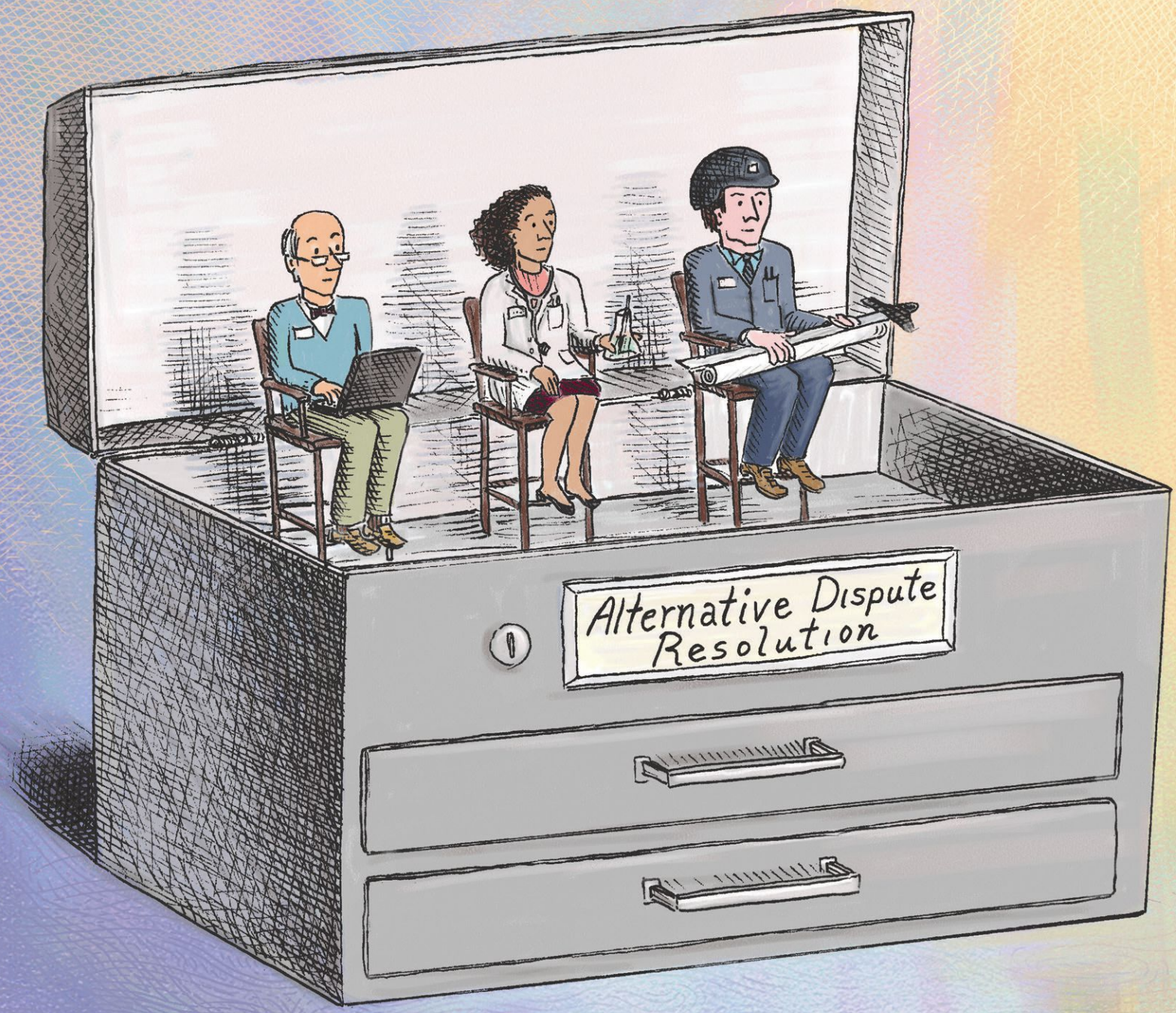

Illustration by Barbara Kelley

Resolving Disputes by Expert Determination:
What Happens When Parties Select Appraisers, Accountants, or Other Technical Experts to Decide Disputes

by Brian C. Willis

Expert determination is a form of dispute resolution in which the parties use a subject-matter expert, rather than a judge, mediator, or arbitrator with legal training, to decide the dispute.[1] It may be the least known form of alternative dispute resolution. In fact, it's been called the "secret alternative to arbitration."[2] While the term "expert" may call to mind the concept of an expert witness, expert determination actually has its roots in the English common law of "valuation" or "appraisement."[3] Perhaps because we do not generally use the word "expert" to describe the decisionmaker, the concept of a person without legal training acting as the ultimate decider of law and fact may be most familiar in the form of an agreement to resolve a dispute over value through an appraiser or panel of appraisers.[4]

