# Is Expert Determination a 'Final and Binding' Alternative?

*by* DOUG S. JONES† BA, LLM, FIArbA, FCIArb

*THE author is a partner of the Sydney law firm, Clayton Utz. This paper was originally delivered under the title, 'Expert Determination in Construction Contracts', to the Hong Kong International Arbitration Centre's International Dispute Resolution Conference held between [illegible]nd 20 November 1996. The paper is reproduced by kind permission of the conference organisers.*

## Introduction

In recent years there has been an increase in the use of expert determination as a means of alternative dispute resolution. This is no doubt due in a large part to the fact that litigation and arbitration can be costly, lengthy and cumbersome methods of dispute resolution.

Expert determination can be used in many different ways as part of the dispute resolution process, in both a binding and non-binding form. Three categories of binding expert determination can usefully be identified in order to place this discussion in context. The first is common, and is where the supervising professional (often called Architect or Engineer but referred to in this paper as 'superintendent') carried out a certification role under a construction contract, acting as an expert. [illegible]ondly, expert determination can be used as an intermediate level of appeal from the decisions of the superintendent, subject to review by an arbitrator. This model is sometimes used with a Disputes Review Board ('DRB') where the parties are bound to comply with decisions of the DRB unless and until they are changed by arbitration. Thirdly, expert determination is used as a substitute for arbitration or litigation as a mechanism for resolving some, or all, disputes arising between the parties.

Non-binding expert determination is a popular form of alternative dispute resolution. Here the parties engage an expert to appraise an existing dispute and suggest an outcome. Although the suggested outcome is non-binding, it is used to further negotiations thus assisting the parties to reach their own agreed solution to the dispute. As this paper is concerned with binding expert determination, this is not the place to do other than recognise the existence, and importance, of the non-binding process.

Binding expert determinations can take a variety of forms. However although they may differ in process, there are common considerations relating to the enforceability of the agreements themselves, and of the determinations produced by them.

The main focus of this paper is on the third form of expert determination mentioned above, namely its use as a final and binding dispute resolution mechanism. This is a relatively new phenomenon and will be contrasted with arbitration as a means of dispute resolution. While expert determination has a valuable role to play, some of its drawbacks, especially in the international context, are quite significant from both a legal and a commercial viewpoint. In particular, because of the wholly contractual character of expert determination, the process lacks the support available domestically and internationally for arbitration processes and awards. These issues seem to have received inadequate attention in the drafting of a number of provisions to be found in some recent domestic and international contracts.

## What is an expert determination?

Expert determination is not a new phenomenon. For hundreds of years, contracting parties have agreed to submit issues for determination to third parties with expertise in particular areas. But the types of issues referred to experts have traditionally been narrow in scope, typically involving the expert only in a process of valuation. Thus, experts have been used for rent review purposes in the context of long term leases, as share valuers in takeover situations, and as certifiers in construction contracts. An expert's terms of reference in situations such as these are clear and narrow. For example, he or she may be required to determine the market value of a parcel of shares or the proper value of

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a claim for interim payment by the contractor under a construction contract.

The new breed of expert determination clauses is, however, different. A typical agreement would provide:

> 'If any dispute or difference arises out of or in connection with the project, either party may by notice in writing to the other party require that the dispute be referred to expert determination.
>
> The expert shall act as an expert not an arbitrator and his or her decision shall be final and binding on the parties.
>
> The expert must act in accordance with the rules for the expert determination in Schedule X.'

Thus there is no reference of an objective fact, but rather an entire dispute is referred. Clauses such as the one above have been held to confer extremely wide jurisdictions on arbitrators to decide on disputed issues ranging well beyond those arising out of the contract. There is no reason why they should not confer similarly wide jurisdictions on experts, and as such they pose challenges different to more traditional processes of expert determination.

The practice of using expert determination as a means of final and binding dispute resolution raises in its subtlest form the distinction between an expert and an arbitrator. The relevance of this distinction cannot be overstated, since an expert determination which is in fact an arbitration will be subject to a legislation relating to domestic or international arbitrations. Such a result would bring with it a number of consequences such as the 'disadvantage' of curial review, but also the prospect of enhanced enforceability.

A classic exposition of the difference between an expert and an arbitrator is that of Lord Esher MR in *Re Dawdy*.[1] His Lordship explained the difference as follows:

> '... An arbitration [is] to be conducted according to judicial laws, where the person who is appointed arbitrator is bound to hear the parties, to hear evidence if they desire it and to determine judicially between them. He must have a matter before him which he is to consider judicially. As a consequence of this, it has been held that if a man is, on account of his skill in such matters, appointed to make a valuation, in such a manner that in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge and his skill, he is not acting judicially; he is using the skill of a valuer, not of a judge.'

It can thus be seen that a hallmark of an arbitration is quasi-judicial procedure. But this really begs the question: How similar to court procedure must a process be in order for it to be characterised as an arbitration?

It is intended to give some substance to this question. An attempt will be made to discern the essential characteristics of arbitration. First, it is proposed to discuss arbitral procedure, with particular reference to the scope for simplifying it. Secondly, a number of judicial statements relating to the distinction between experts and arbitrators will be considered. Thirdly, some conclusions will be drawn, and finally, a number of contractual provisions currently in use will be considered in the light of these conclusions.

In approaching the question its statutory context cannot be ignored. The expert/arbitrator distinction usually arises where arbitration legislation is sought to be invoked, and thus the definition of exactly what type of dispute resolution process the particular legislation is expressed to govern is particularly relevant. The term 'arbitration' is typically not defined as such. Some guidance may be drawn from the arbitral procedure contemplated by each particular piece of arbitration legislation. Thus, for example, the obligation to follow the rules of evidence may in some cases be regarded as decisive in making a process into an arbitration, but if the relevant legislation contemplates an arbitration not bound by these rules[2] then clearly this obligation cannot be decisive.

*Arbitral procedure*

Arbitration has a somewhat undeserved reputation for being incapable of delivering speedy and cheap dispute resolution. This is no doubt due to the temptation in arbitration to mimic traditional court procedure. In many instances the arbitrator's fear of criticism by a court has resulted in arbitration procedures being more cumbersome than the foreshortened procedures available even in the commercial courts.

As a consequence of the essentially consensual nature of arbitration, arbitral proceedings can be as simple and quick as the parties agree, subject of course to any relevant legislation. If a dispute reaches arbitration, the parties, and particularly their advisers, should look carefully at ways of simplifying the process. In the past there has been too little advantage taken of the opportunity to agree upon a simplified procedure at the commencement of an arbitration. This may be attributed to:

- a perception that it is to the commercial advantage of one party to lengthen, delay and increase the expense of the process; and
- a lack of preparedness on the part of lawyers confidently to advise their clients of the advantages (and risks) of simplified arbitration procedures due to a fear of leaving stones unturned in the path to victory.

It is relevant to consider the scope for simplified arbitration for two reasons. The principal reason is that it bears strongly on the expert/arbitrator distinction. Although it is said that the hallmark of an arbitration is

[1] (1885) 15 QBD 426; 54 LJQB 574; 53 LT 800.

