CHAPTER 10

EXPERT DETERMINATION IN COMMERCIAL CONTRACTS

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INTRODUCTION

What is expert determination?

001 Expert determination is a process whereby two parties agree to submit an issue for the determination of a third party. It is commonly used in a wide variety of commercial contracts. For example, the parties to a lease may agree that the amount of rent to be paid under the lease will be determined by a third party. The parties to a share purchase agreement may agree that the price to be paid will be determined by a third party. The parties to a construction contract may agree that the price for varied work performed under the contract will be determined by a third party. In each of these three scenarios, and in countless others, the third party is known as an "expert", although the name given to the process varies with the particular application of the concept.

The new wave of expert determination

002 The types of issues traditionally referred to experts have been narrow in scope, typically involving the expert only in a process of valuation. The three examples given above, namely rent review, share valuation and certification under construction contracts, all fall into this category. An expert's terms of reference in situations such as these are clear and narrow.

003 There is, however, a new type of expert determination clause in contemporary commercial practice. Such clauses provide for the reference of entire disputes or differences to experts for determination. They appear in commercial contracts in the place of and sometimes in substitution for an arbitration clause.

004 Throughout this chapter, the phrases "traditional expert determination" and "expert dispute determination" are used to distinguish these two types. The distinction is crucially important, since the differences between the two types of expert determination are quite radical. While the legal position in relation to the enforceability and reviewability of traditional expert determinations is relatively well settled as a result of well over a century of litigation, the legal position in relation to expert dispute determination is characterised by considerable uncertainty. This is because expert dispute determination is a new phenomenon, and the courts have not yet had sufficient opportunities to clarify its legal effect.

Other categories of expert determination

005 To distinguish between traditional expert determination and expert dispute determination does not tell the whole story. A third category of binding expert determination can be identified. This is where expert determination is used as an intermediate level of appeal from the decisions of a certifier. The determinations of such an expert are subject to further appeal, usually to arbitration. A three-tiered process of dispute resolution is not uncommon in construction contracts.

006 Expert determinations of this kind have almost never been the subject of litigation. The principles of law relevant to such expert determinations will depend on the wording of the relevant clauses. They will share some characteristics with traditional expert determination and others with expert dispute determination.

007 Non-binding expert appraisal 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 chapter 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.

Purpose of this chapter

008 The main purpose of this chapter is to provide a summary of the current state of the law in relation to expert determination. This covers key issues, such as:

- the expert's jurisdiction;
- the enforceability of an expert determination clause where court proceedings are brought in breach of it;
- the capacity of the courts to facilitate the expert determination process;
- the enforceability of expert determinations;
- the extent to which an expert determination can be attacked and reviewed by a court; and
- the liability of an expert for negligence.

009 The differences between traditional expert determination and expert dispute determination are sometimes so dramatic that they need to be dealt with separately.

010 A subsidiary purpose of this chapter is to highlight some of the drawbacks in using expert determination as a dispute resolution technique. To this end, pertinent comparisons with arbitration are made.

EXPERT DETERMINATION AND ARBITRATION COMPARED

011 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. Arbitration is even more ancient. It has been practised for thousands of years as a means of generating binding solutions to mercantile disputes. As a consequence, the distinction between the two processes is well known. Lord Esher MR explained it as follows in *Re Dawdy* (1885) 15 QBD 426; 54 LJQB 574; 53 LT 800:

> "... 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."

012 As was outlined in paras 001–010 above, arbitration and expert determination have in recent times begun to compete in exactly the same market, i.e. that of dispute resolution. It was once a matter of course that contracting parties wanting to make provision for some final and binding dispute resolution process other than litigation would put an arbitration clause into their contract. This is no longer so. Such parties now have the option of inserting an expert determination clause instead. Furthermore, vast numbers have taken up this option.

013 What has motivated so many commercial parties to substitute expert determination for arbitration? No doubt it is the fact that arbitration has developed a reputation for being incapable of delivering cheap and speedy dispute resolution. Although this reputation is somewhat undeserved, it is easy to see how it developed. Due to the temptation in arbitration to mimic traditional court procedure, parties have failed to take advantage of what arbitration has to offer. 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.

014 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.

015 Ways of modifying or eliminating various procedural 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.

016 The arbitration process can be as streamlined as the parties wish. This is one of the major advantages of arbitration. And it is principally due to a failure to recognise this advantage that the perceived need for expert determination as a method of dispute resolution has arisen.