Expert determination, however, has quietly grown far beyond its roots in appraisal and is now also used to resolve issues that require specific technical expertise and for more general dispute resolution.[5] Expert determination is used in some of the largest construction projects and in small disputes.[6] "[F]rom rent reviews to share valuations, from construction disputes to pension scheme transfers, and from computer disputes to oilfield exploration," parties may turn to expert determination whenever they are looking for dispute resolution that is "quick, cheap, and private."[7]

Unlike almost every other form of dispute resolution, lawyers for parties drafting or invoking expert determination clauses cannot assume that the ultimate decisionmaker will have the same background knowledge of litigation, evidence, and civil procedure as a lawyer or judge. An accountant, engineer, or other nonlawyer professional may be unprepared and untrained in aspects of dispute resolution that lawyers find routine. They are also unlikely to share the same assumptions and common understanding of basic legal concepts, such as due process, that are a universal part of a legal education. In Florida, and in other states, the confusion and ambiguity over expert determination clauses have resulted in courts turning expert determination into a hybrid form of arbitration. While providing familiar ground for the parties and courts, treating expert determination as a form of arbitration also opens up pitfalls and may undermine the original intent of the parties.

Both the litigator and the transactional attorney need to be familiar with the benefits and risks of expert determinations as an alternative form of dispute resolution. This article looks at the laws of Florida, the hybrid arbitration scheme the state has developed for handling expert determination clauses, and the problems this has created. It also reviews the law of Delaware, which follows its own version of the hybrid arbitration approach. Delaware's law and experience is particularly relevant because Delaware's corporate law is frequently invoked in business contracts and because Delaware's experience further illustrates the problems with the hybrid arbitration treatment of expert determination. Finally, this article looks at the practical considerations of drafting and reviewing expert determination clauses and the role and responsibilities of the expert given the current state of the law.

What Is Expert Determination?

Expert determination is any dispute resolution mechanism whereby the parties rely on a technical expert, rather than a legal expert, to decide their dispute.[8] While the term "expert determination" may be unfamiliar, the law and

practice of using technical experts and other professionals without legal training to resolve disputes is growing along with its alternative dispute resolution cousins — mediation and arbitration. Adoption and use of expert determination — like other forms of alternative dispute resolution — is driven by several overlapping goals and trends, including the demand for quick, reliable, private, and low-cost alternatives to traditional litigation.

The recent history of litigation over expert determination clauses demonstrates that the use of technical experts to resolve disputes can appear deceptively simple to the litigator, the transactional attorney, and the courts.[9] Expert determination has its own body of caselaw and procedures, and the treatment of expert determination can vary across jurisdictions. Many parties may not be familiar with the unique legal issues arising out of expert determination.

Perhaps because expert determination is less well known, courts and litigants have struggled to understand and apply agreements to use experts to resolve disputes. Often, expert determination is conflated with arbitration. As a result, courts and attorneys typically draw from the more familiar arbitration cases and statutes when handling expert determination and disputes arising out of the expert determination process.[10]

This confusion is holding back the more widespread adoption and use of expert determination. It is also adding unnecessary cost, time, and uncertainty for parties that find themselves in a dispute over the use or outcome of expert determination, which can defeat the original purpose of selecting an alternative dispute mechanism. These problems can only be solved by first recognizing that expert determination is distinct from arbitration.

• *How Expert Determination Can Differ from Arbitration* — Setting aside for the moment the technical question of whether expert determination may be governed by state or federal arbitration acts, expert determination can be distinct from arbitration in one or more ways:

• Arbitration usually follows some of the formalities of litigation, such as pleadings, open and closing statements, and an evidentiary hearing or taking of witness testimony, whereas an expert determination may have none of the formalities of litigation;

• An arbitrator generally has training in dispute resolution processes and is frequently a former judge or lawyer trained in the rules of procedure and evidence, whereas an expert may have no dispute resolution experience and no training in the rules of procedure or evidence;

• Arbitration is expressly governed by state and federal arbitration statutes and the procedures and bases for review by the court are well settled, whereas expert determination may be only partially covered by statute and may afford limited or no appeal rights;

• By statue, arbitration awards can be enforced by the courts, whereas the decision by an expert pursuant to an expert determination proceeding may have to be enforced by a suit for breach of contract;[11] and

