. Here, expert determination is used as a mechanism for resolving all or particular categories of disputes arising under a contract, a role previously played by arbitration. It is with this latter type of expert determination that this paper is concerned.

The expert has been given different titles under a variety of models of expert determination: adjudicator, expert, DRB. Notwithstanding the use of different terminologies and models of expert determination, the basic process can be described as one where a neutral is appointed to provide an expert determination as to certain referred issues following a simple inquisitorial investigation. While this process is similar to the process undertaken by a traditional valuer, the situations in which it is used are more extensive and complex.

Expert determination has been incorporated into many of the new standard forms of construction contracts to deal with disputes arising under the contract. Following are some examples and short summaries of different models used in Australia:

1. The Australian Department of Defence's Commonwealth of Australia Department of Defence: Head Contract for the Construction of Facilities (1993) standard contract contains provisions which establish an adjudication procedure under which the adjudicator acts as an expert and not as an arbitrator. The Contractor under these contracts is given the opportunity of nominating an adjudicator from a list of selected experts, and also of

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[1] For a comprehensive review of the role of the expert as decision-maker see J. Kendall, *Expert Determination*, 2nd edn (F.T. Law & Tax, London, 1996).

specifying the Contractor's order of preference in relation to the other selected experts. This order of preference is used in the case where the nominated adjudicator is unable to act.

The process is initiated with the service of the required notice. Following the provision of the required notice the parties and the Superintendent meet with the adjudicator to agree on the procedure to be adopted in reaching a resolution. Where no such agreement can be reached, the procedure is determined by the adjudicator. The adjudicator is given the power to open up, review and revise any direction of the Superintendent, and proceed to resolution in the manner agreed or determined as being suitable. A decision must be given seven days after the conclusion of the procedure; however, the adjudicator is not required to provide reasons for the decision.

The decision is final and binding unless a party notifies the other within 14 days of the decision that the dispute is to be referred to arbitration.

2. The Property Council of Australia standard form contract for building and civil works, Project Contract PC-1 (1998), establishes a system whereby disputes or differences arising under specified clauses must be submitted to expert determination unless a resolution is reached within 14 days. The expert determination is usually conducted by an industry expert named in the contract. The contract does not set out any particular procedure to be followed in making a determination and the expert is given considerable scope to decide the manner in which the proceedings will be conducted. The only restriction on the conduct of the expert is the qualification contained within the contract expressly stating that the expert will act as an expert and not as an arbitrator. Where an expert is not specified, or where the person specified is unable or unwilling to act or does not make a determination within the required 28-day period, the expert determination is conducted by the person appointed by a specified nominating authority.

   A determination made under these provisions is final and binding unless a notice of appeal is given within 21 days of the determination being made—in which case the dispute is referred to executive negotiation and arbitration. Notwithstanding this, the parties must give effect to the determination until it is reversed, overturned or otherwise changed through executive negotiation or arbitration.

3. Dispute resolution provisions commonly used in construction contracts entered into by New South Wales government departments (such as the Roads and Traffic Authority and the Department of Public Works and Services) provide for expert determination of a dispute in respect of any fact, matter or thing arising out of or in any way in connection with the works or contract.[2] Where good faith negotiations fail to resolve such a dispute within a prescribed timeframe, it will be determined by an independent expert. This expert is either agreed upon and jointly appointed by the parties or, failing agreement, nominated by the Chairperson of the Institution of Engineers, Australia. The expert determination is conducted in accordance with the rules scheduled to the contract, and the expert is bound by a code of conduct similarly scheduled to the contract. The contract grants the expert the power to open up and review any decision of the Principal's Representative.

[2] However, the standard form New South Wales Government C21 Construction Contract Conditions (1996), also used by the Department of Public Works and Services, instead contains a general expedited arbitration procedure to be employed when a claim is valued under $2,000,000 or otherwise agreed by the parties. This procedure (discussed briefly in section 4 below) would seem to mimic some of the qualities of expert determination while retaining the title of arbitration, but places greater reliance on the cooperation of parties.

The determination is final and binding provided it does not require the payment of an amount exceeding $500,000.[3] Where this is the case, the determination is deemed to be a non-binding appraisal.

Should the expert fail to make a determination within 90 days, the parties may agree to arbitrate, or either party may commence litigation.

4. For the purpose of resolving disputes specifically relating to variations or the Schedule of Rates, the New South Wales Government C21 Construction Contract Conditions (1996) (also used by the Department of Public Works and Services) allows the matter to be referred to a valuer for determination. The valuer can be appointed by the Principal in the contract, agreed between the Principal and the Contractor, or nominated by the President of the Australian Institute of Quantity Surveyors. Once a valuer has been appointed, nominated or agreed upon, the Principal and the Contractor jointly engage the valuer.

   A matter can be referred to the valuer by either of the parties orally or in writing and the valuer is either required, or has the option, to meet with the parties to discuss the matter referred. Where the matter relates to a variation, the valuer must only take into account documents which have been exchanged by the parties and which have been submitted to the valuer. A determination is made by issuing the relevant certificate, and must be made within 28 days of the matter being referred to the valuer.