[2] See, for example, the *Commercial Arbitration Act* 1984 (NSW) s19(3), which forms part of uniform arbitration legislation enacted by all the Australian states and territories.

quasi-judicial procedure, there is in fact so much scope for departing from this that the expert/arbitrator distinction can at times become quite unconvincing. A subsidiary reason is to point out that if the scope for simplified arbitration was better appreciated in the industry, the perceived need for expert determination would be reduced.

Ways of modifying or eliminating various procedure steps should be part of an active consideration by lawyers and their clients, and by arbitrators, at the commencement of the arbitration. Methods of simplifying the arbitral proceedings include:

- 'papers only' arbitration where the arbitrator decides issues of contract construction or technical interpretation on written submissions from both parties without the need for any pleadings or (sometimes) any hearing;
- limitations on discovery of documents, a process which can bury both parties in mountains of paper only some of which has any relevance to the issues;
- 'look and sniff' arbitrations where the issue is quality of work and the arbitrator looks at the work in question and makes a binding determination within days of the dispute arising;
- simplified pleadings and statements of the matters at issue;
- presentation of evidence in writing rather than orally with (sometimes) a limited time for cross-examination;
- exchanges of expert reports prior to hearing with or without a requirement for the experts from the opposing sides to confer and isolate for decision in an appropriate way only those issues on which they cannot agree.

The arbitration process can be as streamlined as the parties wish. This is one of the major advantages of arbitration. It is, in fact, partly due to a failure to recognise this advantage that the perceived need for expert determination has arisen.

It can thus be seen that it is possible for an arbitration not to have very much in common at all with court proceedings. The lowest common denominator of all arbitrations is quite low. If it is said that an expert is not bound to hear the parties, then it can be said of an arbitrator that he or she need only receive written submissions. If it can said of an expert that he or she can 'decide solely by the use of his [or her] eyes',[3] then it can be said that an arbitrator has considerable scope to inform him or herself.

*Some comparisons*

The following table identifies some of the attributes which have been regarded as persuasive in distinguishing between expert determinations and arbitrations in a number of cases where the character of the particular process has been in dispute. The distinctions are of two broad kinds: those relating to the *substance* of the matter being determined, and those relating to the *procedure* by which it is determined. The list is obviously not exhaustive.

*A definitive difference?*

If the distinctions relating to substance referred to above are rigorously applied, the attempts of the drafters of the new breed of expert determination clauses to exclude the operation of arbitration legislation are in vain. There is no question that a number of these clauses deal with the sort of subject matter traditionally dealt with by arbitrators and courts. The disputes have been formulated, and, apart from instances where the *Scott v. Avery*[4] principle may operate, the rights being dealt with are 'accrued'.

It is suggested, however, that the distinctions relating to process are more relevant. The judicial statements relating to distinctions of substance can be explained on the basis that, in the past, parties chose to use the expert determination process only when they required a determination of future rights and/or objective facts.[5] Where a formulated dispute as to accrued rights occurred, parties generally chose to use arbitration. It now happens that they are seeking to use the expert determination process to resolve formulated disputes as to accrued rights. Current thinking about party autonomy in commercial dispute resolution demands such an approach. To say that it is the substance of a dispute which determines whether it will be an expert determination or an arbitration is to say that the courts should interfere with the form of dispute resolution process parties choose. Having said that, however, there is little or no authority at present to say that courts will not prefer the substance approach. Nevertheless, the research for this paper disclosed no case in which a purported expert determination was held in substance to be an arbitration.

Adopting a procedure approach, it is suggested that an important essential characteristic of arbitrations is the right of each party to present its case and to answer the case against it. Both the New York Convention and the UNCITRAL Model Law recognise the right to present one's case as being crucial to an arbitration, since failure to accord this right is a ground for refusal to enforce an award.[6] If the parties intended to possess these rights, then, it is suggested that they intended their dispute to be resolved by arbitration.

Obviously this criterion is quite a general one, but it is given substance by some of the case law on arbitration.

[3] *Re Dawdy* (1885) 15 QBD 426; 54 LJ QB 574; 53 LT 800 per Lord Esher MR.

[4] (1856) 5 HLC 811; 10 ER 1121; [1843–60] All ER 1.

[5] As will be seen below, they were probably wise.

[6] New York Convention Art V(b); UNCITRAL Model Law Arts 34(2)(a)(ii) and 36(1)(a)(ii).

**Substance**

| EXPERT DETERMINATION | ARBITRATION |
|---|---|
| An expert may address **issues to which the parties have not adverted their minds.** | An arbitration must be addressed to a **formulated dispute.** (*Arenson v. Casson Beckman Rutley & Co.* [1977] AC 405 at 424 *per* Lord Simon of Glaisdale.) |
| An expert is more likely to determine **future rights**, such as the price to be paid for a parcel of shares, or the rental on a lease which is being renewed. | An arbitration is more likely to decide on **'accrued' rights** (*Thomas Cook Pty. Ltd v. Commonwealth Banking Corporation* (1986) ANZ ConvR 599 at 602 *per* Foster J). |
| The reference of an **objective fact** 'such as a rental or price' suggests an expert determination (*Ajzner v. Cartonlux Pty. Ltd.* [1972] VR 919 at 930 *per* Pape J). | By contrast, an arbitration is likely to involve the making of **value judgments.** |

**Procedure**

| EXPERT DETERMINATION | ARBITRATION |
|---|---|
| An expert is less likely to be required to give **reasons.** | The requirement of a **reasoned judgment** is persuasive of the process being an arbitration (*Arenson, supra* per Lord Simon at 424; *Sport Maska, supra* per L'Heureux-Dubé J at 596). |
| A person whose decisions are **reviewable** by an arbitrator is unlikely to be an arbitrator itself (*Sutcliffe v. Thackrah* [1974] AC 727 *per* Lord Morris at 744). | **Finality** suggests an arbitration (see *Sport Maska, supra per* L'Heureux-Dubé J at 589). |
| An expert is less likely to receive **rival contentions.** | The reception of **rival contentions** is persuasive toward the process being an arbitration (*Arenson, supra per* Lord Simon at 424). |
| An expert is **not necessarily bound to hear the parties.** | The parties to an arbitration have the **right to be heard** if they wish: *Hammond v. Wolt* [1975] VR 108 at 112 *per* Menhennitt J, and the cases cited therein. |
| A decision based on **personal expertise**, especially if the tribunal possesses **professional status**, suggests that the process is an expert determination (see *Sport Maska Inc. v. Zittrer* [1988] 1 SCR 164 at 589–90 *per* L'Heureux-Dubé J). | An arbitral award is more likely to be based on the **submissions** made by the parties, and to be governed by the **dispositive rule**, whereby the arbitrator's choice is 'limited by fixed options determined by the opposing arguments of the parties' (*Sport Maska, supra per* L'Heureux-Dubé J at 596). |

Thus 'each party [to an arbitration] must have a reasonable opportunity to challenge the case put forward by his opponent'.[7]

If an arbitrator informs him or herself, or uses his or her own knowledge, then, in the absence of agreement from the parties, this must not be permitted to take them by surprise.[8]

At present, we may need to satisfy ourselves with likening an arbitration to an elephant: 'it is very hard to describe but you know one when you see one'.

The foregoing emphasises that, where expert determination is used as a means of resolving a defined dispute, it is at the borderline of arbitration, and unless the relevant contractual provisions are drafted very carefully there is a real likelihood that it may be an arbitration.

