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**Expert Determination: a Challenge to Arbitration?**

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**1. Introduction**

1.1 It is intended to examine the growth in popularity of binding expert determination and to enquire whether this growth has some messages for arbitration as a method of dispute resolution.

1.2 An expert engaged to resolve a dispute may be given different names under various models: expert, adjudicator, dispute resolution board (DRB). However, the basic process with which this discussion is concerned is where a neutral is appointed by agreement to conduct a simple inquisitorial investigation into certain referred issues and make a binding determination. This is to be distinguished from:

- (a) non-binding resolution techniques such as expert appraisal or recommendations;
- (b) traditional expert determination models where experts provide contractual certainty on particular issues such as share valuation or market rental value; and
- (c) legislative adjudication schemes imposed, for example, by the United Kingdom's *Housing Grants, Construction Regeneration Act 1996*, or the New South Wales *Building and Construction Industry Security of Payment Act 1999*.

1.3 Expert determination has been incorporated into many new standard form construction contracts to deal with disputes arising out of the contract. Some Australian examples are:

- (a) the Australian Defence Department's Head Contract for the Construction of Facilities (1993);
- (b) the Property Council of Australia's standard form Project Contract PC-1 (1998) for building and civil works;
- (c) the standard dispute resolution clauses included in contracts entered into by New South Wales government departments such as the Roads and Traffic Authority, and the Department of Public Works and Services.

1.4 Internationally, examples of standard form contracts that implement expert determination are:

- (a) all of the new *Fédération Internationale des Ingénieurs-Conseils* (FIDIC) contracts, which establish DRBs; and
- (b) the Engineering Advancement Association of Japan (ENAA) 1996 *International Contract for Power Plant Construction (Turnkey Lump Sum Basis)*, under which the parties can appoint an expert or have one appointed; and
- (c) the World Bank's works contracts, supply and installation contracts and turnkey contracts, which require disputes to be submitted to DRBs or adjudicators as a prelude to arbitration.<sup>1</sup>

1.5 These are only examples of some standard form contracts which make expert determination available as a dispute resolution alternative to arbitration. Many non-

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<sup>1</sup> See, eg, the World Bank *Standard Bidding Document for Procurement of Works* (1995).

standard domestic and international contracts also provide for it in one way or another.

## **2. Why is expert determination a relevant topic?**

2.1 While there is no hard statistical evidence of the increase in the use of expert determination, the development by institutions of formal rules for expert determination is a good indication of its growth in popularity. In Australia, for example, the Institute of Arbitrators and Mediators Australia, and the Australian Commercial Disputes Centre have each developed expert determination rules.

2.2 Another good indication of a growth in the popularity of expert determination is the fact that international organisations such as FIDIC and the World Bank have embraced expert determination by incorporating various models into their standard form contracts.

2.3 Commentators have voiced concern about the lack of research into quantifying the relative effectiveness of expert determination. Whatever the validity of such concerns, expert determination is becoming a core dispute resolution technique at both domestic and international levels of the construction industry, and warrants close analysis.

## **3. Comparing expert determination and arbitration**

3.1 What follows is a comparison of expert determination and arbitration, which seeks to identify some key procedural and substantive differences between the two techniques.

### ***Enforcing the agreement:***

3.2.1 The essential substantive obstacle to the enforcement of an expert determination agreement is the courts' lack of statutory power to stay concurrent court proceedings in favour of expert determination. In

comparison, there is clear legislative basis for the power of the court to stay its own proceedings in order to enforce an arbitration agreement.<sup>2</sup>

3.2.2 Parties to an expert determination could try to invoke the inherent jurisdiction of the Supreme Courts in Australian jurisdictions to stay concurrent litigation or arbitration. However, in so far as the expert determination agreement purports to be final and/or binding, it might be construed as impermissibly ousting the court's jurisdiction, disentitling parties to a stay.

3.2.3 Courts have actually tended not to interpret expert determination clauses as ousting courts' jurisdiction. Decisions to this effect have prioritised freedom of contract, and relied upon High Court authority that parties may make the acquisition of contractual rights dependent upon the discretionary judgment of ascertained or ascertainable persons.<sup>3</sup> Thus a court is unlikely to interfere with an expert determination unless the expert has stepped outside his or her terms of reference under the agreement.<sup>4</sup>

3.2.4 Nonetheless, this approach has not been uniform, especially as there is some authority that expert determination agreements will not be enforced where they are rendered unsuitable by the complexity of law or the magnitude of claims in respect of the dispute.<sup>5</sup> Thus parties cannot confidently predict that their 'final and binding' expert determination agreements will be enforced.

