Expert determination in major construction disputes: public policy, uncertainty and misclassification in Australia

1. Introduction

It is the complexity of major construction projects which makes them both intriguing and ripe for disputation. By taking two protagonists, who typically have unaligned objectives, and thrusting them into the physically challenging arena of construction, it is little wonder that so many projects result in disputes of varying degrees of complexity. A disenchantment with the cost and prolonged duration of litigation, has led many embittered victims to turn to alternative dispute resolution procedures in the hope of redemption. Expert determination[1] is held out as one such messiah. But is this really the path to salvation or just a less certain form of damnation?

Unlike litigation or arbitration, expert determination sits estranged from any legislative parent. It is a species of contract and, as such, is contingent upon the effectiveness and enforceability of the agreement between the parties. Frequently, when a dispute leads one of the parties to challenge the legitimacy of the expert determination procedure, courts are forced to balance the legal validity of the agreement against the public policy objective of holding the parties to their bargain. Typically, courts have treaded warily in casting aside the parties' apparent agreement. For example, in *Straights Exploration Australia Pty Ltd v Murchison United NL*, the Supreme Court of Western Australia observed:

> There is increasingly, as a matter of commercial practice, a tendency of parties to provide for the determination of some or all disputes by reference to an expert... The tendency of recent authority is clearly in favour of construing such contracts, where possible, in a way that will enable expert determination clauses to work as the parties appear to have intended, and to be relatively slow to declare such provisions void either for uncertainty or as an attempt to oust the jurisdiction of the court.[2]

There are a number of potential issues with expert determinations. Prior to the expert making a determination, the disgruntled party may seek to challenge the agreed process, claiming that the procedure: amounts to an attempt to oust the jurisdiction of the courts; is insufficiently certain to be enforceable; is really an arbitration rather than an expert determination; or is inappropriate given the subject matter of the dispute.

After the expert makes a determination, the party against whom the decision was made may argue that the result should be disregarded on the basis that the determination: was not made in accordance with the express or implied terms of the agreed process; or was subject to some vitiating factor such as fraud, collusion or misrepresentation.

A further complication arises if a party seeks to enforce the outcome of an expert determination. In relation to enforcement within the jurisdiction of the *lex loci contractus*, if one party is recalcitrant, the other party must commence proceedings in a domestic court for specific performance. In relation to enforcement in a foreign jurisdiction, in the absence of the equivalent of the New York Convention, expert determination will be far inferior to

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[1] Which is sometimes referred to as adjudication. However, it should be noted that this article is concerned with expert determination which is given force through a contract rather than statutory adjudication which is given force by way of legislation, such as the various *Security of Payment Acts* in Australia.

[2] (2005) 31 WAR 187, 192-193.

international arbitration in that there will be no opportunity for mutual recognition of a foreign determination.

Additionally, as the expert determination procedure is enshrined in the main contract between the parties to a dispute, its survival is reliant on that contract. Accordingly, if the contract is terminated or declared void *ad initio*, the expert determination procedure will similarly unravel. Historically, this was also the case for arbitration until the recognition of the doctrine of separability.[3] In effect, this doctrine holds that an arbitration clause set out in a contract is deemed to be a separate contract in itself which is capable of surviving in the event of breach, repudiation and termination of the main contract. However, this doctrine is not extended to expert determination.[4]

In this article, the author considers three of these shortcomings with expert determination in the context of Australian jurisprudence. First, those circumstances in which an expert determination may amount to an ouster of the court's jurisdiction and, consequently, be declared void on the basis of public policy. Next, those circumstances in which an expert determination clause may be declared void on the basis of uncertainty. Specifically, where the particulars of the procedure have been omitted, the process is inconsistent and where an expert determination clause amounts to nothing more than an agreement to agree. Finally, the article investigates circumstances where an expert determination clause has been held to be an arbitration.

The author concludes that, while expert determination may be appropriate in a number of situations, it is important that those making provision for this form of dispute resolution properly understand its limitations and those grounds where the procedure can be challenged.