017 It will become apparent throughout this chapter, as expert determination and arbitration are compared as techniques of dispute resolution, that expert determination has a number of drawbacks. These need to be considered by any commercial party thinking of joining the expert determination bandwagon.

018 It must be stressed that these arguments relate only to expert dispute determination. Traditional expert determination is a well established commercial practice, without which all sorts of markets would grind to a halt. Expert dispute determination, however, is still suffering from teething problems.

THE EXPERT'S JURISDICTION

The parties' agreement

019 The expert's jurisdiction comes from the agreement of the parties. Unless one can clearly identify an agreement between the parties to submit an issue for determination by an expert, then the expert has no jurisdiction, and therefore no right to proceed.

020 Ascertaining whether or not the parties have agreed to an expert determination is a matter of contract law. Naturally it is not possible here to discuss all of the relevant principles. Only the most important issues will be mentioned.

Oral or written agreement

021 There is no requirement for expert determination agreements to be in writing. An oral agreement can provide the basis for an expert to proceed. In practice, however, this is very rare in commercial contracts.

022 Usually, the expert determination agreement is contained in an expert determination clause which forms part of a written contract. In such a case, the expert should read the clause carefully, to ensure that he or she is entitled to act. For example, if the clause requires one of the parties to issue certain notices in order to activate the expert determination process, then the expert should ensure that these have been complied with.

Expert determination, not arbitration

023 The distinction between expert determination and arbitration was discussed above (in paras 011–018). It is important to ensure that the process referred to in the agreement is actually expert determination. If it is arbitration, then it will be subject to the supervision of the courts under the Arbitration Act 1996.

024 Most expert determination clauses use the phrase "acting as an expert, not an arbitrator", or something similar, to put the nature of the process beyond doubt. Nevertheless, ambiguities sometimes occur, and in such cases it is necessary to consider the *nature* of the process provided for by the contract. The *name* given to the process cannot be regarded as conclusive.

025 In this respect, the following table compares the expert determination and arbitration processes. It can be used as a guide to determine whether the parties' true intentions are for expert determination or for arbitration.

Table 1

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* v. *Casson Beckman Rutley* [1977] AC 405 *per* Lord Simon at 424; *Sport Maska* v. *Zittrer* [1988] 1 SCR 164 *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, supra* at 589–590 *per* L'Heureux-Dubé J)	An arbitral award must be based on the **submissions** made by the parties, and is 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)

Ousting the jurisdiction of the courts

026 There is a rule of public policy which renders void any contractual provision purporting to oust the jurisdiction of the courts on a question of law. This rule is in place so that all people are able to enjoy the protection of the courts. If a contract confers a right, but then provides "You may not sue on this right", then that provision is void.

027 Naturally, it is crucial for the parties and the expert alike to ensure that their expert determination clause does not violate this rule. If it does, then the expert has no jurisdiction to proceed, because the clause is void.

028 It is often said that expert determination clauses violate the rule because they prevent recourse to the courts. Surprisingly, however, there are very few cases in which such clauses have actually been held to violate the rule. The only example known to the author is *Baulderstone Hornibrook* v. *Kayah Holdings* (unreported, Supreme Court of Western Australia, Heenan J, 2 December 1997). That case concerned an expert determination clause, not unlike many others in contemporary contracts, which provided that the expert's decision would be "final and binding" upon the parties. Heenan J considered that it purported to oust the jurisdiction of the courts (and was therefore void) because of this "final and binding" stipulation.

029 The *Baulderstone Hornibrook* v. *Kayah Holdings* decision is, with respect, rather difficult to reconcile with a number of other decisions which have upheld "final and binding" expert determinations. It will probably not be widely followed.

030 It is suggested that the rule avoiding agreements which oust the jurisdiction of the courts will only apply to expert determination clauses which provide for such cumbersome or impractical procedures that they seriously hinder parties from enforcing their contractual rights.

Severability of expert determination clause

031 An expert determination clause will usually form part of a wider contract (such as a lease or a construction contract). Occasionally, this wider contract will for some reason not be enforceable. The wider contract may, for example, have been procured by duress, it may be illegal, or it may simply be too uncertain to be enforced. What becomes of the expert determination clause in such a case? Does it become unenforceable too?

032 This issue has not yet been settled by the courts in relation to expert determination. But it has been settled in relation to arbitration. The courts have held that an arbitration clause is regarded as "severable" from the wider contract of which it forms part, so that if the wider contract is unenforceable, the arbitration clause will nevertheless survive.