   The determinations of the valuer are final and binding, and are not open to review in any legal proceedings.

At an international level, examples of standard form contracts implementing expert determination are as follows:

5. All of the new Fédération Internationale des Ingénieurs-Conseils, (FIDIC) contracts[4] contain a tripartite agreement which establishes a disputes adjudication board (DAB) for the resolution of disputes. This board (comprising either one or three members) is appointed by agreement of the contractor and employer to provide an interim dispute resolution mechanism in the form of expert determination. A party may within 28 days after receiving the DAB's decision give notice to the other party of dissatisfaction. This notice may also be given if the DAB fails to provide a decision within a specified period of 84 days (or within a period otherwise approved by the parties). Once a notice of dissatisfaction is received, a party is entitled to commence arbitration of a dispute.

   The contracts outline the obligations of the member/s of the DAB, the Employer and the Contractor as well as the procedural rules to apply to the DAB.

6. The Engineering Advancement Association of Japan (ENAA) 1996 International Contract for Power Plant Construction (Turnkey Lump Sum Basis) provides that the parties can, by mutual agreement, appoint an expert or have one appointed by the International Chamber of Commerce. Where no such agreement can be reached, the dispute is referred to arbitration. The contract also specifically sets out the type of disputes which may be referred to expert determination; however the parties can agree to refer any disputes which do not fall within the scope of this provision for the determination of the expert. Once the dispute has been referred to the expert, a decision must be

[3] This figure may vary depending upon the particular project. For example, under the Design Construct & Maintain Project Deed used by the Roads and Traffic Authority for the Albury bypass project, expert determinations of awards up to $2,000,000 are final and binding.

[4] For example, The Conditions of Contract for Construction 1998, Conditions of Contract for Design-Build and Turnkey 1998 and the Conditions of Contract for Plant and Design-Build 1998 each contain provisions for dispute adjudication boards.

provided within either 30 days of the closing of submissions made by the parties, or in any case within 60 days of the appointment of the expert.

The expert determination is final and binding unless a party serves notice of dispute within 14 days of the decision. In such a case the dispute is then referred to arbitration.

Each of these models of dispute resolution is established by agreement between the parties. This distinguishes them from legislative schemes of adjudication, such as under the Housing Grants, Construction and Regeneration Act 1996, or the New South Wales Building and Construction Industry Security of Payment Act 1999.[5] This paper is concerned only with contractual expert determination.

2. WHY IS EXPERT DETERMINATION A RELEVANT TOPIC?

These are only examples of the use of expert determination as a method of dispute resolution alternative to arbitration. Many non-standard domestic and international contracts also provide for it in one way or another. While there is no real statistical evidence of this growth, the development by institutions of formal rules for expert determination is an indication of its growth in popularity. In Australia, for example, the Institute of Arbitrators and Mediators Australia,[6] and the Australian Commercial Disputes Centre,[7] have developed expert determination rules.[8]

The fact that FIDIC (discussed above), the World Bank and other international organisations[9] have supported the use of expert determination by adopting different models as interim procedures for the resolution of disputes is further evidence of the growth in popularity of expert determination at an international level.[10] The World Bank, for instance, requires disputes under works contracts, supply and installation contracts and turnkey contracts to be submitted to dispute review boards (DRBs) or adjudicators as a prelude to arbitration. The 1995 version of the Standard Bidding Document for Procurement of Works provides mandatory use of DRBs consisting of three members for contracts estimated to cost more than US$50 million.[11]

Because expert determination has gained popularity with relative celerity, concern about its effectiveness as a dispute resolution technique has developed among commentators. Attention has been drawn to the fact that not enough data collection or research has been done to quantify expert determination in terms of its effectiveness. Whatever the validity of such concerns, the extent to which expert determination is being used in the construction and other

[5] The New South Wales 1999 Act implements an adjudication procedure similar to that under the Housing Grants, Construction and Regeneration Act 1996.

[6] This Institute promulgated rules for expert determination in 1997.

[7] The Australian Commercial Dispute Centre established Guidelines for Expert Determination in 1995 and revised its rules in 1997.

[8] For a short discussion on the Institute of Arbitrators and Mediators Australia Expert Determination Rules see A. de Fina, 'Expert Appraisal or Determination' 62 *ACLN* 24. As yet, organisations such as the International Chamber of Commerce, the Chartered Institute of Arbitrators, the American Arbitration Association, the London Court of International Arbitration, the Singapore International Arbitration Centre, and the Hong Kong International Arbitration Centre have not formulated rules or guidelines for the conduct of expert determination.

