



Is it time to call in the experts?

CRAIG SANDISON - ASSOCIATE DIRECTOR, DRIVER TRETT DUBAI OUTLINES THE PROCESS OF EXPERT DETERMINATION, ITS BENEFITS AND THE INCREASING ATTRACTION FOR USING THIS METHOD IN THE UNITED ARAB EMIRATES.

The use of alternative forms of dispute resolution (ADR) is becoming an increasingly attractive option in the United Arab Emirates (UAE) due to cost of formal dispute resolution processes, such as arbitration and litigation.

One method of ADR available is that of expert determination, but does this option provide a suitable means of resolving a dispute? And, why should parties consider this against the other alternative resolution methods? In answering these questions, the process needs to be explained and examined, with consideration of the relative merits and de-merits of appointing an expert to determine the dispute.

What is expert determination?

Expert determination can be defined as the process of dispute determination by an individual, independent third-party, who possess particular expertise relative to the dispute.

What are the benefits of expert determination?

There are numerous benefits associated with opting for expert determination, these can be summarised briefly as follows:

- **Privacy and confidentiality** - The only parties that will be privy to the process and the decision of the expert are those that are involved with the dispute, and naturally the expert determiner.
- **Freedom to choose** - The parties have flexibility in their ability to freely select the appropriate expert and also choose the rules, proceedings, and the effect of the expert's determination.
- **Impartiality** - The expert should possess a duty to act independently and fairly throughout the whole process.
- **Speed** - A dispute may be resolved quickly, although the nature of the dispute will have significant impact on this factor.
- **Lower cost** - The less formal nature of expert determination should result in a more cost-effective resolution process.
- **Technical expertise** - The appointed expert determiner will be likely to have greater expertise on the subject than an arbitrator or court judge.

Expert determination is suited to disputes and matters which concern detailed technical issues, and sometimes where the parties require a swift and quick resolution on a disputed matter.

However, it must be remembered that expert determination is not always suitable, as:

- The procedure lacks formality.
- It is not subject to rules of evidence.
- There is an absence of cross-examination.

Enforcement of the Determination

Under legal jurisdictions such as Australia and the United Kingdom, the enforcement of expert determination is strongly

USING EXPERT DETERMINATION CLAUSES AND AGREEMENTS

The parties may choose to insert a clause within the contract conditions as a dispute resolution clause. If such clause does not exist, the parties have the option to form an ad-hoc agreement for expert determination, once the dispute arises.

Institutions, such as the Academy of Experts or the Chartered Institute of Arbitrators, are able to provide model clauses for expert determination.

In the drafting of an expert determination clause, the following matters are recommended for inclusion:

- Procedures for referral to expert determination.
- Procedures for appointment of an expert determiner and, if required, replacement of the expert.
- Procedures for disclosure of conflict or any other matter that may affect impartiality of the expert.
- Requirements for confidentiality.
- Roles and powers of the expert.
- Obligations of the disputing parties in connection with the procedure.
- Requirements for meetings.
- Requirements for the determination of the expert, such as the decision to be in writing and shall be final and binding.
- Parties liability for costs.
- Procedure for referring or disputing the determination.

NB: In some jurisdictions, such as the UK, such a clause will need to account for local statutory arrangements such as adjudication to ensure validity.

SELECTION AND APPOINTMENT OF THE EXPERT

The parties can agree upon the selection of any individual considered suitable to be the expert determiner. However, the parties' freedom of choice can be limited by the provisions contained within the expert determination clause or ad-hoc agreement. This may stipulate that the expert determiner must be associated with a specified professional body, such as the Royal Institution of Chartered Surveyors or the Chartered Institute of Arbitrators.

The parties must apply caution when selecting the expert determiner to ensure that the process is successful, provides a fair determination, and prevents the unsuccessful party protesting the expert's determination on the basis of a procedural fault.

It should be of foremost consideration that the expert possesses suitable experience related to the field of the disputed matters. It would also be recommended (although not imperative) that the selected expert has a reasonable track record of performing expert determination appointments.

supported by the courts. Considered as a recognised method of ADR, the courts are reluctant to overrule a binding expert determination, unless the process has been subject to serious procedural fault, fraud, or bias.

In the UAE, the enforcement of expert determination was examined by the Court of Cassation in 2014. In the judgment the court decided that, even though the

parties had agreed the expert determination shall be final and binding, it cannot have the effect of binding the parties and can only be considered a technical assessment or opinion of the matter.

Despite the ruling, expert determination should not be dismissed as a means of ADR resolution in the UAE. At present, the UAE laws do not provide a legal basis for any of the other ADR methods. There-

THE EXPERT DETERMINATION PROCEDURE

Comparative to arbitration or litigation, expert determination is much less formal. The procedure can operate with greater flexibility. Procedural requirements will be set out within the applicable contract clause or, in the absence of such a clause, the ad-hoc agreement.

The procedure would usually require an initial meeting. Depending on the requirements of the expert determination agreement, this can either be undertaken in person or by teleconference.

After this meeting, depending on the requirement of the clause or ad-hoc agreement, the parties will submit the evidence and submissions to timetables set out or agreed with the expert. If required, the expert may set further directions to the parties for further submissions or additional evidence. Following the submissions and provision of evidence, the expert will determine the dispute between the parties, and provide their decision in writing to each of the parties.

fore, other means, such as mediation and adjudication, could face similar interpretation by the court.

If the parties still choose to select expert determination as a means of ADR, even if the expert's decision is ruled unenforceable by the courts, the expert's decision would still hold significant weight if the matter were referred to arbitration or litigation.

In summary, expert determination is a viable and credible method of ADR. The greatest appeal of this is that an expert, with suitable technical knowledge of the disputed matter, will be undertaking and determining the dispute, with the added benefits of expert determination being a flexible, speedy, and reliable means of dispute resolution. However, for parties in dispute, the primary advantage of expert determination could be the avoidance of a lengthy and costly resolution in either arbitration or litigation. ■