2. Is the expert determination process an ouster of the court's jurisdiction?

It is a longstanding rule of the common law that a contract which purports to extinguish the rights of one or both parties to submit questions of law to the courts is *pro tanto* void for being contrary to public policy.[5] As the High Court held in *Dobbs v National Bank of Australasia Ltd*:

> No contractual provision which attempts to disable a party from resorting to the Courts of law [is] recognised as valid. It is not possible for a contract to create rights and at the same time to deny to the other party in whom they vest the right to invoke the jurisdiction of the courts to enforce them.[6]

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[3] *Harbour Assurance Company (UK) Ltd v Kanas General International Insurance Company Ltd* [1992] 1 Lloyd's Rep 81; *Ferris v Plaister* (1994) 34 NSWLR 474; *QH Tours Ltd v Ship Design & Management (Australia) Pty Ltd* (1991) 105 ALR 371.

[4] Jones notes that '[t]here is no doctrine of separability in respect of expert determination or adjudication. Accordingly, there no argument can be made that a determination made under an expert determination clause of the main contract is valid notwithstanding that the rest of the contract is void': Jones, D 'Contractual expert determination and statutory adjudication' - conference 'Latest Development in International Commercial Arbitration and ADR', Barcelona Spain 25-26 June 2001 at 5.

[5] *Thompson v Charnock* (1799) 101 ER 1310. Relevantly, it has also been held that pending or commenced proceedings do not oust the jurisdiction of an inferior tribunal, including an expert determination: *Boyd v Halstead; Ex parte Halstead* [1985] 2 Qd R 249 at 253.

[6] (1935) 53 CLR 643, 652.

In *Novamaze v Cut Price Deli*, Drummond J observed that '[i]t is well settled that a contract is against public policy and therefore void and unenforceable, to the extent it operates as an ouster of the jurisdiction of the court to enforce the rights of a party under the contract or otherwise'.[7]

Notwithstanding the ostensible simplicity of this proposition, its implementation in practice has been problematic. In *Czarnikow v Roth, Schmidt and Co*, Bankes LJ remarked that '[n]o one has ever attempted a definition of what constitutes an ouster of jurisdiction. Each case must depend on its own circumstances'.[8] In *Felton v Mulligan*, Windeyer J observed that 'the grandiloquent phrases of the eighteenth century condemning ousting of the jurisdiction of courts cannot be accepted in this second half of the twentieth century as pronouncements of a universal rule'.[9]

There is a divergent line of authority within the Supreme Courts of Australia on the application of this rule to expert determination clauses. In *Fletcher Construction Australia Ltd v MPN Group Pty Ltd*,[10] the New South Wales Supreme Court held that an expert determination procedure which provided for determinations to be final and binding was not an ouster of the court's jurisdiction. Rolfe J reasoned that the determination by the expert:

(a) was limited to the ascertainment of the facts in dispute. Accordingly, the clause did not seek to prevent a party from enforcing such a determination in a court and so did not attempt to oust the jurisdiction of the court; and

(b) was a *Scott v Avery*[11] type of condition precedent to an action and, consequently, was not an attempt to oust the jurisdiction of the court.

Similarly, in *Badgin Nominees Pty Ltd v Oneida Ltd*,[12] the Victorian Supreme Court held that an expert determination clause was not an ouster of the Court's jurisdiction. Gillard J cited the decision *Fletcher Construction* as authority for this position but did not conduct a detailed public policy analysis of the issue.

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[7] (1995) 128 ALR 540, 548. Further, in *Murphy v Benson* (1942) 42 SR (NSW) 66 Jordan CJ held (at 67) that '[a] provision that an existing legal right shall not be determinable or enforceable by the appropriate Court is void for repugnancy to the right'.

[8] [1922] 2 KB 478, 485.

[9] (1971) 124 CLR 367, 385. Jones also remarks that '[t]he rule that the jurisdiction of the courts as to questions of law cannot be ousted by contract has had a turbulent history, especially in recent times. While it has never been overruled, it has been eroded by a number of decisions which, while being difficult to reconcile with the rule, do not deal with the authorities which support it': Jones D, 'A Critical Analysis of the Means Commonly Adopted to Avoid Disputes in the Construction Industry' (1995) 14 BCL 31, 50.

[10] (unreported, NSW Sup Ct, 14 July 1997).

[11] *Scott v Avery* (1856) 5 HLC 810. In *Novamaze* (at 548), Drummond J explained the operation of a *Scott v Avery* clause as follows: '*Scott v Avery* (1856) 5 HCL 810 established that a contractual term that made the obtaining of an arbitral award a condition precedent to the accruing of a right of action on a contract did not infringe this public policy, for the reason that there existed no cause of action whose prosecution could be interfered with by the contractual agreement until an award had first been made'.