• An arbitrator is statutorily immune from liability, whereas an expert may not be able to rely on the statutory immunity granted to arbitrators and may be sued for negligence.[12]

• *Selecting Expert Determination* — "Almost every expert determination arises out of a contract."[13] The words "as an expert and not as an arbitrator" may be used to indicate the role of the third-party decider but are not strictly necessary.[14] As a creature of contract, the usual requirements of contract law, such as offer and acceptance, consideration, and breach, govern.[15] As a contract, no writing is necessary except as may be required to comply with the statute of frauds.[16]

A contract may refer disputes arising out of the agreement to an arbitrator and carve out a separate set of disputes that go to an expert. In these cases, attention must be given to the description of the type of disputes delegated to each form of dispute resolution and, in the case of expert determination, whether disputes about the expert determination are subject to the arbitration clause. If the arbitration clause excludes disputes arising under the section of the agreement dealing with expert determination from arbitration, then the parties may be opening the door to the courtroom when the intent was to have disputes handled solely by alternative dispute resolution mechanisms. Alternatively, requiring disputes over expert determination to go to arbitration can create nested levels of alternative dispute resolution that may prevent a party from getting in front of a judge.

Expert Determination as Hybrid Arbitration

• *Florida* — "Florida courts have generally treated appraisal clauses as 'narrowly restricted' arbitration provisions."[17] This treatment, illustrated in a series of cases under the caption *Allstate Ins. Co. v. Suarez,* 786 So. 2d 645, 646 (Fla. 3d DCA 2001), *approved,* 833 So. 2d 762 (Fla. 2002) (hereafter referred to as "*Allstate I*"), creates a form of expert determination that is a hybrid between the common law of appraisal and statutorily governed arbitration. In *Allstate I*, the Third District Court of Appeal was asked by the defendant to review a trial court order granting plaintiffs' motion to confirm an appraisal award.[18] The Third DCA's decision and reasoning would ultimately be adopted by the Florida Supreme Court in *Allstate Ins. Co. v. Suarez*, 833 So. 2d 762 (Fla. 2002) (hereafter referred to as "*Allstate II*").

The underlying dispute in the *Allstate* decisions involved a claim for damages under a homeowners' insurance policy.[19] The homeowners and the insurance company arrived at an impasse as to the value of the homeowners' loss, and the homeowners/plaintiffs filed a complaint for declaratory relief and/or petition to compel appraisal seeking to enforce the following provision from the insurance policy:

> *Appraisal.* If you and we fail to agree on the amount of loss, either party may make written demand for an appraisal. Upon such demand each party must select a competent and impartial appraiser and notify the other of the appraiser's identity within 20 days after the demand is received. The appraisers will select a competent and impartial umpire. If the appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge or a court

of record in the state where the resident premises is located to select an umpire.

The appraisers shall then determine the amount of loss, stating separately the actual cash value and the amount of loss to each item. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of loss. If they cannot agree, they will submit their differences to the umpire. A written award by any two will determine the amount of loss.[20]

The petition to compel appraisal was granted by the trial court.[21] The trial court then appointed a neutral appraisal umpire and each party appointed their own appraiser.[22]

The insurance company next sought to have the appraisal umpire hold an evidentiary hearing with all of the formalities required by the Florida Arbitration Code.[23] In relevant part, the Florida Arbitration Code provides that "[u]nless otherwise provided by the agreement...(2)[t]he parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing."[24] The appointed umpire, not the court, determined that the Florida Arbitration Code did not apply, and the defendant insurance company was barred from presenting evidence, examining witnesses, and exercising such other rights as a party would ordinarily have at an evidentiary hearing.[25] The opinions do not provide any explanation or clarity as to why the umpire was chosen as the decider or whether both parties agreed the umpire could make legal determinations regarding the applicability of the Florida Arbitration Code.

The opinions are also not clear as to what procedure was actually followed by the umpire to arrive at a final decision, but a decision was reached, and the plaintiff filed a motion to confirm appraisal award.[26] The opinion does not explain why, since the umpire had determined that the Florida Arbitration Code did not apply, the trial court, appellate court, and Florida Supreme Court believed that the court had the power to enter a judgment based on the Florida Arbitration Code. The Florida Arbitration Code, F.S. §618.12, authorizes the court to confirm an award upon motion made by "a party to an arbitration proceeding," but, as we saw, the umpire, who for some reason was given authority to decide whether the Florida Arbitration Code applied, had already decided that the code did not apply when denying the defendant's request for a formal evidentiary hearing.[27] The trial court could only confirm the award if the arbitration code applied. The issue was apparently not raised by any of the parties, and the trial court granted the motion to confirm and entered a final judgment based on the appraisal.[28]

