

An Expert Determination Code for Scotland

DO WE NEED A CODE FOR EXPERT DETERMINATION?

It's not uncommon for commercial contracts governed by Scots law to contain a clause referring all disputes, or disputes in respect of a certain part of the contract for determination by an 'expert'.

Unfortunately, there are a number of problems inherent in stating that a dispute is to be determined by an expert. The first, and most pressing problem being that it is not the function of an expert under Scots law to determine a dispute at all. That may sound like an odd thing to say, but I'll explain that in a moment.

Ignoring for the moment the function of an expert, a fundamental problem in appointing an expert is that the powers of an expert are not clear under Scots law.

Arbitration faces similar issues. If parties to a contract in Scotland state in their contract that "all disputes arising under the contract are hereby referred to arbitration", what powers does the arbiter have? Can the arbiter award damages? Interest? Expenses? In what circumstances can the decision of the arbiter be reviewed?

On the question of damages for example, an arbiter has no common law power to award damages. Thus a simple reference to arbitration, without defining the arbiter's powers can result in a situation where the arbiter has no power to award the remedy sought.

Another unexpected consequence of making a bald reference to arbitration, is that parties have the right to ask the arbiter to state a case for the opinion of the Inner House of the Court of Session under section 3 of the Administration of Justice (Scotland) Act 1972. This can greatly delay proceedings.

We hope that we will soon have an Arbitration Act in Scotland, but in the meantime, the uncertainty in arbitration can be removed by the incorporation of the Scottish Arbitration Code into arbitration clauses, or by parties agreeing to abide by it after a dispute has arisen.

Similarly, the uncertainty surrounding the use of expert determination could be removed, or at least greatly diminished by the incorporation of a standard code for expert determination. The Scottish Branch of the Chartered Institute of Arbitrators is currently drafting such a code.

The appointment of an expert determiner is of course a matter of contract. Parties are entirely free to agree the basis on which the expert is to determine an issue, and that agreement can be reached in the terms of the contract, or indeed, at a later stage when a dispute has arisen. The purpose of the code is to set a 'default' position, so that where parties have not specifically negotiated the powers of the expert, but have agreed in their contract (or at the time a dispute arises) that there will be expert determination under the code, the powers of the expert will be clearly defined.

The proposed terms of the code, and the reasons for each provision are set out below. We intend to consult with our members, and with members of the legal profession and other interested parties on the proposed terms.

EXPERT NOT ARBITER

Some contracts will specify that the expert appointed to determine a dispute is to act as an “expert and not as an arbiter”. There remains some controversy in Scotland regarding the juridical nature of expert determination. “Expert determination” is not a term of art in Scots law. The use of the term ‘expert determination’ has come to be used in place of the term ‘valuation’ which is regarded as a distinct subset of arbitration. There are a number of historic distinctions between valuation and arbitration.

The main distinctions, generally accepted by the courts are that (1) a valuer/expert can, and must, use their own expertise in determining the issue, whereas an arbiter exercises a judicial function, and should not use their own expertise; (2) an arbiter deals with formulated disputes, including questions of law whereas a valuer/expert deals with a difference of opinion on factual issues (such as the value of a piece of land); and (3) an arbiter is immune from actions for negligence, whereas a valuer/expert is not.

To avoid uncertainty, the Code will make it clear that an expert appointed under the code is entitled to use his or her own expertise in determining the issue referred.

SUBJECT MATTER OF ISSUE REFERRED

I mentioned before that strictly speaking, an expert is not supposed to determine a dispute at all. Instead, an expert is supposed to apply their own expertise to determine a question of fact. If an expert behaves like an arbiter, acts ‘judicially’ and determines a formulated dispute, there is a risk that the expert will be held to be an arbiter. The courts have held that use of the term ‘expert’ or ‘arbiter’ is not determinative, and that the courts will look behind the terminology used to see what the ‘expert’ is in fact being asked to do. If the court determines that the parties have in fact asked the expert to act judicially and determine a formulated dispute, and the expert is held to have been, in reality, an arbiter, there is potential for unexpected consequences. For example, an expert is not obliged to comply with the rules of natural justice. If the expert fails to comply with those rules, and is then held to be an arbiter (who must comply with the rules) the decision of the expert might be struck down.

In reality, even purely factual issues, where there is no formulated dispute, will often entail an incidental question of law. So, for example, in reaching a decision on a rent review, an expert will need to consider many principles of valuation, some of which will represent legal presumptions and questions of law.

It is therefore important to provide as much clarity of intent as possible as to the type of subject matter that the expert can consider.