[9] It should also be noted that the International Chamber of Commerce has a pre-arbitral referee procedure which allows parties to apply to referees for the urgent resolution of disputes as an interim measure. The procedure has many similarities with expert determination and could perhaps be considered one of the first developments of formalised expert determination. It enables recourse at very short notice to a third person who is empowered to order provisional measures needed as a matter of urgency. Under the procedure the parties can choose by agreement the referee required to be appointed by the organisation and in doing so take into consideration his or her technical and professional qualifications.

[10] For a discussion on a perceived drift away from ICC arbitration to expert determination with particular reference to FIDIC and the World Bank see R. Knutson, 'Disputes Provisions: Recent Developments at FIDIC and the World Bank' (1996) 13 *ICLR* 174.

[11] See also for example, The World Bank, Standard Bidding Documents: Procurement of Works Smaller Contracts (1995) section IV, Conditions of Contract clause 24.1–26.1.

industries, at both domestic and international levels, is more than enough to justify the view that, as it becomes a core dispute resolution technique, it deserves close analysis.

3. DISTINCTION BETWEEN EXPERT DETERMINATION AND ARBITRATION?

If expert determination could be shown to have distinct benefits over arbitration then this could go some way in explaining the increased use of expert determination in the place of arbitration. Accordingly, what follows is a comparison of the two procedures, with the objective of identifying some central procedural and substantive differences between expert determination and arbitration. This comparison does not deal with all of the *post facto* criteria relevant to distinguishing between expert determination and arbitration,[12] only those which serve to bring to light the substantive or procedural differences.[13]

3.1. Enforcing the agreement

Usually, the expert determination agreement is contained in a clause which forms part of the written contract, although *ad hoc* expert determination agreements are not uncommon. Such clauses will refer all or some disputes for interim or final and binding expert determination. Essentially, the substantive obstacle to enforcement of such an agreement is the courts' lack of statutory basis for staying concurrent court proceedings to allow the unfettered operation of the expert determination procedure.[14] In contrast, the court does have the statutory power to stay its proceedings in favour of arbitration.

For example, under the Australian Uniform Commercial Arbitration Act 1984 s53(1) a party can apply to stay court proceedings and enforce an arbitration agreement.[15] The reason for this provision was to provide a certain and predictable basis upon which to ensure the enforcement of agreements to arbitrate. Prior to such enactments there was no clear basis for a party sued in a court in respect of a dispute the subject of an agreement to arbitrate to compel compliance with the agreement. Damages for breach of the agreement had provided no obvious deterrent to the party seeking court redress.[16] Expert determination procedures do not enjoy similar statutory protection.

In the Australian jurisdictions it may be possible to invoke the inherent jurisdiction of the Supreme Courts to seek the stay of court proceedings the subject of expert determination agreements. However, there have been some serious difficulties in doing so. The terms 'final', 'conclusive' and 'binding' are often used to describe the outcome of expert determination. There have been challenges to the enforceability of an expert determination agreement on the basis that the parties' adoption of a process described thus constitutes an impermissible ouster of the jurisdiction of the courts. It has been argued that public policy renders void any contractual provisions purporting to oust the jurisdiction of the courts on a question of law, thereby disentitling parties to such agreements to a stay of the court proceedings.

However, the tendency of courts to give weight to the freedom of parties to contract has meant generally that courts have been restrained in interfering with expert determination agreements. In the main, their approach to expert determination agreements has been to interpret the clauses as not ousting the jurisdiction of the courts. In Australia, decisions have

[12] For a brief discussion on the law relating to expert determination in Australia and the criteria used to establish whether a process is expert determination see K. Mealey, 'The Law relating to Expert Determination' 57 *ACLN* 26. The legal distinction is discussed in detail in M. Jacobs, *Commercial Arbitration, Law and Practice*, loose leaf paragraphs 12.50 to 12.195.

[13] For a more in depth discussion of the *post facto* criteria relevant to distinguishing expert determination from arbitration see D. Jones, 'Expert Determination in Commercial Contracts' in M. Cato (ed.), *The Expert in Litigation and Arbitration* (LLP Professional Publishing, London, 1999) 789.

[14] The Arbitration Act (AA) 1996 s9(2) can be used to enforce some expert determination agreements since it provides that an application to enforce an arbitration agreement by staying court proceedings may be made 'notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures'.

[15] See also AA 1996 ss9 and 86 and art36 of the Model Law.

[16] Above n. 13 at 802.

relied on the 1935 High Court judgment of *Dobbs* v *National Bank of Australasia Limited.*[17] The majority said in that case that:

> Parties may contract with the intention of affecting their legal relations, but yet make the acquisition of rights under the contract dependent upon arbitrament or discretionary judgement of an ascertained or ascertainable person.[18]

To this effect, a court is unlikely to interfere with an expert determination unless the expert has acted outside his or her terms of reference as set out in the contract.[19]

But this approach is by no means uniform. A recent decision of the Western Australian Supreme Court stayed a reference to expert determination on the basis that the expert determination agreement was void and against public policy in that it purported to oust the jurisdiction of the courts.[20] With respect, this case appears to contradict the general position adopted by courts in Australia, though it can perhaps be distinguished on the grounds that the dispute involved significant issues of law, a claim of $400,000 and a cross claim of approximately $3.6 million. Because the case involved complex questions of law, the Supreme Court was of the opinion that the expert determination procedure prescribed by the agreement was wholly unsuited to the resolution of the dispute.