[12] [1998] VSC 188.

By contrast, in *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd*,[13] the Western Australian Supreme Court found that the final and binding expert determination was an impermissible ouster. Heenan J, reasoned that:

(a) the dispute the subject of the expert determination concerned a mixed question of fact and law which the expert was not sufficiently qualified to assess; and

(b) the clause did not purport to make the determination a condition precedent to bringing a cause of action.

While there is some support for the proposition that it is legitimate to refer questions of fact but not law to an extra-judicial tribunal,[14] it is respectfully submitted that the issue of whether the expert is sufficiently qualified is not, of itself, a relevant public policy concern.[15] Instead, the primary focus in these situations should be to consider whether the clause goes to the existence of a right or to its enforcement. This distinction was recognised by Owen J in *Bateman Project Engineering Pty Ltd v Resolute Ltd.*[16]

In *Bateman*, a dispute arose between the parties to an engineering, procurement and construction management contract for a processing plant for a nickel and cobalt mine in Kalgoorlie. When the principal[17] sought to drawn on a bank guarantee, the contractor argued that a term of the guarantee prohibiting the contractor from seeking an injunction against the principal was an attempt to oust the jurisdiction of the court. Owen J observed that '[i]t is important to bear in mind the distinction between a clause which qualifies the existence of a right and one which purports to affect the enforcement of the right'.[18] His Honour held that the prohibition on seeking an injunction was an impermissible ouster because '[i]t goes clearly and permanently to the enforcement of a right that arises under the contract'.[19]

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[13] (1998) 14 BCL 277.

[14] For example, Lord Denning in *Lee v Showman's Guild of Great Britain* [1952] 2 QB 329, 342 stated: '[Parties can] make [a] tribunal the final arbiter on questions of fact, but they cannot make it the final arbiter on questions of law. They cannot prevent its decisions being examined by the courts. If the parties should seek, by agreement, to take the law out of the hands of the courts and put it in the hands of a private tribunal, without any recourse at all to the courts in cases of error of law, then the agreement is to that extent contrary to public policy and void'. Further, in *South Australian Railways Commissioner v Egan* (1973) 130 CLR 506, a dispute arose under a contract for the construction of certain bridges and culverts for a railway line. Clause 32 of the contract provided that certificates issued by the Chief Engineer for Railways were to be "final and conclusive". Stephen J relied upon the decision in *Dobbs* as authority for the validity and effectiveness of the decision of the Chief Engineer as being 'in no way an attempted ouster of the Court's jurisdiction' (at 531). In *Jones v Sherwood Computer Services Plc* [1992] 2 All ER 170, a "final and binding determination" from a firm of accountants that were appointed as "independent experts" in relation to financial matters concerning the sale of a computer company was also held to be valid and not an attempt to oust the jurisdiction of the courts.

[15] For example, in relation to the decision of Heenan J, Bellemore notes: '[t]he writer has some difficulty in agreeing that because the clause requires a dispute to be referred to an unsuitable tribunal, this is, of itself, sufficient to make the clause contrary to public policy': Bellemore A, 'Is Expert Determination Always Appropriate' (2003) 19 BCL 84, 84; see also the comments of Osborn J in *Age Old Builders Pty Ltd v Swintons Pty Ltd* [2003] VSC 307, [70], where his Honour makes reference to the fact that the qualifications of the expert are not relevant in determining whether the agreed process is an expert determination or an arbitration.

[16] (2002) 18 BCL 41.

[17] Under the contract, the principal was Resolute Ltd and the contractor was Bateman Project Engineering Pty Ltd.

[18] (2002) 18 BCL 41, 47 citing *Anderson v G H Mitchell & Sons* (1941) 65 CLR 543, 549-550.

[19] (2002) 18 BCL 41, 47.

