

FINAL AND BINDING EXPERT DETERMINATIONS: BEWARE

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Where a contract provides that disputes are to be determined by an expert who will make a final and binding decision, the parties risk being bound by an unsatisfactory decision as there is no statutory and limited (but difficult) common law rights to challenge the decision. It is because of this that parties should think carefully before including a final and binding expert determination clause in their contract. The courts have generally taken a strict approach in valuing the parties' freedom to contract and have resisted interfering with a dispute resolution process that was established by the consent of the parties. As such, parties may be bound by a decision on a point of law, 'warts and all', even although the third party is an expert in a technical field with no legal qualifications at all. Expert determination clauses and expert's determinations have been challenged by parties on numerous grounds, with mixed results.

APPEAL UNDER THE *COMMERCIAL ARBITRATION ACT*

In order to come within the provisions of the *Commercial Arbitration Act*, it must be shown that the parties have agreed to submit present or future disputes to arbitration. There is no simple formula to determine whether a particular process will be categorised as an expert determination or an arbitration.

OUSTER OF THE COURT'S JURISDICTION

Whether or not the 'final and binding' nature of an expert's determination is considered void as an attempt to oust the jurisdiction of the court is somewhat unsettled in Australia. To date, the issue has only been considered by courts at first instance. The courts in New South Wales and Victoria have enforced the intention of the parties to refer disputes to expert

determination and held the parties to their decision.

VOID FOR UNCERTAINTY

Failure by the parties to set out the procedures to be followed in the expert determination may invalidate the clause.

EXPERTS ACTING OUTSIDE THEIR TERMS OF REFERENCE

It is well established that fraud, collusion or dishonesty on the part of the expert will invalidate the determination. However, mistakes that fall short of fraud, collusion or dishonesty may only be impugned on the grounds that the expert has acted outside his or her terms of reference.

CONCLUSION

It is the difficulty and uncertainty associated with appealing an unsatisfactory determination that makes expert determination a risky dispute resolution measure for contracting parties. Where the parties have a strong desire to include an expert determination clause in their contract, there are ways to reduce the risks:

- Clearly stipulate the types of dispute the particular expert is to be referred;
- Clearly stipulate the terms of reference of the expert; and
- Limit reference to expert determination for claims under a certain monetary amount.

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