Thus parties cannot confidently predict that their 'final and binding' expert determination agreement will be enforced in the face of court proceedings commenced in respect of its subject matter.

3.2. Procedural assistance

If the expert determination process breaks down because, for example, the parties cannot decide upon the appointment of an expert, or if the agreement between the parties is incomplete as to a procedure necessary for the expert determination to be effective,[21] then the agreement to use expert determination may be unenforceable and therefore void. This is a challenge typically brought by a party reluctant to abide by expert determination provisions. Such challenges could be avoided by prescribing in the dispute resolution clause the procedure for expert determination. However, it is difficult if not impossible to provide contractual machinery for every conceivable procedural difficulty.

In respect of arbitration, statutes typically provide for assistance by the courts where procedural difficulties arise. Where, for example, the parties cannot agree on the appointment of an arbitrator, or an arbitrator's impartiality is doubted, there are legislative procedures to help facilitate arbitration and ensure it stays on foot.[22] However, no such procedural assistance applies to expert determination. The courts have refrained from 'filling gaps' in expert determination agreements,[23] and it is therefore imperative that such agreements set out a comprehensive procedure and default provisions which apply when procedural difficulties

[17] Some examples include *Atlantic Civil Pty Ltd* v *Water Administration Ministerial Corporation* (1992) 39 NSWLR 468; *Fletcher Construction Australia Limited* v *MPN Group Pty Ltd* (unreported), Supreme Court of New South Wales, 14 July 1997 *per* Rolfe J; *Fletcher Construction Australia Limited* v *State of New South Wales* (unreported), Supreme Court of New South Wales, 1 December 1997 *per* Hunter J.

[18] (1935) 53 CLR 643.

[19] For example, in the English case *Bouygues UK Limited* v *Dahl-Jensen UK Limited* [2000] BLR 49, Dyson J (drawing an analogy in this respect between adjudication and expert valuation) refused to rectify a clear miscalculation made by the adjudicator in coming to his award, because the mistake was as to fact not jurisdiction. See also *Nikko Hotels (UK) Limited* v *MEPC plc* [1991] 2 EGLR 103, in which a factually erroneous expert valuation as to a rent review was not set aside because it could not be demonstrated that the expert had not performed the task assigned to him.

[20] *Baulderstone Hornibrook Engineering Ltd* v *Kayah Holding Pty Ltd* (unreported), Supreme Court of Western Australia, 2 December 1997 *per* Heenan J.

[21] In *Fletcher Construction Australia Limited* v *MPN Group Pty Ltd*, unreported, NSW Supreme Court 14 July 1997 Rolfe J stated that in the event that the parties cannot decide upon an appropriate procedure the expert is to decide.

[22] See Commercial Arbitration Act 1984 ss9–2 regarding the appointment of arbitrators, s42(1) 'Power to Set Aside Award' and s44 'Removal of Arbitrator or Umpire'.

[23] See, for example, *Triano Pty Ltd* v *Triden Contractors Ltd* (1992) 10 BCL 305.

arise. The common practice is to provide that in certain situations a third party will step in to make a decision as to procedure to prevent the expert determination from breaking down. If an expert determination agreement fails to lay down the procedure and the parties or expert cannot agree on the appropriate procedure, a court can do little other than declare the expert determination agreement unenforceable for lack of certainty.

Moreover, the liabilities of arbitrators and experts may be contrasted. If the parties fail to specify how the proceedings are to be conducted in the expert determination, an expert is left to his or her own opinions or devices. But, unlike arbitrators, experts do not have any legislative protection from liability in relation to their conduct in making a determination.[24] This raises the possibility of the parties suing for professional negligence or breach of the contract with respect to the procedure adopted by the expert as well as for the determination itself. Of course, an expert can avoid liability by obtaining an indemnity from the parties with respect to the determination or attempt to limit potential liability by providing reasons for his or her decision. At any rate neither an arbitrator nor the court can intervene so long as the determination has been made honestly and within power in the sense of in accordance with the contract.[25] If the contract fails to outline the expert's duties, he or she may still need to comply with an implied duty to act fairly,[26] and will owe a duty of care to the parties to the expert determination.

It may well be considered that the only time a lack of statutory procedural assistance would prove a real disadvantage would be when a recalcitrant party refused to cooperate or an appointed expert failed to resolve a procedural difficulty. The effect, after all, of there being no facilitative legislation for expert determination is that the procedure remains at all times in the hands of the contracting parties. But the lesson is that, if an expert determination clause is poorly drafted, then parties are likely to have difficulty enforcing the dispute resolution mechanism. In an effort to avoid these difficulties parties usually incorporate into the expert determination agreement a set of standard rules promulgated by a professional body.

