

Expert Determination - A Progress Report

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The recent upsurge of interest in, and adoption of, alternative procedures for dispute resolution has given new life to a process which has centuries old origins - the use of experts to determine, in a relatively quick and inexpensive way, disputes arising from commercial contracts.

Such processes, commonly referred to as "*expert determination*" or "*expert appraisal*", are now being increasingly used as part of dispute resolution regimes within contracts or are being adopted by parties when a dispute arises, as an alternative to arbitration or litigation.

In early 1997, The Institute issued a general set of "*Rules for the Expert Determination of Commercial Disputes*". These Rules have since been utilised in several matters throughout Australia and are being incorporated by reference in contract clauses. The Institute is frequently requested to provide names of experts for appointment by parties to adjudicate disputes. Many members have now had some experience in dealing with expert determination procedures. A number of parties, particularly government bodies and major principals within the construction industry, have also incorporated special-purpose expert determination rules into their standard contracts.

An "*expert determination*" is usually a relatively straight-forward process. The parties in dispute agree (by contract) to submit the matter to an independent expert for a decision. The expert is selected for his/her expertise and experience in the relevant subject of the dispute. The parties agree (in most cases) to be bound by the decision of the expert.

The Institute's Rules provide that the appointed expert receives written submissions and documentation from each party in respect of the issues in dispute. The expert may also require a conference with the parties in order to ask questions and gain a complete understanding of the issues. There is no 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 on the disputed issues, usually with supporting reasons.

It is not possible to obtain reliable statistics on the expert determinations which have been conducted within Australia over the last (say) five years, but there is a reasonable amount of anecdotal evidence accumulated. It seems that at least several hundred determinations have been undertaken by members of The Institute. The majority are reported as having proceeded satisfactorily to a conclusion, although surprisingly (in the current climate of enthusiasm for ADR) a relatively large number of concerns have been expressed in relation to various procedural difficulties and unsatisfactory outcomes. There is also some debate as to the inappropriateness of expert determination for dealing with certain types of disputes.

Clearly where the dispute involves a single issue, often relating to valuation or quality, the procedure appears to have generally worked smoothly. However, where the determination has involved a range of issues (e.g. all disputes arising from a construction project with a complex background of facts and claims - some possibly outside the contract) problems are often reported. With 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 concerns (both from the parties and the expert) about the lack of ability to test and establish disputed facts and the necessarily arbitrary outcome of some decisions by the expert.

There have been a number of determinations which have run into difficulties in a procedural sense, albeit that these were often apparently initiated for tactical reasons by a party to the dispute. These problems have included failure by parties to cooperate in performing the required steps (in a timely manner or at all), attempts to introduce new or differing issues into the determination and actions to challenge the validity of the whole process (both during or after the determination). There have also been occasions where the expert has not ensured that the parties have been accorded natural justice, has gone beyond the issues in dispute in his/her determination, or has made an obvious error (fact or law) in the reasoning of the determination.

In these instances, the rights of the parties have often been very unclear. The only remedy for a party faced with such non-performance or procedural breakdown is to seek redress in court - an expensive course of action inconsistent with the philosophy of expert determination.

Generally, it appears the courts have been reluctant to interfere procedurally with a process such as "*expert determination*" which has been established by contractual agreement between the parties. Where challenges to "*expert determination*" have been mounted on grounds of alleged ousting of the jurisdiction of the court or that the process was void for uncertainty due to lack of a specified procedure, the process has in most cases been upheld. Successful challenges have generally only occurred where the expert has acted improperly or beyond power.

However, a recent decision of the Supreme Court of Western Australia has somewhat changed the landscape. In *Boulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd* (unreported) 2 December 1997, it was held that a contract provision which referred a dispute to "*expert determination*" was void and against public policy. It was found that the referral to "*expert determination*" purported to oust the jurisdiction of the Court and prescribed a procedure which was "*entirely unsuited to the resolution of disputes which may arise out of the contract*". Mr Justice Heenan appeared to place significant reliance on the fact that the issues for expert determination in the particular dispute involved both matters of fact and law, such as whether the contract was partly oral and how the terms of the contract should be construed (- *issues not unknown to many of our members!*). His Honour commented, inter alia, that "*satisfactory determination of those matters by ... an expert ... is impossible: by its very nature the case is one for an arbitrator and not an expert*".

There is no doubt "*expert determination*" has become firmly established as an appropriate and effective mainstream procedure in the dispute resolution spectrum. However, it appears to this reporter that the rapid growth in the utilisation of expert determination processes, which as occurred over the last five years, may be levelling off. It is likely that in future, the use of expert determination will be more targeted and tailored to particular types of disputes. □