Expert determination – a new way to resolve disputes or the emperor's new clothes?

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The 'expert determination' process

The growth of alternative procedures for the resolution of commercial disputes over the last decade has given new life to a process which has a long provenance – the use of an independent expert to determine, in a relatively quick and inexpensive way, a dispute arising from a commercial transaction. In particular areas of business, such as construction, property, insurance and accounting, 'expert determination' is now frequently specified as part of the dispute resolution regime within standard form contracts or is adopted (by mutual agreement between parties) when a dispute arises, as an alternative to litigation or arbitration.

The process is commonly referred to as 'expert determination' or 'expert appraisal' – generally the former where the result is agreed to be final and binding and the latter where it is not. The independent 'expert' who conducts the process is usually chosen by the parties or appointed by nomination from a professional institute (e.g. IAMA or AMINZ). In principle, the expert is selected for his/her high level of expertise and experience in the subject matter of the dispute.

An 'expert determination' is usually designed to be a relatively quick and straightforward procedure. In most cases, the agreed 'rules' will provide that the expert receives submissions and documentation from each party in respect of the issues in dispute. The expert may also convene a conference with the parties in order to ask questions and to gain a complete understanding of their respective contentions. However, there is no oral evidence taken nor any formal hearing with witnesses, etc. For some disputes, it may be appropriate for the expert to conduct a view or to carry out tests. The expert will then consider all the relevant information and publish a written determination of the disputed issues, usually with supporting reasons.

In contrast to the adjudicative processes of litigation or arbitration, the expert is not constrained from applying his/her personal expertise to the determination.

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There is also the possibility of being inquisitorial in his/her approach. With regard to documents, there is no process of discovery, subpoenas are not available to compel the production of documents and no questions of admissibility can arise. After the expert determination has been made, there is no means by which the decision can be appealed, and the circumstances in which the Courts will decline to enforce an expert determination agreement (and the result) are very limited. A 'final and binding' agreement with respect to the expert's determination usually means just that.

Rules for the conduct of expert determinations

The rules governing any process of expert determination will depend wholly and solely on the parties and the specific provisions of the contract they have entered into. It is fundamental for parties to not only agree that their disputes will be referred to 'expert determination', but also to define the rules of the procedure they wish to use (see *Triarno Pty. Ltd. v. Triden Contractors Ltd.* unreported, 22/7/92, NSW Supreme Court).

This in theory gives the process great flexibility. Subject to maintaining procedural fairness (and even that can be overruled by express agreement), parties are able to fashion a set of rules to suit their particular needs and the specific nature of the disputes likely to arise between them. Thus the procedure for dealing with the dispute (say) concerning the valuation of electric power being sold into a national grid by private generators may be structured differently to that for resolving a dispute concerning the quality of concrete in a building, or that for determining the proper construction of a clause in an insurance policy.

In practice, however, it is more common for parties to rely on a 'standard' set of rules, several of which have been promulgated by industry bodies or professional institutes. These sets of rules for expert determination can be incorporated by reference into the dispute resolution provisions of the parties' contract. A typical set of rules for expert determination would include provisions defining:

- the appointment and remuneration of the expert, together with an exclusion of liability and indemnity;
- the identification and definition of the issues in dispute;
- the powers of the expert in the conduct of the process;
- the steps by which the expert is to be informed of each party's case, e.g. written or oral submissions, documentary materials, a view, exchange of questions/answers;
- other procedural requirements, e.g. disclosures of conflict of interest, communications with the expert, conferences, representation, confidentiality; and
- the form of the determination by the expert, e.g. with/without reasons, inclusion of interest or costs, interim or staged decisions.

Finality of a determination

Most agreements for expert determination (or the rules under which the process is conducted) expressly provide for the expert's determination to be final and binding on the parties. Along with the speed and (relatively small) cost of the process, this finality is often seen to be the main advantage over litigation.

No doubt this view is promoted by parties who are experienced litigants and who are not adverse to a 'Russian roulette' style of decision-making. However in several recent cases, it has also been the cause of considerable dissatisfaction amongst parties who with hindsight would have preferred a more traditional process.

The Courts have indicated that as long as the expert complies with the terms of his/her appointment and the expert determination agreement, then the determination will be immune from challenge (see *Legal & General Life of Australia Ltd. v. A. Hudson Pty. Ltd.* (1985) 1 NSWLR 314). Thus it will not be open to a party to seek to overturn a determination on the basis that the expert has made an error, has not considered relevant matters or has relied upon irrelevant matters. As long as the expert has not departed from the terms of the contract, the parties' agreement to be bound by his/her decision, whatever it may be, will be upheld (*Holt & anor. v. Cox* (1997) 23 ASCR 5902). If however the expert can be shown to have gone outside the terms of the agreement, e.g. by determining a matter not referred to him/her or by failing to act impartially or honestly, then the determination may be set aside by the Court.