033 For example, in *Harbour Assurance* v. *Kansa General International Insurance* [1993] QB 701, a dispute arose under a re-insurance contract. It was alleged that the re-insurers under the contract were not registered or approved to carry on insurance business in Great Britain under the relevant legislation and that, as a result, the re-insurance contract was void for illegality. Court proceedings were initiated in breach of an arbitration clause contained in the re-insurance contract. The defendants applied for a stay of these proceedings on the basis that the arbitration agreement should be enforced. The plaintiffs argued that the arbitrator could not have jurisdiction to determine the dispute because a finding that the contract was void for illegality would destroy the arbitrator's jurisdiction.

034 The Court of Appeal upheld the defendant's argument. The arbitration clause, as a

matter of construction, was wide enough to cover disputes as to the initial illegality of the contract and, since the particular type of illegality alleged had nothing to do with the arbitration clause itself, the arbitration clause remained operative. Even were the rest of the contract to fall, this would not bring down the arbitration clause, because the illegality alleged did not affect it.

035 In the result, a stay of the court action brought in breach of the arbitration clause was granted.

036 It has been suggested that the courts would hold an expert determination clause to be severable in an appropriate case: J Kendall, *Expert Determination*, 2nd ed (1996), p. 77.

Coverage of expert dispute determination clauses

037 Contractual provisions for the resolution of disputes by expert determination commonly use words such as this: "... Any dispute or difference which arises out of or in connection with the contract or the project shall be referred to expert determination ...."

038 The question arises: what is the coverage of such a clause? What disputes would have to be submitted to the expert if such clause were to be activated?

039 Again, there is little guidance from the courts as to the meanings of such words when found in expert determination clauses. But in cases relating to the jurisdiction of arbitrators, such words have often been considered. They have been held to confer jurisdiction over a wide variety of claims and disputes. For example, the Court of Appeal has held that a claim in tort for negligence resulting in a collision between two vessels during unloading arose "out of the contract": *Aggeliki Charis* v. *Pagnan (The Angelic Grace)* [1995] 1 Lloyd's Rep 87. Indeed, an arbitrator will generally have power under such clause to decide all claims in tort if those claims are sufficiently connected with the contract: e.g. *Ashville Investments* v. *Elmer Contractors* [1988] 2 Lloyd's Rep 73. A wide variety of other disputes have been held by the courts to fall within the ambit of such an agreement, including:

- release, estoppel, waiver or set-off: *Kathmer Investments* v. *Woolworths* [1970] 2 SA 498;
- internal rectification of the contract: *Ashville Investments* v. *Elmer Contractors* [1988] 2 Lloyd's Rep 73; *Overseas Union Insurance* v. *AA Mutual Insurance* [1988] 2 Lloyd's Rep 63;
- in Australia, claims for civil remedies under the Trade Practices Act 1974 (Cth): *National Distribution Services Ltd* v. *IBM Australia Ltd* (1991) ATPR 41–077.

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

Limiting the jurisdiction of the expert

041 In comparison to arbitration, expert determination is an abbreviated form of issue resolution. It is fast, it involves less argument, and its results are usually absolutely final. As a result, parties often attempt to limit the expert determination to small matters appropriate for the speedy resolution which it provides. Such parties regard larger matters as warranting a more extensive process.

042 Accordingly, phrases such as the following are sometimes used: "... The expert shall have exclusive jurisdiction in respect of disputes valued at less than $100,000 ...". 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. Since construction disputes are notorious for the myriad tangled chains of causation which characterise them, this question easily breaks down into nonsense.

043 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

044 Where a commercial contract provides that an issue is to be determined by an expert, one party may become unwilling to submit to the expert determination process and may instead seek to have the issue determined by a court. This involves commencing court proceedings in breach of the expert determination clause.

045 In such circumstances, the other party has two options. One option is to choose not to enforce the expert determination clause, but rather submit to the court proceedings as a means of resolving the issue. On the other hand, it may seek to enforce the expert determination clause. This would involve requesting that the court grant a stay of proceedings so as to enable the expert determination process to continue. We therefore need to ask: in what circumstances will the court grant a stay of proceedings so as to enable the expert determination process to continue?

Traditional expert determination

046 This question very rarely arises in the case of a traditional expert determination clause. It is simply not within the jurisdiction of the court to entertain proceedings commenced in breach of such a clause.

