

Expert Determination

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This paper was settled jointly by the members of ADRAC.

What is expert determination and why is it used?

Expert determination is a non-judicial dispute resolution process whereby the parties agree to appoint a neutral third-party expert to decide a specific issue or issues in a dispute.¹ Unlike arbitration or litigation, it is purely contractual and is not governed by legislation.

Expert determination clauses are commonplace, especially in the Australian construction industry. Often they incorporate terms based on recognised standards such as the rules put out by the Resolution Institute, the Law Society of NSW or industry bodies.²

The rights and duties of each party are stipulated in the contract and disputants agree in advance to be bound by decisions of the expert. Thus, parties are obliged to participate in the expert determination process according to the procedure outlined in the contract or that specified by the expert.³

Perceived advantages of expert determination

Expert determination is considered ‘an informal, speedy and effective way of resolving disputes, particularly disputes which are of a specific technical character or specialised kind’.⁴

It gives parties autonomy and control over the dispute resolution process. For instance, a contract may set a monetary limit under which disputes are referred to

expert determination and can impose conditions of confidentiality on both parties and the expert. The parties can specify the questions to be determined, the methods applied as well as setting other parameters on documents provided, length of submissions, whether there is a hearing, timeframes, cost and immunity of the expert.⁵

Agreements to submit a dispute to expert determination - pre or post dispute?

In commercial contracts, ‘upfront’ provision can be made for expert determination in a DR clause whereby the parties agree to submit disputes, if they arise, for expert determination. Parties may, however, be reluctant to bind themselves in advance to expert determination.

Parties can always reach agreement to submit a particular dispute to expert determination *after* a dispute arises, even if (i) their relationship is not governed by any contract; or (ii) their contract does not make provision for expert determination, in which case a post-dispute agreement to submit the dispute for expert determination will operate as a variation of the original contract.

Agreeing to expert determination after a dispute has arisen can have significant advantages because the choice of expert, procedures, timeframes etc can be tailored to that particular dispute and the circumstances in which it arises.

For that reason, ADRAC considers that DR clauses in contracts (particularly those of a tiered kind) could make greater, and more explicit, provision for expert determination – for instance, by requiring the parties, when a dispute arises, to attempt to reach agreement on submitting the dispute to expert determination within a stipulated timeframe, failing which other tiers in the DR regime would apply.⁶

Who are the experts and what are their responsibilities?

An expert is usually selected based on their expertise and experience in the relevant subject area of the dispute.⁷ They have specific training, qualifications, skills or experience in the area.⁸ Often parties provide for a nominated third party to appoint the expert(s) to determine the dispute, with or without adopting the corresponding

complementary rules of that third party. If the nominated third party fails to appoint an expert, and no default mechanism is specified for selecting the expert, then the expert determination agreement made between the parties will fail and be of no effect.⁹

The role of the expert may be inquisitorial or purely adjudicative by reference to an agreed body of material. In either case, the task of the expert is to apply their expertise to the question(s) in the dispute. Most rules governing expert determination give the expert discretion to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay and expense, whilst acknowledging that an expert is not acting in an arbitral capacity.¹⁰ An expert is not bound by the rules of evidence and is not obliged to ensure procedural fairness unless those elements are expressly required by the contract.¹¹ Moreover, unless provision is made to contrary effect, an expert is neither obliged to take evidence in the presence of the parties nor disclose any evidence obtained to the parties.¹² It is implied that the expert should act fairly and impartially and determine the dispute based on a set of agreed facts or materials.¹³ An expert is also not obliged to give reasons for their decision unless expressly required by the contract.

Unlike the statutory protection that exists for arbitrators, an expert does not have immunity against a claim for negligence or anything done or not done in the course of the determination, unless the contract expressly provides for it.¹⁴ For example, a failure of the expert to exercise reasonable care and skill may give rise to a suit for damages.¹⁵

When a dispute may be unsuitable for expert determination?

Certain disputes may not be suitable for the process of expert determination, such as disputes involving complex and contested issues of fact and/or law, or where credit is a fundamental part of the enquiry.¹⁶ The absence of traditional litigation procedures, such as discovery of documents or cross-examination of witnesses, may make it difficult to test and resolve disputed facts, and the expert may not be qualified to do so. However, much will depend on the terms of the agreement governing the expert determination. Some very complex and sensitive matters may

be very amenable to expert determination, particularly if the agreement makes adequate provision for relevant matters (such as what law is to apply, and what material the expert is to have before him or her). An agreement which does not make adequate provision for the expert to arrive at a determination may be void or unenforceable.¹⁷

Cost arrangements

In most cases, parties will bear their own costs of an expert determination unless the contract gives the expert the power to award costs against the losing party.¹⁸

How are expert determinations enforced and can they be reviewed?

