

# CONSTRUCTION LAW

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## ABBREVIATED CONTENTS

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decision<sup>44</sup> as to the resolution of disputes that arise during the course of a project.<sup>45</sup> Dispute boards are often established at the outset of a project (as a "standing" dispute board), rather than when disputes arise. One of the perceived advantages of using a "standing" dispute board is that it may "nip in the bud" any incipient disputes,<sup>46</sup> perhaps even by (if permissible) filling in gaps in the parties' contract, where ambiguities have arisen.<sup>47</sup> In the US, boards of contract appeals, established by administrative regulations,

<sup>44</sup> It is usually dispute "adjudication" boards which make decisions that bind the parties. Dispute "review" boards offer what is hoped to be a persuasive indication of the parties' respective rights and obligations, with the intention being that the parties will adopt the recommendation of the board, rather than escalate matters and commence adversarial (or cognate) proceedings. Dispute review boards operate as a form of early neutral evaluation (which is discussed later in this chapter in relation to expert determination).

<sup>45</sup> There has been an increasing interest in dispute boards in recent years, with a corresponding boom in (enthusiastic) literature, as to which see, by way of example: Lodigiani, "A 'Claims Review Board' as a Way for an Amicable Settlement of Disputes, and other Considerations on the Subject of Claims" [1986] ICLR 498; Pike, "Dispute Review Boards and Adjudicators" [1993] ICLR 157; Jaynes, "Dispute Review Boards – Yes!" [1993] ICLR 452; Pike, "Dispute Review Boards – Yes! A Review" [1993] ICLR 467; Lewis, "Dispute Resolution in the New Hong Kong International Airport Core Programme Projects – Part 3" [1995] ICLR 131; Molineaux, "Real Time Dispute Resolution: Updating FIDIC" [1995] ICLR 258 at 263–265; Shadbolt, "Resolution of Construction Disputes in Vietnam" [1995] ICLR 267 at 271–273; Jaynes, "Dispute Review Boards: The World Bank is Aboard" [1996] ICLR 17; Verveniotis, "Alternative Dispute Resolution in Two Major Construction BOT Contracts" [1996] ICLR 589; Shadbolt, "Resolution of Construction Disputes by Disputes Review Boards" [1999] ICLR 101; Jaynes, "FIDIC's 1999 editions of Conditions of Contract for 'Plant and Design-Build' and 'EPC Turnkey Contract' is the 'DAB' Still a Star?" [2000] ICLR 42; Seppälä, "FIDIC's New Standard Forms of Contract – Force Majeure, Claims, Disputes and Other Clauses" [2000] ICLR 235; Gerber, "Dispute Avoidance Procedures ('DAPs'): The Changing Face of Construction Dispute Management" [2001] ICLR 122; Genton, "The Role of the DRB in Long Term Contracts" (2002) 18 *Const LJ* 1; Jaynes, "A Dispatch from the Front: Dispute Boards" [2002] ICLR 135; Tackaberry and Marriott (eds), *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (Sweet & Maxwell, 4th edition, volume 1, 2003) Part 7; Dering, "Dispute Boards: It's Time to Move On" [2004] ICLR 438; Jaynes, "Dispute Boards – Good News and Bad News: The 2005 'Harmonised' Conditions of Contract Prepared by Multilateral Development Banks and FIDIC" [2006] ICLR 102; Röntges, "International Dispute Adjudication – Contractors' Experiences" [2006] ICLR 306; Mourre, "Canada Dry Arbitrations" [2006] ICLR 422; Mahnken, "Why International Dispute Settlement Institutions Should Offer Ad Hoc Dispute Board Rules" [2006] ICLR 433; Chern, *Chern on Dispute Boards: Practice and Procedure* (Informa, 4th edition, 2020); Danuri, Hussein, Mustafa and Jaafar, "Growth of dispute avoidance procedure in the construction industry: a revisit and new perspectives" (2010) 26 *Const LJ* 349; Griffiths, "Do dispute review boards trump dispute adjudication boards in creating more successful construction projects?" (2010) 76 *Arbitration* 686; Gerber and Ong, "DAPs: When will Australia jump on board?" (2011) 27 *BCL* 4; Teo, "Proactive dispute prevention: the value of dispute review boards to the construction industry" (2011) 27 *BCL* 233; Gerber and Ong, "Look before you leap: avoiding the traps and maximising the benefits of your DRB" (2012) 28 *Const LJ* 310; Denehy and Gerber, "What constitutes world's best practice for dispute avoidance in standard form contracts?" (2012) 28 *BCL* 266; Stubbe and Wietzorek, "Making Dispute Boards Better with the 'One Plus One Model'" [2013] ICLR 4; Armes, "Putting your money where your mouth is or 'practising what you preach': the funding (or not) of dispute boards by the international funding banks" (2013) 29 *Const LJ* 111; Genton, "30 years of experience in the prevention and resolution of disputes" (2014) 30 *Const LJ* 151 at 155–158; Duffy and Duffy, "An analysis of dispute review boards and settlement mediation as used in the Australian construction industry" (2014) 30 *BCL* 165; Bunni, "What Has History Taught Us in ADR? Avoidance of Dispute!" (2015) 81 *Arbitration* 176; von Kumberg, "Conducting conflict aware business management – a user's perspective on dispute boards" (2015) 31 *Const LJ* 375; Miers, "Real time dispute resolution in Rio de Janeiro... since you cannot delay the Olympic Games" (2015) 31 *Const LJ* 399; Pillet, "On the vocation of dispute boards" [2017] *International Business Law Journal* 253; Bates and Torres-Fowler, "Dispute Boards: A Different Approach to Dispute Resolution" in Campbell (ed), *Comparative Law Yearbook of International Business 41a: International Mediation* (Kluwer, 2020) pages 237–264; Charrett, "Dispute board manual: a guide to best practices and procedures" (2020) 36 *Building and Construction Law* 78; Gould and McCrea, "Dispute boards: trends, observations, developments and procedures" in Nazzini (ed), *Construction Arbitration and Alternative Dispute Resolution* (Informa, 2022) chapter 9.

<sup>46</sup> *Mi-Space (UK) Ltd v Lend Lease Construction (EMEA) Ltd* [2013] EWHC 2001 (TCC) at [16], per Akenhead.

<sup>47</sup> See Vernstein, "Ex tempore contracting", 55 *William and Mary Law Review* 1869 (2014).

have been used for some time to adjudicate on disputes arising out of government construction and engineering contracts.<sup>48</sup>

23.13 Dispute adjudication boards ("DABs")<sup>49</sup> are used increasingly in international construction and engineering projects.<sup>50</sup> Adjudicating a dispute pursuant to a DAB may be a precondition to either party commencing an arbitration of the dispute (as is generally the case under the FIDIC forms of contract).<sup>51</sup> Where a DAB makes a decision that is binding on the parties (by virtue of the dispute-resolution agreement in the underlying construction or engineering contract) there may be an issue as to how the DAB's decision is to be enforced if a party fails to comply with it. In domestic (ie, non-international projects), the DAB's decision may be enforceable through the national courts as a binding contractual determination of rights and obligations.<sup>52</sup> In international contracts the usual mechanism for enforcing a DAB's decision will be for the successful party to commence an arbitration, and to obtain an award that can be enforced against the unsuccessful party.<sup>53</sup> However, in order to do this it is necessary for the dispute-resolution procedure in the project documents to specify adequately how a

<sup>48</sup> *See Contractors, Inc v United States*, 406 US 1 at 17–18 (1972). See also Hinchey, "Evolution of ADR Techniques for Major Construction Projects in the Nineties and Beyond: a United States Perspective" (1996) 12 *Const LJ* 14 at 18–19; Groton, Rubin and Quintas, "A Comparison of Dispute Review Boards and Adjudication" [2001] ICLR 275.