*Some commonly used drafting devices*

It is proposed in this section to deal with a number of phrases commonly found in expert determination agreements, especially with regard to the effects they may have on whether the dispute resolution process is to be regarded as an expert determination or an arbitration.

'... acting as an expert not an arbitrator ...'

[7] Mustill and Boyd, *Commercial Arbitration*, 2nd ed., p308.
[8] Mustill and Boyd, *Commercial Arbitration*, 2nd ed, pp310–11 and 360–1.

It is trite law that such a phrase will not operate to transform what is in reality an arbitration into an expert determination.[9] On the other hand, where there are no other conclusive factors, these words may be persuasive.[10] Because the difference between an expert (in a dispute resolution context) and an arbitrator is often so subtle, these words can be effective.

> '... the parties must provide the expert with a written statement of the dispute or difference and written submissions in support of their respective contentions ...'

Provisions such as these, endowing the disputants with the rights to present their cases and answer the cases against them, appear to move the process dangerously close to the nature of an arbitration.

> '... the expert shall not be bound by the rules of evidence and shall not be required to give reasons for his or her decision ...'

One aim of provisions such as these may be to put beyond doubt that the expert is indeed an expert and not an arbitrator. A common approach is to exempt the expert from the *duty* to proceed in a manner characterised by judicial activities such as hearings and reasons and instead to leave all of these things up to the expert's *discretion*. In this case, the question arises whether the manner in which the expert determination was actually practised is relevant to determining whether it was in fact an arbitration.

> '... the expert shall follow the rules of natural justice ...'

'Natural justice' is a term of such indeterminate meaning that its use should be eschewed in framing expert determination agreements. It is strongly arguable that it means the parties must be allowed to answer the cases against them. As such it may serve to characterise the process as an arbitration.

**The expert's jurisdiction**

It is proposed here to consider two phrases commonly used in the drafting of expert determination agreements and their likely effects.

> '... any dispute or difference which arises out of or in connection with the contract or the project shall be referred to expert determination ...'

In cases relating to the jurisdiction of arbitrators, phrases such as this have been held to confer jurisdiction over a wide variety of claims and disputes, including:

- claims in tort which are closely connected with the contract.[11]
- release, estoppel, waiver or set-off.[12]
- internal rectification of the contract.[13]
- in Australia, claims for civil remedies under the *Trade Practices Act* 1974 (Cth).[14]

There seems no reason why phrases such as these should not confer a similarly wide jurisdiction upon the expert.

> '... the expert shall have exclusive jurisdiction in respect of disputes valued at less than $100,000 ...'

The object of such a provision is obviously to limit the expert determination to small matters appropriate for the speedy resolution which it provides. Presumably the parties have regarded larger matters as warranting a more extensive process. However, it is suggested that provisions such as this may be productive of almost insoluble disputes. The question arises whether a given claim encompasses one dispute of a large value or many disputes of a small value.

It can be seen that, for example, in construction disputes which are notorious for the myriad tangled chains of causation, this question easily breaks down into nonsense.

An alternative to this form of drafting is to provide that the determination will only be final and binding if it awards less than some maximum figure. This does not seem, however, to be any more satisfactory, since it is likely to place pressure on the expert artificially to alter the amount he or she is awarding if it is approaching the ceiling figure. For example, if the correct outcome was to award $105,000, the expert may feel obliged to award $99,000 to ensure finality.

**Court proceedings brought in breach of an expert determination clause**

Where court proceedings are brought in breach of an arbitration clause, two types of defence may be invoked. One is of a substantive kind, namely, that if the arbitration clause is in *Scott v. Avery*[15] form, no right of action in respect of the matters agreed to be referred can arise until reference to arbitration has occurred. The other is a procedural defence, whereby the court is invited to decline to exercise its jurisdiction by granting a stay of court proceedings in favour of arbitration. Arbitration legislation normally provides for this

[9] *Re Hammond & Waterton* (1890) 62 LT 808 at 809; *Re the King and the Acclimatisation Society of Queensland* [1913] St R Qd 10 at 21; *Ajzner v. Cartonlux Pty. Ltd.* [1972] VR 919 at 928.

[10] See, for example, *Re Premier Trust Co. and Hoyt and Jackman* (1969) 3 DLR (3d) 417 (Ontario Court of Appeal); *Thomas Cook Pty. Ltd. v. Commonwealth Banking Corporation* (1986) ANZ ConvR 599 at 603.

[11] For example, *Astro Vencedor Compania Naviera SA of Panama v. Mabanaftag GmbH (the Damianos)* [1971] 2 B 588; *The Playa Larga and Marble Islands* [1983] 2 Lloyds Rep 171; *Ashville Investments Ltd v. Elmer Contractors Ltd.* [1988] 2 Lloyds Rep 73.

[12] *Kathman Investments Pty. Ltd v Woolworths Pty. Ltd.* [1970] 2 SASR 498.

[13] *Ashfield Investments Ltd. v. Elmer Contractors Ltd.* [1988] 2 Lloyds Rep 73; *Overseas Union Insurance Ltd. v. AA Mutual Insurance Co. Ltd.* [1988] 2 Lloyds Rep 63.

[14] *National Distribution Services Ltd. v. IBM Australia Ltd.* (1991) ATPR 41-077.

[15] (1856) 5 HLC 811; 10 ER 1121; [1843–60] All ER 1.

course. At the international level, the courts' discretion not to grant a stay is often very limited or non-existent.

Each of these defences has a counterpart in the context of court proceedings brought in breach of an expert determination clause. I consider each of these in turn.

*Substantive defence*

It is a well established principle of law that, if a party possesses a right of action (eg for breach of contract), the jurisdiction of the courts to deal with that right of action will not be ousted by an agreement to refer it to arbitration,[16] to the courts of a foreign jurisdiction,[17] or, it is suggested, to expert determination. This means that, where court proceedings are brought in respect of an accrued right of action which has been agreed to be referred to expert determination, the scope for enforcing the expert determination clause lies within the court's (possibly limited) discretion to stay the action.

It is suggested, however, that there is a possibility of avoiding this problem by providing in the contract that no rights for breach of the contract will accrue apart from those established by the expert determination process. This possibility is based not on any direct authority but on a number of general principles. It must be emphasised that achievement of this result (if it is possible) would required careful drafting.

The first relevant principle is that of *Scott v. Avery*[18] which established than an arbitration agreement can effectively provide for reference to arbitration to be a condition precedent to the accrual of a cause of action in respect of a matter the subject of the agreement. The cases on ousting the jurisdiction of the courts were distinguished on the basis that, if arbitration was a condition precedent to the accrual of a cause of action, court proceedings could not be brought prior to arbitration, because no cause of action existed over which the court could have jurisdiction. Thus, a *Scott v. Avery* clause provides a substantive defence to court proceedings brought in breach of it. It should be noted that some arbitration legislation abrogates the *Scott v. Avery* principle. This principle can apply even where the conditioning event is not reference to arbitration.[19] Thus, for example, contractual provisions that written notices given within certain time periods are to be conditions precedent to the accrual of rights of action have been given effect to by the courts.

