

Expert Determination

Sir Laurence Street KCMG comments upon expert determination of disputes and provides a modified version of his Expert Determination Agreement.

Dear Sir

I have read with interest Mr Philip Davenport's article "Experts and Arbitrators" in Issue 21 of the Australian Construction Law Newsletter, page 4. He raises a subject of increasing importance and I should like to offer a few comments in relation to the matter generally.

I share with Mr Davenport regret at the concept of a "quasi-arbitrator" having crept into the field of dispute resolution. I believe it needs to be understood that this was the device by which the Courts sought to confer upon an expert the immunity from negligence that the law gave to arbitrators. In effect, what the Courts were doing was saying - well, you are not an arbitrator in the full sense of the word but we think it desirable that you should have protection from negligence so we shall call you a quasi-arbitrator.

Recognition of this origin in no way diminishes the validity of Mr Davenport's criticism of this uncertain characterisation and, I repeat, I warmly endorse his view in that regard. Immunity from liability for negligence should be the subject of a special clause in the contract by which the expert is retained by the parties.

I respectfully suggest to your readers that the useful mechanism of expert determination need not and should not be relegated simply to questions of valuation and the like. An appropriately drawn agreement should enable parties to submit the resolution of an entire dispute to an expert for determination outside the framework of the arbitration law. The Courts will, as Murray J did in the case to which Mr Davenport refers (*Aztec Mining Co Ltd v Leighton Contractors Pty Ltd 1990 1 ADRJ*), examine the procedure agreed between the parties and followed in the determination process to see whether it is in truth an arbitration irrespective of what they have called it.

It is the task of the drafter of the agreement, and the duty of the expert, to lay down and follow through a process that will not stray into the area of arbitration.

The mechanism is already serving a valuable purpose across a wide range of disputes and it can be expected to gain increasing acceptance in the years ahead. It would be regrettable if undue caution in relation to expert determination were to inhibit its healthy development.

Having said this, I should acknowledge that Mr Davenport makes a justifiable criticism of a precedent I had prepared that was published in the November 1989 issue of the Australian Construction Law Newsletter at page 17. I revised that precedent following upon the judgment of Murray J in the *Aztec Mining* case reported in 1990. In

particular the provision entitling the parties to a hearing has been deleted and in place of it the redraft provides that "the consultant may if he/she so desires arrange to meet with the parties to discuss the dispute." At any such meeting "any party may be accompanied by legal or other advisers." In practice, such meetings, if they are held, are conducted as free ranging discussions in which all who may wish to do so participate - especially the parties. They do not correspond either in form or in substance with a forensic or adversarial exchange.

At the risk of encumbering the pages of your journal, I annex a copy of the redraft agreement for Binding/Non Binding Expert Determination of Disputes. Prudence leads me to disclaim any warranty that this is immune from challenge as an arbitration, particularly as the actual course of proceedings followed in the expert determination could bear upon the validity of such a challenge. Modern judicial attitudes to ADR procedures do, however, encourage some confidence in the parties being able to regulate for themselves the manner in which their disputes are to be resolved.

Yours faithfully

Laurence Street

AGREEMENT FOR BINDING/NONBINDING (Note 1) EXPERT DETERMINATION OF DISPUTES

WHEREAS

- 1. By Contract made on (date) A and B agreed to carry our certain building and construction work for B.
- 2. Disputes have arisen between the parties upon the matters set out in the Schedule to this agreement ("the disputes").

IT IS NOW AGREED:

- A. The parties hereby request ("the consultant") to determine the disputes by issuing a certificate stating his/her determination, and the consultant by signing his/her acceptance of this agreement agrees to comply with such request in accordance with the terms of this agreement.
- B. The consultant in so determining and certifying -
 - (i) will act as an expert and not as an arbitrator;
 - (ii) will proceed in such manner as he/she thinks fit without being bound to observe the rules of natural justice or the rules of evidence;
 - (iii) will take into consideration all documents, information and other material that the parties place before him/her including documents, information and material relating to the facts in dispute and to arguments and submissions upon the matters in dispute;
 - (iv) will not be expected or required to obtain or refer to any other documents information or material but may do so if he/she so desires;
 - (v) will without giving reasons issue a certificate in such form as he/she considers appropriate stating his/her determination of the matters in dispute;
 - (vi) will act with expedition with a view to such certificate being issued as soon as practicable.
- C. The consultant may if he/she so desires arrange to meet with the parties to discuss the dispute; at and in connection with any such meeting:
 - (i) any party may be accompanied by legal or other advisers;
 - (ii) the parties agree to be bound by such procedural directions as may be given by the consultant both in preparation for and during the course of the meeting.

The parties agree that any such meeting shall be deemed not to be a hearing such as to import any colour of the proceedings under this agreement being considered to be an arbitration. (Note 2).

D. The parties agree to accept the determination in the said certificate as final and binding. (Note 3).

OR

D. The parties agree that they will not be bound by the said determination. (Note 3).

E. The parties may agree to confine the matters in dispute to be determined and certified in contemplation that the remaining matters in dispute will be the subject of a formal mediation by the consultant designed to achieve agreement between the parties on the resolution of such remaining matters. In that event the mediation shall take place at such stage and by such procedures as the parties and the consultant may agree. (Note 4)

F. The consultant shall not be liable to the parties or either of them or to any third party or stranger for anything done or omitted by him/her pursuant to this agreement and the parties release and indemnify him/her from and against any claims for negligence, bias or other misconduct other than actual fraud.

G. The parties shall share equally in paying the costs and expenses of the determination and mediation.

Signature

Signature

Name Printed

Name Printed

Date

Date

Accepted

Consultant

- Note 1 One of these alternatives must be deleted.
- Note 2 Paragraph C can be left unaltered or can be deleted in whole or clause (i) of Paragraph C can be deleted as the parties may wish.
- Note 3 One of these alternatives must be deleted.
- Note 4 Paragraph E can be omitted if the parties so wish.

SCHEDULE

(Description of the matters in dispute.)