<sup>49</sup> Or "Dispute Avoidance/Adjudication Boards" or "DAABs", as they are now referred to under the 2017 FIDIC forms of contract. The NEC4 contract, Option W3, contemplates the use of a "Dispute Avoidance Board" where the Housing Grants, Regeneration and Construction Act 1996 (UK) does not apply to the contract.

<sup>50</sup> And indeed in other fields: see Rosher, "The application of dispute boards in the field of satellite projects" [2016] *International Business Law Journal* 119. However, it may be observed that the use of DABs is limited in certain parts of the world, especially the Middle East: see Grose, "Compatibility of FIDIC's drafting principles with contract practices in the Gulf: a perfect match or marriage of convenience?" [2017] ICLR 375 at 388. In 2021, the Joint Contracts Tribunal (JCT) and the Chartered Institute of Arbitrators (CI Arb) published the first Dispute Adjudication Board Rules for use with the JCT Design & Build Contract and Major Project Construction Contract forms.

<sup>51</sup> *Peterborough City Council v Enterprise Managed Services Ltd* [2014] EWHC 3139 (TCC) (considering an amended FIDIC Silver Book, 1st 1999 form). Compare Kondev, "Is dispute adjudication under FIDIC contracts for major works indeed a precondition to arbitration?" [2014] ICLR 256. See also Bailey, "Current Issues with FIDIC Dispute Adjudication Boards" (SCL paper no. D176, January 2015, www.scl.org.uk); Seppälä, "Commentary on recent ICC arbitral awards dealing with Dispute Adjudication Boards under FIDIC contracts" [2016] ICLR 185.

<sup>52</sup> *Downer & Co Ltd v The Airport Authority* [1999] HKCFI 820 (considering the enforceability in the courts of Hong Kong of a decision made by a Dispute Review Panel under a contract for the Hong Kong airport expansion project).

<sup>53</sup> The reason for using arbitration as the means of enforcing a DAB's decision is that the decision does not have the legal status of an arbitral award or the judgment of a court, and if the DAB's decision is homologated as an international arbitration award it is usually enforceable in most countries in the world pursuant to the New York Convention (as to which, see paragraph 25.13). However, it may be noted that the law of Brazil expressly countenances the judicial enforcement of decisions made by dispute boards: see de Barros, "Construction dispute resolution in Brazil – recent developments in arbitration and alternative dispute resolution" [2019] ICLR 160 at 164. See also Saidov, "An International Convention on Expert Determination and Dispute Boards?" (2022) 71 *International Commercial Law Quarterly* 697; Saidov, "Imagining an International Convention on Expert Determination and Dispute Boards: Challenging Decisions" [2024] *Journal of Business Law* 101.

decision of the DAB is to be enforced.<sup>54</sup> If no enforcement mechanism is specified in the relevant contract, it may be possible to enforce a DAB's decision through the court as an arbitral award.<sup>55</sup>

**23.14** The duties and responsibilities of dispute board members will depend upon the terms of their appointments, and the terms of the relevant construction or engineering contract pursuant to which the dispute board was created. There is no reason in principle why a contract cannot provide for a dispute board to give a non-binding recommendation with regard to a dispute referred to the board, and then if that recommendation is not accepted by either party for the board to act as an arbitral tribunal, and render a final and binding award on the dispute.<sup>56</sup>

### (iii) Mediation<sup>57</sup>

(a) Generally<sup>58</sup> refers to a process, which is usually conducted in private, whereby disputing parties meet and endeavour, with the facilitation of a mediator,<sup>59</sup> to reach an agreement for the resolution of their dispute.<sup>60</sup> The process is one that seeks the resolution of a dispute through consensus, as opposed to adjudication by a third party. A mediator will try to facilitate (if possible) the reaching of a settlement agreement, but the mediator himself does not make a decision on the underlying dispute so as to bind the parties (unless the parties so agree).<sup>61</sup>

**23.16** One of the attractions of mediation is that it has the potential to produce a consensus between disputing parties, and thereby end their dispute. If a settlement is reached before proceedings are brought, or even after the commencement of proceedings, the parties will have avoided expending further valuable time and resources on litigation, and obtained the commercial certainty of an agreed outcome.<sup>62</sup> A settlement resulting from a mediation, which requires one party to pay a sum of money to another, may be regarded as a species of accord and satisfaction,<sup>63</sup> and the agreement constituted by the settlement may even be capable of international enforcement.<sup>64</sup> On the other hand, if a mediation goes ahead, but it is unsuccessful in producing a resolution of the dispute, the

<sup>57</sup> See generally Brookner and Wilkinson, *Mediation in the Construction Industry: An International Review* (Taylor and Francis, 2010).

<sup>58</sup> Which is also referred to, synonymously, as "conciliation" or "facilitation". However, "conciliation" may be regarded as distinct from "mediation", in that a conciliation may involve the independent neutral (ie, the conciliator) making a non-binding recommendation to the parties as to appropriate terms of settlement in the event that they are unable to resolve their dispute through the mediation process. This non-binding recommendation is based in a pure "mediation"; see also *Tenerat International Pty Ltd v Parade Construction Pty Ltd* [2011] SASCA 8 at [26], per Doyle JA. Conciliation, as just described, is used commonly in construction contracts in Ireland, as to which see, for example, the Engineers Ireland Conciliation Procedure 2013 ([www.engineersireland.ie](http://www.engineersireland.ie)). Bond, "Alternative methods of resolving construction disputes: is statutory adjudication really the best way?" (2016) 82 *Arbitration* 239. However, as the court emphasised in *Taxenat* (at [27]), what is significant is the legal features of a dispute resolution process, rather than the label the parties have chosen to give to it.

<sup>59</sup> Who has also been referred to as a "neutral process designer"; see Lurie, "Guided Choice: Early Mediated Settlements and Unsupervised Arbitrations" (2013) 29 *Constr LJ* 480 at 480.

<sup>60</sup> See *Glenet Developments & Design Co Ltd v Ben Barrett & Son (Constructors) Ltd* [2001] BLR 207 at 219 [25], per HHJ Lloyd QC; *Mediation Ordinance* (Cap. 620) (HK) section 4; *Mediation Act 2017* (Sing) section 3. See also *Ku-Rong-Gai Council v Lohar Construction Pty Ltd* [2018] NSWSC 610 at [22]–[28], per McDougall J (appeal dismissed) [2019] NSWCA 2.

<sup>61</sup> Hence, a party cannot be forced by the other party or the mediator to settle, even if the proposed terms of settlement are sensible. *Ericsson AB v EADS Defence and Security Systems Ltd* [2010] BLR 131 at 141 [51], per Akenhead J.

<sup>62</sup> Hence it is a truism that "no-one ever lost a settlement". Similarly, "a bad settlement beats a good trial". *Turf Club Auto Emporium Pty Ltd v Yee Boong Hui* [2017] SGCA 21 at [1].

<sup>63</sup> As to accord and satisfaction, see paragraph 23.51F.