This distinction was recognised by Osborn J in *Age Old Builders Pty Ltd v Swintons Pty Ltd.*[20] In this case, his Honour agreed with the analysis of Rolfe J in *Fletcher Construction* that the term 'final and binding' was not a negative restriction on the court's power but was a 'positive provision for the ascertainment of rights'.[21] In other words, the term was a qualification rather than a prohibition.[22] Accordingly, it is submitted that the appropriate inquiry when determining whether an expert determination clause attempts to oust the jurisdiction of the courts, is to consider whether that clause seeks to qualify the existence of a right rather than its enforcement. If the expert determination clause is limited to the ascertainment of the facts in dispute and makes the determination a *Scott v Avery* type of condition precedent, the clause is clearly directed to qualification rather than prohibition. Consequently, it is unlikely to constitute an attempt to oust the jurisdiction of the court.[23]

However, even if an expert determination clause is *prima facie* an attempt to oust the jurisdiction of the court, this will not necessarily be determinative in the clause being declared void. This is because considerations of public policy should be placed in the context of the situation as a whole and not viewed in isolation. For example, Lord Wright in *Vita Food Products Inc v Unus Shipping Co Ltd*, observed that 'public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds'.[24] In support of this argument is Lord Atkins's warning in *Fender v St John Mildmay* that 'the doctrine [of public policy] should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds'.[25] This goes to the oft-quoted caution of Burrough J in *Richardson v Mellish* that 'public policy is a very unruly horse, and when once you get astride it you never know where it will carry you'.[26]

In the context of an expert determination clause, the countervailing public policy interest of holding the parties to their bargain has been recognised in a number of cases. For example, in *Ipoh v TPS Property No 2*, McDougall J acknowledged that, when considering whether or not to order a stay of proceedings in the face of an expert determination provision, the court should start with a presumption that the parties should be held to their contract.[27]

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[20] [2003] VSC 307.

[21] [2003] VSC 307, [78].

[22] This was also recognised by Einstein J in *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996, where his Honour observed (at [42] and [43]): '[If the] parties have entered into an agreement to conciliate or mediate their dispute, the Court may, in principle, make orders achieving the enforcement of that agreement as a precondition to commencement of [legal] proceedings in relation to the dispute... To achieve enforcement of such an agreement it is essential that the agreement is in the *Scott v Avery* form - that is, expressed as a condition precedent. Such a clause was seen not to offend the general tenet of law that it is not possible to oust the jurisdiction of the court as it acted, in effect, as a postponement of a party's right to commence legal proceedings until the arbitration was concluded, not as a prohibition against a party having such recourse'.

[23] Equally, this dichotomy is an important consideration when drafting an expert determination clause and care should be taken to avoid the possibility of the relevant provision being interpreted as a prohibition of legal proceedings rather than a qualification.

[24] (1939) AC 277, 293.

[25] (1938) AC 1, 12.

[26] (1824) 130 ER 294, 303.

[27] [2004] NSWSC 289, [30] and [32]. Further, in *Huddart Parker Limited v The Ship Mill Hill* (1950) 81 CLR 502, Dixon J (at 508- 509) held: 'I start with the general proposition that, where parties have by contract agreed to follow a particular dispute resolution procedure, they should be required to adhere to that procedure unless the party

In *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd,* Lord Mustill remarked that 'those who make agreements for the resolution of disputes must show good reasons for departing from them'.[28] Additionally, Einstein J, in *State of New South Wales v Banabelle Electrical Pty Ltd,*[29] observed that enforcing a dispute resolution clause is about ensuring that the parties participate in the process rather than enforcing consent between those parties.

In light of these decisions, it is appropriate for a court in each case to weigh the public policy interest of preventing a contract ousting the jurisdiction of the court against the broader public policy interest of holding parties to their bargain. It is respectfully submitted that, at least in the context of commercially sophisticated parties, considerable weight should be given to the public policy interest of holding the parties to the express terms of their bargain. As such, in the cut and thrust of construction projects, courts should treat cautiously claims that an expert determination clause be declared void on the basis of public policy.

3. Is the agreed expert determination process sufficiently certain?

It may be possible to challenge the validity of an exert determination process on the basis that the procedure itself is uncertain. Typically, uncertainly is said to arise as a consequence of:

(a) particulars being omitted from the expert determination procedure;

(b) there being an inconsistency in the expert determination procedure; or

(c) the procedure amounting to nothing more than an agreement to agree and, consequently, being inherently uncertain.

