

THE FUTURE OF COMMERCIAL DISPUTE RESOLUTION (BACK TO THE FUTURE)

A Joint Conference by the Chartered Institute of Arbitrators
(Scottish Branch) and the Law Society of Scotland

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PRESENTATION BY JOHN KENDALL: EXPERT DETERMINATION IN ENGLAND AND WALES

Profile of Expert Determination

Amounts – some very substantial
Origins - valuation

Place in commercial dispute resolution

Expert is not an expert witness
Not like a single joint expert either
Not legal proceedings
Part of ADR now

Attractive qualities: quick, robust, cheap and private

How achieved? A contractual, informal process

In fact, startlingly informal

Rules of natural justice don't apply: *Bernhard Schulte GMBH and Co KG, Sloman Neptune Schiffahrts AG and Othello Shipping Company v Nile Holdings Limited* [2004] EWHC 977

First rule: No one judge in own cause – some expert clauses allow one party to make the decision

Second rule: hear both sides “due process” is not strictly applied

Analysis of dispute systems

System	Binding?	Due process?
Litigation	Yes	Yes
Arbitration	Yes	Yes
Statutory Adjudication	Yes	Yes, but...
Expert Determination	Yes	No
Mediation	No	No

Only remedy challenge on contractual grounds

Due process key difference from arbitration

What is meant by due process?

All matters put to the tribunal by each party have to be disclosed to the other party

The other party must have the opportunity of rebuttal

The tribunal must make known the result of its own investigations to the parties and give them the same opportunity of rebuttal

Due process is much more than a duty of fairness

Binding

Not early neutral evaluation or mediation, and must lead to a binding result: *Davies Middleton & Davies v Toyo Engineering Corporation* (1997) 85 BLR 59.

Expert can decide questions of law as well as fact and professional opinion

“As and expert and not as an arbitrator”

not arbitration

no immunity

no requirement to follow due process

can use own expertise

no appeal

expert may determine questions of law

No need to refer to parties before decision as in arbitration

Not adjudication either

No terms implied by statute

No time-limits

Not necessarily interim

Not limited to construction

No due process obligation

Inquisitorial

No duty to keep within the submissions

Unlike arbitrators, experts can make findings based on their own, undisclosed, inquiries

– *Fox v Welfair Ltd* [1981] 2 Lloyd’s Rep 514

Bernhard Schulte GMBH and Co KG, Sloman Neptune Schiffahrts AG and Othello

Shipping Company v Nile Holdings Limited [2004] EWHC 977

Applications

- rent review
- take-overs and other corporate applications
- oil and gas
- computers
- construction
- projects
- systems
- QC clauses
- Valuation
- Technical
- Two-tier dispute resolution clauses
- General dispute resolution?

- As a form of ADR, to be used, in the appropriate case, rather than the court system: *Fuller v Cyracuse Ltd*, Law Alert No 0015801, Chancery Division, Companies Court, Deputy Judge P Leaver QC, June 6, 2000: see also *Yorkshire Electricity Distribution Ltd v Telewest Limited* [2006] EWCA Civ 1418

Who can be an expert?

Qualifications?

Surveyors, engineers, architects, all kinds of construction professionals

Accountants, energy experts

Lawyers, even

Appointing authorities

Conducting a reference

Different styles, informal to legalistic

Expert's own investigations

Challenging the procedure

Can you get a stay?

Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334

Cott UK Ltd v FE Barber Ltd [1997] 3 All ER 540

Thames Valley Power v Total Gas & Power Ltd [2005] EWHC 2208 (Comm)

Jurisdiction challenges

before decision:

Amoco (UK) Exploration Co v Amerada Hess Ltd [1994] 1 Lloyd's Rep 330

Mercury Communications Ltd v Director-General of Telecommunications [1996] 1 WLR 48

National Grid Co plc v M25 Group Ltd (no 1) [1999] 1 EGLR 65

after decision:

Homepace Ltd v Sita South East Ltd [2007] EWHC 629 (Ch)

Fraud and partiality

Partiality: *Macro v Thompson (No 3)* [1997] 2 BCLC 36

Material departure from instructions

Jones v Sherwood Computer Services Ltd [1992] 1 WLR 277

Macro v Thompson [1996] BCC 707

Veba Oil Supply and Trading GmbH v Petrograde Inc [2002] BLR 54

Asking the right question, even of law:

Nikko Hotels (UK) Ltd v MEPC plc [1991] 2 EGLR 103

Decisions without reasons ("non-speaking") hard to challenge

Jones v Sherwood

Doughty Hanson v Roe [2002] EWHC 2212

Finality

Shorrock Ltd v Megitt plc [1991] BCC 471

Suing the expert

No immunity at common law: *Arenson v Casson Beckman Rutley & Co* [1977] AC 405

What is the standard of the expert's work?

Principle: *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582; Supply of Goods and Services Act s 13

Specialists: *Whiteoak v Walker* (1988) 4 BCC 122

Application: *Zubaida v Hargreaves* [1995] 1 EGLR 127; *Goldstein v Levy Gee* [2003] EWHC 1574

Incompetence: *Macro v Thompson (no 3)* [1997] 2 BCLC 36;

Hence - exclusions and indemnities

Enforcement

As a contractual event

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Expert Determination, by John Kendall, Clive Freedman and James Farrell, Fourth Edition, Sweet & Maxwell, 2008.

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