An alternative option to the usual finality of expert determination has been adopted by some public authorities and major companies in their standard commercial contracts. These are parties who are usually in the position of defending claims. Their expert determination agreements provide that the expert's decision will only be final and binding if the outcome (in terms of monies to be paid to the claimant) is less than a defined amount (e.g. say, $250,000). For larger amounts, the result is (by contractual agreement) not final and binding and it is open to the parties to pursue their dispute in another forum (arbitration or litigation). A variation to this approach is sometimes adopted whereby only disputes where the claim is less than a defined amount are made referable to expert determination in the first place. These approaches recognise that for smaller disputes, the costs of traditional arbitration or litigation processes cannot be justified while effectively preserving rights to an appeal (or a full hearing) in the case of larger disputes.

On the other hand, processes such as 'expert appraisal', which are expressly agreed by the parties not to be final and binding, increasingly seem to be regarded by experienced disputants as ineffective and a waste of time. A range of contractual provisions requiring parties to jointly obtain an independent expert opinion have

been utilised in several commercial contracts as a dispute resolution option. From all reports these appear to have achieved only very limited success and it is clear that finality is seen as the better option.

Practical problems and outcomes

While it is not possible to obtain statistical information or reports on the outcomes of expert determinations, there is now (in Australia, at least) a large amount of anecdotal experience accumulated by arbitrators and lawyers working in the field. It is estimated that over the last five years, several hundred commercial disputes have been dealt with using a process of expert determination, in lieu of arbitration or litigation.

Not all the matters referred to expert determination have been suited to the process. Where the dispute involved a single issue, often relating to valuation or quality, the procedure appears to have generally worked smoothly. However, where the determination has involved a number of interrelated disputes (such as those often arising from a construction project with a complex background of facts and a mixture of legal and technical issues), problems are often reported. Further, in the absence of traditional litigation/arbitration procedures, such as discovery of documents and the testing of evidence by cross-examination of witnesses, the expert determination process has given rise to serious concerns (both from parties and the expert) about the difficulty of resolving disputed facts. Where the resolution of an issue is largely dependent on the credit of witnesses, the process often results in an arbitrary decision by the expert.

There have been several expert determinations reported which have run into difficulties due to the tactics adopted by a reluctant defendant. The process is by its nature consensual and depends for its smooth progress on the co-operation and timely compliance of both parties. The expert generally has no power to deal with a dilatory party. The process cannot be progressed *ex parte*. There is thus considerable scope within the procedural steps for one party to delay or disrupt the proceedings.

A related problem which has arisen in some determinations is the attempt by a party to introduce new issues (such as a cross-claim) or to re-frame the issues to be determined. In these cases, the substantive determination process has had to be suspended or abandoned while the parties argue the ancilliary questions as to the expert's jurisdiction and the scope of his/her authority. Again the result can be a considerable delay or disruption to the proceedings, particularly since the only recourse for an aggrieved party may be to seek the intervention and direction of a Court.

It is also plain that a frequent cause of miscarriage is the lack of any form of pleadings defining the issues to be determined. Pleadings, in the form of a

statement of claim and a defence, are regarded as fundamental in any arbitration or litigation. Yet many parties appear to embark upon the expert determination process with no clear definition of the matters in dispute. In this situation, it is the expert who is left to formulate his/her precise terms of reference, often from a mountain of documents indiscriminately submitted by a party. At the end of the process, the same party will frequently be the one complaining that the determination has addressed the wrong questions or provided the wrong answers.

The present view of expert determination

There can be no doubt that the process of expert determination has gained rapid acceptance over the last few years as an alternative to arbitration or litigation for many disputes. It is now firmly established in the mainstream of dispute resolution procedures.

In its favour, when compared with traditional arbitration or litigation processes, expert determination is usually a quicker, cheaper, less adversarial and a more user friendly means of dispute resolution. On the negative side, there is a genuine concern that in many expert determinations the outcome may be arbitrary, unpredictable or not based on proven facts.

As I have indicated above, there can be procedural difficulties which may be utilised by a recalcitrant party to effectively disrupt the process. However, there is clearly also an ongoing evolution of more comprehensive sets of 'rules' to improve the integrity and efficiency of the process.

Is expert determination a new and better way to resolve commercial disputes? In a few circumstances, the answer is yes, but generally it is simply a new set of clothes on the old emperor of arbitration.