<sup>64</sup> Pursuant to the United Nations Convention on International Settlement Agreements Resulting from Mediation (2018), generally known as the "Singapore Convention". The United Kingdom, Australia, Singapore and China are signatories to the Convention. See also Appel, "A 'done deal' for States and Investors? The new United Nations Convention on International Settlement Agreements Resulting from Mediation" (2019) 35 *Constr LJ* 481; Astar-Cazenave, "The Singapore Mediation Convention" [2020] *International Business Law Journal* 47; Choong, "The Singapore Convention on Mediation: its impact on international construction disputes" in Nazini (ed.), *Construction Arbitration and Alternative Dispute Resolution* (Informa, 2022) chapter 3; Coombe, "What Are the Pros and Cons of the Singapore Convention and Should Australia Enact Legislation with a Similar Effect for Wholly Australian Construction Disputes?" (2023) 39 *Constr LJ* 138.

<sup>54</sup> See *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33 (considering the DAB award upholding a DAB's decision) and subsequent commentary: Smith and Rosen, (2011) 27 *IBCL* 305; Gellman and Genton, "Compliance with and enforceability of a dispute board decision: recommendations by the International Bear-Rivage Palace Forum Working Group" (2012) 28 *Constr LJ* 3; Dederzade, "Mind the gap: analysis of cases and principles concerning the ability of ICC arbitral tribunals to enforce binding DAB decisions" in the 1999 FIDIC conditions of contract" (2012) 15 *Int Arb Law Rev* 145; Seppälä, "How not to interfere with the disputes clause: the Singapore Court of Appeal judgment in *Persero*" [2012] *ICLR* 4; Butera, "Enforcing the enforcement of DAB decisions" [2014] *ICLR* 36. Subsequently, the DAB's decision the subject of the *Persero* case was enforced at first instance (*PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonnesia)* [2014] SGHC 146 (commented upon by Seppälä, "Singapore contributes to a better understanding of the FIDIC disputes clause: the second *Persero* case" [2015] *ICLR* 4 and Gillion, "Pay now, argue later" in the context of DAB decisions – what approach best advances the purpose of the FIDIC's security of payment regime?" [2015] *ICLR* 26)) and then on appeal: *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] SGCA 30 (commented in by Bunn, Ong and O'Reilly, "The enforcement of Dispute Adjudication Board decisions: *Persero* and the FIDIC Standard Form of Contract" (2015) 81 *Arbitration* 367; Seppälä, "An excellent decision from Singapore which should enhance the enforceability of decisions of Dispute Adjudication Boards – the second *Persero* case before the Court of Appeal" (2015) 31 *Constr LJ* 367; Haran, "Understanding the decision in *Persero II* in its proper context" (2016) 32 *Constr LJ* 813; Gillion, "The Court of Appeal decision in *Persero II*: are we now clear about the steps to enforce a non-final DAB decision under FIDIC?" [2016] *ICLR* 4). See also *Tubular Holdings (Pty) Ltd v DTF Technologies (Pty) Ltd* [2013] ZAGPHC 155 (considering the enforcement of a DAB decision under a FIDIC form), *Serfanuri Stocks (Pty) Ltd v S8 Property (Pty) Ltd* [2013] ZAGPHC 249 (considering the adjudication provisions of the JBCC Services 2000 Principal Building Agreement) and *Zillion Investment Holding (Pty) Ltd v Salz-Gossow (Pty) Ltd* [2019] NASC 10 (considering the enforcement of a DAB decision under a FIDIC form). See, further, Jaynes, "FIDIC guidance memorandum dated April 1, 2013 to users of the 1999 Conditions of Contract" (2015) 31 *Constr LJ* 415; Petkova, "Enforceability of 'until and unless' DAB decisions under the 1999 FIDIC contracts" [2017] *ICLR* 178; Figueroa and Schubert, "The role of dispute boards in the construction industry" [2017] *International Arbitration Law Review* 55; Hartingh, "Adjudication practice in South Africa: from *ad hoc* towards statutory adjudication" (2018) 34 *Constr LJ* 188; Dederzade, "Enforcement of DAB decisions under the FIDIC forms of contract" in Nazini (ed.), *Construction Arbitration and Alternative Dispute Resolution* (Informa, 2022) chapter 10; Seppälä, "Proposal for Enforcement of Agreements of the Parties, Final and Binding Determinations of the Engineer and Decisions of the DAAB Under FIDIC's 2017 Rainbow Set (As Amended in 2022)" [2024] *ICLR* 106.

<sup>55</sup> This issue is not the subject to any judicial excesses on point, however for a persuasive argument that DAB decisions should be treated as arbitral awards and enforced as such (absent contractual machinery for enforcement), see Schiller, "Dispute board is arbitration: an alternative view on the nature and enforceability of a dispute board's determination" (2015) 31 *Constr LJ* 380.

<sup>56</sup> *Mi-Space (UK) Ltd v Land Lease Construction (EMEA) Ltd* [2013] EWHC 2001 (TCC) at [26], per Akenhead J.

mediation will have the effect of increasing the overall cost of the dispute, and delaying the conclusion of any proceedings.<sup>65</sup>

(b) Consensual or compulsory?

**23.17** Mediation may be (and usually is) a consensual process, which takes place because the parties have agreed to attempt to resolve their dispute (or any disputes) by way of mediation.<sup>66</sup> Such an agreement will be treated as binding between the parties, provided that the mechanism by which the mediation is to take place, including the identification of the mediator, is sufficiently defined.<sup>67</sup> If a contract includes a provision for the mediation of disputes arising under it, the obligation to mediate may be mandatory, or it may only arise if one party elects or requires that a dispute be mediated.<sup>68</sup> A mediation agreement, if incorporated as part of a construction or engineering contract, will be held to survive the termination of the contract for breach or repudiation.<sup>69</sup> Various industry and dispute-resolution bodies produce standard mediation rules or procedures that are regularly utilised in construction and engineering disputes.<sup>70</sup> Mediation is often used to resolve construction and engineering disputes successfully.<sup>71</sup>

**23.18** Mediation need not, however, be a consensual process, because the courts have the power to order the parties to attempt to resolve their dispute by way of mediation.<sup>72</sup> In England and most Australian jurisdictions, litigants are expected to consider whether their dispute is suitable for mediation.<sup>73</sup> Thus, in *Burchell v Bullard*,<sup>74</sup> Ward LJ observed

<sup>65</sup> That is (in relation to delay), unless the mediation is conducted in parallel with the relevant proceedings.  
<sup>66</sup> The JCT Standard Building Contract, 2016 edition, clause 9.1 requires the parties, when locked in dispute, to "give serious consideration" to any request made by the other party to refer the dispute to mediation. The provision is facilitative rather than mandatory, as it cannot be relied upon by one party to compel the other party to participate in a mediation.

<sup>67</sup> *Cable & Wireless plc v IBM United Kingdom Ltd* [2003] BLR 89; *Sulamerica CIA Nacional de Seguros SA v Ensa Engenharia SA* [2012] EWHC 42. Compare *Hyundai Engineering & Construction Co Ltd v Vigor Ltd* [2005] BLR 416 at 422, per Rogers VP [HKCA], where it was held that a simple agreement to "submit to Third Party Mediation procedure" was too ill-defined to be enforceable.

<sup>68</sup> See, for example, *VDM Construction Pty Ltd v MCC Mining (Western Australia) Pty Ltd* [2011] WASC 208, where the construction contract in question gave either party to it the option of requiring that a dispute be mediated.