3.1 Omissions

In *Banabelle Electrical*[30] it was argued that the expert determination clause was uncertain because the parties had failed to specify the identity of the expert in the annexure to the contract.[31] The defendant argued that this failure caused the provision to be manifestly uncertain and that the court should declare the expert determination provision void. The plaintiffs conceded that, in the absence of the specified expert, that part of the clause was uncertain but argued that the court should sever that element of the clause and retain the rest. Further, the plaintiff argued that the court should imply a term that the parties would act in good faith and use reasonable endeavours to agree upon an expert. Einstein J held that it was inappropriate to imply such a term and found that the failure to specify an expert infected the entire clause, rending the whole provision uncertain.

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wishing to abandon it in favour of resort to the courts can show good reason for that course'. See also *Strategic Publishing Group Pty Ltd v John Fairfax Publications Pty Ltd* [2003] NSWSC 1134, [14], where Einstein J held that the 'Court starts with the proposition that the parties should be held to their agreement'.

[28] [1993] AC 334, 353.

[29] (2002) 54 NSWLR 503; [2002] NSWSC 178; see also Spencer D, 'Casenotes: Drafting dispute resolution clauses with certainty' (2003) 14 ADRJ 85, 87.

[30] Ibid.

[31] In this case, the State of New South Wales engaged Banabelle Electrical Pty Ltd to undertake works for the redevelopment of the Sydney Conservatorium of Music and Conservatorium High School.

In *Triarno Pty Ltd v Triden Contractors Ltd,* Cole J held that it was not open to a court to imply terms relating to the expert determination procedure. His Honour found that:

> If the parties have not by their deed agreed the procedures to be followed upon an expert determination, that is not a void the Court can fill. There is no reason to imply a term that the Court will determine procedures. It is a matter for either agreement between the parties, or determination by the independent experts as to the procedures to be followed.[32]

However, while Cole J was not prepared to imply a term, his Honour did not find that the clause was uncertain. Similarly, in *Fletcher Construction,*[33] Rolfe J (relying on the decision in *Triarno*) held that, where an expert determination clause failed to set out the process to be followed, a court should not imply such a process. That was a job for the parties to agree or the expert to determine. However, the omission of the process was not sufficient to make the clause uncertain.[34]

Accordingly, these authorities suggest that the omission of particulars, such as the identity of the expert or the nominating authority, will be sufficient to render the expert determination uncertain. Conversely, the omission of details of the process itself will not cause the expert determination clause to uncertain because the process can, thereafter, be determined by the expert. While it may be argued that this is an artificial distinction, it is reflective of the lengths that a court will go to hold the parties to their original bargain, consistent with the public policy objectives discussed above.

3.2 Inconsistency

In *Heart Research Institute Ltd v Psiron Ltd*[35] it was argued that the expert determination procedure contained inconsistencies which rendered it void for uncertainty. In this case, the parties entered into a funding agreement for two cardiovascular research projects. The agreement contained a clause which referred the parties to expert determination[36] in accordance with the "Guidelines" published by the Australian Commercial Dispute Centre (ACDC). These Guidelines, in turn, referred to an "Expert Determination Appointment Agreement". The central issue in the case was whether the Guidelines and the Appointment Agreement contained a sufficiently consistent set of terms to make the expert determination procedure certain. Einstein J observed that it wasn't necessary to establish that the Guidelines and the Appointment Agreement contained exactly the same terms so long as the 'provisions were precisely reflective of the same concepts'.[37]

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[32] (unreported, NSW Sup Ct, Cole J, 22 July 1992).

[33] (unreported, NSW Sup Ct, 14 July 1997).

[34] His Honour held (at 23-24): 'In my opinion, this decision is authority for the proposition, which I consider is correct, that in the absence of agreement as to procedures, they are to be decided by the expert. There is, accordingly, no uncertainty of the type for which MPN contended'.

[35] [2002] NSWSC 646.

[36] The disputes were first referred to mediation in accordance with similar ACDC guidelines and, subsequently, to expert determination.

[37] [2002] NSWSC 646, [43]. Ultimately, his Honour held (at [54]) that the dispute resolution was uncertain: '[I]t is clear that in the absence of identification in the Guidelines, presumably by reference, of precisely which terms were to be included in the Expert Determination Appointment Agreement, the parties agreement fails for relevant uncertainty'.