With regard to the issue of an expert's liability, this must be resolved at the outset of the agreement in terms of an indemnity or mechanism for removing the expert in the event of impartiality, incompetence or other. Failing the incorporation of such measures, the grounds upon which an expert's decision can be impugned are based in contract, tort or equity.[27] While the process involved in seeking one of these remedies is cumbersome, parties to an arbitration agreement can simply apply to a court to have an arbitrator removed or to have an award set aside where there has been misconduct on the part of the arbitrator.[28] This statutory recourse is desirable because it bolsters the dispute resolution process and enables a matter to be re-submitted to arbitration. In comparison, an action for damages, for fraud, mistake, breach of contract or negligence, requires a party to attack the expert directly. It may be difficult to prove these claims where the expert has failed to provide reasons for the decision. Furthermore, the court can only award damages or set aside the expert decision and cannot re-submit the matter to expert determination.

3.3. Enforceability of the outcome

There is no legislative basis upon which the expert determination itself may be enforced. Any avenue of enforcement of an expert determination is therefore dependent on the terms of the

[24] See Commercial Arbitration Act 1984 s51 in relation to the exclusion of liability of arbitrators and umpires for negligence.
[25] See *WMC Resources Ltd* v *Leighton Contractors Pty Ltd* (1999) 15 BCL 49.
[26] Where the contract is silent as to a duty to act fairly there is support for the position that the expert is obliged to be fair: see Denning LJ in *Lee* v *Showman's Guild* [1952] 2 QB 329 at 342.
[27] For a thorough discussion of the Australian and United Kingdom's law regarding impugning an expert's decision see M. Jacobs, 'Impugning an Expert's Determination in Australia' (2000) 1 *International Arbitration Quarterly Law Review* 127.
[28] Commercial Arbitration Act 1984 s42(1) 'Power to Set Aside Award' and s44 'Removal of Arbitrator or Umpire'.

contract between the parties. Domestically, a successful party usually brings an action for breach of contract for failure to comply with the expert's determination or sues for the value of the determination as a debt due and payable to it.[29]

For agreements with an international dimension, particular difficulties arise because of the purely contractual nature of expert determination. Parties to an international expert determination are faced with having to rely on the various conventions, treaties and national laws governing the enforcement of foreign judgments in different countries. Understandably, a party would only seek to enforce a foreign judgment in the event that another party is withholding money owed, and considering the time and added cost involved in launching an action to have a foreign judgment enforced, the amount of money owed would have to be considerable. In this respect, arbitration would appear to have a distinct advantage over expert determination in light of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.[30] This convention is widely observed among countries and provides a simple and effective method of obtaining recognition and enforcement of foreign awards.[31] The formalities require a party to simply produce to the relevant court the original or a certified copy of the arbitral award and the original arbitration agreement and the court will grant recognition and enforcement provided none of the grounds for refusal is satisfied.

In practice international organisations have tended to adopt expert determination as a binding interim dispute procedure thereby enabling recourse to arbitration when a party wishes to appeal or needs to enforce an expert's determination. For example, Clause 20.7 of the FIDIC Red Book[32] provides:

> 20.7 Failure to comply with Dispute Adjudication Board's Decision
> In the event that:
>
> (a) neither party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision],
> (b) the DAB's related decision (if any) has become final and binding, and
> (c) if a Party fails to comply with this decision,
>
> Then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 [Arbitration]. Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference.

Incorporating expert determination as a step before possible arbitration is a recognition that the outcome of a binding expert determination is not itself easily enforceable and, apart from the delay involved, is an appropriate fabric for dealing with transnational matters, especially in the light of the fact that a stay of legal proceedings can now be obtained to enforce a dispute resolution procedure under which expert determination is a prelude to arbitration.[33] However, one would query whether it is necessary to have expert determination at all when there is a risk that a lack of cooperation between the parties will force disputes to arbitration. An answer to this might be that the risk of having to resort to arbitration to enforce an expert's determination is outweighed by the benefits to be gained from using expert determination.

[29] The capacity of parties to overturn an expert's decision for even obvious error is generally limited to mistakes as to the expert's terms of reference only, a principle recently confirmed by Dyson J in *Bouygues UK Ltd* v *Dahl-Jensen UK Ltd* [2000] BLR 49, concerning an adjudication under the CIC model adjudication procedure.

[30] A. Redfern and M. Hunter discuss the origins of the New York Convention in *Law and Practice of International Commercial Arbitration*, 3rd edn (Sweet & Maxwell, London, 1999) in Chapters 1 and 10. See also Lord Mustill, 'Arbitration: History and Background' (1989) 6 *Journal of International Arbitration* 43.

[31] Under the New York Convention 1958 there is an obligation on the arbitrator to keep to the international standard of due process.

[32] Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer 1999 edition.

[33] *Channel Tunnel Group* v *Balfour Beatty Construction* [1993] AC 334. AA 1996 s9(2) confirms this decision.