<sup>69</sup> *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709 at 715, per Giles J. *Open Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2246 (TCC) at [43], per O'Hare J.

<sup>70</sup> See, eg, the American Arbitration Association's "Construction Industry Arbitration Rules and Mediation Procedures" ([www.adr.org](http://www.adr.org)); CEDR's *Model Mediation Procedure and Agreement* ([www.cedr.com](http://www.cedr.com)); and TeCSA's *Mediation Rules* ([www.tecsa.org.uk](http://www.tecsa.org.uk)). See also Lightburn, "Mediation in International Construction Disputes" [2000] ICLR 202; Bristow, "The Preparation for the Mediation of a Complex Multi-Party Construction Dispute" (2001) 17 *Const LJ* 486; Netto, Ping and Christudason, "Med-Arb in the Carbird Seat of ADR" [2003] ICLR 517.

<sup>71</sup> See Hudson-Tyerman, "Encouraged, Pushed or Forced – The Order of the Day?" (2008) 24 *Const LJ* 79; Gould, King and Britton, *Mediating Construction Disputes: An Evaluation of Existing Practice* (King's College London, Centre of Construction Law & Dispute Resolution, 2010) (downloadable at [www.kcl.ac.uk](http://www.kcl.ac.uk)). It is increasingly common to find enthusiastic proponents of mediation in the construction industry, with the greatest enthusiasm being expressed by mediators themselves. McCartner and Dain, "Is construction mediation changing?" (2010) 26 *Const LJ* 505.

<sup>72</sup> It has been suggested that "some form of artificial insertion of mediation into the traditional disputing culture through court initiation or embedding in standard form contracts may be appropriate": Agapiou and Clark, "An empirical analysis of Scottish construction lawyers' interaction with mediation: a qualitative approach" (2012) 31 *Civil Justice Quarterly* 494 at 513. See also Agapiou and Clark, "A follow-up empirical analysis of Scottish Construction Clients [sic] interaction with Mediation" (2013) 32 *Civil Justice Quarterly* 349.

<sup>73</sup> Mediation is also a growing force for resolving construction disputes in other countries, and in international projects. For a discussion on the emergence of mediation in Turkey, see Ilter, "An analysis of the key challenges to the widespread use of mediation in the Turkish construction industry" (2009) 1 *International Journal of Law in the Built Environment* 143.

<sup>74</sup> [2005] BLR 330 (CA).

that the English Court of Appeal "has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value".<sup>75</sup> Under the Civil Procedure Rules (CPR), the court has the power to order that the parties participate in an ADR procedure such as mediation, even if one or more of the parties to the dispute is unwilling to participate.<sup>76</sup> Parties are required to consider seriously the appropriateness and utility of mediation as part of the process of complying with the Pre-Action Protocols, before litigation is commenced.<sup>77</sup> Even once litigation is commenced, it is generally expected that mediation (if appropriate) should be used. It has been suggested that the optimum time for mediation is

"the point when the detail of the claim and the response are known to both sides, but before the costs that have been incurred in reaching that stage are so great that a settlement is no longer possible".<sup>78</sup>

**23.19** In New South Wales (and some other Australian jurisdictions) the court is empowered to order the parties to participate in mediation, whether upon application, or of the court's own volition.<sup>79</sup> The courts of New South Wales have recognized the potential utility of court-imposed mediation in relation to building disputes between neighbours.<sup>80</sup>

**23.20** Mediation statutes operate in Hong Kong<sup>81</sup> and Singapore.<sup>82</sup> Under the Singapore statute, court proceedings commenced in defiance of a mediation agreement may be stayed.<sup>83</sup> Statutory mechanisms for compelling parties to mediate, whether before or

<sup>75</sup> [2005] BLR 330 at 338–339 [43]. See also *Rolf v De Guerin* [2011] BLR 221.

<sup>76</sup> The power to order parties to participate in ADR is derived from CPR rule 1.1. See *Shirayama Shokusan Co Ltd v Danovo Ltd* [2004] 1 WLR 2985. The court may also order a stay of proceedings, usually for a period of 1 month, where a willingness to mediate has been indicated: see CPR rule 26.4 and *King Felix Sunday Bebor Berebon v Shell Petroleum Development Company of Nigeria Ltd* [2018] EWHC 1377 (TCC) at [42]–[44], per Cockerill J. Cross-border disputes in the EU are subject to Mediation Directive 2008/52/EC, which was implemented in English law by amendments to the Civil Procedure Rules (effective 6 April 2011), although the Directive ceased to apply as a result of the Brexit constitutional reforms. See also Toulmin, "Cross-border mediation and civil proceedings in national courts" (2010) 26 *Const LJ* 516; Ramsey, "Mediation 2020: A presentation to the Chartered Institute of Arbitrators' 4th Annual Mediation Symposium, October 19, 2011" (2012) 78 *Arbitration* 159 at 160.

<sup>77</sup> As to the Pre-Action Protocols, see paragraphs 26.19–26.23.

<sup>78</sup> *Nigel Witham Ltd v Smith (No 2)* (2008) 117 *Con LR* 117 at [32], per HHJ Coulson QC. See also Brooker and Lavers, "Mediation outcomes: lawyers' experience with commercial and construction mediation in the United Kingdom" 5 *Pepperdine Dispute Resolution Law Journal* 161 (2005) at 193–196; Brooker, "Criteria for the appropriate use of mediation in construction disputes: judicial statements in the English Technology and Construction Court" (2009) 1 *International Journal of Law in the Built Environment* 82.

<sup>79</sup> *Civil Procedure Act* 2005 (NSW) section 26. Once mediation has been ordered, the court will not be reluctant to make appropriate ancillary orders for ensuring that the mediation process is made effective: *Addisland Pty Ltd v Simmons* [2005] SASC 25 at [19]–[22], per Bleby J. It may be inappropriate to order mediation where one of the litigants is unwilling to participate in a mediation voluntarily, and it is apparent that forcing the parties to mediate would be a waste of time and money: *Morrow v chinadotcom Corp* [2001] NSWSC 209; cf *Baulderstone Hornibrook Engineering Pty Ltd v Dare Sutton Clark Pty Ltd* [2000] SASC 159. See also *Idoport Pty Limited v National Australia Bank Limited* [2001] NSWSC 427; *Blue Cross Properties (Toorak) Pty Ltd v Mackie & Staff Pty Ltd* [2007] VSC 304; *United Group Rail Services Ltd v Rail Corporation NSW* [2009] NSWCA 177 at [78], per Allsop P (127 *Con LR* 202).

<sup>80</sup> See, eg, *Jukes v Larter* [2012] NSWSC 369 at [40]–[41], per Beech-Jones J.

<sup>81</sup> Mediation Ordinance (Cap. 620) (HK).

<sup>82</sup> Mediation Act 2017 (Sing).

