

Expert determination under IChemE contracts

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A WIDE range of dispute resolution procedures are available which are effective at resolving at an early stage the vast majority of disputes. These are principally adjudication, mediation, dispute boards and early neutral evaluation. Most of these processes are consensual in nature and rarely lead to a binding decision (unless the parties agree otherwise).

In contrast, court proceedings and arbitration lead to a binding decision by a third party (a judge, arbitrator or arbitration tribunal). However, there is a third and less well known procedure of dispute resolution which leads to a binding decision by a third party, called expert determination, where the appointed expert applies their own expertise as part of the decision making process. Whilst the use of this procedure is less widespread, it has been a distinguishing and successful feature of the Institution of Chemical Engineers' (IChemE) forms of contract for many years and continues to play an important role in dispute resolution in the process industry.

Expert determination

Expert determination is a process whereby the parties agree that a third party (the expert), who is independent of the parties, is engaged to answer a particular question or determine a particular dispute and that the parties are to be bound by that expert's decision. The expert determination process is intended to produce a fast, binding and final resolution of the dispute referred to the expert.

The distinguishing feature of expert determination is that the expert is free to apply their own knowledge, expertise and experience to investigate the matter that has been referred, taking account of the submissions of the parties, whereas judges and arbitrators are required to make a decision on the basis of the submissions and evidence provided by the parties. This is one of the greatest strengths of expert determination, particularly when the nature of the dispute to be decided is a technical one, as the expert will have been carefully

selected because of their relevant expertise. Therefore, the expert is not just appointed to hear the parties' rival contentions and to choose between them, but also to investigate the facts and to apply their knowledge and expertise to answer the question that has been referred.

Expert determination is also very flexible. It is based upon an agreement between the parties, with each party having an opportunity to control and tailor the process to suit their own particular circumstances or the facts of the particular dispute. This flexibility allows expert determination to be used in a very broad range of matters, sometimes to avoid lengthy and complex disputes from arising and at other times to resolve disputes quickly and cost effectively. It is not uncommon for parties to agree that the whole process shall be concluded in a matter of days after an expert has been appointed.

Types of dispute suitable for expert determination

Although parties may decide that any dispute arising out of a project should be determined by an expert, it is usual for the parties to identify in their contract defined questions, issues or subject areas for which a reference to an expert can be made. As one of the greatest benefits of expert determination is that an appropriately qualified and respected expert can usually be identified and engaged to answer a question within their field of expertise, it is readily understandable why this is the case. For example, the question of whether a piece of equipment is functional is a well defined issue and, as a result, it should be relatively uncontroversial for parties to agree that the question is capable of resolution by an expert practising in the particular field in question.

For these reasons, expert determination is considered most appropriate when narrow and well defined questions can be referred to an appropriate expert such as an engineer, scientist, accountant, surveyor or lawyer. The likely issues can often be identified and specified at the time that

The principles of expert determination and how it works in practice

the contract is drafted. For example, on a process or manufacturing project there are often disagreements as to whether completion has been achieved; or whether certain performance guarantees have been met; or over the appropriate price for a variation; or whether remedial work is required; or the appropriate accounting principles applicable to a valuation exercise. IChemE has always seen the appointment of an expert as being a means by which a disagreement between the parties can be resolved before it becomes a major dispute leading to expensive and often lengthy arbitration or litigation. In addition, by specifying such issues pre-contract, and by including appropriate terms in the contract, both parties can proceed with the confidence that, if certain disagreements or disputes arise, they have the right to resolve those matters through a swift, cost effective and binding process.

IChemE has taken the lead in developing a suite of standard forms of contract where expert determination has, from the earliest editions, been identified as an integral dispute resolution procedure available to either party. Experience suggests that this has been very successful. Expert determination is defined as being available to the parties to resolve disputes on subjects as diverse as objections to a variation order; disapproval by the project manager of documentation provided by the contractor; whether a completion certificate should be issued; the cost and time implications of suspension orders; or the amounts payable following a termination. IChemE contracts provide that any dispute concerning the identified subject areas can be referred to expert determination if one party serves notice to that effect on the other, and also allows any other issues to be resolved by expert determination if both parties agree. It is encouraging to note that IChemE is not aware of any challenges having been made to an expert's determination, unlike adjudication and arbitration.

The selection

Since the decision of the expert is final and binding (under IChemE contracts and English law), the importance of the identification and selection of a suitable expert cannot be overstated. The courts do not have jurisdiction to select an expert for the parties, so provision should be made for naming the expert (and possibly alternatives) in the contract or the contract should provide reliable machinery for the selection and appointment of a suitable expert. Unsurprisingly, agreeing the identity of an individual or firm which is to act as an expert is rarely feasible unless the subject matter of referable disputes is precisely framed before the contract is executed.

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The contract should provide what is to happen where no individual is selected in advance, or if that individual becomes unavailable or unwilling to fulfil the role of expert. This is most commonly done by agreeing that an appropriate third party body (such as the president of a nominated professional institution) should appoint an expert if the parties have been unable to agree on the identity of an expert within a defined number of days of notification by one party of its desire to refer a matter to an expert. This latter route allows the parties to attempt to match the skills and expertise of the expert to the particular issue that has by then arisen between the parties, before approaching an appointing body to select the expert if agreement on the individual cannot be reached.