An expert determination is not quite the same as the *Scott v. Avery* situation, however, because it is rarely supposed that the right of action will continue to exist after the expert determination. It would be arguable that an expert determination clause in *Scott v. Avery* form would not so much make the determination a condition precedent to the accrual of a cause of action, as prevent a cause of action from ever arising. This may be regarded as an ouster of the courts' jurisdiction.

It is sufficient to say for the purposes of this paper that, while a strong argument can be made to the effect that the reasoning of *Scott v. Avery*[26] is robust enough to cover the case of an expert determination, it is distinguishable, and it would be foolish to express a concluded view with confidence.

The second principle is that which permits the parties to a contract to decide what the consequences of a breach will be. In the absence of any terms relating to the consequences of breach, the common law provides remedies (ie damages, and in the appropriate case, equitable remedies). The parties are free to add to these common law remedies, as they do in respect of defective work in construction contracts. Defects liability clauses commonly provide for a number of different remedies, such as rectification, variation (designing around the defect) and debt. The parties are also free to exclude the common law remedies. The principle was aptly put by Lord Diplock:

> 'It is, of course, open to parties to a contract ... for work and labour ... to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law .... But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption'.[20]

Thus it may be possible to provide that a breach of contract shall result in reference to expert determination, and that the only remedies shall be such as the expert orders. Clear words would be required to achieve this result.[21]

The extent to which these principles will apply to rights of action arising independently of contract has yet to be explored, and may be limited. Thus, although an expert determination clause may purport to confer a wide jurisdiction on the expert to determine disputes relating to tort, estoppel and, amongst other things, certain statutory remedies, it may not be possible to draft the expert determination clause so as to provide a substantive defence to court proceedings brought in respect of these claims.

In particular, if there is a right which arises by operation of law or under statute and which is unable to be excluded by contractual provision,[22] then there is some doubt as to whether the parties can place a condition

[16] *Thompson v. Charnock* (1799) 8 Term Rep. 139; 101 ER 1310.
[17] Unless either the Brussels or Lugano Conventions apply.
[18] (1856) 5 HLC 811; 10 ER 1121; [1843–60] All ER 1.
[19] *Dobbs v. National Bank of Australasia Ltd* (1935) 53 CLR 643 at 652; *South Australian Railways Commissioner v. Egan* (1973) 130 CLR 506 at 531 *per* Stephen J.
[20] *Gilbert-Ash (Northern) v. Modern Engineering (Bristol)* [1974] AC 689 at 717 per Lord Diplock.
[21] See *Hudson's Building and Engineering Contracts*, 11th Edition, 1995 para 18.041.
[22] An Australian example is to be found in the duties imposed by the *Trade Practices Act* 1974 (Cth).

precedent on its accrual in accordance with the *Scott v. Avery* principle. In *South Australian Railways Commissioner v. Egan*,[23] it was sought to be argued that claims in the torts of detinue and conversion were barred on the basis that a certain written notice, which had not been given, was, in accordance with the *Scott v. Avery* principle, a condition precedent to their accrual. This argument was rejected, albeit as a matter of construction of the contract, since the claims in detinue and conversion were not said to arise out of the contract.[24]

Furthermore, it seems clear that the principle enunciated by Lord Diplock above is expressed to apply only to rights arising from breach of contract.

*Procedural defence*

As noted above, where court proceedings are brought in respect of an accrued right of action which has been agreed to be referred to expert determination, it may be possible for a party seeking to enforce the expert determination agreement to persuade the court to grant a stay of the action. Two issues arise in this context:

- the *basis* of the courts' jurisdiction to grant a stay; and
- in what *circumstances* will a court grant a stay?

It is suggested that if the courts can grant a stay of court proceedings in favour of expert determination, the only basis for doing so is their inherent jurisdiction. There is no statutory power, such as that under which stays can or must be granted in respect of arbitration and foreign litigation.

There is no doubt that the courts have an inherent jurisdiction to stay actions brought in them.[25] The real question is whether the courts possess a general competency to stay actions brought in breach of contract. The answer to this question appears to be in the affirmative.

The courts' power to say proceedings brought in breach of a foreign jurisdiction clause was originally thought to be based on the statutory power to say an action in favour of arbitration.[26] But then, in *Racehorse Betting Control Board v. Secretary for Air* MacKinnon LJ expressed the following view:

> 'It is, I think, rather unfortunate that the power and duty of the court to stay the action [on the grounds of a foreign jurisdiction clause] was said to be under [the arbitration legislation]. In truth, that power and duty arose under a wider general principle, namely that the court makes people abide by their contracts, and, therefore will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall be otherwise determined'.[27]

This view received authoritative endorsement in the context of an expert determination clause by the House of Lords in *Channel Tunnel Group Ltd. and Anor v. Balfour Beatty Construction Ltd. and Ors.*[28]

The authoritative Australian position probably remains that the inherent jurisdiction does not exist.[29] However, this rule is arguably ripe for reconsideration. The High Court of Australia gave a very strong hint of its intention to follow the principle enunciated by MacKinnon LJ in *PMT Partners Pty. Ltd. v. Australian National Parks and Wildlife Service*.[30] For example, Brennan CJ, Gaudron and McHugh JJ said that:

> 'It may be accepted that contracts will only be construed as limiting the rights of the parties to pursue their remedies in the courts if it clearly appears that that is what was agreed. However, when it is provided, as it is in c145,[31] that '[a]ll disputes or differences ... shall be decided' in accordance with specified procedures, the starting point must be that the parties are to be taken to have provided exclusively and exhaustively as to the procedures to be followed, unless something makes it plain that that is not the case.[32]

The criteria by which the court's discretion should be exercised are somewhat uncertain, but it seems fair to assume that, in accordance with the favour in which all forms of ADR, both binding and non binding, are currently held by the courts, every effort will be made to hold the parties to their agreement. Some guidance is provided by Lord Mustill in his judgment in *Channel Tunnel Group Ltd. and Anor v. Balfour Beatty Construction Ltd and ors*:[33]

> 'My Lords, I also have no doubt that this power [the inherent power to stay court proceedings] should be exercised here. This is not the case of a jurisdiction clause, purporting to exclude an ordinary citizen from his access to a court ... The parties here were large commercial enterprises, negotiating at arm's length in the light of a long experience of construction contracts ... It is plain that clause 67 was carefully drafted, and equally plain that all concerned must have recognised [its] potential weaknesses. Having made this choice I believe that it is in accordance, not only with the presumption exemplified in the English case cited above that those who make agreements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce,

[23] (1973) 130 CLR 506.
[24] See (1973) 130 CLR at 524–5 *per* Gibbs J.
[25] For example in *McHenry v. Lewis* (1882) Ch D 397, Sir George Jessel MR held that the court had an inherent jurisdiction to stay an action which was vexatious to the defendant, since an action in respect of the same facts had already been brought overseas.
[26] *Law. v. Garrett* (1878) 8 Ch D 26.
[27] [1944] Ch 114 at 126.
[28] [1993] AC 334. See especially *per* Lord Mustill at 352–3.
[29] In *Anderson v. G H Michell & Sons Ltd.* (1941) 65 CLR 543 at 548, Rich ACJ, Dixon and McTiernan JJ said: 'An agreement to refer disputes, whether existing or future, to arbitration could, apart from statute, be enforced only by an action for damages against the party who refused to carry it out'.
[30] (1995) 184 CLR 301; (1995) 69 ALJR 829; (1995) 131 ALR 377.
[31] Ie. Ch 45 of NPWC3, a commonly used Australian standard form.
[32] (1995) 184 CLR at 311. See also the comments of Bray CJ in *Adelaide Steamship Industries Pty. Ltd. v. Commonwealth of Australia* [1974] 10 SASR 203; (1974) 24 FLR 97.
[33] [1993] AC 334 at 353.

that having promised to take their complaint to the experts and if necessary to the arbitrators, that is where the appellants should go'.