3.4. Practical problems

The expert determination procedure is open to being manipulated or used tactically to create delay. Like any dispute resolution procedure, expert determination may be utilised by a recalcitrant party to disrupt a contract and delay dispute resolution. However, in arbitration, unlike other dispute resolution procedures, the arbitrator has powers to combat a party's dilatory tactics. For example, a court can issue a subpoena to force the production of material, or the arbitrator can progress with an *ex parte* arbitration.[34] A mere expert, on the other hand, has no coercive power, and a court cannot assist the process. An expert determination may therefore be easily derailed if party relations turn sour and cooperation ceases.

Some expert determination agreements have attempted to overcome the difficulty of delay by inserting time restraints in the expert determination clause. If a party fails to submit documents or attend meetings in accordance with the expert determination clause it will be liable for breach. Usually another clause will be inserted into the expert determination agreement referring any dispute or claim arising out of or in connection with the expert determination, or breach thereof, to be finally settled by arbitration. These contractual provisions may create enough dissuasion to avoid delay altogether, but the question again arises: why choose expert determination over arbitration if it is probable that a dispute will ultimately be determined by arbitration? This question is addressed in section 3.5 of this paper.

The issue of a lack of curial power is more serious in terms of the inability of an expert to determine his or her own jurisdiction. Like arbitration, the expert's power is derived from the agreement between the parties. It is now settled that an arbitrator can be empowered to determine his or her own jurisdiction,[35] but there is little case law on the issue of whether a similar power can be conferred on an expert without ousting the jurisdiction of the courts. Where an expert determination clause expressly reserves the right to appeal against the expert's decision on a question of law, or to submit the dispute to arbitration where a party is dissatisfied with an expert's decision, the issue of ouster may not be fatal to the dispute resolution process. On the other hand, where there is no appeal process it remains to be seen whether the courts will consider this conferral an ouster of the jurisdiction of the courts.

If an expert determination agreement fails to clearly delineate an expert's jurisdiction and the types of matters which can be submitted to expert determination there is scope for further delay. Parties may be forced to abandon expert determination proceedings in order to determine subsidiary questions relating to the expert's jurisdiction. This matter is obfuscated by the fact that expert determination, if not stated otherwise in the agreement, often does not require the parties to submit particulars of the dispute or formal pleadings in which event the expert is left with daunting jurisdictional and determinative issues.

Related to the issue of an expert's jurisdiction is the question of what matters should be referred to expert determination. The decision in *Baulderstone Hornibrook Engineering Ltd* v *Kayah Holding Pty Ltd*,[36] discussed above, suggests that expert determination might not be appropriate when there are complex questions of law involved or the construction of legal documents.[37] Further, the models of expert determination adopted by some organisations suggest that expert determination might be better suited to disputes that are financially small.

[34] Commercial Arbitration Act 1984 ss18(1) and 18(2) 'Refusal or Failure to Attend before Arbitrator or Umpire etc'. See *WFA Pty Ltd* v *Hobart City Council* (unreported), Supreme Court of New South Wales, 28 March 2000, *per* Powell JA, where it was held that the powers given the arbitrator under the Tasmanian Commercial Arbitration Act enabled him to refuse deviation from the arbitration timetable formulated by himself and the parties in accordance with the contract.

[35] See Lord Saville, 'The Arbitration Act 1996' [1997] *Lloyd's Maritime and Commercial Law Quarterly* 502 at 508 and *Commonwealth* v *Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662, where Kirby P stated at 675–677 'Of course the decision of an arbitrator as to the scope of her or his own jurisdiction may always be subjected to judicial scrutiny.'

[36] Supreme Court of Western Australia, (unreported) 2 December 1997.

[37] See also R.J. Stephens, 'Civil Litigation, Arbitration and ADR: Will ADR Take Over?' (1992) *ICLR* 89–92.

There is a perception that complex disputes involving large sums of money require the more formal and extensive dispute resolution procedure of arbitration. For this reason it is common to find agreements that provide for expert determination to be final and binding if the amount awarded is less than a certain figure; parties having the right in respect of awards above this figure to invoke arbitration. This type of expert determination has given rise to a concern that, by placing a ceiling figure on the amount recoverable in expert determination, pressure is exerted on the expert to render an artificial decision.[38]

3.5. Summary of procedural/substantive differences

In order to assist the discussion the following is a brief summary of differences between arbitration and expert determination.