<sup>83</sup> Mediation Act 2017 (Sing) section 8.

during the course of litigation, have also gained a certain popularity in other jurisdictions, including the Republic of Ireland.<sup>84</sup>

### (c) Conduct of mediation

**23.21** The format that a mediation takes is a matter to be decided by the parties involved, including the mediator. The format of commercial mediations usually involves the parties exchanging written summaries of their respective positions in advance of a mediation meeting. At the mediation meeting the parties, with the assistance of the mediator, discuss and attempt to resolve the matters in dispute. A mediation may also involve something in the nature of a so-called "mini-trial".<sup>85</sup>

**23.22** Mediations usually take place in private, and communications made during a mediation are usually confidential.<sup>86</sup> The fact that a mediation takes place with a view to the parties attempting to resolve their dispute means that communications in the mediation attract "without prejudice" privilege, and therefore may not be referred to in court proceedings unless the parties agree to waive that privilege.<sup>87</sup> Under the applicable NSW legislation, evidence of anything said during a mediation session is not admissible in evidence, nor are documents produced for or as a result of a mediation session,<sup>88</sup> unless the evidence in question records an agreement or arrangement reached during the mediation session.<sup>89</sup>

<sup>84</sup> Ireland has passed a Mediation Act 2017, as to which see Chaffer, "An international perspective: mediation in Ireland: a future model for English law?" (2018) 34 *Const LJ* 478.

<sup>85</sup> Henderson, "Mini-Trial of Construction Disputes" [1994] *ICLR* 442 (although some might say that there is a distinction to be made between a "pure" mediation and a "mini-trial"). A cognate concept is that of an "evaluative mediation", where the mediator – at the parties' request – offers his or her views on the likely outcome of the instant dispute should it not settle and be adjudicated upon in an adversarial forum: see Lenz, "Is evaluative mediation the preferred model for construction law disputes?" (2015) 31 *BCL* 134.

<sup>86</sup> Where a mediation agreement provides that the contents of the mediation are to be confidential, and the mediation agreement is between the parties and the mediator, the communications in the mediation are confidential, and that confidentiality cannot be removed unless all of the parties (including the mediator) so agree: *Farm Assist Ltd (in liq) v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] BLR 399 at 404 [21]–406 [29], per Ramsey J. In Hong Kong and Singapore, the confidentiality of mediations is now enshrined in statute: Mediation Ordinance (Cap. 620) (HK) section 8 (as to which, see Yu, "The Draft Mediation Bill" (2012) 42 *Hong Kong Law Journal* 351) and Mediation Act 2017 (Sing) sections 9–11.

<sup>87</sup> See, eg, *Hammerschlag Properties (Welwyn) Ltd v Saint-Gobain Ceramics and Plastics Ltd* [2013] EWHC 2227 (TCC) at [33], per Ramsey J. However, the privileged is "owned" by the parties, and not the mediator, meaning that the parties themselves may waive privilege in communications made for the purposes of a mediation even if the mediator does not consent to that privilege being waived: *Farm Assist Ltd (in liq) v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2009] BLR 399 (noted by Cornes (2009) 75 *Arbitration* 583). As to "without prejudice" privilege, see paragraphs 26.98–26.101.

<sup>88</sup> *Civil Procedure Act* 2005 (NSW) section 30(4).

<sup>89</sup> *Civil Procedure Act* 2005 (NSW) section 29(2). See also *Owners Corporation Strata Plan 62285 v Betona Corporation (NSW) Pty Ltd* [2006] NSWSC 216.

### (d) "Med-arb"<sup>90</sup>

**23.23** Arbitration statutes in Australia,<sup>91</sup> Hong Kong<sup>92</sup> and Singapore<sup>93</sup> (but not England) permit an arbitrator of a dispute also to act as a mediator as between disputant parties, provided that the parties have agreed to the arbitrator acting as a mediator. Under the Hong Kong<sup>94</sup> statute, the arbitrator may continue to act as arbitrator even if the mediation is unsuccessful. The fact that the arbitrator may have previously acted as mediator is not of itself a disqualifying factor. The position is the same under the Singapore statutes, although an arbitrator is required to disclose to the parties material confidential information gleaned from the mediation process before resuming his function as arbitrator.<sup>95</sup> By contrast, under the NSW arbitration statute, if the mediation is unsuccessful in resolving the dispute, the arbitrator is unable to continue to act as arbitrator of the dispute unless the parties further agree to him so acting.<sup>96</sup>

### (viii) Expert determination<sup>97</sup>

#### (a) Introduction

**23.24** An expert determination agreement is an agreement,<sup>98</sup> for which there are no particular legal formalities,<sup>99</sup> between two or more parties that a person<sup>100</sup> is to make a determination concerning factual and/or legal matters that have not been agreed by

<sup>90</sup> See generally Netto, Ping and Christodason, "Med-Arb in the Catbird Seat of ADR" [2003] *ICLR* 517; Goodrich, "Arb-med: ideal solution or dangerous heresy?" (2012) 15 *International Arbitration Law Review* 12; Rhodes, "Mediation-arbitration (med-arb)" (2013) 79 *Arbitration* 116; Mau, "Arbitration to mediation to arbitration with the same parties in the same international dispute before the same neutral: innovative evolution or recipe for disaster?" (2015) 31 *Const LJ* 429.

<sup>91</sup> *Commercial Arbitration Act* 2010 (NSW) section 27D.

<sup>92</sup> Arbitration Ordinance (Cap. 609) (HK) section 33 (and see also section 32(3)).

<sup>93</sup> Arbitration Act 2001 (Sing) section 63; International Arbitration Act 1994 (Sing) section 17 (which refers to an arbitrator acting as a "conciliator").

<sup>94</sup> Arbitration Ordinance (Cap. 609) (HK) section 33(5).

<sup>95</sup> Arbitration Act 2001 (Sing) section 63(3); International Arbitration Act 1994 (Sing) section 17(3).

<sup>96</sup> *Commercial Arbitration Act* 2010 (NSW) section 27D(4). See also *Ku-Ring-Gai Council v Labor Constructions Pty Ltd* [2019] NSWSCA 2.

<sup>97</sup> See generally Chinkin, "Expert Determination as a Viable Alternative to Arbitration and Litigation" [1989] *ICLR* 401; Jones, "Expert Determination in Commercial Contracts" in Cato (ed), *The Expert in Litigation and Arbitration* (LLP, 1999) chapter 10; McHugh, "Expert Determination" (2008) 74 *Arbitration* 148; Farrell and Freedman, *Kendall on Expert Determination* (Sweet & Maxwell, 5th edition, 2014); Duthie, "Expert determination – the Peter Pan of ADR? Challenges to the expert determination process and practical insights for its use" (2016) 32 *Building and Construction Law* 370.

<sup>98</sup> The foundation of expert determination is the law of contract: *Poh Cheng Chew v KP Koo & Partners Pty Ltd* [2014] SGHC 20 at [32], per Lionel Yee JC. An expert determination agreement may be a stand-alone contract, or an agreement constituted by the dispute-resolution provisions of a construction or engineering contract, or other contract: see, eg, *SIA Building Contract*, 1st edition, 2016, clause 39. Even if an expert determination agreement forms part of a larger contract, the former agreement may be "separable", so that its operation will survive the termination of the larger agreement: *Illawarra Community Housing Trust Ltd v MP Park Lane Pty Ltd* [2020] NSWSC 751 at [70]–[72], per Hammerschlag J. As to separability in the context of arbitration agreements, see paragraphs 25.52–25.54.

<sup>99</sup> Usually an expert determination agreement is expressed in written form, but equally the submission of a matter to expert determination may occur by less formal means, including by conduct: see *ZVI Construction Co LLC v The University of Notre Dame (USA) in England* [2016] EWHC 1924 (TCC) at [44]–[50], per DHCJ Furst QC.