### 3.3 ***Procedural assistance:***

3.3.1 If the expert determination process breaks down because, for instance, the parties cannot decide on the expert, or a step of the procedure was overlooked, the expert determination agreement may be unenforceable.

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<sup>2</sup> See, eg, s 53(1) of the Australian Uniform *Commercial Arbitration Act* 1984.

<sup>3</sup> *Dobbs v National Bank of Australasia Limited* (1935) 53 CLR 643.

<sup>4</sup> As in, eg, the English case *Bouygues UK Limited v Dahl-Jensen UK Limited* (unreported, 17 November 1999, TCC, Dyson J).

<sup>5</sup> *Baulderstone Hornibrook Engineering Ltd v Kayah Holding Pty Ltd* (unreported, 2 December 1997, Supreme Court of Western Australia, per Heenan J).

Such problems could be avoided by careful drafting but it is difficult or impossible to provide contractual machinery for every conceivable procedural difficulty. Parties try to offset this problem by incorporating into the agreement a set of rules promulgated by a professional body.

- 3.3.2 With arbitration, statutes allow the court to give assistance where procedural difficulties arise. No such assistance is available in respect of expert determination, and the courts have refrained from 'filling gaps' in expert determination agreements.<sup>6</sup>
- 3.3.3 Furthermore, failing the incorporation into the agreement of measures for the removal of an incompetent or partisan expert, the determination can only be impugned in contract, law or equity. Parties to an arbitration, however, can apply to the courts in such circumstances to have the arbitrator removed or the award set aside.
- 3.3.4 It should also be noted that, unlike arbitrators, experts do not have legislative protection from liability in respect of their conduct in making a determination. This raises the possibility of parties suing the expert for professional misconduct or breach of contract in respect of both the procedure adopted by the expert (in the absence of detailed contractual prescription), as well as for the determination itself. Of course an expert may obtain an indemnity from the parties in this regard.
- 3.3.5 Over all, parties will have to weigh the advantages of expert determination in having the dispute resolution procedure entirely in their hands, against the procedural weaknesses encountered when faced with a recalcitrant party or an incompetent or unfair expert.

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<sup>6</sup> See, eg, *Triarno Pty Ltd v Triden Contractors Ltd* (1992) 10 BCL 305.

### 3.4 ***Enforceability of the outcome:***

- 3.4.1 There are no statutory bases upon which expert determinations themselves may be enforced. Domestically, where the unsuccessful party fails to comply with the determination, the other party will usually sue for breach of contract or for the value of the determination as a debt due to it.
- 3.4.2 For international agreements, difficulties are incurred with the purely contractual nature of expert determination. Parties to an international expert determination must rely on the various conventions, treaties and municipal laws governing the enforcement of judgments in each country. Parties to an international arbitration, however, can have a foreign award executed under the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958.
- 3.4.3 In practice, international organisations tend to adopt expert determination as a binding interim method, enabling recourse to arbitration when a party wishes to appeal or needs to enforce an expert's determination.<sup>7</sup> This may be an appropriate way of dealing a transnational dimension to the agreement. However, one must query whether it is necessary to have expert determination at all where lack of cooperation between the parties will trigger arbitration.

### 3.5 ***Practical problems:***

- 3.5.1 Like any dispute resolution procedure, expert determination is open to manipulation or tactical delay. However, the arbitrator, unlike the expert, has some powers to combat a party's dilatory tactics. For instance, in an arbitration, a court can issue subpoenas, or the arbitrator can proceed *ex parte*. A mere expert has no such coercive powers, and the court no power to assist.

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<sup>7</sup> See the *FIDIC Conditions of Contract for Construction for Building and Engineering Work Designed by the Employer* (Red Book) 1999, clause 20.7.



3.5.2 Some expert determination agreements have attempted to overcome the difficulty by incorporating time restraints. A party who fails to meet the timetable will be liable for breach.