This decision came on top of a similar decision of Giles J in *Elizabeth Bay Developments Pty Ltd v Boral Building Services*,[38] which concerned a mediation provision instead of an expert determination clause. In this case, his Honour similarly concluded that the provisions were inconsistent and hence uncertain.

3.3 Agreement to agree

In the context of alternative dispute resolution, the law regarding the enforceability of agreements to agree can best be described as labyrinthine. The authorities suggest that there are at least three distinct categories of agreements to agree:

(a) straightforward agreements to agree, which are unenforceable;

(b) agreements to negotiate (including to negotiate in good faith), which may be unenforceable; and

(c) agreements to participate in the dispute resolution process, which may also be enforceable depending on the terms.

Straightforward agreements to agree

Generally, at common law, provisions which amount to a mere agreement to agree are inherently uncertain and unenforceable. As Kirby P held in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd*: 'I have already noted the basic law that courts will not enforce an agreement to agree. This is accepted by the High Court of Australia as part of the law of this country'.[39] His Honour was referring to the decision of Gibbs CJ and Murphy and Wilson JJ in *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd,* where it was held:

> It is established by authority, both ancient and modern, that the courts will not lend their aid to the enforcement of an incomplete agreement, being no more than an agreement of the parties to agree at some time in the future.[40]

Agreements to negotiate

An agreement to negotiate is a phrase which is typically used to describe an agreement to enter into a dialogue. In *Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd*, Lord Denning, in considering an agreement 'to negotiate fair and reasonable contract sums', acknowledged that such agreements are anathema to fundamental legal principles. His Lordship stated:

> If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one could tell whether the negotiations would be successful or would fall through: or if successful what the result would be. It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law.[41]

In *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*, Giles J was asked to consider the meaning of a clause which required the parties to enter into a mediation with a commitment to attempt to negotiate in good faith towards achieving a settlement of the

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[38] (1995) 36 NSWLR 709.

[39] (1991) 24 NSWLR 1 at 22.

[40] (1982) 149 CLR 600, 604.

[41] [1975] 1 WLR 297, 301.

dispute. His Honour queried the purpose and operation of such a clause, asking whether it was merely a declaration of the parties' state of mind or whether it was intended to impose a future obligation on the parties to negotiate in good faith. Ultimately, Giles J found that the clause was intended to commit the parties to negotiate in good faith and, on this basis, his Honour held that the clause was uncertain and unenforceable.[42]

However, Cremean argues the contrary view that an agreement to negotiate should be treated differently to an agreement to agree. He observes:

> No justification exists for starting from the premise that an agreement to negotiate in good faith is like an agreement to agree. The two are quite different. To adopt the analogy of an agreement to conciliate or mediate, an agreement to negotiate should be viewed as obliging the parties to participate in a negotiating process. A negotiating process, where offers and counteroffers are made, may or may not lead to agreement. But agreement is not necessarily the outcome of the process. Agreement in consequence of agreement is not guaranteed. An agreement to agree, on the other hand, obliges no participation in a negotiating process because, in theory, agreement has already been reached. Agreement in consequence of agreement is guaranteed.[43]

Further, Kirby P in *Coal Cliff Collieries* acknowledged that a promise to negotiate in good faith will, in some circumstances, be enforceable depending on its precise terms. His Honour held:

> In a small number of cases, by reference to a readily ascertainable external standard, the court may be able to add flesh to a provision which is otherwise unacceptably vague or uncertain or apparently illusory.[44]

By the same token, Hadley JA in *Coal Cliff Collieries* held that:

> Negotiations are conducted at the discretion of the parties. They may withdraw or continue, accept, counter offer or reject, compromise or refuse, trade-off concessions on one matter for gains on another and be as unwilling, willing or anxious and as fast or as slow as they think fit.
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> To my good mind these considerations demonstrate that a promise to negotiate in good faith is illusory and therefore cannot be binding.[45]

This approach was also recently endorsed by Hammerschlag J in *Laing O'Rourke v Transport Infrastructure*.[46]

Agreement to participate in the dispute resolution process

The distinction between an agreement to agree, an agreement to negotiate and an agreement to participate in a process was acknowledged by Giles J in *Hooper Bailie Associated Ltd v Natcom Group Ltd*.[47] In this case Giles J held that a mediation clause (which was framed in the

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[42] (1995) 36 NSWLR 709, 716.