<sup>100</sup> Who may be referred to as an "expert", or in some cases an "expert determinator": see *Sterling Estates Development Corporation Pty Ltd v Malouf* (2003) 58 NSWLR 685 at [15]. The appellation of the expert is of little importance. The person who acts as expert will usually be independent of the parties, however there is no general legal requirement that this be the case.

the parties.<sup>101</sup> The decision of the expert is often agreed to be binding, although it need not be. In construction and engineering projects, expert determination may be used to provide a valuation or measurement of work performed, an assessment of the quality of work performed, or a determination of other factual or legal matters in dispute. A contract administrator, in certifying the value of work performed by a contractor, may be regarded as acting in the capacity of an appointed third party who is to provide an expert determination. Expert determination may also be deployed as a form of dispute resolution which, in some cases, is analogous to or almost indistinguishable from arbitration. Expert determination, as a form of dispute resolution, is perceived as having certain advantages over litigation, and also arbitration. It is regarded by some as providing "an informal, speedy and effective way of resolving disputes, particularly disputes which are of a specific technical character or specialised kinds".<sup>102</sup> The increased use, in recent times, of this variety of expert determination has brought its features into sharp focus, often with somewhat startling consequences.<sup>103</sup>

#### (b) Scope of expert determination

**23.25** Expert determination is a consensual process, and contracting parties are generally unfettered as to the matters that they may choose to have resolved by way of expert determination. An expert may be tasked with considering a specific matter, such as a contractor's entitlement to an extension of time.<sup>104</sup> Alternatively, an expert determination agreement may be a broadly worded provision in a contract that requires any dispute arising under the contract or relating to the contract to be decided by expert determination.<sup>105</sup> An expert determination clause could, therefore, permit the expert to consider such a matter as whether the terms of the applicable contract ought to be reformed.<sup>106</sup> An expert determination agreement may confer powers on the expert not only to make a decision on the substantive matters in dispute, but also to decide upon incidental matters

<sup>101</sup> An expert determination agreement may contemplate there being multiple references of disputes to expert determination. If so, the fact that a particular issue could have been referred to an earlier determination is not usually a bar to it being referred to a later expert determination: see *Connect Plus (M25) Ltd v Highway England Co Ltd* [2016] EWHC 2614 (TCC) at [27]–[32], per Coulson J.

<sup>102</sup> *Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646 at [16], per Einstein J. See also *JGL Victoria Pty Ltd v TXU Networks (Gas) Pty Ltd* [2004] VSC 225 at [49], per Byrne J; *Bannabelle Electrical Pty Ltd v State of NSW* [2005] NSWSC 714 at [76], per McDougall J; *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] QSC 135 at [27], per Chesterman J; *Straits Exploration (Australia) Pty Ltd v Murchison United NL* [2005] WASCA 241 at [14], per Wheeler JA; *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2007] QSC 206 at [9], per Mullins J (affirmed [2008] QCA 160); *Downer Engineering Power Pty Ltd v PCH Minepro Australasia Pty Ltd* [2007] NSWCA 318 at [79], per Hoeben J.

<sup>103</sup> See, eg, *Boulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd* (1997) 14 BCL 277 [Sup Ct WA], where the Supreme Court of Western Australia held that an expert determination agreement in a construction contract was void on public policy grounds as an ouster of the court's jurisdiction. See also Marston, "Final and Binding Expert Determination as an ADR Technique" [2001] ICLR 213; *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2008] NSWSC 749.

<sup>104</sup> See, eg, *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2010] QSC 238.

<sup>105</sup> Indeed, it is common for expert determination clauses in construction and engineering contracts (where used) to be expressed in broad language similar to that found in arbitration clauses. The principles concerning the interpretation of arbitration clauses are largely applicable where expert determination agreements are concerned, given that both forms of dispute resolution are predicated on party agreement: see *United Group Rail Services Ltd v Rail Corporation NSW* [2009] NSWCA 177 at [2]–[3], per Allsop P (127 Con LR 202); *Illawarra Community Housing Trust Ltd v MP Park Lane Pty Ltd* [2020] NSWSC 751 at [42]–[49], per Hammerschlag J. As to the interpretation of arbitration clauses, see paragraphs 25.89–25.92.

<sup>106</sup> *Dance With Mr D Ltd v Dirty Dancing Investments Pty Ltd* [2009] NSWSC 332 at [55]–[58], per Hammerschlag J. Cf *Persimmon Homes Ltd v Woodford Land Ltd* [2012] BLR 73.

such as how the costs associated with the expert determination will be borne.<sup>107</sup> If there is any dispute or disagreement over the scope of an expert's powers, the final resolution of that dispute is usually a matter for the court, and not the expert himself.<sup>108</sup>

#### (c) Appointment of expert

**23.26** As expert determination is a consensual process, the appointment of an expert is a matter for the parties' agreement. To this end, a contract will usually either identify<sup>109</sup> the person who is to act as an expert, or alternatively it will provide a mechanism for the appointment of such a person (eg, nomination by the RIBA). If a contract requires the parties to attempt to agree upon the identity of the expert, there will not necessarily be implied into the agreement a term that the parties are to act reasonably in attempting to agree on the expert's identity.<sup>110</sup> By contrast, if a contract which contemplates expert determination is silent as to the terms on which the expert will be appointed, it may be an implied term of that contract that the parties will agree to the appointment of an expert on terms that are reasonable.<sup>111</sup> If, after reasonable terms have been put forward, one of the parties refuses to sign the terms of the expert's appointment, the court may order that party to do so.<sup>112</sup>

#### (d) Distinction between expert determination and arbitration

**23.27** Arbitration agreements and expert determination agreements, in their machinery and substance, are often so closely related that it is difficult to distinguish between the two.<sup>113</sup> It may, however, be of some importance as to whether a dispute-resolution agreement is characterised as one or the other. First of all, most commercial arbitrations are underpinned by statutory provisions that affect the rights and remedies of the parties in relation to the arbitration. In contrast, expert determination lacks that statutory support. It

<sup>107</sup> An expert's power to make a decision on costs may, depending on the terms of the relevant expert determination agreement, only extend to those costs which were incurred after the commencement of the expert determination: see *Highway Construction Pty Ltd v Commissioner of Main Roads* [2010] WASC 9. Compare *Empyreal Energy Ltd v Daylighting Power Ltd* [2020] EWHC 1971 (TCC) at [10], per Stuart-Smith J.

<sup>108</sup> *Barclays Bank plc v Nylon Capital LLP* [2011] BLR 614 at 620 [21]–[23], per Thomas LJ. It is open to a court to enjoin a party from seeking to instigate or prosecute an expert determination where there are grounds for doubting the entitlement of that party to take a dispute or matter to expert determination, and the balance of convenience otherwise favours such a measure: *Maypole Dock Ltd v Catalyst Housing Ltd* [2021] EWHC 1742 (TCC).

<sup>109</sup> Either by name or job title.

<sup>110</sup> Compare *Redpath Contract Services Pty Ltd v Anglo Coal (Grosvenor Management) Pty Ltd* [2016] QSC 313.

<sup>111</sup> *CLK Kitchens & Joinery Pty Ltd v Mayneline Kitchens & Joinery Pty Ltd* [2017] NSWSC 1737 at [89], per Ward CJ in Eq.

<sup>112</sup> See, for example, *CLK Kitchens & Joinery Pty Ltd v Mayneline Kitchens & Joinery Pty Ltd* [2017] NSWSC 1737 at [121], per Ward CJ in Eq.