Expert determination	Arbitration
There is **no statutory basis for staying court proceedings** concerning matters the subject of expert determination agreements. Other bases for enforcing expert determination agreements are unclear.	The court has a **statutory power** to stay proceedings in favour of arbitration.
Typical **challenges** to the expert determination agreement include: • the expert determination agreement is **void for uncertainty** for failure to specify a procedure; and • the expert determination agreement is void on the basis that it purports to **oust the jurisdiction of the courts**.	**Arbitration statutes** typically empower the courts to assist arbitration where procedural difficulties have arisen. Once an arbitral award is rendered parties still have recourse to the courts for the **setting aside of an award**. See art34 of the model law, 'Application for setting aside as exclusive recourse against arbitral award'.
Experts do not have any legislative protection from **liability** and the different processes for **impugning an expert's decision** are cumbersome.	**Arbitration statutes** protect arbitrators from liability for negligence. Parties to an arbitration agreement have statutory recourse where an arbitrator's impartiality is compromised or the arbitrator is unable to perform his or her duties, such as the **setting aside of an arbitral award** or **the removal of an arbitrator**.
The expert's decision can only be **enforced contractually** on the basis of a **breach of contract**.	**Arbitration legislation** contains provisions for the summary enforcement of awards.
A foreign expert's decision can only be enforced either as a **foreign judgment** (which depends on the rules and national laws of foreign countries), **or sued upon in the place of enforcement**.	**The New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards** is widely observed and enables the enforcement of arbitral awards internationally.
The expert has **limited power** to prevent a party from manipulating the expert determination process and causing **delay**.	The arbitrator has **statutory power** to combat a party's **dilatory tactics**.
Expert determination **may not be suited to all types of disputes** particularly where there are **questions of law** or **multifaceted matters to be resolved**.	**Arbitration** is generally used for all disputes arising out of or in connection with an agreement.

[38] Above n. 13 at 796.

3.6. Given the difference, why expert determination?

The above discussion has highlighted a number of potential drawbacks in using expert determination which parties can attempt to overcome either by carefully drafting a dispute resolution clause or by introducing arbitration as the final step in the dispute resolution procedure. If the chief practice is to refer disputes to arbitration by default, that is, when expert determination has failed, then an apparent use of expert determination would be that of a filtering process for arbitration. With this filtering system only the complex disputes or those disputes requiring more extensive procedures, extra cost and time, will result in arbitration. Accordingly, parties may not so much be choosing expert determination *over* arbitration as using expert determination as a funnelling device in a tiered dispute resolution procedure. However, if this tiered approach involves binding outcomes, either interim or final, the process fails to deliver enforceability, a necessary ingredient of that vital commercial requirement—cash flow.

Increasingly, however, it is clear that some parties are opting for expert determination *instead* of arbitration. If the expert determination clause is drafted carefully then disadvantages in using expert determination over arbitration can be minimised. In order to draft the expert determination clause effectively parties are having to include a mini-set of arbitral rules in their dispute resolution agreements. This means that parties are going to great lengths to develop sophisticated dispute clauses either to avoid using arbitration, or to gain advantages which arbitration cannot provide.

The two lines of thought are related. In recent years arbitration has achieved a reputation for being costly and time consuming. While some commentators have suggested that this reputation is unfounded, it is undoubtedly responsible, at least in part, for the increased use of expert determination. Expert determination, on the other hand, has been praised for its speed and cost-effectiveness, two of the most desirable features of any dispute resolution process.

Another significant feature of expert determination is its informality. Expert determination is an abbreviated, flexible form of issue resolution. Unless otherwise agreed by the parties, there is no need for formal pleadings, discovery or witness statements. There is also no formal hearing, no cross-examination or oral submissions, and the expert is given as much power as stipulated in the contract. The fact that expert determination is a creature of contract creates a real sense of control by the parties over the dispute process. This, coupled with a general dissatisfaction with the formal procedures of arbitration, is perhaps one reason why parties are adopting expert determination over arbitration despite such virtues of arbitration as expedited arbitration procedures and the wealth of legislative and curial assistance available to parties involved in arbitration.

Also related to the issue of informality is a perception that there is more opportunity to preserve relationships through expert determination than with litigation and arbitration. The perception is that, because they are in a non-confrontational, informal dispute, the parties are more likely to achieve a commercial rather than a legal settlement.[39] It has been suggested that expert determination provides parties with a mechanism to avoid or discourage disputes, whereas arbitration is perceived to be more like litigation which requires parties to take an adversarial stance.[40] For contracts with an Asian dimension, expert determination may be a more desirable option precisely because it corresponds with what has been found to be a tradition of avoiding confrontational dispute resolution.[41]

[39] For a discussion on these perceptions regarding ADR in general see P. Brooker and A. Lavers, 'Appropriate ADR: Identifying Features of Construction Disputes which Affect their Suitability for Submission to ADR' [2000] *ICLR* 276.

[40] See J. Kendall, 'Expert Determination in Major Projects' (1997) *International Business Lawyer* 171.

[41] Burton discusses in more detail some of the cultural drawbacks of arbitration in 'Combining Conciliation with Arbitration of International Commercial Disputes' (1995) 18 *Hastings International & Comparative Law Review* 636.

Overall, because there is no real statistical evidence to consider, it could be suggested that some of the perception of expert determination is the result of literature promoting its use.[42] Without research to quantify expert determination in terms of its effectiveness, it is difficult to displace these attitudes or assess whether they are justified.