[43] Cremean D, 'Agreements to negotiate in good faith' (1996) 3 Commercial Dispute Resolution Journal 61, 63.

[44] (1991) 24 NSWLR 1, p 2.

[45] Ibid, p 41-42.

[46] [2007] NSWSC 723, [48].

[47] (1992) 28 NSWLR 194.

context of a *Scott v Avery* type condition precedent) was an agreement to participate in a particular process and, as such, was enforceable. His Honour stated:

> An agreement to conciliate or mediate is not to be likened... to an agreement to agree. Nor is it an agreement to negotiate, or negotiate in good faith, perhaps necessarily lacking certainty and obliging a party to act contrary to its interests. Depending upon its express terms and any implied terms, it may require of the parties participation in the process by conduct of sufficient certainty for legal recognition of the agreement.[48]

In *Hooper Bailie*, Giles J reasoned that what is 'enforced is not cooperation and consent but participation in a process from which consent might come'.[49]

A similar distinction was recognised by Einstein J in *Aiton Australia Pty Ltd v Transfield Pty Ltd*.[50] In this case, his Honour held that:

> The focus ought properly be on the process provided by the dispute resolution procedure. Provided that no stage of the dispute resolution is itself an "agreement to agree" and therefore void for uncertainty, there is no reason why, in principle, an agreement to attempt to negotiate a dispute may not itself constitute a stage in the process.[51]

This approach was recently upheld by Jacobson J in *Armacel Pty Limited v Smurfit Stone Container Corporation*.[52]

In light of the convoluted mismatch of authority set out above, it is difficult to draw any precise statement of the law generally applicable in this area. It is respectfully submitted that the consensus that agreements to agree are uncertain should be extended to agreements to negotiate given that the consideration provided thereunder is largely illusory. If this proposition is accepted, it is difficult to see how the consideration provided under an agreement to participate in a dispute resolution represents any more value than a mere agreement to negotiate. Consequently, it is suggested that a court should be weary of upholding the enforceability of an agreement to participate in a dispute resolution process in situations where the consideration is purely illusory.

4. Is the expert determination really an arbitration?

If it can be established that an expert determination procedure has the characteristics of an arbitration, then it may either enliven the *Uniform Commercial Arbitration Acts*[53] or, as Mullins J observed in *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd*, where it does not meet the requirements of those Acts it may nevertheless give rise to 'a common law agreement for arbitration which is effective... but which will not be subject to

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[48] (1992) 28 NSWLR 194, 209.

[49] (1992) 28 NSWLR 194, 206.

[50] [1999] NSWSC 996.

[51] [1999] NSWSC 996, [59].

[52] [2008] FCA 592, [120].

[53] For example, the *Commercial Arbitration Act 1984* (NSW); *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1985* (WA) and similar Acts for other States and Territories of Australia; see also Bellemore A, 'Is Expert Determination Always Appropriate' (2003) 19 BCL 84, 85-88; Hunt R, 'The Law Relating to Expert Determination' (2002) 18 BCL 2, 11-13.

that legislation'.[54] Accordingly, it is essential that an expert determination procedure be drawn in such a manner that it not, inadvertently, be found to be an arbitration.

In *Re Carus-Wilson & Greene*, Lord Esher MR described the determinative feature of an arbitration as being an 'inquiry in the nature of a judicial inquiry'.[55] Further, Lord Wheatley in *Arenson v Casson Beckman Rutley & Co,* described the indicia of an arbitration as follows:

> (a) there is a dispute or a difference between the parties which has been formulated in some way or another; (b) the dispute or difference has been remitted by the parties to the person to resolve in such a manner that he is called upon to exercise a judicial function; (c) where appropriate, the parties must have been provided with an opportunity to present evidence and/or submissions in support of their respective claims in the dispute; and (d) the parties have agreed to accept his decision.[56]

There are a number of factors which may be considered in determining whether the dispute resolution process is in the nature of a judicial inquiry. For example, in *Badgin Nominees*[57] Gillard J considered that the duration of the contractual negotiations, the level of commercial sophistication of the participants and the fact that the expert's costs were to be shared between the protagonists suggested that the parties intended the dispute resolution process to be an expert determination rather than an arbitration.