047 Suppose, for example, that a lease provided for expert determination as a means of reviewing the rate of rent to be paid after renewal of the lease. Suppose that the lessee refused to submit to the expert determination but instead commenced court proceedings, asking the court to set the rate of rent. The court would refuse to do this. Consequently the lessee would be forced to submit to the expert determination process.

Expert dispute determination

048 The issue is more likely to arise in relation to clauses providing for full scale dispute resolution by expert determination. It is well illustrated by *Cott UK Ltd* v. *F E Barber Ltd* [1997] 3 All ER 540. That case concerned a dispute which had arisen out of a contract for the bottling and packaging of soft drinks. Any disputes or differences arising out of the contract were to be referred to a final and binding expert determination.

049 Rather than submitting to the expert determination, one party chose to commence

court proceedings in respect of a dispute which had arisen under the contract. The other party then applied for a stay of these proceedings, arguing that the parties had agreed to submit the dispute to expert determination. Judge Hegarty QC refused to grant such a stay. As a result, the court proceedings continued and the expert determination was supplanted.

050 Judge Hegarty QC held that the court did have the power to stay court proceedings brought in breach of an expert determination clause, but in his discretion decided not to grant a stay in this case. There were a number of reasons for this decision.

- First, the organisation which was supposed to be conducting the expert determination had no rules governing any form of dispute resolution.
- Secondly, the expert who had been appointed under the clause had no experience in dispute resolution.
- Thirdly, the clause laid down no rules or principles for the determination of the dispute.
- Fourthly, Judge Hegarty QC perceived some potential problems in the interpretation of the clause.

051 The *Cott* v. *Barber* decision, if correct, enables us to draw some conclusions in relation to the circumstances in which a court will grant such a stay. It appears that a court will *usually* grant a stay *unless* there is some good reason for allowing the court proceedings to continue and the expert determination to be supplanted.

052 *Cott* v. *Barber* shows that where the expert determination clause is unclear and uncertain in operation, or where the expert has no experience in dispute resolution, the court may consider that good enough reasons exist to decline to grant a stay. The practical advice to take from the case is that expert determination agreements should be clearly and comprehensively drafted so as to have the maximum chance of being given judicial effect.

Comparison with Arbitration

The availability of a stay of legal proceedings commenced in breach of an arbitration agreement is, unlike that in relation to an expert determination agreement, not governed by the common law. It is governed by ss.9 and 86 of the Arbitration Act 1996.

Under s.9(4), which relates to international arbitration agreements, the court *must* grant a stay unless it is satisfied: "that the arbitration agreement is null and void, inoperative, or incapable of being performed".

This provision is very strongly in favour of upholding arbitration agreements. The grounds on which Judge Hegarty QC refused to grant a stay in *Cott* v. *Barber* would not be valid reasons under s.9(4).

Section 86(2) relates to domestic arbitration agreements. It provides that the court *must* grant a stay unless satisfied:

> "(a) that the arbitration agreement is null and void, inoperative, or incapable of being performed, or
> (b) that there are other sufficient grounds for not requiring the parties to abide by the arbitration agreement."

This provision is not as strongly in favour of upholding arbitration agreements as is s.9(4), because it provides an additional ground for refusing a stay, i.e. "other sufficient grounds for not requiring the parties to abide by the arbitration agreement". This provision is still, however, more strongly in favour of arbitration than its counterpart under the previous Arbitration Act, because the grant of a stay is mandatory rather than discretionary.

If *Cott* v. *Barber* is a good indication, then it seems as though court proceedings brought in breach of an expert determination clause will be stayed in similar circumstances as would apply in relation to a domestic arbitration agreement.

Expert determination clause in Scott v. Avery form

053 According to the rule in *Scott* v. *Avery* (1856) 5 HLC 811, 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 effect of such a clause is that unless the parties first submit their dispute to arbitration and get an award, they will not be permitted under the contract to commence proceedings in court. This means that a court has no power to entertain proceedings commenced in breach of such a clause.

054 The question arises whether an expert determination clause can successfully be placed in *Scott* v. *Avery* form. If it could, then a stay of proceedings brought in breach of the clause would in effect be made mandatory.