On appeal to the Third DCA, in *Allstate I*, the defendant challenged the confirmation of the appraisal award since the proceedings were not conducted in accordance with the Florida Arbitration Code.[29] The district court would end up splitting the proverbial baby. The court upheld the trial court's decision to enter a judgment based on the Florida Arbitration Code and the final decision of the appraiser, but found that the appraisal provisions of the insurance policy contemplated that the dispute would be resolved by "inspection and valuation by each appraiser individu-

Expert determination, as applied following the Allstate *decisions, has all of the speed and force of law of arbitration without any of the ordinary protections. It is not clear from a policy standpoint whether that was actually the intent of the Florida Arbitration Code, and it is equally unclear whether parties enter into an expert determination clause intend to bind themselves to the hybrid arbitration scheme.*

ally, not a trial-type hearing."[30]

The court in *Allstate I* reasoned that the Florida Arbitration Code provides the parties to an arbitration action the right to "be heard, to present evidence material to the controversy and to cross-examine witnesses… [u]nless otherwise provided by the agreement."[31] According to the court, "the agreement specifically provides for an appraisal" and, therefore, "[i]t is difficult to imagine that a formal arbitration hearing was within the contemplation of the parties when entering into the agreement."[32]

In *Allstate II*, the Florida Supreme Court would go on to affirm the Third DCA's decision and adopt that court's reasoning.[33] The Florida Supreme Court expressly rejected the argument that the expert determination clause required "a formal arbitration hearing."[34] The decision states that the court appointed umpire "correctly followed the trial court's ruling by refusing to proceed under the formal procedures of the [a]rbitration [c]ode."[35]

In the 15 years since *Allstate II*, Florida courts have turned expert determination into a hybrid arbitration proceeding with conflicting results and outcomes. Under this hybrid scheme, a party waives all of the ordinary evidentiary and procedural rights that it would otherwise have in an arbitration proceeding by using the term "appraisal" instead of "arbitration."[36] The logic of the *Allstate* decisions turn the phrase "[u]nless otherwise provided by the agreement" from the Florida Arbitration Code into an invitation for parties to waive their due process rights when they invoke the expert determination dispute resolution mechanism. Expert determination, as applied following the *Allstate* decisions, has all of the speed and force of law of arbitration without any of the ordinary protections. It is not clear from a policy standpoint whether that was actually the intent of the Florida Arbitration Code, and it is equally unclear whether parties entering into an expert determination clause intend to bind themselves to the hybrid arbitration scheme.

This hybrid approach has sometimes produced conflicting outcomes. Most courts interpret the *Allstate* decisions as standing for the position that the Florida Arbitration Code provides a court with the power to compel appraisals in the same manner that the court would compel arbitration.[37] However, while citing *Allstate II*, at least one court found "that the Florida Arbitration Code is not applicable to appraisal cases" and refused to compel appraisal.[38] Similarly, when it comes to enforcing the expert's decision, most courts also interpret the *Allstate* decisions as supporting the position that a court has the power to enforce an appraisal valuation in the same manner that the court would enforce an arbitration award.[39] However, citing *Allstate II*, at least one court overturned a decision to confirm an appraisal valuation on the basis that the Florida Arbitration Code is "not applicable to appraisal awards."[40]

In addition to producing conflicting decisions, the caselaw in Florida has not addressed multiple areas that are germane to the treatment of expert determination clauses, such as: 1) Does the arbitration act apply to all forms of expert determination?; 2) Can parties exempt their expert determination clause from the Florida Arbitration Code and, if so, how?; 3) What are the limits of Florida courts' authority to turn the decision made by an expert into a judgment pursuant to the Florida Arbitration Code?; and 4) Does a party to an expert determination proceeding have the same rights to challenge the expert's determination as a party to arbitration has to challenge the decision of an arbitrator?

At a minimum, the results of the *Allstate* decisions show how the expectations of the parties can be frustrated and lead to unnecessary confusion among the parties as to their rights under an agreement. The defendant in *Allstate*, perhaps on principle, or perhaps finding itself on the wrong side of an appraisal valuation, sought the protections of the Florida Arbitration Code. The defendant was denied the protections of the Florida Arbitration Code while its opponent was given the benefits of the code — enforcement of the appraiser's decision.