**Facilitation of the process**

Situations may often arise in arbitrations where exercises of discretion and/or coercion by courts are required in order for the arbitration to proceed. Depending on the particular legislation under which the arbitration is occurring, courts are normally empowered to provide such assistance. Under the UNCITRAL Model Law, for example, the parties to an arbitration may apply for the following assistance:

- appointment of an arbitrator in the case where the parties cannot agree on one;[34]
- decisions on challenges made to the appointment of arbitrators as to whose impartiality or independence there may be 'justifiable doubts';[35]
- decisions on the termination of the mandate of an arbitrator who becomes unable to perform his or her functions or for other reasons fails to act;[36] and
- assistance in taking evidence in any way which the court is competent to take,[37] eg the issue of subpoenas or the ordering of discover.

It should be noted that only the last of these four forms of assistance may be provided only by a court; the others may be performed by an arbitration agency for example.[38]

Domestic arbitration legislation frequently provides for the rather more interventionist form of judicial assistance known as removal of an arbitrator for misconduct. Under the pre-existing English arbitration legislation,[39] the court had two options as to how to proceed having taken this course of action. It may, on the application of any party to the agreement, either:

- replace the arbitrator; or
- order that the arbitration agreement shall cease to have effect with respect to the dispute referred.

The second option is interesting in the context of a *Scott v. Avery* arbitration clause since such an order, with nothing more, would leave the parties with no accrued rights of action on which to sue. Thus the loss would lie where it fell. For this reason, the legislation provided that any condition precedent to the accrual of a course of action shall cease to have effect when such an order is made.[40]

This second option does not now exist under the English *Arbitration Act* 1996,[41] and thus abrogation of the *Scott v. Avery* rule is not needed. However, the powers of the courts to declare a *Scott v. Avery* clause of no effect have been expanded in this *Act* to cover two more situations:

- When the court wishes to refuse to stay proceedings brought in breach of an arbitration clause, that the clause is in *Scott v. Avery* form is of no consequence.[42]
- Where an award is set aside, the court may at the same time order that a *Scott v. Avery* clause is of no effect so that it does not have to be re-arbitrated.[43]

The situation when an expert determination breaks down contrasts starkly to the situation just described where an arbitration breaks down.

The problems which arise when the parties cannot agree on the identity of the expert may not be particularly serious. The most common practice in Australia is to provide that in this situation the President of the Institute of Arbitrators Australia will make the appointment. In the event that circumstances subsequently come to light which indicate that there are reasonable grounds for suspecting the expert to lack impartiality or independence, it would seem necessary for there to be contractual provisions for the procedures to be followed in th event. Many expert determination agreements fail to do provide as such.

The situation where the expert fails or refuses to act for any reason appears to be similar. The traditional position has been that a court will not compel the appointment of a replacement for an expert who fails or refuses to act. This has meant that contracts for the sale of goods at prices to be fixed by third parties have been held to cease to be enforceable upon failure or refusal of the third party to act.[44]

As for the collection of evidence, it goes without saying that an expert is on his or her own, except insofar as the parties have agreed to cooperate with him or her. Interesting questions may arise in circumstances where one or the other of the parties has refused to cooperate with the expert as agreed in a way which can be shown to have affected the substance of the expert's determination.

Similarly, an expert determination clause in *Scott v Avery* form will remain in *Scott v. Avery* form. This presents a great risk to parties choosing to frame their contracts in this way, since, in the event that the expert determination machinery breaks down, the parties have no accrued rights to arbitrate or sue on. This fact may

[34] UNCITRAL Model Law, Art 11.
[35] UNCITRAL Model Law, Arts 12–13.
[36] UNCITRAL Model Law, Art 14.
[37] UNCITRAL Model Law, Art 27.
[38] See UNCITRAL Model Law, Art 6.
[39] *Arbitration Act* 1950 s25.
[40] Under the Australian Uniform *Commercial Arbitration Acts*, the *Scott v. Avery* rule is abrogated in all circumstances, so that what would otherwise be a *Scott v. Avery* clause becomes a mere arbitration agreement: s55(1).
[41] Section 18 is the new provision outlining what assistance the court may provide where procedures for appointment of an arbitrator fail.
[42] *Arbitration Act* 1996, s9(5).
[43] *Arbitration Act* 1996, s71(4).
[44] See McPherson BH, 'Arbitration, Valuation and Certainty of Terms' (1986) 60 ALJ 8 at 9–10.

lead a party seeking to avoid an ultimately unfavourable result to play some interesting forensic games.

A good illustration of some of the problems which can arise is the case of *Triarno Pty. Ltd. v. Triden Contractors Ltd.*[45] In that case, a construction project deed obliged the contractor to provide a bank guarantee to the owner. Any claims by the owner were to be paid out of the bank guarantee. In the event of disputed claims, the owner was not entitled 'to any amount of his claim in dispute until it received a determination from an independent expert agreed upon by the parties or failing agreement, appointed by the chairperson of the Institute of Arbitrators Australia, New South Wales Chapter, whose decision shall be final and binding'.

Unfortunately, however, as Cole J observed:

> 'The deed made no express provision for payment of the independent expert, for the procedures to be followed by the independent expert in reaching his determination, or for any rights or obligations upon Triarno [the owner] or Triden [the contractor] in relation to such expert determination.'

Cole J refused to make a declaration as to the rules and procedures for the conduct of the expert determination and he also refused to order the contractor to submit to and co-operate with the expert determination. He said:

> 'If the parties have not by their deed agreed the procedures to be followed upon an expert determination, that is not a void the court can fill.'

## Enforcement of expert determinations

Where an expert determination agreement provides that the determination will be final and binding on the parties, the courts will generally enforce determinations made under it, subject to their limited jurisdiction to open it up and ensure that it is not contaminated by fraud or a serious error of law. But it must be emphasised that the enforcement mechanism is purely contractual in nature. This means that a party faced with non-performance of an expert determination has no course but to sue on the contract at common law.

Historically, when the only option open to a party faced with non-performance of an arbitral award was to sue on it, considerable difficulties were faced. It was found that the law of contract was a weak and cumbersome enforcement mechanism indeed. It was for this reason that provisions for the summary enforcement of awards were introduced into arbitration legislation, both domestically and, later on, at the international level. From an enforceability viewpoint, expert determination is where arbitration was 100 years ago. Two consequences flow from this position.