055 Apparently there are no decided cases dealing with expert determination clauses truly in *Scott* v. *Avery* form. There is, however, the case of *Amoco* v. *Amerada Hess* [1994] 1 Lloyd's Rep 330, where the expert determination clause was very similar to a *Scott* v. *Avery* clause. It provided that: "... [the parties] agree that no action or other legal proceedings shall be brought in respect of any matters in dispute which may be referred to the expert for decision in the course of the redetermination, or in respect of or arising out of any decision of an expert ... until all the key steps in that redetermination have been completed ...."

056 One party commenced legal proceedings, seeking a determination from the court as to which evidence the expert was permitted to consider. Morritt J stayed this action, because it was in breach of the agreed prohibition on legal proceedings.

057 The clause considered in this case was not a *Scott* v. *Avery* clause, because it did not place a condition precedent on the *accrual* of a right to litigate; it merely placed a condition on the *exercise* of the right to litigate. As a result, the court had a discretion either to grant or refuse a stay. Nevertheless the clause had its desired effect because the court in its discretion granted the stay.

Comparison with Arbitration

It must be noted that, by virtue of s.9(5) of the Arbitration Act 1996, placing an arbitration clause in in *Scott* v. *Avery* form will not be effective to deprive the court of its discretion to assume jurisdiction in respect of a dispute covered by the arbitration clause. As a result, the final outcome as to whether the dispute is arbitrated or litigated does not turn on whether the arbitration clause is in *Scott* v. *Avery* form, but on the court's discretion whether or not to grant a stay of court proceedings brought in breach of the clause.

Expert determination followed by arbitration

058 Some contracts, particularly large commercial contracts, contain elaborate dispute resolution procedures. Such a procedure may, for example, provide that any dispute or difference arising under the contract is to be referred to expert determination, and, if either party is dissatisfied with the result thereof, then the dispute is to be referred to arbitration.

059 Where court proceedings are commenced in breach of such a provision before or

during the expert determination process, the question arises whether the court proceedings can be stayed. This situation arose in *Channel Tunnel Group* v. *Balfour Beatty Construction* [1993] AC 334 in which a stay was granted. Lord Mustill said:

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

060 This position has now been confirmed by the Arbitration Act 1996, s.9(2) of which provides:

> "An application [for a stay of legal proceedings] may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures."

061 This provision expressly contemplates the type of provision which makes expert determination part of a dispute resolution process which culminates in arbitration. It makes clear that, subject to the fulfilment of certain conditions outlined in s.9, a stay of legal proceedings commenced in breach of such a dispute resolution clause will be granted.

FACILITATION OF THE PROCESS

062 An expert determination clause sets up contractual machinery for the determination of issues or disputes. This machinery consists of a number of components. The most important is, of course, the *expert* himself or herself, on whose appointment the parties must agree. Other components include the *parties*, whose co-operation is often required for the viability of the expert determination process. Apart from that, the expert determination process requires *rules* to enable it to proceed on a certain basis.

063 What happens when this contractual machinery breaks down? The expert may die or fail to act, one party may refuse to co-operate, or the contract may not contain any rules for the conduct of the process. Expert determination clauses frequently make no provision for what is to happen in this event. The consequences can be quite serious, especially where the purpose of the expert determination is to determine an essential term of the contract, such as price (which is of course the most common purpose of expert determination).

Traditional expert determination: contract for sale of property at valuation

064 A contract for the sale of goods at a price to be determined by an expert will be unenforceable if the expert for some reason or another fails to act: Sale of Goods Act 1893, s.9(1). This reflects the common law position in relation to the sale of goods, and probably all personal property.

Sudbrook Trading Estate Ltd v. Eggleton

065 In *Sudbrook Trading Estate Ltd* v. *Eggleton* [1983] AC 444, the lessee of a parcel of land had been granted an option to purchase the parcel outright at the expiration of the lease. The purchase price was to be determined by a process which involved the lessor and the lessee each appointing a valuer. If these valuers could not agree on a price, then they were to appoint an umpire who would make the final determination. The lessee purported to exercise the option, but the lessor refused to appoint a valuer. The situation appeared to be a deadlock, because there was no way of determining the purchase price for the land. Without curial intervention, the option agreement would have been unenforceable.

066 The House of Lords ordered that the contract should be specifically performed, with the purchase price to be determined by the court on the principle of a fair and reasonable market value. According to Lord Diplock, damages would not, as far as the lessee was concerned, have been an adequate remedy for the lessor's failure to appoint a valuer, because they would have been assessed as the difference between the market value of the land and the purchase price, which difference was by definition zero. It followed, therefore, that the contract must be specifically performed. The court substituted its own machinery for the failed contractual machinery in order to determine the price.