• *Delaware* — The ambiguity around expert determination clauses and the resulting lack of clarity is not unique to Florida. Corporate entities often select the law of Delaware in contractual choice of law provisions because the state is perceived as having a more established and robust corporate jurisprudence than other states. Delaware has more published decision on expert determination provisions than Florida and, on its face, Delaware law appears to take a more straightforward approach to expert determination.

Delaware courts have explicitly determined that an expert determination clause is an agreement to arbitrate.[41]

While the Florida Supreme Court states "[i]t is difficult to imagine that a formal arbitration hearing was within the contemplation of the parties when entering into the agreement," a Delaware court lambasted counsel's argument that an expert determination clause was *not* arbitration as a "half-hearted contention."[42] In Delaware, "the fact that the decision maker is referred to as an 'expert,' rather than an 'arbitrator' is not dispositive."[43] Indeed, the Delaware Supreme Court has determined that expert determination clauses are arbitration agreements and will be governed by the applicable arbitration act.[44]

In *Viacom Intern., Inc. v. Winshall*, 72 A.3d 78, 79 (Del. 2013), the parties to the dispute entered into an agreement and plan of merger whereby Viacom would buy out the shareholders of Harmonix Music Systems. The buyout provided for a lump sum payment and additional payouts over a two-year period based on Harmonix's financial performance.[45] In the second year, the designated shareholder representative for Harmonix disputed Viacom's calculation of Harmonix's financial performance and thereby triggered a contractual dispute resolution process that would ultimately turn the matter over to an accountant for determination.[46]

The agreement in *Viacom* specifically stated that the accountants "shall be deemed to be acting as experts and not as arbitrators."[47] While one party initially took the position that the accountant was not acting as an arbitrator, this position had been abandoned by the time the case reached the appellate level where the parties agreed to apply the Federal Arbitration Act (FAA).[48] While it is possible the expert determination proceeding was treated as arbitration because of other Delaware decisions that expert determination clauses are arbitration clauses, the New York Bar's Committee on International Commercial Disputes suggested that the decision to treat the expert determination clause as arbitration was made "in order to place the dispute on familiar ground."[49]

During the course of the accountant's engagement, Viacom and Harmonix were unable to agree on what information the accountant could consider.[50] Two weeks after the accountant issued a decision, Viacom filed a lawsuit alleging that the accountant "disregarded the terms" of the merger agreement and that Harmonix had breached the merger agreement by refusing to consent to the accountant's consideration of records submitted by Viacom.[51] The trial court confirmed the accountant's decision and the matter ultimately came before the Delaware Supreme Court.[52]

Viacom argued that, pursuant to the FAA, the accountant's "refusal to hear pertinent and material evidence" was fundamentally unfair and, therefore, should be vacated.[53] The Delaware Supreme Court found no merit in Viacom's argument, and deferred to the accountant regarding what arguments and records to consider.[54]

A different outcome may have been reached if the FAA did not apply. The merger agreement provided that the accountant's determination "shall be final and binding on all parties" except in the case of "fraud or manifest error."[55] As such, the contract's expert determination clause allowed the court to consider whether a "manifest error" had occurred, whereas the FAA did not allow for review in the event of manifest error.[56] The parties confusion, or search for familiar ground, led them to apply arbitration law and fundamentally deviated from the intent of the drafters that the accountants should act as "experts and not as arbitrators." The contractually negotiated for and agreed to standard of review was discarded in favor of the standard of review available under the FAA.

• *Hybrid Arbitration Approach Can Frustrate Intent of Parties* — If parties elect to use expert determination because it is "quick, cheap, and private," then the *Viacom* and the *Allstate* decisions illustrate how the parties' intent is frustrated by the hybrid arbitration treatment of expert determination. Delaware's decision to formally treat expert determination clauses as an election to arbitrate does not necessarily lead to outcomes that are more consistent with the parties' original intent than in Florida's version of hybrid arbitration.

Applying arbitration laws to expert determination clauses results in the court substituting applicable arbitration code provisions for the contractually agreed terms. Perhaps because the arbitration code was not drafted with expert determination in mind, it may be difficult for the agreement's drafters to anticipate which provisions of the expert determination clause will survive judicial scrutiny. These factors combine to make litigation over expert determination less predictable. Such problems will continue unless the arbitration laws are redrafted with expert determination clauses in mind, specific laws for expert determination are drafted, or the courts return to the common law history of treating expert determination solely as a creature of contract.