### *Foreign arbitral awards v. foreign judgments*

The first problem arising from the purely contractual nature of the enforcement mechanism for expert determinations relate to those expert determinations with an international dimension. In addition to the difficulties of suing on the determination, this introduces the even more serious difficulty of enforcing foreign judgments. By comparison to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Brussels and Lugano Conventions relating to foreign judgments have not been implemented widely (Australia is not a party to either of them). In many situations the enforcement of a foreign expert determination will require reliance on the conflict of laws rules of individual countries. These may operate in a cumbersome and unpredictable way.

This of course presupposes that the party seeking enforcement needs to extract money from the defendant. This is not always the case, especially in construction disputes, which often arise in a situation where the owner withholds payment from the contractor, alleging defective work. If, under the expert determination, the owner wins, it may be that no money will need to change hands. In this case, of course, the problems with enforcing an expert determination are not serious.

The cumbersome nature of its enforcement mechanisms means that expert determination will tend to favour the party with the money (usually the owner). Where the outcome of the dispute is likely to be either payment by the owner to the contractor or maintenance of the status quo, the contractor is disadvantaged because of the difficulties it will suffer in enforcing a determination in its favour, difficulties not faced by the owner in the event that the determination favours it. It is interesting to note in this context that one prominent Australian contractor uses a dispute resolution clause whereby disputes relating to a fairly narrow range of issues, such as extensions of time and progress payments, are to be referred to expert determination, while the balance are to be referred to arbitration. Owners, on the other hand, often use very wide expert determination clauses.

The foregoing argument is not intended to put at naught the effectiveness of goodwill, reputation, and a desire to avoid conflict as mechanisms for the enforcement of any kind of dispute resolution outcome. It is, however, intended to establish that, where there is no such co-operation a wide gulf separates the enforceability of an arbitral award and that of an expert determination.

### *Remedies*

The second problem is that the remedies available from an expert adjudicator are limited. This has not traditionally been a live issue, since, until recently, the issues referred to experts have been limited to those of valuation. Thus, experts have been asked to determine

[45] (Unreported, Supreme Court of New South Wales, Cole J, 22 July 1992).

market rental rates in rent review situations, market prices for shares in takeover situations, and, amongst other things, the amount of loss suffered by a party to a settlement agreement.[46] The new breed of expert determination clauses, however, often provide for the references of all disputes or differences arising out of or in connection with the project. Such clauses cover a wide range of extra-contractual claims.

The problem here is that to deal with many of these claims properly, there is a need for the expert to have at its disposal a number of remedies apart from the power to order that one party pay a sum of money to another.[47]

**Attacking an expert determination**

The extent to which an expert determination can be attacked for fraud or error is of enormous importance to disputing parties, but it exhibits a tension. On the one hand, an expert determination not subject to attack and review by the courts is desirable in that it provides fast and cost effective dispute resolution. On the other hand, however, there is a greater risk of capricious results.

Attacks on expert determinations occur only in the context of the successful party suing on the decision. A number of issues, outlined below, may be raised in defence to such an action. An advantage flowing from this is that the determination need only be acceptable to the courts of the State in which it is sought to be enforced (unless the local judgment is sought to be enforced to another jurisdiction). By contrast, under the UNCITRAL Model Law, the courts of the State where an award was made are able to set it aside.[48] On the other hand, there is a disadvantage in that enforcement of an expert determination is 'all or nothing'. The court cannot do anything like remitting it to the expert: all it can do is either grant or refuse enforcement, with the latter course of action often placing the parties in a particularly sticky situation because there may be nothing with which to replace the determination.

As noted above, a contractual provision purporting to render an expert determination final and binding on the parties will generally be given effect by the courts. The starting point, therefore for any discussion as to what will render an expert determination susceptible to attack, is the relevant agreement. Thus, in the context of valuation for rent review purposes, it has been said that:

> 'In each case, the critical question must always be: Was the valuation made in accordance with the terms of a contract? If it is, it is nothing to the point that the valuation may have proceeded on the basis of error or that it constitutes a gross over or under value. Nor is it relevant that the valuer has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account. The question is not whether there is an error in the discretionary judgment of the valuer. It is whether the valuation complies with the terms of the contract.[49]

Bearing this in mind, it is proposed to consider the susceptibility of an expert determination to attack on three bases: fraud, error of fact and error of law.

*Fraud*

It is well accepted that an expert determination procured on the basis of fraud will not be given effect by the courts. 'Fraud or collusion unravels everything.[50] It has never clearly been enunciated whether the basis for this position is a positive rule of law or an implied term of the contract, and in most cases, this distinction will not matter. The implied term theory is certainly tenable,[51] and furthermore, it has the advantage of accommodating the curious authority of *Tullis v. Jacson*,[52] where Chitty J held that a provision in a building contract providing that the decisions of the architect were to be final even in the event of fraud or collusion would be given effect by the court. But this decision has received some disapproval,[53] and for this reason, on public policy grounds, it may be more appropriate to regard the non-enforcement expert determination procured by fraud or collusion as a positive rule of law, not subject to contrary provisions in contracts.

*Error of fact*

In the absence of express provision to the contrary, the parties to an expert determination are regarded as agreeing to be bound by the determination even if it is based on an error of fact.[54] An expert determination, by its nature, is an arrangement whereby an 'expert' is employed to ascertain an objective fact. Although differences of professional opinion are possible, it proceeds on the assumption that there is one 'correct' outcome. This has led to the suggestion that, where the parties agree to be bound by the decision of someone whom they recognise as being 'an expert not an arbitrator':

> '[I]t would ... be entirely wrong in principle that one party

[46] As in *Capricorn Inks Pty. Ltd. v. Lawter International (Australasia) Pty. Ltd.* [1989] 1 Qd R 8.

[47] For example, in Australia, the *Trade Practices Act* 1974 (Cth) provides for a wide range of remedies, including declaration that the contract is void *ab initio*, injunctions and the like.

[48] UNCITRAL Model Law Art 34.

[49] *Legal and General Life of Australia Ltd v. A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 336 *per* McHugh JA.

[50] *Campbell v. Edwards* [1976] 1 All ER 785 at 788; [1976] 1 WLR 403 at 407 *per* Lord Denning MR.

[51] In *Legal and General Life of Australia Ltd v. A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 335, McHugh JA said: 'a valuation obtained by fraud or collusion can usually be disregarded even in an action at law. For in a case of fraud or collusion, the correct conclusion to be drawn will almost certainly be that there has been no valuation in accordance with the terms of the contract.'

[52] [1892] 3 Ch 441.

[55] *Czarnikow v. Roth, Schmidt & Co.* [1922] 2 KB 478 at 488–9 per Scrutton LJ; *In Re Davstone Estates Ltd's Leases Manprop Ltd v. O'Dell & Ors.* [1969] 2 Ch 378.

