

20 Expert Determination

1) Introduction

Expert determination is the fourth method of dispute resolution considered in the field of international commercial dispute resolution. It is very different from the three other forms of dispute resolution considered so far in this part of the Manual: litigation, arbitration and ADR in its various forms.

Using experts to determine technical or valuation matters has been the practice in England for hundreds of years. The parties agree to instruct a third party to determine a specific matter. Expert determination operates in a fairly narrow field. For example, it is used in the petroleum industry for equity redetermination and for the resolution of specific matters identified in the relevant contract.

This chapter compares expert determination and arbitration; discusses two reported cases dealing with expert determination; and considers some of the institutions offering expert determination facilities

2) Expert Determination and Arbitration

Although it may be difficult at times to distinguish between expert determination and arbitration, the differences between the two are significant.

Arbitration in England is governed by the provisions of the 1996 Arbitration Act.¹⁰⁴ Due process is very much part and parcel of the arbitral process. Leaving aside documents-only arbitrations, the parties will in all probability present their case to the arbitral tribunal and the decision of that tribunal is based on the evidence and submissions put forward by the parties and their professional advisers. The arbitral tribunal must, in arriving at its decision, apply the relevant law.

On the other hand, there are no statutory provisions governing expert determination. 'Due process' may be conspicuously absent, as the parties may not necessarily present their case or submit evidence. The expert is appointed to obtain the benefits of his/her expert opinion, which will be used to arrive at the determination. Very often the matters to be decided will involve the expert in a valuation exercise.

The assistance of the courts is available to aid the arbitral process. For example, under the English Arbitration Act the court can appoint arbitrators. There is no such provision in relation to experts. Similarly, the courts can assist the arbitral tribunal by enforcing peremptory awards of that tribunal, by securing the attendance of witnesses and by making orders in relation to the taking of evidence, the preservation of evidence and the

1 The provisions of the English Arbitration Act – the ways in which that Act supports the arbitral process in both the domestic and international spheres – were considered in Chapter 16.

making of orders relating to any property that is the subject matter of the proceedings: for example, in relation to the preservation and custody of such property. The court also has powers to grant interim injunctions and appoint receivers in support of the arbitral proceedings. An arbitral award can be challenged on the grounds of 'serious irregularity', and there is a limited right of appeal in relation to points of law.

Such safeguards do not apply in the case of expert determination. Any challenge to the determination of an expert can only be made on fairly limited grounds relating, for example, to fraud or collusion, or to an allegation that the expert had departed from his or her instructions to a material extent.

But perhaps one of the most significant differences between expert determination and arbitration lies in the area of enforcement. On the domestic level, an arbitral award is normally enforced through the national courts. That is the case in England, where an award is enforceable as if it were a judgment of the court. No such assistance is available in relation to the determination of an expert. Such determination is enforceable – if it is enforceable at all – purely as a matter of contract.

The problem of enforcement on the international level is perhaps even more significant. The determination of an expert is not an arbitral award and therefore cannot be enforced under the New York Convention.

3) Reported Cases Dealing with Expert Determination

It may now be helpful to see the approach that the courts have taken to expert determination. The following examples are taken from decisions of the English courts, both of which concern the petroleum industry.

Shell (UK) Limited v Enterprise Oil PLC: Commercial Court¹⁰⁵

The claimants and the defendants were involved in the exploration and production of hydrocarbons from reservoirs in the North Sea. The parties' respective ownership interests in the oilfields were reflected in their participation in the proceeds (and the costs) of exploration and production in given proportions. These proportions were to be redetermined three times during the life of the agreement. Matters that could not be agreed by the parties were to be referred to an agreed expert.

During the course of the second redetermination, the defendants contended that the expert determination was of no contractual effect and that the parties were therefore not bound by it. The contention was that, for mapping the contours of strata of rock under the seabed, the expert had used a computer package other than the one that had been contractually agreed to.

Mr Justice Lloyd said that the law concerning the status of a decision by an expert and possible challenges to it had been stated in the decision in *Jones v Sherwood Computer Services PLC* [1992] 1 WLR 277. In that case it had been held that if a mistake was made

by an expert who had departed from his/her instructions in a material respect, the conclusions of that expert were not binding. Whether an expert had departed from his/her instructions in a material respect depended on the materiality of the error. That had to be considered according to the potential effect on the result and/or the process.

In this case, the judge determined that it would be unfair for Enterprise to be held subject to the findings of a programme that had not been agreed to in the contract.

Veba Oil Supply and Trading GmbH v Petrotrade Inc:
Commercial Court¹⁰⁶

The defendants sold 25,000 tonnes of gasoil to the claimants. Clause 10 of the contract provided that the quantity and quality of the cargo was to be determined by a mutually agreed independent inspector at the loading installation (Antwerp) in the manner customary at such installation and that *“such determination shall be final and binding for both parties save for fraud or manifest error”*.