An external appointment creates uncertainty for both parties and there are differences in approach taken by the various appointing bodies. For example, if a dispute on a matter such as a structural or civil engineering issue arises within a project taking place under an IChemE form of contract where IChemE is the appointing body, it might well approach other professional bodies to assist in selecting a suitable expert for appointment. Therefore, prior to selecting an expert from an alternative appointing body, care should be taken first to understand how that appointing body would select an expert; second, whether the appointing body would restrict itself to a list of potential candidates and, if so, whether that list would be likely to contain a broad selection of highly qualified people from whom a suitable expert could be selected and matched to the subject of a future dispute; and third, whether the appointing body would receive submissions from both parties as to the relevant discipline for any potential expert to have before proceeding to make an appointment.

If the agreed process breaks down, the English court will, if necessary, substitute its own procedure by, for example, ordering that there be an inquiry before the court as to the point in issue (*Sudbrook Trading Estates Ltd v Eggleton and Others* (1983) AC444. In *Ursa Major Management Ltd v United Utilities Electricity plc* (2002) EWHC 3041, it was held that the court would itself decide the issue in question after the parties had failed for 14 months to agree how the reference to the expert should proceed.

The terms of appointment

Several professional bodies are willing to act as an appointing body for expert determinations; or publish standard terms for expert determination clauses; procedural rules for expert determinations; and terms for the appointment of the expert.

IChemE's standard forms of contract, together with its published rules for expert determination (the White Book, now in its

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fourth edition, July 2005), provides a comprehensive code for expert determination. Annexed to the rules are standard terms for the expert's appointment. It should be noted that the fourth edition, unlike earlier ones, includes a provision that the expert has power to determine the extent of their own jurisdiction. The standard terms of engagement also provide a contractual exclusion of liability for the expert save in circumstances of bad faith, thereby mirroring the immunity provided to arbitrators under the *Arbitration Act*.

The International Chamber of Commerce (ICC) in Paris has also recently launched a revised set of expert rules, effective as from 1 February 2015. The rules make provision not just for the selection and appointment of experts but also neutrals such as mediators and dispute board members, thereby allowing parties to take advantage of the ICC's long standing role as an appointing authority.

Enforcement of decisions

Under English law, the expert determination process produces a final and binding determination without any scope for an appeal or a challenge to the expert's decision (subject to few very limited exceptions). It should be noted that whilst experts must be fair and impartial, they are not bound to observe due process or to comply with the rules of natural justice.

Since an expert is not acting in a judicial capacity, the need for impartiality is more limited in scope than that of judges and arbitrators and an expert's decision will only be set aside if actual bias is proved. This is illustrated in the case of *Owen Pell Limited v Bindi (London) Limited* (2008) EWHC 1420 (TCC), where the parties agreed to have their dispute determined by an independent expert. The defendant was unhappy with the decision and refused to make payment contending that the expert had not conducted himself in accordance with the principles of natural justice, was biased or gave the appearance of bias, and reached conclusions that were obviously in error or perverse. The court reviewed the authorities and held that the expert's decision was valid and enforceable, and that actual rather than apparent bias was necessary to challenge an expert's decision.

Internationally, the ability to challenge awards will depend upon the law governing the contract, but the procedure is accepted in many other jurisdictions. For example, the Australian courts have affirmed the final and binding nature of expert determination in *Lipman Pty Ltd v Emergency Services Superannuation Board* (2012) ConstLJ 248, and in *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (2012) ConstLJ 255 the court held that a mistake in the expert's reasons did not

deprive the decision of its binding force. Nonetheless, the Australian courts have also confirmed the necessity for strict compliance with the dispute resolution clause and that the adoption of a procedure that did not comply would render the determination unenforceable (*Hardesty & Hanover International LLC v Abigroup Contractors Pty Ltd* (2012) 28 ConstLJ 343).

Therefore it is suggested that, when considering matters suitable for expert determination, the benefit of a swift dispute resolution process which produces certainty should be weighed against the risk of adopting a procedure that might not allow sufficient time for the full investigation that a wide ranging and complex matter might require. Nevertheless, the complexity of a dispute should not necessarily prohibit a competent expert from analysing the core issues and reaching a fair and appropriate determination

Conclusions

Expert determination has an important role in the dispute resolution process. It has been successfully used by the process industries for more than four decades and continues to remain an integral part of IChemE's standard terms. As is stated in the guidance notes attached to IChemE contracts:

"Expert determination is particularly suited to those disputes where the knowledge and experience of a senior and respected practitioner in the field is likely to assist in reaching a speedy and fair result."

It goes on to confirm that

"Recent experience in the process industries of the use of expert determination has been encouraging, particularly for single issue, essentially technical or valuation disputes."

The IChemE's experience and the recent update by the ICC of its own expert rules would indicate a growth in use of this form of dispute resolution and an increasing acceptance of the process internationally. This is particularly so where the parties to a dispute recognise and respect the knowledge and experience being brought to bear by the expert in resolving the parties' differences.

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