067 It is unclear how widely this case will be followed. There are at least three possible limitations on the application of the case's reasoning:

- It may only apply where the property being sold is of such a kind as to warrant specific performance of the contract. Contracts for the sale of land and unique items such as paintings are normally specifically enforced. Contracts for the sale of non-unique items, such as shares, are not specifically enforced without some good reason.
- The result in the case was that the court substituted its own machinery for the failed contractual machinery of the parties, i.e. it determined the purchase price because the expert determination process had failed. In order to do this, the court had to be able to discern from the contract an objective basis on which the valuation was to be made. The court was able to discern such a basis only because the contract made clear that the purchase price was to be a reasonable market price. If the contract had disclosed no objective basis for the calculation of the price, the contract would have been void for uncertainty.
- The contractual machinery had broken down because the lessor (the would-be vendor) was refusing to co-operate. The House of Lords was particularly concerned to prevent the lessor from benefiting from this wrongdoing. Accordingly, it ordered the contract to be specifically performed, which was the result that the lessor had been trying to prevent. Thus the reasoning of the House of Lords would not apply in the case where the machinery broke down without wrongdoing on the part of either party, e.g. the expert died and the parties, acting in good faith, could not agree on a new expert.

068 In summary, the position after *Sudbrook* is that the court is still unable to *appoint an expert* where the parties' contractual machinery to do so has failed. However, the court may be able to *substitute its own machinery* to determine the question that the expert was supposed to have determined, but this is only possible if the contract contains an objective statement of what the expert was supposed to have determined and the basis on which he or she was

supposed to have determined it. This is instructive for drafters. It suggests that an expert determination clause should ideally contain an objective statement of the parties' entitlements, separate from the provision for this entitlement to be determined by an expert.

Expert dispute determination

069 *Sudbrook* was concerned with a traditional expert determination, i.e. where the expert was charged with the narrowly defined task of determining the price for a sale of land. What of the clauses which provide that all disputes or differences arising under a contract are to be referred to expert determination? What if the expert fails to act?

070 Although there are no decided cases on this point, it seems fair to assume that in such circumstances the expert determination clause would fall down and the dispute would have to be resolved by litigation.

071 A good illustration of some of the problems which can arise is the case of *Triarno Pty Ltd* v. *Triden Contractors Ltd* (unreported, Supreme Court of New South Wales, Cole J, 22 July 1992). 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".

072 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".

073 The problems which arise when the parties cannot agree on the identity of the expert need not be serious, if drafters follow the common practice of providing that in this situation some appointing authority (such as a professional association) 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 provision for the procedures to be followed. Many expert determination agreements fail to make such provision.

Comparison with Arbitration

Situations may often arise in arbitrations where exercises of discretion and/or coercion by courts are required in order for the arbitration to proceed. Courts are empowered to provide such assistance. For example, under the Arbitration Act 1996 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: ss.16, 18.
- Decisions on challenges made to the appointment of arbitrators and on applications for their removal: s.24.

- Assistance in taking evidence in any way which the court is competent to take: s.43; e.g. the issue of subpoenas or the ordering of discovery.

The wealth of curial assistance available to parties involved in arbitrations contrasts starkly with the dearth of such assistance for expert determinations. The courts are unable either to appoint experts, to remove them or to assist them in the taking of evidence. All that a court can do if an expert determination process breaks down is either:

- declare the contract to be unenforceable for uncertainty; or
- where the issue to be determined by the expert is sufficiently well defined in the contract, the court *may* be able to determine that issue itself.

For example, if an expert is biased, a court is unable to remove it, although of course the expert's decision would ultimately prove to be unenforceable.

ENFORCEMENT OF EXPERT DETERMINATIONS

074 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 power to open it up and ensure that it is not contaminated by fraud or a serious error of law (see paras 080 *et seq.* below). 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.

075 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 over a century ago. Two consequences flow from this position.

Foreign arbitral awards v. foreign judgments

076 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. This is governed by the Brussels and Lugano Conventions which operate within the European Community, as well as reciprocal enforcement treaties with various other countries. 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.

077 These problems of course only occur where the party seeking enforcement needs to extract money from the other. This is not always the case, as disputes often arise where one party withholds payment from the other, alleging a wrongful act or omission. If, under the expert determination, the party withholding the money 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.