<sup>113</sup> *Sutcliffe v Thackrah* [1974] AC 727 at 745, per Lord Morris; *Arenson v Arenson* [1977] AC 405 at 430–431, per Lord Kilbrandon; *Australian Pacific Airports (Melbourne) Pty Ltd v The Nuance Group (Australia) Pty Ltd* [2005] VSCA 133 at [43], per Nettle JA; *Macdonald Estates plc v National Car Parks Ltd* [2009] CSIH 79A at [22]. Compare *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] QSC 135 at [23], where Chesterman J suggested that "[t]here is a clear distinction between arbitration and expert determination", on the basis that the former involves an adjudication over respective cases put before an arbitrator, whereas the latter tends to involve a speedy and less formal way of resolving disputes. Although in many cases a particular procedure may clearly be one or the other, there are, however, many cases in which there is little to distinguish between arbitration and expert determination, especially where an expert is deciding a dispute on the basis of the parties' submissions, yet it is expressly agreed that the expert does not act as an arbitrator. See also Bellemore, "Is Expert Determination Always Appropriate?" (2003) 19 BCL 84; *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2010] QSC 97 at [32], per A Lyons J; *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* [2011] HCA 38 at [25] (noted by O'Keefe, (2012) 28 BCL 87).

is purely a creature of contract.<sup>114</sup> Hence, it is necessary for an expert determination agreement to define (often at length and with precision) the powers of the expert. If the parties have failed to do so, a court will not ordinarily be minded to fill in the gaps in the agreement.<sup>115</sup> The juridical characterisation of an expert's function and determination may be of relevance to questions such as how an expert's determination may be enforced, and whether there are statutory rights of or restrictions on appeals.<sup>116</sup> Secondly, if an "expert determination" agreement in truth constitutes an arbitration agreement, the expert/arbitrator will be subject to the duties normally imposed on arbitrators, eg, the duty to afford natural justice to the parties.<sup>117</sup> In the case of expert determinations the duties of the expert are only those that the parties agree upon (expressly or impliedly). Thirdly, arbitrators are immune from suit for having acted carelessly in the conduct of the arbitration,<sup>118</sup> whereas an expert who makes a contractual determination is not immune from suit.<sup>119</sup>

23.28 The essence of an arbitration is the agreement by two or more parties that a dispute between them is to be resolved by a third party, on the basis of competing submissions or contentions.<sup>120</sup> In contrast, the provision by a third party of a valuation or assessment where none existed before, such as where the value of work performed is assessed under a construction contract, involves the application of skill to arrive at an original valuation or assessment. It does not involve the settling of a dispute. In cases of valuation or appraisal, the third party does not act in a quasi-judicial capacity as an arbitrator.<sup>121</sup> The essential distinction between an arbitration and a valuation or appraisal form of expert determination, therefore, is that an arbitrator decides a dispute, whereas an expert answers a question (eg, what is the value of X?) without deciding a dispute. In this sense, an arbitrator may be regarded as undertaking a judicial function, which attracts an immunity from suit, whereas an expert may not be so regarded.<sup>122</sup>

114 *Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646 at [17], per Basten J. However, the position may be different under German and Swiss laws, as to which see Ehle, "Expert Determination" in Requele and Pröster (eds), *International Construction Disputes* (CH Beck, 2022) at pages 71–72.

115 *Triarno Pty Ltd v Triden Contractors Ltd* (1992) 10 BCL 405 [Sup Ct NSW, Cole J]; *Fletcher Construction Australia Ltd v MP Group Pty Ltd* (Unreported, Sup Ct NSW, Rolfe J, 14 July 1997); *ARM Group (Aust) Pty Ltd v Galwin Pty Ltd* [2006] VSC 325 at [39], per Hansen J.

116 Enforceability is a critical issue where international projects are concerned, as (broadly speaking) arbitral awards are readily enforceable throughout the world, whereas contractual expert determinations that do not constitute arbitral awards are not always enforceable. This is a point which sometimes goes unnoticed: see O'Neil and Hammett, "60-day expert determination – structured to meet the commercial expectations of business management" (2012) 28 *Const LJ* 181. Another issue is whether there should be a stay of court proceedings commenced in defiance of an expert determination agreement. The enforceability of ADR agreements including expert determination agreements is discussed in paragraphs 23.43–23.50.

117 *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 336, per McHugh JA; *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* [2008] QCA 160 at [77]–[79], per Muir JA. As to the duties of arbitrators, see paragraph 25.177ff.

118 See paragraph 25.136.

119 *Arenson v Arenson* [1977] AC 405 (HL(E)). See also Hunt, "The Law Relating to Expert Determination" (2001) 17 BCL 2 at 13–14.

120 *Re Carus-Wilson & Greene* (1886) 18 QBD 7 at 9, per Lord Esher MR; *Re Fenwick v Port Jackson Co-operative Steamship Co* (1898) 14 WN (NSW) 85 at 87; *Australian Pacific Airports (Melbourne) Pty Ltd v The Nuamit Group (Australia) Pty Ltd* [2005] VSCA 133 at [43], per Nettle JA; *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2007] QSC 206 at [54]–[73], per Mullins J (affirmed [2008] QCA 160).

121 *Xstrata Queensland Ltd v Santos Ltd* [2005] QSC 323 at [28]–[31], per McMurdo J (appeal allowed for other reasons: [2005] QCA 477). See also *Wadsworth v Smith* (1871) LR 6 QB 332.

122 See *Arenson v Arenson* [1977] AC 405 at 423–424, per Lord Simon.

23.29 The position is rather more complicated when an expert is actually deciding a dispute, as opposed to providing a valuation or appraisal. There are no bright lines between the adjudicative form of expert determination on the one hand, and arbitration on the other. If there is doubt as to whether a dispute resolution procedure constitutes expert determination or arbitration, it may be of some assistance to examine the features of the procedure, to see whether what is contemplated is something in the nature of a judicial inquiry. The following matters are indicative of a judicial inquiry, although there is not one matter which is determinative either way in the characterisation of the process:<sup>123</sup>

- the parties have a right to be heard, should they so desire;
- each party is entitled to see and hear the evidence advanced by his opponent;
- the parties have the right to give evidence if they desire; and
- each party is entitled to test by cross-examination or by other appropriate means the opposing case, and to answer the opposing case.<sup>124</sup>

23.30 By contrast, the salient characteristics of an expert determination process are that the expert has complete discretion over the procedure to be applied, and moreover he may arrive at his decision "without being hamstrung by procedural and evidential intricacies or niceties".<sup>125</sup> To illustrate this distinction, in *Age Old Builders Pty Ltd v Swintons Pty Ltd*<sup>126</sup> an owner and a contractor, who were in dispute over a number of matters including alleged defects, entitlements to extensions of time and delay costs, agreed to appoint a building consultant to conduct an independent assessment of these matters. It was agreed that the decision of the independent expert was to be binding upon the parties. In concluding that the building consultant acted as an expert, and not as an arbitrator, Osborn J held that the most significant matter was that neither party had a fundamental right to a hearing before the building consultant, and therefore the exercise undertaken by the building consultant was not in the nature of a judicial inquiry.<sup>127</sup> Nevertheless, there will be many cases involving the adjudicative form of expert determination where the procedure agreed upon by the parties is virtually identical to an arbitration, and yet it is not treated as constituting an arbitration. The way in which the parties themselves characterise the procedure is also highly influential on how a court will characterise it.