Practical Considerations

• *Drafting and Litigating Expert Determination Clauses* — Until and unless the law changes, attorneys drafting expert determination clauses need to be prepared to deal with the unique challenges presented by the current state of the law. As a result of the ambiguities in the law of expert determination, a lawyer or judge drafting or interpreting an expert determination clause should consider whether the parties intended for some or all of the applicable arbitration code to apply; whether the decision of the expert is subject to review; and the means by which a party may enforce the decision of the expert.

Further, an attorney should understand and consider the type of disputes that are likely to arise. In general, these disputes will fall into five categories: compelling expert determination; selecting the expert; deciding what procedure the expert will follow; deciding what testimony or records the expert will consider; and enforcing the expert's decision. Drafting more detailed expert determination clauses, or reviewing expert determination clauses with these recurring areas of dispute in mind, can provide a framework for a more logical

and predictable expert determination process.

If a dispute arises that the parties have contractually elected to be decided by expert determination, secondary disputes may arise about the scope of the expert's review. For example, in the *Allstate* decisions, the underlying agreement was silent as to who would decide what law the expert's decision would be governed by.[57] There, the umpire — selected by the judge — determined that the Florida Arbitration Code did not apply.[58] The agreement between the parties did not give the umpire this authority.[59]

Secondary disputes may also arise as to the scope of the evidence that the expert may consider, whether one or more hearings will be held, whether the parties may call witnesses, and whether cross examination can take place. Under the Florida Arbitration Code, a party in arbitration automatically has the right "to be heard, to present evidence material to the controversy and to cross-examine witnesses." Under the *Allstate* decisions, a party that invokes expert determination waives these rights unless the contract expressly provides for them.

Finally, once the expert reaches a decision and renders an opinion, what rights of review do the parties have, if any? Absent specific rights of review granted by agreement, the answer may be none at all. If the underlying agreement has a general arbitration clause, then it is possible that the parties will need to arbitrate disputes over the expert's decision.

Failure to provide specific rules for how the expert is to reach its determination, along with the ambiguities in the application of either the Florida Arbitration Code and FAA to expert determination, mean that drafters of expert determination clauses must be careful to not limit their clients' options should a dispute arise.

The London-based Centre for Effective Dispute Resolution (CEDR) provides a model expert determination agreement that may be incorporated into a contract, attached as an exhibit, or kept as a separate agreement.[60] Though the CEDR form is based on English law, both the English law of expert determination and American law share common roots in the common law of appraisal, and the form can serve as a guide for drafters.

• *Role of the Expert* — An expert called upon to make a determination pursuant to an expert determination clause may not be familiar with the rules of the road that lawyers take for granted. Arbitrators and mediators, who are almost always lawyers or former judges, have extensive training in the rules of evidence, civil procedure, and concepts of due process. Experts, accountants, appraisers, or engineers may have no training in these areas.

Once the parties have agreed on an expert, the expert must be retained. Consideration must be given to the form of the engagement of the expert. An accountant, appraiser, or engineer generally is not in the businesses of engaging in dispute resolution. In fact, they may be chosen for the role because of their subject-matter expertise, not because they have any specific dispute resolution experience. Because a third party serving as an expert may not have experience with dispute resolution, their form engagement agreement often will not be properly structured to account for the unique issues involved in the role of expert. Depending on the form of the engagement, the parties may be setting themselves up for further disputes over the course of the expert's decisionmaking process and limiting their rights and remedies as to how the expert carries out the expert determination proceedings.

Further, the expert may not realize the extent to which they are creating exposure to potential liability based on service in the role of decision maker. The Florida Arbitration Code and the FAA provide immunity from civil liability for an arbitrator. To the extent a court finds that the expert's role was not covered by the relevant arbitration laws, the expert is subject to suit for damages based on its actions in the case. The suit may be based on a negligence theory or, depending on the form of engagement with the expert, a breach of contract action.

While the Florida Supreme Court's decision in *Allstate* and the Delaware Supreme Court's decision in *Viacom* may have differed in reasoning, both courts ultimately left the expert with almost unfettered decision-making authority to determine what information to consider in rendering a decision. This principle of deference toward the expert traces back to the common law of appraisal. In the 1776 English decision of *Belchier v. Reynolds*, 3 Keny. 87, the judge found that by selecting an expert, the parties made the expert "their judge" and had to abide by "his judgment and skill." If the parties want to direct the expert as to what information will be considered and when it will be submitted, then the parties need to reach an agreement on these points when drafting the expert determination clause or entering into an agreement to retain the expert. Likewise, the expert, when being retained, needs to consider what rules of the road will apply. The model expert determination agreement from CEDR can be helpful to make those decisions.[61]

Conclusion

For over 200 years, parties have looked to resolve their disputes through the use of experts bringing to bear technical, instead of legal, knowledge. This long history is proof that expert determination as a distinct form of alternative dispute mechanism can be of value. Yet, today, expert determination is treated as a hybrid arbitration proceeding. This has resulted in substantial confusion and uncertainty for courts and parties.

