

Letter to the editor

17 April 2001

Dear Sir,

In the February 2001 issue of the journal of the Chartered Institute of Arbitrators and Mediators there is an article by Douglas Jones, a fellow of our Institute, with the heading 'Expert determination and arbitration'.

This article will perhaps reduce the enthusiasm of those who advocate expert determination instead of arbitration in dispute resolution.

The table on p 26 of the journal sets out the differences between the two procedures. From this table the defects of expert determination as distinct from normal arbitration may be summarised as follows.

1. The courts have no power to stay court proceedings in favour of expert determination agreements.
2. Failure to specify procedures under an expert determination agreement may void the agreement for uncertainty.
3. An expert determination agreement may be void on the basis that it purports to oust the jurisdiction of the courts.
4. Experts have no legislative protection from liability for negligence.
5. An expert's decision can only be enforced on the grounds of breach of contract.
6. A foreign expert's decision can only be enforced as a foreign judgment or else sued upon in place of enforcement — the New York Convention has no relevant authority.
7. The expert has limited authority in minimising delays.
8. Expert determination may be unsuited to all types of disputes.

The author's final paragraph sums up the whole article:

None the less, even if it is nearly impossible to ascertain a practical reason for choosing expert determination over arbitration, it is clear that expert determination has struck a chord with business people and governments, particularly those in the construction industry. Parties may choose expert

determination because of their traditions, the attitude with which they embark on the project, or because expert determination is suited to particular types of disputes. The choice is open to various influences and ultimately the decision will depend on where one wants to sit along the ADR continuum. But the warning remains that, in choosing expert determination over arbitration, parties are agreeing to forsake an internationally enforceable award and an established system of domestic and international laws, in favour of what may be prove to be illusory advantages of speed, reduced cost and informal procedure.

As an arbitrator for many years, one wonders why an expert determination agreement which includes a compliance clause does not automatically become an arbitration agreement under the simple definition of an arbitration submission as an agreement in writing to refer disputes to an independent person whose decision shall become final and binding.

As has been said before: an arbitration does not cease to be an arbitration by giving it another name.

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