[54] *Campbell v. Edwards* [1976] 1 WLR 403; [1976] 1 All ER 785; *Baber v. Kenwood Manufacturing Co. Ltd* [1978] 1 Lloyd's Rep. 175.

having so agreed, should be entitled in law to frustrate he agreement by alleging mistake in the expert's opinion.'[55]

Three caveats need to be placed on this proposition. The first is that a mistake of fact may be such as to render the expert determination contrary to the agreement under which it was made. Thus:

'If the mistake made was that the expert departed from his instructions in a material respect – eg if he valued the wrong number of shares, or values shares in the wrong company, or if, as in *Jones (M) v. Jones (RR)*,[56] the expert had valued machinery himself whereas his instructions were to employ an expert valuer of his choice to do that – either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do.[57]

The second is that, in an appropriate case, equity will intervene to relieve against the harshness associated with an expert determination procured by mistake. Clearly, the extent to which an expert determination can be impugned for mistake at common law is entirely dependent on the express and implied terms of the relevant agreement[58] but:

'When a party seeks the assistance of equitable remedies to enforce an agreement to abide by the valuation of the third party, mistake ... can be a defence to the action in certain circumstances.[59]

At present, equitable intervention for mistake in this context is merely a theoretical possibility, since in none of the leading cases[60] has the principle been applied.

The third caveat is the possibility that the cases where expert determinations have been upheld in spite of mistake of fact that can be distinguished on the basis that these determinations were given without reasons. Lord Denning MR suggested that 'if a valuer gives a speaking valuation – if he gives his reasons or his calculations – and you can show on the face of them that they are wrong it might be upset.[61] This suggestion has received both approval[62] and disapproval,[63] and as such awaits authoritative resolution. It is suggested, with respect, that the idea that a 'speaking valuation' is inherently more susceptible to review for errors of fact is contrary to principle. The question will always be whether the valuation complies with the terms of the contract.

*Error of law*

What complicates matters with respect to errors of law in expert determinations is that the parties' agreement is not necessarily paramount. The question whether the determination complies with the terms of the agreement is still, of course, highly relevant since the parties cannot be bound by a determination by which they did not agree to be bound. But a more fundamental question arises, namely: Is an agreement purporting to make an expert determination final and binding on the parties, even as to questions of law, enforceable, or is it void as contrary to public policy for ousting the jurisdiction of the courts?

The rule that the jurisdiction of the courts as to questions of law cannot be ousted by contract[64] has had a turbulent history, especially in recent times. While it has never been overruled, it has been eroded by a number of decisions which, while being difficult to reconcile with the rule, do not deal with the authorities which supported it. As Windeyer J observed in *Felton v. Mulligan*,[65] 'the grandiloquent phrases of the eighteenth century condemning ousting of the jurisdiction of courts cannot be accepted in this second half of the twentieth century as pronouncements of a universal rule'.

The rule has always been said to be based on public policy. There was a perception that the public had an interest in the ultimate oversight of all affairs by the King's Courts, such that no section of society (eg private industry) could form 'a law unto themselves'. The question to be asked now is whether the public can still be said to have an interest in such a position.

This paper is not the place to contemplate the future of the ouster doctrine, except to observe that the courts are becoming far more permissive towards all forms of alternative dispute resolution, both binding and non-binding.

Aside from the ouster doctrine, the agreement pursuant to which an expert determination has been made again assumes paramountcy. No court will give effect to an expert determination which errs on a point of law unless the parties have agreed to be bound by it.

The remarks of Lord Slynn of Hadley, with thom the other Lords agreed, in *Mercury Communications Ltd. v. Director General of Telecommunications and Anor.*[66] are relevant in this context. The case concerned the re-negotiation of an agreement between British

[55] *Baber v. Kenwood Manufacturing Co. Ltd.* [1978] 1 Lloyd's Rep. 175 at 179 *per* Megaw LJ.

[56] [1971] 1 WLR 840.

[57] *Jones & Ors. v. Sherwood Computer Services plc* [1992] 1 WLR 277 at 287 *per* Dillon LJ.

[58] As Lord Denning MR said in *Arenson v. Arenson* [1973] Ch 346 at 363, 'At common law – as distinct from equity – the parties are undoubtedly bound by the figure fixed by the valuer.'

[59] *Legal and General Life of Australia Ltd. v. A Hudson Pty. Ltd.* (1985) 1 NSW LR 314 at 336 *per* McHugh JA.

[60] *Collier v. Edwards* (1858) 25 Beav 200; *Dean v. Prince* [1954] Ch 409; [1954] 2 WLR 538; [1954] 1 All ER 749; *Campbell v. Edwards* [1976] 1 WLR 403; [1976] 1 All ER 785; *Baber v. Kenwood Manufacturing Co. Ltd.* [1978] 1 Lloyd's Rep. 175.

[61] *Campbell v. Edwards* [1976] 1 WLR 403 at 407; [1976] 1 All ER 785 at 788.

[62] *Burgess v. Purchase and Sons* [1983] 1 Ch 216.

[63] *Jones and Ors v. Sherwood Computer Services Plc* [1992] 1 WLR 277; Mustill and Boyd, *Commercial Arbitration*, 2nd Edition (1989), p36.

[64] Originally set down in *Thompson v. Charnock* (1799) 8 Term Rep 139.

[65] (1971) 124 CLR 367 at 385.

[66] [1996] 1 WLR 48.

Telecommunications and Mercury Communications for telephony inter-connections. The parties, considering it unlikely that they would be able to reach agreement on the issue of price, referred this issue to the Telecommunications Director pursuant to an earlier agreement into which they had entered together. The task of the Telecommunications Director in making his determination included interpreting certain phrases found in Mercury's licence. Mercury alleged that the Telecommunications Director misinterpreted some of these phrases, causing him to arrive at a price prejudicial to Mercury's interests. The Telecommunications Director argued in reply that the meaning of these phrases was for him to determine and not the courts. Lord Slynn dealt with this argument in the following way:

> 'What has to be done in the present case ... depends on the proper interpretation of the words 'fully allocated costs' which the defendants agree raises a question of construction and therefore of law, and 'relevant overheads' ... If the Director misinterprets these phrases and makes a determination on the basis of an incorrect interpretation, he does not do what he was asked to do ... [The parties intended the Director] to deal with such matters and such principles as correctly interpreted. They did not intend him simply to apply such meanings as he himself thought they should bear ... There is no provision expressly or impliedly that these matters were remitted exclusively to the Director ... Nor is there any provision excluding altogether the intervention of the court. On the contrary, clause 29.5 contemplates that the the determination shall be implemented 'not being the subject of any appeal or proceedings'. In my opinion, subject to the other points raised, the issues of construction are ones which are not removed from the courts' jurisdiction by the agreement of the parties.[67]

It will be noted that His Lordship's analysis does not proceed on the basis that the court's jurisdiction as to a question of law cannot be ousted. On the contrary, he assumes that it can be so ousted, at least to some extent, but finds that the parties' agreement had not achieved this result. It is therefore suggested that this decision does not necessarily restrict party autonomy in favour of the ouster doctrine. It simply gives effect to the parties' contract.

The case does, however, indicate that clear words will be required to achieve any possible ouster of the courts' jurisdiction on a question of law. It also highlights the effect of clauses which contemplate judicial review of expert determinations. In this context, it is relevant to consider two examples of these types of clauses.

> '... the parties agree to give effect to the expert's determination unless and until it is appealed, reversed or overturned in subsequent litigation proceedings ...'

Lord Slynn, in *Mercury Communications*,[68] saw such a clause as a request by the parties for the courts to open up the expert determination. Some expert determination clauses specifically contemplate review by arbitration in the event of an appeal from the expert determination within a specified period. In such cases it is clear that the decision is not final until the time period expires. This is however a different issue to that of judicial review, but may assist the conclusion that the parties intended it to be excluded.