Clause 3 of the contract dealt with quantity. Clause 4 provided *“products / quality: Gasoil meeting the following guaranteed specifications: test limit method Density at 15 deg. C + 0.876 KG/L max ASTM. D 1298.”*

Celeb Brett were appointed as the inspectors. They produced a report that determined the density at 0.8750 kg/l. The claimants sold on to the Lebanese Ministry of Oil. On arrival, the density was found to exceed the contractual maximum. The claimants sought damages. They submitted that the determination was not final and binding on them because the method used for testing the product was ASTM D 4052 rather than D 1298 as specified under the contract.

The defendants applied for summary judgment dismissing the claim brought against them. They argued that there had not been a material departure by the inspector and that the test used was more accurate and was widely used for calculating the density of gasoil.

The application for summary judgment was dismissed by Mr Justice Morison. He said that the parties *“had only agreed to be bound by a determination of quantity and quality which, using the test prescribed, complied with the contractual specification. The fact that the method used was more modern or more accurate is not to the point.... As I read the decided cases, a contractual stipulation as to an expert determination must be observed.”*

Later, the judge said: *“it is not the business of the Court to weigh the importance of the stipulation in the contract. If the requirement to use the method specified in Clause 4 was contractual that is the end of the matter, whether or not the Court thinks it was important or would have made a difference.... The position is, I think, that it is no business of the Court to inquire why the buyers asked for this particular test.... In my view, this approach has recently been approved by the Court of Appeal in Bouygues UK Limited v Dahl Jensen UK Limited [unreported] July 31 2000 and is consistent with what Mr Justice Lightman said in British Shipbuilders v VSEL Consortium Plc [1971] 1 Lloyd’s Rep 106.”*

In that case Mr Justice Lightman had stated that the Court may set aside the decision of an expert who “*goes outside his remit e.g. by determining a different question from that remitted to him or if his determination fails to comply with any conditions which the agreement requires him to comply with in making his determination*”.

4) Some Institutions Offering Expert Determination

Examples are given of just three organisations providing expert determination services.

i) The International Chamber of Commerce

The ICC’s International Centre for Expertise offers a range of services, in addition to providing a set of Rules for use in the field of expertise.¹⁰⁷

The International Centre for Expertise was founded some 30 years ago, and has since then

“... built up unique access to experts in every conceivable subject relevant to business operations. It casts its net wide to find the expert most likely to propose the best solution. Ability to deliver the right expert is vital. Equally important are ICC’s Rules for Expertise, to which parties may refer in their contracts or at a later stage in their relationship. The rules, updated for 2003, provide the basis for ICC expertise. Parties can request that the Centre propose an expert, appoint an expert or administer the expertise proceedings.

“To make the right choice, the Centre relies on its own extensive contacts, a standing committee – whose members are themselves experts – and a network of more than 90 ICC national committees, all able to call on experts in their own countries.

“ICC expertise can cover technical, financial or contractual issues. It may be requested by one or several parties to a contract or before a deal has been struck. Expertise provided through the Centre can assist amicable settlement of a dispute or resolve a mere difference of opinion. It may do no more than remove uncertainty about a set of facts. If the parties wish, the findings can be binding. ICC expertise may also be used during litigation or arbitration.”

The ICC Rules for Expertise are in five sections:

Section I: general principles

Section II: proposal of experts

Section III: appointment of experts

Section IV: administration of expertise proceedings

Section V: miscellaneous

Article 1 of the Rules sets out the three types of services available: the proposal of experts, the appointment of experts and the administration of expertise proceedings.

In the case of administered proceedings, the Rules describe the role of the Expert. After consulting with the parties the Expert is to set out his/her 'mission' in a document, which is to include a list of the issues to be dealt with in the Expert's Report. The Expert's main task is to set out in that Report his/her findings, after having given the parties the opportunity to be heard and/or to make written submissions.

ICC expertise can, for example, be used when parties want to resolve a difference of opinion or remove uncertainty about a set of facts. If the parties in an expertise proceeding so wish, the expert's findings can be binding. Recourse to ICC expertise can also be made during litigation or arbitration, by either one of the parties, the judge or an arbitral tribunal.

The proposal is free if it is made at the request of an arbitral tribunal acting under the ICC Rules of Arbitration

The International Centre for Expertise also administers the ICC's Rules for Documentary Credit Dispute Resolution Expertise (DOCDEX), which are considered in the next Part.

ii) The London Court of International Arbitration

Expert determination is one of the dispute resolution services offered by the LCIA. The LCIA is *"happy to discuss with parties and their advisers other tailor-made dispute-resolution services. For example, where an appointing authority is required, where there is provision for expert determination of a dispute, or for the appointment of an adjudicator, or for the establishment of a standing dispute-review panel."*

iii) The Chartered Institute of Arbitrators

The Chartered Institute operates an ad hoc scheme under which the President of the Institute will make an appointment for expert determination.

5) Conclusions

There is no limit to the areas in which litigation can operate.

The field of operation of international arbitration, and to a lesser extent ADR in an international context, is very wide.

Expert determination, on the other hand, has a fairly restricted field of operation. Nevertheless, it has an important role to play in the field of international commercial dispute settlement, as is indicated by the two petroleum cases decided by the English courts.