Final And Binding Expert Determination

For centuries, the construction industry has used experts to determine issues arising during construction projects.

There are two types of *expert determination* - that which is binding and that which is non-binding. Both can be very useful. However, the recent fad of turning to expert determination as a substitute for arbitration or litigation threatens to take the unwary right back to the stone age of dispute resolution.

Serious problems arise when contracts adopt expert determination as a final binding dispute resolution mechanism, not just for the determination of a narrow, objective fact, such as a valuation, but for entire disputes arising from any cause during a project. This is usually done because litigation and arbitration can be costly, lengthy and cumbersome - and the parties assume, quite wrongly, that arbitration necessarily exhibits these faults.

The *cure* is often worse than the disease. At best it is a very poor substitute. This is because expert determination is generally not subject to the laws that facilitate arbitration. These laws were developed because, quite simply, they were found to be necessary for the system to work.

In most cases, both within Australia and internationally, it would be far safer and simpler to use a flexible, abbreviated form of arbitration than to rely on the uncharted perils of final, binding expert determination.

Simplified arbitration is readily available. It can include *papers only* arbitration, limitations on the discovery of documents to avoid being bogged down in paper, "*look and sniff*" arbitrations, simplified pleadings and statements, the use of written evidence, and exchanges of expert reports and isolation of the points of difference prior to any hearing.

So, arbitration can be as streamlined as the parties wish. It need have very little in common with court proceedings. The supposed *need* for final, binding expert determinations largely reflects a failure to recognise arbitration's inherent flexibility and protections. Conversely - and ironically - many *expert determinations* may actually be arbitrations in the eyes of the law, notwithstanding contractual terms like *acting as an expert not an arbitrator.*

The processes of streamlined arbitration and expert determination are often so close that no sensible distinction can be drawn. But while arbitration has the active assistance of Australian and international laws, expert determination can lead to a legal quagmire.

What happens if a party ignores the requirement to refer all disputes for expert determination, and goes to court instead?

It is well established that a contract may provide for a dispute to be referred to arbitration before a court has any jurisdiction, so as to prevent a party turning straight to litigation in breach of an arbitration clause.

An equivalent clause requiring a reference for final, binding expert determination might, however, be regarded as an attempt to oust the court's jurisdiction altogether, and hence might be ignored by the court.

Further, while it seems a contract may provide for breaches of the contract to be addressed solely through expert determination, it is unclear whether this can be done successfully for other disputes, such as negligence claims and claims based on statutory rights (e.g. under the *Trade Practices Act*).

Even if these substantive obstacles can be overcome, in arbitration cases the court has a statutory power to stay its proceedings in favour of arbitration.

In expert determination cases, the court has no statutory basis for staying its proceedings, and would have to rely on an *inherent* jurisdiction that the High Court has held does not exist - albeit in a 1941 case that might be overturned if the issue were revisited today.

What happens if the processes of an expert determination break down?

Arbitration statutes typically provide for assistance by the courts if the parties cannot agree on the appointment of an arbitrator, or if the arbitrator's impartiality or independence is doubted, or if the arbitrator fails to act, or if assistance is needed in taking evidence.

None of these *facilitation* provisions applies to expert determinations.

If the parties cannot agree on an expert, most contracts provide for the Institute of Arbitrators to make an appointment. But many contracts don't say what is to happen if an expert's impartiality or independence comes into question, or if the expert fails or refuses to act.

Traditionally, the courts have refused to compel the appointment of a replacement in these circumstances.

Similarly, the expert is on his or her own when it comes to the collection of evidence, except to the extent the parties have agreed to co-operate. If a party fails to co-operate, and this affects the expert's determination, the rights of the parties are very unclear.

Most importantly of all, if the processes break down the parties cannot then turn to arbitration or litigation to resolve their dispute. They are left with no accrued rights

to arbitrate or sue on, and the courts will generally not act to fill the void.

How enforceable is an expert determination?

If the contract says expert determinations are to be final and binding, the courts will generally enforce them.

But the only remedy for a party faced with non-performance is to sue on the contract at common law. This is a very weak and cumbersome mechanism as was discovered 100 years ago with arbitration, before legislation introduced summary enforcement of arbitration awards.

The problems are especially acute for international cases, where both suing and the enforcement of a foreign court's judgments are complex, difficult and expensive. Without the protections afforded by international arbitration conventions, expert determination strongly favours the party with the money - usually the owner.

Further, the courts have much less flexibility than for arbitration cases. They can enforce or refuse to enforce the determination - in the latter case leaving the parties with no other remedies - but they cannot, for example, ask the expert to reconsider.

What happens if the expert makes a mistake?

In general, the parties to an expert determination agree to be bound by it even if the expert makes an error of fact, unless the expert has departed from his or her instructions so fundamentally as not to have complied with the contract. This is a difficult task to prove, given the broad wording of most agreements.

While in theory a court might intervene to relieve the harshness of a determination based on a mistake of fact, this seems never to have happened in practice.

If the expert makes an error of law, the situation is even murkier.

Traditionally the courts have refused to allow a contract to oust their jurisdiction but recent cases suggest this might be able to occur. And again, even if the court does intervene, only *all or nothing* remedies are available.

What happens if the expert is negligent?

Arbitrators are immune from actions for negligence, primarily to protect their independence in weighing up the parties' interests.

It was once thought that the same immunity would apply for experts, provided they acted fairly, but it now seems that *something else* - something not yet spelt out by the courts! - is also required. Architects, engineers and superintendents carrying out *traditional* expert determinations on relatively narrow issues appear to have lost their immunity, but experts charted with wider dispute resolution tasks might still be protected.

Again, a difficult - and expensive - legal issue is still to be resolved.

In the face of all these problems and uncertainties, if you are asked to agree to an expert determination clause, it would be wise to think twice, put aside any preconceptions and look seriously at flexible, abbreviated arbitration instead.

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