Accordingly, we propose that the Code will make it clear that the expert is entitled to consider and determine formulated disputes, including disputes as to questions of law, whether such questions of law are incidental to the issue for determination, or central to it; and that notwithstanding this, the expert will be entitled to use his or her own expertise, and will not be deemed to be acting as arbiter.

It is not impossible that a court may still decide that the expert has been acting as an arbiter, with all that entails, but by clearly expressing the intention of the parties in the contract (by incorporating the code) this risk can be minimised.

NO LIABILITY IN NEGLIGENCE

A distinction between arbitration and expert determination is that arbiters are immune from actions for negligence whereas experts are not.

We consider that any possible liability for negligence is a disincentive to potential experts accepting appointments; the principle here being why should an unsuccessful party be able to sue an expert determiner, but not an arbiter (or a judge for that matter).

Accordingly, it is proposed that the Code will provide that the expert is not liable in negligence for any losses arising out of his or her decision (except in the case of fraud or collusion).

BINDING EFFECT

The primary purpose of expert determination is to obtain a binding decision of an expert. We consider that it would not be appropriate to have any form of appeal from the decision of an expert.

Accordingly, the Code will provide that the decision of the expert shall be final and binding on the parties, save in the case of actual bias, fraud or collusion, or excess of jurisdiction.

JUDICIAL REVIEW

There is a question mark as to whether the decision of an expert can be judicially reviewed in Scots law. Generally speaking, judicial review will not be entertained where there is an alternative remedy. Under the rules of expert determination as they currently stand in Scotland, an expert may be sued for negligence. Thus it might be said (although there is no authority on this point) that if an expert is negligent in the decision, and the losing party wishes to have that reviewed, the court will not entertain an application for judicial review because there is an alternative remedy: an action in negligence. The decision would of course be enforceable meantime. That is not satisfactory.

It is suggested that the expert should be immune from suit for negligence as mentioned above. Accordingly, judicial review would be competent, but only in the instance of actual bias, fraud or collusion, or excess of jurisdiction. Errors of fact or law would not give rise to a right of review, and we would therefore have a similar system as that which applies to adjudication under the Construction Act, which is to say that so long as the expert answers the right question, it doesn't matter if the answer is wrong (the risk of a 'wrong' answer applying equally to arbitration and even, dare I say, litigation), but if the expert answers the wrong question (or fails to answer the question put to him) that decision can be challenged.

RULES OF NATURAL JUSTICE DO NOT APPLY

The proposed provision here is that the rules of natural justice are expressly disapplied. Accordingly, the expert's decision can only be challenged where there is proof of actual (not merely perceived) bias, or fraud or collusion. The expert is entitled to make his or her own investigations, and is not required to give the parties a right of rebuttal.

TIME FOR DECISION

It is difficult to cater for every dispute that might arise under a contract, but given the speed at which expert determination is meant to operate, it is desirable to have a default time limit for the issue of the decision. Accordingly we propose to include a period of one calendar month for the decision, unless the parties and the expert agree a different timescale.

POWER TO AWARD DAMAGES

It will be an express provision that the expert can award damages.

POWER TO CONTROL PROCEDURE

The expert will be given the widest possible discretion to set and control procedure.

APPOINTING BODY

The default appointing body under the code will be the Scottish Branch of the Chartered Institute of Arbitrators.

Parties would of course be free to specify another body, such as the Law Society, the Faculty of Advocates, the RICS, ICE, ICAS, etc. depending upon the nature of the dispute.

REASONS

It is proposed that the default provision under the code is that the expert is required to give reasons for his or her decision.

Parties would of course be free to agree in the contract, or at the time of appointment that reasons are not required.

EXPENSES

It is proposed that an expert appointed under the code should have power to award his or her own expenses and discretion to do so as he or she sees fit.

It is proposed that the parties own legal expenses are not recoverable.

CONCLUSION

Expert determination is not going to suit everyone, but used properly, it can provide parties with a form of dispute resolution that is quick, comparatively cheap, and binding.

It is desirable that parties in Scotland who wish to resolve their disputes using an expert can do so using clear and well understood rules.

At this stage, I am interested to hear views on the more controversial aspects of the proposed code: ought an expert be able to determine questions of law? Ought an expert to be immune from suit?

More importantly, is there a demand for such a code? Do clients want it? At the moment, expert determination is largely confined to rent reviews. Would lawyers include it in their contracts for other types of dispute, or choose to use it if a dispute arises?

If parties are willing to sacrifice a right of appeal, for speed and certainty and lower legal costs, a properly supported expert determination regime offers an attractive alternative to arbitration and the courts. I hope that you will take time to consider what is being proposed and feed back to the Institute.

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