Comparison with Arbitration

By comparison with the treaties relating to foreign judgments, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is very widely observed. Arbitral awards are therefore easier to enforce internationally than are expert determinations.
One must not discount the effectiveness of goodwill, reputation, and a desire to avoid conflict as mechanisms for the enforcement of any kind of dispute resolution outcome. But where there is no such co-operation a wide gulf separates the enforceability of an arbitral award and that of an expert determination.

Remedies

078 The second problem is that the remedies available from an expert are limited. Without express contractual provisions to the contrary, an expert cannot award any remedy except a sum of money. Whether or not the parties can agree to confer on the expert the power to issue injunctions and the like is not yet clear.

079 This problem is not generally a live issue in traditional expert determination, where the role of the expert is limited to valuation. But in expert dispute determination, it may reduce the expert's flexibility, because such entire formulated disputes often cover a wide range of contractual and extra-contractual claims. 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.

Comparison with Arbitration

By comparison, under the Arbitration Act 1996, s.48, arbitrators have powers to:

- make declarations;
- order the payment of money in any currency;
- order a party to refrain from doing anything;
- order specific performance of a contract; and
- order rectification of a deed or other document.

ATTACKING AN EXPERT DETERMINATION

080 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.

081 Attacks on expert determinations occur only in the context of the successful party

suing on the decision. An advantage flowing from this is that the determination need only be acceptable to the courts of the jurisdiction in which it is sought to be enforced (unless the local judgment is sought to be enforced in another jurisdiction). By contrast, under the UNCITRAL Model Law, Article 34, an arbitral award is subject to scrutiny in two jurisdictions: the jurisdiction where the award is made as well as the jurisdiction where it is sought to be enforced.

082 On the other hand, there is a disadvantage in that enforcement of an expert determination is "all or nothing". The court cannot remit 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.

083 As noted in paras 074–079 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": *Legal and General Life of Australia Ltd* v. *A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 336 *per* McHugh JA.

084 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

085 It is well accepted that an expert determination procured on the basis of fraud will not be given effect by the courts. As Lord Denning MR said in *Campbell* v. *Edwards* [1976] 1 All ER 785 at 788, "fraud or collusion unravels everything".

086 What if the contract expressly provides that the expert determination shall remain binding despite fraud? Amazingly, this situation was considered in *Tullis* v. *Jacson* [1892] 3 Ch 441. 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.

087 This decision may be incorrect. But even if it is correct, the only situation in which a fraudulent expert determination will stand is in the extremely unusual case where the contract expressly provides for that result.

Error of fact

Generally, determination still binding

088 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: *Campbell* v. *Edwards* [1976] 1 All ER 785; *Baber* v. *Kenwood* [1978] 1 Lloyd's Rep 175. 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. Thus, as Megaw LJ said in *Baber* v. *Kenwood* [1978] 1 Lloyd's Rep 175 at 179, 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, having so agreed, should be entitled in law to frustrate the agreement by alleging mistake in the expert's opinion".

089 These principles are well illustrated by *Campbell* v. *Edwards* [1976] 1 All ER 785. In that case, a tenant surrendered her lease to her landlord. The tenant and the landlord agreed that a particular firm of surveyors would determine the price to be paid. The surveyors determined a price of £10,000, which the landlord duly paid, but it was subsequently discovered that the value of the lease was no more than £4,000. The landlord therefore argued that it was not bound by this valuation. The Court of Appeal rejected this argument, holding that the parties were bound by the expert determination even though it may be incorrect. The only relief available to the party being asked to pay more than it should is to sue the valuer himself or herself.

When will an error of fact render a determination non-binding?

090 There are three situations in which an error of fact may result in an expert determination being held not to be binding on the parties.

091 The first is where the mistake of fact is 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—e.g. if he valued the wrong number of shares, or valued shares in the wrong company, or if ... 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": *Jones* v. *Sherwood* [1992] 1 WLR 277 at 287.

092 The second is where an expert determination is infected by a mistake which produces a result so harsh that it justifies equitable intervention by the court. As McHugh JA put it in *Legal and General* v. *A Hudson* (1985) 1 NSWLR 314 at 336: "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." Equitable intervention for mistake in this context has not yet occurred in any decided case, but remains a theoretical possibility.