3.5.3 More importantly, while it is now settled that an arbitrator can be empowered under the contract to determine his or her own jurisdiction,<sup>8</sup> there is little case law on whether a similar power can be conferred upon the expert without ousting the jurisdiction of the courts. Thus, the issue of ouster may be fatal where the agreement does not expressly reserve the parties' right of appeal. Where the expert determination agreement fails clearly to delineate an expert's jurisdiction, the parties may be forced to abandon the expert determination proceedings in order to settle preliminary issues as to jurisdiction. This problem is obfuscated because expert determination agreements rarely require the parties to submit formal pleadings or particulars.

3.5.4 Furthermore, expert determination might be seen as inappropriate where there are complex questions of law, or claims are of some financial magnitude.<sup>9</sup> Thus it is common to find agreements that provide that expert determination be final and binding if the amount awarded is below a certain figure; for awards above this amount, parties may bring an arbitration. This gives rise to the concern that a ceiling figure on the amount recoverable at expert determination places pressure on the expert to render an artificial decision.

#### 4. **Given the difference, why expert determination?**

4.1 Contracts that implement arbitration and expert determination as different stages of a tiered dispute resolution process may be understood as not so much choosing expert determination *over* arbitration, as using expert determination as an initial filter of

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<sup>8</sup> 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.

<sup>9</sup> *Baulderstone Hornibrook v Kayah*, *op cit*.

disputes. There is however an issue as to whether interim binding expert determination provides sufficient commercial certainty to be worth the trouble.<sup>10</sup>

4.2 However, it is clear that some parties are opting for expert determination *instead of* arbitration. Because minimising the disadvantages of expert determination requires extremely careful drafting - to the point of including a mini-set of arbitral rules - such parties are going to great lengths to avoid arbitration or gain advantages arbitration cannot provide.

4.3 This is for a number of reasons. Primarily, arbitration has achieved a reputation for being costly and time-consuming. Expert determination, on the other hand, has been held up as speedy and cost-effective, which is the suggested reason why government agencies continue to adhere to the process.

4.4 Furthermore, expert determination is an informal, abbreviated and flexible procedure. Unless otherwise agreed, there are no pleadings, discovery, formal hearing, witness statements, cross-examination and so forth. The expert's powers are as stipulated in the agreement. There is a real sense of contractual control, which can be contrasted with the formalities of arbitration.

4.5 Finally, expert determination may provide increased scope to preserve party relations, because it is seen as non-confrontational, and a process which deflects disputes rather than worsens them.

## 5. **Need arbitration be supplanted?**

5.1 If expert determination is being favoured as expeditious, cost-effective and informal, we must ask whether arbitration can equally provide these benefits. If so, it may be possible to implement a process with all of the advantages of arbitration and none of the weaknesses of expert determination.

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<sup>10</sup> If a determination to pay money has to be enforced either through National Courts or by subsequent arbitration (see for example clause 20.7 of FIDIC Red Book) the determination may not be worth the time and trouble of obtaining it.

- 5.2 Arbitration does combine contractual freedom with the capacity to streamline dispute resolution. Parties can design the process and dispense with discovery, witnesses, or even a hearing if they so wish. Arbitration legislation does not restrict the procedure in this regard. And when it is considered that the court only becomes involved in arbitration at the request of a party (usually when some procedural or legal problem has arisen), the risk of increased costs is not significantly greater than the risk had expert determination been implemented.
- 5.3 Furthermore, the major arbitral institutions have developed accelerated or 'fast track' arbitration procedures, which may, for instance, apply time limits and condense proceedings to a sole arbitrator.<sup>11</sup> Given that accelerated arbitration relies on party cooperation, it would take a rare commercial relationship to ensure the process did not encounter some form of delay. That said, the recent popularity of mediation and expert determination indicate a growing market for negotiation-based dispute resolution. It is possible that accelerated arbitration may play a bigger role in the resolution of future disputes.
- 5.4 It is also possible that the fickleness of the perceived procedural advantages of expert determination will be exposed and the substantive advantages of arbitration be more appreciated. In particular, time may emphasise the ability of arbitration to be streamlined while maintaining its unique legislative underpinnings.
- 5.5 However, it is clear that expert determination has struck a chord with business and government, especially in the construction industry. The decision as to whether, and in what way, expert determination is implemented in any given contract will ultimately depend upon where the parties wish to sit along the ADR continuum.
- 5.6 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 facilitative legislation in favour of what may be the illusory advantages of speed, reduced cost and informality. Overall, experienced expert

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<sup>11</sup> See, eg, the WIPO's Expedited Arbitration Rules.

determination practitioners will advise their clients that the process, while cheap, carries an increased risk of unpredictable failure.