In *Xstrata Queensland Ltd v Santos Ltd*, McMurdo J reasoned that it was the manner in which the inquiry was to be carried out which was determinative of whether or not it was judicial. Her Honour held that:

> If the decision maker is free to apply his or her idiosyncratic view the decision making process cannot in substance be a judicial one. It is only if the decision maker is bound by certain measures, standards or criteria, which are known to the parties, that the process can resemble a judicial one. An arbitration requires the existence of a dispute which is to be resolved according to such defined criteria.[58]

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[54] (2008) 24 BCL 117, 127 citing *Lord v Lee* [2002] LR 3 QB 404, 407-408.

[55] (1886) 18 QBD 7, 9 where his Lordship held: 'If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of a mere valuation. There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of any arbitrator. Such cases must be determined each according to its particular circumstances'. His Lordship made similar remarks in *Re Dawdy and Hartcup* (1885) 15 QBD 426, 430.

[56] [1977] AC 405, 428.

[57] [1998] VSC 188, [56] - [59] as follows: '[T]he parties expressly provided that the valuation should be by an expert and not an arbitrator. Clearly the parties intended that the procedure should not be by way of arbitration. The evidence shows that the terms of the contract were negotiated over a period of two months between the parties and their representatives. It is not difficult to infer that the parties appreciate the difference between arbitration and expert valuation: experience shows that arbitration conducted invariably as a trial can be costly and time consuming. The parties wished to avoid this. They put in place what they intended was to be an inexpensive and speedy dispute resolution procedure conducted by an expert valuer. This conclusion is supported by the requirement that each party was to pay the costs of the valuation in equal proportions'.

[58] [2005] QSC 323, [29].

In *Northbuild Construction*, Mullins J observed that, simply naming the dispute resolution process as either an expert determination or an arbitration may be relevant in objectively determining its status but it will not be conclusive. Her Honour held that the question will ultimately depend 'on the terms of the relevant contractual provisions'.[59]

In *Hammond v Wolt*, Menhennitt J considered that a key indicia of a judicial inquiry was whether the parties had a right to call evidence.[60] In *Santos Ltd v Pipelines Authority of South Australia*,[61] Debelle J set out some further evidentiary bases for a provision having the characteristics of a judicial inquiry. These included whether the parties had a right to be heard, to see and hear evidence, the right to give evidence and whether there was an opportunity to test evidence by cross-examination. In *Age Old Builders,* Osborn J held that the dispute resolution procedure was not a judicial inquiry because the process was not adversarial and could proceed at the discretion of the expert.

As such, there are a number of factors which should be taken into account when deciding whether a dispute resolution procedure is in the nature of a judicial inquiry. One must look to how evidence can be presented, how the expert will be renumerated, the commercial sophistication of the parties, the express words of the contract, whether the expert can exercise his or her discretion and whether the process is inherently adversarial. Given the plethora of judicially recognised indicia, there is considerable room for courts to exercise either own discretion in the face of the facts in any particular case.

5. Conclusions

Expert determination offers a quick, efficient and cost effective means of resolving certain types of disputes in major construction projects. It is often usefully applied in relation to determining valuations, such as claims for extensions of time or delay costs. Since expert determination derives its authority from contract, it is important that the parties' agreement actually achieves the intended outcome. This article has considered three ways in which that intent can be undermined. That is by being contrary to public policy, uncertain or reclassified as an arbitration.

In relation to public policy, where an expert determination procedure places an impost on the enforcement of a parties' right rather than qualifying the existence of that right, it may constitute an ouster of the court's jurisdiction. The key distinction is whether the term constitutes a qualification or a prohibition. With respect to uncertainty, it is essential to ensure that there are no omissions in the procedure, there is no internal or external inconsistency and that the expert determination clause does not amount to an agreement to agree. Finally, in relation to the distinction between an expert determination and an arbitration, it is vital that the procedure not have the characteristics of a judicial inquiry.

Each of these factors must be given due regard in order to give effect to this important form of alternative dispute resolution procedure in the construction industry. Too often, expert determination clauses are included in contracts for major projects with little regard to their enforceability or utility. By the same token, where a contract makes provision for expert determination, a court should treat cautiously a claim that the agreed process be abandoned.

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[59] (2008) 24 BCL 117, 132.

[60] [1975] VR 108, 112.

[61] (1996) 66 SASR 38, 46.