Generally, courts will not intervene to remedy deficiencies in the expert determination procedure or to review the decision unless provided for in the contract.¹⁹ The principle is that ‘parties should be held to their agreement’.²⁰ As long as the expert has acted within the scope of the agreement between the parties, the court will enforce the decision as final and binding regardless of whether the expert made any errors or took irrelevant matters into account when reaching their decision.²¹

The courts do however have limited jurisdiction to investigate an expert determination where fraud or collusion has occurred or an expert has acted outside the terms of the contract. For example, where allegations were made that the expert had not performed the task they were required to undertake or had not performed it in a way contemplated by the agreement.²²

In *AGL Victoria v SPI*,²³ Nettle JA applied a two-tier test for determining whether a mistake within the scope of the contract would justify setting aside a determination.²⁴ Firstly, if the error occurred in the exercise of the expert’s judgment, opinion or discretion then it is beyond review. On the contrary, if the error occurred in relation to the objective facts or when performing a mechanical or arithmetical task, then it is reviewable. If, on review, the error is found to be unreasonable and beyond contemplation of ‘honest business people’, it is liable to be set aside.²⁵

Furthermore, the stated reasons for an expert determination may be reviewable if the contract or applicable rules require the provision of reasons.²⁶ Since the contract will be conditional upon the determiner providing reasons that address issues arising from the contract, their adequacy might be challenged.

Difficulties may arise in enforcing an expert determination where one party simply chooses to ignore the decision. In these circumstances, the party wishing to enforce the determination would need to approach the court to enforce the agreement.²⁷

Ongoing issues

ADRAC considers that expert determination may be a significantly underutilised form of DR, given its potential advantages to disputants. ADRAC is interested to receive feedback on this, including the reasons for any underutilisation and what may be done to increase the level of use of expert determination.

1. Troy Peisley, 'Impugning expert determination: When does an error justify setting aside a determination?' (2011) 22 *Australian Dispute Resolution Journal* 247, 248.
2. Institute of Arbitrators and Mediators Australia (IAMA, now Resolution Institute), *Expert Determination Rules* (2010); Law Society of NSW, *Rules for Expert Determination*. The Resolution Institute is in the course of issuing new rules relating to expert determination, for inclusion in the Australian Standards.
3. Peisley above n 1, 248.
4. *The Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646 [16] (Einstein J).
5. Peisley above n 1, 248.
6. It is important that such DR clauses make provision for what is to occur in the event agreement on expert determination cannot be reached – otherwise the DR is likely to be unenforceable as a mere agreement to agree; see [Enforceability of DR clauses in contract](#).
7. Graham Easton, 'Expert Determination – A Progress Report' (1999) 64 *Australian Construction Law Newsletter* 33.
8. AA de Fina, 'Expert Determination: misconception and misapplication' (2014) 30 *BCL* 368, 368.
9. Ibid 371.
10. IAMA, *Expert Determination Rules* (2010), r 5(3) and 5(1).
11. AA de Fina above n 7, 369.
12. Ibid.
13. Ibid 370.

14. Ibid.
15. Ibid.
16. Ibid.
17. Ibid.
18. [Text of footnote]
18. IAMA, *Expert Determination Rules* (2010), r 13.
19. Peisley above n 1, 248.
20. *Strategic Publishing Group Pty Ltd v John Fairfax Publications Pty Ltd* [2003] NSWSC 1134 at [14].
21. *Fletcher Construction Australia Ltd v MPN Group Pty Limited* (Unreported, NSW Supreme Court, Rolfe J, 14 July 1997) 15; *Australian Vintage Limited v Belvino Investments No 2 Pty Ltd* [2015] NSWCA 275 at [74].
22. Karen Ingram, Lauren Stewart and Blair McEwan, '[Engaging an Expert for Dispute Determination](#)' (10 December 2015) Clayton Utz Insights.
23. *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173.
24. Peisley above n 1, 254.
25. Peisley above n 1, 255; *AGL Victoria* [2006] VSCA 173 at [53], [81].
26. *Firedam Civil Engineering Pty Ltd v Shoalhaven City Council* [2009] NSWSC 802.
27. Karen Ingram, Lauren Stewart and Blair McEwan, '[Engaging an Expert for Dispute Determination](#)' (10 December 2015) Clayton Utz Insights.