If we accept that expert determination is a valuable tool in the alternative dispute resolution toolbox, then we would be wise to provide a specifically codified set of laws governing expert determination in the same manner that we have codified mediation and arbitration. A baseline set of rules for expert determination will provide more predictability and speedier outcomes at lower cost, which is often the primary goal of parties seeking alternative dispute resolution in the first place.❑

[1] JAMES FARRELL & CLIVE FREEDMAN, KENDALL ON EXPERT DETERMINATION 1.1 (5th ed 2014).

[2] Steven H. Reisberg, *Expert Determination? Secret Alternative to Arbitration*, 250 N.Y. L. J. 115 (Dec. 13, 2013).

[3] Existing as part of the common law prior to 1776, the use of experts for dispute resolution is incorporated into the common law of Florida. *See Belchier v. Reynolds*, 3 Keny. 87, 96 E.R. 1318 (1754) ("Whatever be the real value is not now to be considered, for the parties made Harris their judge on that point; they thought proper to confide in his judgment and skill and must abide by it."); *See also* Michael Cavendish & Blake J. Hood, *Florida Common Law Jurisprudence*, 81 FLA. B. J. 8 (Jan. 2007), citing WALTER W. MANLEY II, ed., THE FLORIDA SUPREME COURT AND ITS PREDECESSOR COURTS, 1821-1917 4 (1997) and James W. Day, *Extent to Which the English Common Law and Statutes are in Effect*, 3 U. FLA. L. REV. 303 (1950). This enactment would become FLA. STAT. §2.01, originally enacted in the Florida Territorial Acts 1829 at 8.

[4] New York City Bar, Report by the Committee on International Commercial Disputes, *Purchase Price Adjustment Clauses and Expert Determinations: Legal Issues, Practical Problems and Suggested Improvements* 2 (June 2013), *available at* http://www2.nycbar.org/pdf/report/uploads/20072551-PurchasePriceAdjustmentClausesExpertDeterminations--LegalIssuesPracticalProblemsSuggestedImprovements.pdf.

[5] FARRELL, KENDALL ON EXPERT DETERMINATION at 1.1.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] New York City Bar, Report by the Committee on International Commercial Disputes at 3; FARRELL, KENDALL ON EXPERT DETERMINATION at 18.3-6.

[10] New York City Bar, Report by the Committee on International Commercial Disputes at 2.

[11] FARRELL, KENDALL ON EXPERT DETERMINATION at 18.3-6.

[12] FLA. STAT. §682.051 (2016) created statuary immunity for arbitrators under Florida law. This has never been expressly expanded to include experts. Under federal law, arbitral immunity has been created by the expansion of judicial immunity doctrines. *See* Jenny Brown, *The Expansion of Arbitral Immunity: Is Absolute Immunity A Foregone Conclusion?*, 2009 J. DISP. RESOL. 225, 227 (2009). The expansion of immunity to experts serving in a quasi-judicial role is a complex topic beyond the scope of this article. In the author's experience, most professionals retained to act as an expert in an expert determination proceeding are unfamiliar with the potential liability.

[13] FARRELL, KENDALL ON EXPERT DETERMINATION at 7.2-1.

[14] FARRELL at 7.2-5 ("[A]n agreement to refer an issue to expert determination need not be in writing but modern commercial practice makes oral agreements for expert determination most unlikely.").

[15] FARRELL at 1.2-2.

[16] FARRELL at 7.2-5.

[17] *Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co.*, 250 F. Supp. 2d 1357, 1362 (M.D. Fla. 2003), *aff'd,* 362 F.3d 1317 (11th Cir. 2004).

[18] *Allstate I,* 786 So. 2d at 646.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* (The Third DCA's opinion even refers to the appraisers selected by the parties as arbitrators.).

[23] *Id.*

[24] *Id.* (citing FLA. STAT. §682.06 (1999)).

[25] *Id.* The case does not state whether the umpire in this case had any legal training or experience.

[26] *Id.*

[27] *Allstate II*, 833 So. 2d at 763) ("Allstate thereafter contended that the appraisal umpire should apply the Florida Arbitration Code to the appraisal proceedings, but the umpire denied Allstate's request.").

[28] *Allstate I*, 786 So. 2d at 646.