It is, however, suspected that the continued adherence to the process by government agencies with significant experience of it is not unconnected with some perceived commercial advantage arising from the process. Certainly experienced dispute resolution practitioners advise their clients that the process, though cheap, carries an increased risk of unpredictable failure.

4. NEED ARBITRATION BE SUPPLANTED?

If expert determination is being chosen over arbitration because it provides expeditious resolutions, is cost-effective and helps maintain commercial relationships, then the question that needs to be addressed is whether arbitration can provide these benefits as well. If the answer is affirmative then it may be possible to have a process with all the advantages of arbitration and none of the difficulties of expert determination.

In the 1980s there were a number of high profile arbitrations involving huge costs and delays which gave arbitration a bad name, particularly in the public works and private sectors. As a result, delay and disruption became a major concern in international commercial arbitration.[43] It was realised that if arbitration was to retain a competitive advantage over other dispute resolution techniques it needed to be fast and to institute mechanisms for avoiding cost blow-outs. Since that time, numerous papers have been produced by working groups of different institutions outlining approaches to streamlining arbitration.

Arbitration as a technique combines contractual freedom with the capacity to streamline the dispute resolution process. Parties may choose for themselves the arbitral procedures to be followed. They can dispense with the disclosure of documents or the evidence of witnesses, and even a hearing if they wish. Parties can opt for *ad hoc* arbitration and tailor their own arbitration clauses, rather than accept arbitration conducted under institutional rules. To save time and money in drafting special rules for arbitration, parties can adopt, or adapt, rules of procedure which have been specifically formulated by arbitral institutions. Depending on the type of procedure adopted by the parties, the dispute process can be less confrontational than institutional arbitration and save the parties time and extra costs.

Furthermore, the world's major arbitral institutions have developed accelerated or 'fast track' procedures for conducting arbitration. For instance, WIPO modified its arbitration rules to achieve the objectives of less time and reduced costs by applying time limits to various stages of the arbitral proceedings and condensing proceedings before a sole arbitrator.[44] Such developments have gone some way to providing parties with an ability to avoid delays and added costs. However, since fast track arbitration relies on the parties' will to cooperate, and experience has shown that almost no dispute will run smoothly, it could be said that the process is even more open to the vagaries of delay. Indeed, it would take a rare commercial relationship to ensure that fast track arbitration did not encounter some form of delay. For this reason the general response to expedited arbitral rules has been that they will not become a standard form of dispute resolution.[45]

[42] For a discussion of the effect of literature on perceptions of ADR in general see P. Brooker and A. Lavers, 'Perceptions of the Role of ADR in the Settlement of Construction Disputes: Lessons for the UK from the US Experience' in P. Fenn (ed.), *Construction Conflict: Management and Resolution* (Spon, London, 1992) 49–69.

[43] There were a number of ICCA Congresses during this time which looked closely at ways of avoiding delay in arbitration. See ICCA Congress Series Nos 5, 7 and 9.

[44] WIPO's Expedited Arbitration Rules can be obtained from www.wipo.int.

[45] For comments to this effect see Redfern and Hunter, above n. 30 at 302.

That said, there seems to be a growing market for dispute resolution that relies on negotiation between the parties. This is evidenced by the recent popularity of mediation and increased use of expert determination. It is therefore possible that expedited arbitration will play a bigger part in commercial dispute resolution in the future. It is also possible that, in time, experience with expert determination will prove that it is susceptible to the same difficulties encountered by fast track arbitration. If delay and disruption become major concerns for expert determination, the fickle nature of the expected benefits of expert determination—speed and reduced cost—will be exposed and certain advantages of arbitration may become more apparent. In particular, time may emphasise the ability of parties to adopt modified or streamlined dispute resolution procedures through *ad hoc* or fast track arbitration while maintaining all of the substantive underpinnings of arbitration.

Any perceived benefits of expert determination over arbitration are procedural. Substantively, arbitration legislation does not restrict the process in such a way as to prevent arbitration from providing that which can be provided by expert determination. There is thus no real reason for wanting to avoid the substantive underpinnings of arbitration other than wanting to limit the court's ability to interfere in the dispute resolution process. However, when it is considered that the court only becomes involved in arbitration at the request of one of the parties, usually when the arbitration strikes some procedural or legal difficulty, the risk of increased costs is no greater than that which would apply to expert determination. Indeed, the risk is probably greater with expert determination as there are no laws assisting and facilitating the process.

None the less, even if it is nearly impossible to ascertain a practical reason for choosing expert determination over arbitration, it is clear that expert determination has struck a chord with business people and governments, particularly those in the construction industry. Parties may choose expert determination because of their traditions, the attitude with which they embark on the project, or because expert determination is suited to particular types of disputes. The choice is open to various influences and ultimately the decision will depend on where one wants to sit along the ADR continuum. But the warning remains that, in choosing expert determination over arbitration, parties are agreeing to forsake an internationally enforceable award and an established system of domestic and international laws, in favour of what may prove to be the illusory advantages of speed, reduced cost and informal procedure.