> '... the expert must take all relevant considerations into account in coming to his or her determination ...'

Again, this may be seen by the courts as an invitation for judicial review of the determination. Cases on administrative law demonstrate the extent to which the relevance or irrelevance of factors considered by a decision maker can easily be an excuse for opening up the decision.

Even if the parties want an expert determination to be reviewed by the courts, the utility of a clause of this kind may be limited, considering that the courts do possess the flexibility in reviewing expert determinations as they do in reviewing arbitral awards. Essentially all they are able to do is to refuse to give effect to a determination contaminated by an error of law, or in some cases to provide declaratory relief. In short, if the parties desire a judicially reviewable expert determination, they may be well advised to opt for an arbitration instead.

### Liability of experts

The question whether an expert is liable in respect of a determination negligently made is a multifaceted legal question involving inquiries into:

- the *basis* of liability (eg tort or implied term of contract);
- the *standard of care* that the expert was found observe;
- *breach* of duty;
- *causation* of damage;
- *remoteness* of damage; and
- *measure* of damages.

These issues are beyond the scope of this paper, and it is proposed here to deal with only one issue; namely, whether an expert is *immune* from an action for negligence.

It is well established that an arbitrator is so immune, and it was once thought that, by analogy with this immunity, an expert, such as a property valuer or architect, also enjoyed immunity from suit for negligence.

[67] [1996] 1 WLR 48 at 58–9.
[68] [1996] 1 WLR 48.

The principle upon which this immunity was granted has been explained as follows:

> '... where a third party undertakes the role of deciding as between two other parties a question, the determination of which requires the third party to hold the scales fairly between the opposing interests of the two parties, the third party is immune from an action for negligence in respect of anything done in that role'.[69]

The principle was narrowed considerably by two cases in the House of Lords, *Sutcliffe v. Thackrah*[70] and *Arenson v. Casson Beckman Rutley and Co*,[71] in which it was held that, to enjoy an arbitrator's immunity from suit, a person whose determination will bind the parties to a contract must be obliged to afford the parties more than mere fairness.

The old cases use the term 'quasi-arbitrator' to refer to an expert who would receive an arbitrator's immunity from suit due to his or her obligation to act fairly between the parties. These two House of Lords cases have clearly reduced the class of quasi-arbitrators: at the very least, architects, engineers and accountants (in most circumstances) are no longer quasi-arbitrators. The concept of a quasi-arbitrator was however not entirely repudiated in these cases.[72] Thus, the question arises whether there may still be a class of third parties who are not arbitrators for the purposes of arbitration legislation, but still enjoy an arbitrator's immunity from suit. If such a category of quasi-arbitrators still exists,[73] then a number of the experts provided for in construction contracts may fit into this category, considering that they are on the borderline of arbitration.

One consideration militating against the continuing existence of a quasi-arbitrator is the fact that many judicial statements[74] link the arbitrator's immunity from suit with the possibility of curial review of arbitrations. Thus, they set up the choice of the parties in framing their dispute resolution provisions as being between:

- on the one hand, arbitration, which will provide them with no recourse to the arbitrator for his or her negligence, but will provide curial review; and
- on the other hand, expert determination, which provides for minimal curial review counterbalanced by the possibility of suing the expert for negligence.

It is suggested, with respect, that this reasoning is not entirely sound, for a number of reasons. Firstly, it is clear that the protection afforded to disputing parties by the judicial supervision of arbitration is not necessarily co-extensive with the protection provided by the possibility of recourse to a negligent expert. Arbitral awards can often be reviewed where the arbitrator has not been negligent, and are sometimes unreviewable even though he or she may have been. This depends on the relevant legislation and upon the agreement of the parties.

Secondly, there is no reason to suggest that an arbitrator enjoys his or her immunity from suit simply because his or her actions are under the supervision of the courts. As Lord Reid suggested in *Sutcliffe v. Thackrah*[75], the reason for an arbitrator's immunity is based on public policy. If it did not exist, arbitrators might be harassed by actions with little chance of success. Probably more importantly, the threat of suit may harm their independence in weighing up the opposing interests of the disputing parties.

It has never been denied that both experts and arbitrators are obliged to be fair to the parties. The two landmark House of Lords decisions established the principle that the mere obligation to be fair to both the parties is not sufficient to ground an immunity from suit. The basic thrust of the cases is that an obligation of fairness *plus something else* is required; however, this something else was not clearly spelt out.

There appear to be two possibilities as to what the something else might be. The first is the possibility that it is the kind of quasi-court like procedures which characterises arbitration. In this case, the concept of a quasi-arbitrator would not exist, since arbitrators for the purposes of arbitration legislation and arbitrators for the purposes of immunity from suit would be the same class of people.

The other possibility is that the something else refers to an obligation on the part of the expert or arbitrator to resolve a dispute as opposed to determining a fact. In traditional forms of expert determination, such as valuation of shares or appraisal of building work, while it has always been accepted that differences of professional opinion may occur, there has been an assumption that an objectively correct result for the determination exists in the ether. Thus if an expert is asked to determine an objective fact, there is a standard against which their carrying out of that determination can be measured. If on the other hand the expert is asked to resolve a dispute, a standard against which to measure his or her performance is not easy to find. In the absence of such a

[69] *Arenson v. Arenson* [1973] Ch 346 at 370 *per* Buckley LJ, as quoted in *Arenson v. Casson Beckman Rutley and Co.* [1977] AC 405 at 416 *per* Lord Simon of Glaisdale.

[70] [1974] AC 727.

[71] [1977] AC 405.

[72] For example, in *Sutcliffe v. Thackrah* [1974] AC 727, Lord Morris of Borth-y-Gest at 744 expressed the view that the category may still exist.

[73] As indicated by Murray J in *Aztec Mining Company Limited v. Leighton Contractors Pty. Ltd.* (unreported, Supreme Court of Western Australian, Murray J, 23 February 1990).

[74] *Sucliffe v. Thackrah* [1974] AC 727 at 744 per Lord Morris; *Campbell v. Edwards* [1976] 1 WLR 403 at 408–9 per Geoffrey Lane LJ; *Public Authorities Superannuation Board v. Southern International Developments Corporation Pty. Ltd. and Anor* (unreported), Supreme Court of New South Wales, Smart J, 19 October 1987 at 10.

[75] [1974] AC 727 at 735–6.

standard, the expert may be immune from suit. If this is so, then the new breed of experts used for dispute resolution in construction contracts may indeed repopulate that troublesome jurisprudential category known as the quasi-arbitrator.

## Conclusion

The broadened concept of expert determination, although a reaction to the cost and delay of arbitration, is a poor substitute indeed for arbitration as a means of resolving disputes in a binding way. As Lord Mustill pointed out in his Goff lecture,[76] there are many necessary laws facilitating and assisting arbitration. The use of binding expert determination for the resolution of existing disputes enjoys few of these.

Those who seek to use expert determination for this purpose run the real risk of taking a journey back to the stone age of dispute resolution from which there may be no escape. It would be far safer to ensure that arbitration is used in an abbreviated and amended form, rather than take what in many cases is an uninformed risk for fear of a process which is both extremely flexible and well supported by established domestic and international laws.

[76] To be published in a future volume.