[29] *Id.*

[30] *Id.* at 347 (citing *Liberty Mut. Fire Ins. Co. v. Hernandez,* 735 So. 2d 587 (Fla. 3d DCA 1999)).

[31] *Id.* (citing FLA. STAT. §682.06 (1999)).

[32] *Id.*

[33] *Allstate II*, 833 So. 2d at 766.

[34] *Id.* at 765.

[35] *Id.* at 766.

[36] Writing about its prior decision in *Allstate II*, the Florida Supreme Court stated that "an appraisal provision in an insurance contract is not an agreement to submit to formal arbitration proceedings under the Florida Arbitration Code." *Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187, 190 (Fla. 2011).

[37] *See Prescott Architects, Inc. v. Lexington Ins. Co.*, 638 F. Supp. 2d 1317, 1323 (N.D. Fla. 2009) ("Florida courts have repeatedly used FLA. STAT. §682.03, governing arbitration, to compel appraisals.").

[38] *Citizens Prop. Ins. Corp. v. Cuban-Hebrew Congregation of Miami, Inc.,* 5 So. 3d 709, 712 (Fla. 3d DCA 2009).

[39] *Three Palms Pointe, Inc.*, 250 F. Supp. 2d at 1361-62 ("Numerous Florida [d]istrict [c]ourt of [a]ppeal decisions have affirmed confirmation of appraisal awards utilizing Florida's Arbitration Code's confirmation process.").

[40] *State Farm Florida Ins. Co. v. Gonzalez*, 76 So. 3d 34, 37 (Fla. 3d DCA 2011); *see also Florida Ins. Guar. Ass'n, Inc. v. Olympus Ass'n, Inc.,* 34 So. 3d 791, 796 (Fla. 4th DCA 2010).

[41] *SRG Glob., Inc.*, CIV.A. 5314-VCP, 2010 WL 4880654 ("[T]he merger agreement created a detailed four-step process for resolving such disputes, culminating in the submission of unresolved issues to an accountant for resolution.[44] Similarly, in this case, the fact that the decisionmaker is referred to as an "expert," rather than an "arbitrator" is not dispositive.")

[42] *Id.*

[43] *Id.*

[44] *Viacom Intern., Inc. v. Winshall*, 72 A.3d 78 (Del. 2013).

[45] *Id.* at 79.

[46] *Id.* ("The parties were unable to resolve all of their disagreements, so they submitted the [e]arn-[o]ut [d]isagreements (the unresolved items from the 2008 [s]ummary of [i]ssues) to BDO USA LLP, the selected [r]esolution [a]ccountants ("BDO"). The December 8, 2010 BDO [e]ngagement [l]etter specified the manner in which Viacom was to produce additional documents; the dates on which initial and reply submissions were due; the manner in which BDO could submit and receive answers to substantive questions prior to the hearing; and the manner in which the hearing would be conducted.").

[47] *Id.* at n.2.

[48] *Id.*

[49] *SRG Glob., Inc,* CIV.A. 5314-VCP, 2010 WL 4880654; New York City Bar, Report by the Committee on International Commercial Disputes at 46.

[50] *Viacom Intern., Inc,* 72 A.3d at 80.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 80-81 (citing 9 U.S.C. §10(a) (2013)).

[54] *Id.* at 81 ("There was no misconduct, even if BDO's decision on that issue was incorrect.").

[55] New York City Bar, Report by the Committee on International Commercial Disputes at 46 (citing *Viacom International, Inc. v. Winshall*, Civil Action No. 7149-CS, 2012 WL 3249620 (Del. Ch. Aug. 9, 2012)).

[56] *Id.*

[57] *Allstate II*, 833 So. 2d at 762-63.

[58] *Id.* at 763.

[59] *Id.* at 762-63.

[60] Centre for Effective Dispute Resolution, *Model Expert Determination Agreement* (2016), *available at* https://www.cedr.com/about_us/modeldocs/?id=34.

[61] *Id.* Factors to be considered according to the CEDR include "a timetable for the submission of case summaries and supporting documents to the [e]xpert with copies to each other; whether submissions are to be simultaneous or sequential; whether there should be one round or two rounds of submissions; whether the [e]xpert has the power to call for documents; or whether the [e]xpert has the power to award costs."

Brian C. Willis *is a real estate and business litigation attorney with Shumaker, Loop & Kendrick, LLP. He earned his J.D. from The George Washington University Law School. His practice is focused on advising and representing clients in court on the diverse issues that arise from the ownership, operation, and management of businesses and real property.*