

Expert Determinations Carry Risk

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THE INCREASING POPULARITY OF EXPERT determination has been partly attributed to the expense of arbitration. However, those who include it should be aware of the dangers involved. Only decisions beyond the terms of the expert's brief can be challenged. Decisions of experts within the terms of their reference are binding, even if a serious mistake occurs in the process of making the decision.

MISTAKES CAN BE BINDING

A recent English case highlights the dangers involved. The contract under consideration in *Bouygues UK Limited v Dahl-Jensen UK Limited* provided for dispute resolution by adjudication (analogous to expert determination in the UK). The adjudicator made an obvious mistake in calculating an amount owed, resulting in the payment of a retention amount before it was contractually due, but refused to accept that an error had been made.

When an appeal was made to the Technology and Construction Court, Justice Dyson agreed that the adjudicator had made an obvious mistake. However, His Honour held that an error will not affect the valid and binding nature of the adjudicator's decision. He concluded that an adjudicator's decision could only be challenged in court if it involved a mistaken decision to deal outside the expert's jurisdiction. He acknowledged that, while it is inherent in these forms of dispute resolution that mistakes will often be made, such mistakes are contractually binding, no matter how unjust the result.

AUSTRALIAN DECISIONS

Australian cases have also held that where a provision in a contract refers issues to expert determination, the rights and obligations of the parties are a matter of contract and, in such circumstances, courts are reluctant to interfere.

If an expert determination is contractually expressed to be final and binding on the parties, the parties are bound by the expert's decision provided the expert acts honestly and impartially. Only a mistake that shows the determination is not in accordance with the contract, or that the expert has acted outside the terms of the contract, will give rise to a legitimate challenge.

WHAT CAN BE DONE?

The contract must be able to provide a remedy in the case of mistakes by the expert. With caution, you may contractually qualify the finality of the expert's decision to allow the correction of errors.

There is further possible relief in the form of the 'slip' rule. The Institute of Arbitrators' Rules for the Expert Determination of Commercial Disputes and the Australian Commercial Disputes Centre Guidelines for Expert Determination both contain a version of this rule. They give the expert power to correct a clerical mistake, an error arising from an accidental slip or omission, a material miscalculation of figures or material mistake in the description of any person, thing or matter, or a defect of form. As demonstrated by *Bouygues*, however, the expert may not recognise the mistake and may refuse to exercise the power of correction. When this occurs, there is no recourse to the courts. ☐

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