093 The third situation is where an expert determination is given with 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": *Campbell* v. *Edwards* [1976] 1 All ER 785 at 788. This suggestion has received both approval and disapproval, 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

The public policy rule

094 The position with respect to errors of law in expert determinations is complicated by the fact that the parties' agreement is not necessarily paramount. Although the question whether the determination complies with the terms of the agreement is still highly relevant, there is a rule of public policy which may operate to limit the autonomy of contracting parties in framing their issue resolution procedures. This rule, which is also discussed above (in paras 026–030), renders void any contractual provision purporting to oust the jurisdiction of the courts on a question of law.

095 As a practical matter, modern courts have tended to refrain from opening up expert determinations for review, even though they may be infected by error of law. However, the rule provides the courts with a justification to set aside an expert determination (even though it may comply with the parties' contract) if it is based on a particularly serious error of law resulting in unfairness to a party.

096 Aside from the public policy rule, the agreement pursuant to which an expert determination has been made again assumes paramountcy. An expert determination will be enforceable provided it is clear from the agreement that the parties have agreed to be bound by it. For example, if the agreement provided that no expert determination would bind the parties if it contained a serious error of law on the face of the record, then a determination infected by such an error would not be enforceable.

Mercury Communications

097 The remarks of Lord Slynn of Hadley, with whom the other Lords agreed, in *Mercury Communications* v. *Director General of Telecommunications* [1996] 1 WLR 48 are relevant in this context. The case concerned the re-negotiation of an agreement between British Telecommunications and Mercury Communications for telephony interconnections. 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 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."

098 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 represent an application of the rule that a clause ousting the jurisdiction of the court is void. The decision simply gives effect to the parties' contract.

Drafting issues

099 *Mercury Communications* indicates that clear words will be required to render an expert determination final and binding even though contaminated by an error of law. It shows that the courts are prepared to open up expert determinations if this can be justified according to terms of the contract. In this context, it is relevant to consider two provisions commonly found in expert determination clauses.

100 "... 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*, 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.

101 "... 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 a justification for opening up the decision.

102 Even if the parties want an expert determination to be reviewed by the courts, the utility of a clause of this kind is limited, considering that the courts do not possess the flexibility in reviewing expert determinations as they do in reviewing arbitral awards. Essentially all they are able to do is either 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

Generally

103 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 (e.g. tort or implied term of contract);
- the *standard of care* that the expert was bound to observe;
- *breach* of duty;
- *causation* of damage;
- *remoteness* of damage; and
- *measure* of damages.

104 These issues are beyond the scope of this chapter, and it is proposed here to deal with only one issue; namely, whether an expert is *immune* from an action for negligence. See also Chapter 1/8.

Immunity

105 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. 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": *Arenson* v. *Arenson* [1973] Ch 346 at 370 *per* Buckley LJ.

106 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.

107 The "quasi-arbitrator" principle was narrowed considerably by two cases in the House of Lords, *Sutcliffe* v. *Thackrah* [1974] AC 727 and *Arenson* v. *Casson Beckman Rutley and Co* [1977] AC 405, 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.

Traditional expert determination

108 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. Broadly speaking, therefore, traditional experts are no longer quasi-arbitrators. They are now vulnerable to being sued by parties to whom they cause loss.

109 The case of *Campbell* v. *Edwards* [1976] 1 All ER 785, which was also discussed above (in paras 088 to 089), illustrates this principle. In that case, expert quantity surveyors ordered a landlord to pay £10,000 to a tenant for the surrender of a lease when the proper amount would have been no more than £4,000. Although the landlord was bound to pay the over-inflated amount to the tenant, it was open to him to sue the expert for the loss he thereby incurred.

Expert dispute determination

110 The concept of a quasi-arbitrator was not entirely repudiated in these cases. Thus, there might still be a class of third parties who are not arbitrators for the purposes of the Arbitration Act 1996, but who still enjoy an arbitrator's immunity from suit. If such a category of quasi-arbitrators still exists, then the experts involved in expert dispute determination would probably fit into this category, considering that they are quite similar in role to arbitrators.

111 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.

112 The most widely held view in practice is that experts engaged in expert dispute determination are not immune from suit. As a result it is common for the expert's retainer to contain a release from liability. Contracting parties preparing to sign such releases must be aware that they have minimal recourse in the event of being disappointed with the expert's decision.

CONCLUSION

113 Traditional expert determination is a proven method of defining contractual relations in a complex commercial world. On the other hand, the broadened concept of expert dispute 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 commercial contracts in a binding way.

114 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.

115 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.

116 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.

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