123 *Santos Ltd v Pipelines Authority of South Australia* (1996) 66 SASR 35 at 46–47, per DeBelle J. See also *Arenson v Arenson* [1977] AC 405 at 428, per Lord Wheatley; at 439, per Lord Salmon; *Capricorn Inks Pty Ltd v Lawter International (Australia)* [1989] 1 Qd R 8; *Apache Northwest Pty Ltd v Western Power Corporation* (1998) 19 WAR 350 at 367–368 (FC); *David Wilson Homes Ltd v Survey Services Ltd* [2001] BLR 267; *Queensland Power Trading Corporation v Xstrata Queensland Ltd* [2005] QCA 477 at [9]–[10], per Williams JA; *500 Burwood Highway Pty Ltd v Australian Unity Ltd* [2012] VSC 596 at [164]–[168], per Vickery J; *Haridemos v Labatbas* [2015] ACTSC 110 at [11]–[19].

124 However, the fact that either party or the expert has the ability to cross-examine witnesses does not in itself mean that the process involves arbitration and not expert determination: *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* [2008] QCA 160.

125 *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634 at [35], per VK Rajah J. However, to some extent this may still beg the question, especially if the agreed dispute resolution procedure is silent or unclear as to the procedural powers possessed by the independent neutral.

126 [2003] VSC 307.

127 [2003] VSC 307 at [69]. See also *Turville Heath Inc v Chartis Insurance UK Ltd* [2013] BLR 302 at 309 [49], per Edwards-Stuart J.

## (e) Agreement that expert is not an arbitrator

23.31 It is common to find provisions in expert determination agreements to the effect that the parties agree that the expert is to act as an expert and not as an arbitrator. Effect will usually be given to such provisions, although the fact that the parties have labelled a dispute resolution procedure as "expert determination" and not "arbitration" is not determinative of its character.<sup>128</sup> Obversely, where the parties have failed to identify whether an independent neutral is to act in an arbitral or non-arbitral capacity, there is no presumption that the person in question acts in one capacity or another. What is of primary importance is whether the person, when appointed, possesses the necessary attributes of an arbitrator.<sup>129</sup> The grounds upon which the person's decision may be challenged are also of importance to the characterisation of the process. For example, if it is provided that decisions of the third person may only be impugned in the case of "manifest error", the mention of "manifest error" could indicate that the parties intended the process to be one of expert determination and not arbitration, given that "manifest error" does not in itself constitute a ground for review under arbitration legislation.<sup>130</sup>

## (f) Procedure

23.32 The procedure for the appointment of an expert,<sup>131</sup> and the procedure to be applied by the expert once appointed, is that which is agreed upon by the parties. Furthermore, "[u]nless the parties specify the procedure, the expert determines how he will proceed".<sup>132</sup> One of the consequences of this is that an expert determination procedure need not be prescriptive as to the conduct of the expert determination in order

for it to be enforceable.<sup>134</sup> Further, an expert is not obliged to apply the rules of natural justice unless the terms of the applicable expert determination agreement require him to do so.<sup>135</sup> Having said that, an expert will nevertheless be required to act impartially in the conduct of the expert determination, in the sense of acting without actually being biased.<sup>136</sup> Indeed, an expert determination agreement may expressly provide that the expert is to be independent, and to act independently of the parties' respective interests. A failure to fulfil such an obligation will render the expert's determination void, on the basis that the determination does not comply with the express contractual requirements for such a determination.<sup>137</sup> An expert, in contrast to a judge or most arbitrators, will not be required to give reasons for his determination, unless required to do so.<sup>138</sup>

## (g) Binding or non-binding?

23.33 The effect of an expert's determination, as between the parties to the relevant expert determination agreement, is to be established having regard to the parties' intention as expressed in the expert determination agreement, considered against the commercial background of the project.<sup>139</sup> If the agreement of contracting parties is that the independent expert's decision is to be binding upon them, a court will give effect to the agreement. Unless there is a vitiating factor affecting the determination, a court will not go behind it and change the determination simply because the court may have reached a different conclusion to that of the expert.<sup>140</sup> Where it is clear that what the parties were looking for is a binding adjudication as to their respective rights and obligations, the

128 *Arenson v Arenson* [1977] AC 405 at 425, per Lord Simon, at 438, per Lord Salmon; *Badgin Nominees Pty Ltd v Oneida Ltd* [1998] VSC 188 at [56], per Gillard J; *APM Group (Aust) Pty Ltd v Galwin Pty Ltd* [2006] VSC 325 at [37], per Hansen J; *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd* [2008] HCA 160 at [80]–[84], per Muir JA; *British Telecommunications plc v SAE Group Inc* [2009] BLR 231 at 240 [4]–[24] [46], per Ramsey J; *Sboalhaven City Council v Firedam Civil Engineering Pty Ltd* [2011] HCA 38 at [25]; *Haridemos v Labatbas* [2015] ACTSC 110 at [10]. Compare McHugh, "Expert Determination" (2008) 74 *Arbitration* 148 at 156–157.

129 *David Wilson Homes Ltd v Survey Services Ltd* [2001] BLR 267 at 269 [11], per Longmore LJ.

130 *British Telecommunications plc v SAE Group Inc* [2009] BLR 231 at 241 [45(2)], per Ramsey J. The grounds on which arbitral awards may be challenged are discussed in Chapter 25.

131 Which may involve the expert being nominated by an appointing institutional body, according to its usual terms for doing so: see *Watpac Construction NSW Pty Ltd v Taylor Thompson Whitting (NSW) Pty Ltd* [2015] NSWSC 780 at [60], per Ball J.

132 It is open to contracting parties to agree upon the rules and procedures to be applied in any expert determination. Rules for expert determination are published by several bodies, including the ICC (which operates its "Expert Rules" (2015) – see [www.iccwbo.org](http://www.iccwbo.org); see also Jarvin, "International Chamber of Commerce Court of Arbitration – Note on Award in Case No 5639" [1989] ICLR 417; Davis, "The ICC Pre-Arbitral Referee Procedure in Context with Technical Expertise, Conciliation and Arbitration" [1992] ICLR 218 at 220–221), the Academy of Experts ([www.academyofexperts.org](http://www.academyofexperts.org)) and CEDR ([www.cedr.com](http://www.cedr.com)). Resolution Institute (formerly the Institute of Arbitrators and Mediators Australia) publishes its own rules for expert determination (see [www.resolution.institute](http://www.resolution.institute)). An Australian body called LEADR also published such rules, however LEADR merged with the IAMA in 2015 to become "Resolution Institute". The LEADR expert determination rules attracted judicial criticism: *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2008] NSWSC 749 at [28]–[29], per McDougall J. See also de Fina, "Experts in the Australian Context" (1998) 14 BCL 338.

133 *Barclays Bank plc v Nylon Capital LLP* [2011] BLR 614 at 623 [37], per Thomas LJ. This may mean, for example, that an expert is entitled to enlist the assistance of others in carrying out his determination: *Eliastra Construction and Developing Group v Sidrak* [2014] VSC 418 at [85]–[100], per Dixon J. See also *Evergreat Construction Co Pty Ltd v Presscrete Engineering Pty Ltd* [2006] 1 SLR(R) 634 at [35] and [39], per VK Rajah J; *Watpac Construction NSW Pty Ltd v Taylor Thompson Whitting (NSW) Pty Ltd* [2015] NSWSC 780 at [36], per Ball J.

134 See *1144 Nepean Highway Pty Ltd v Abnote Australasia Pty Ltd* [2009] VSCA 308; *Illawarra Community Housing Trust Ltd v MP Park Lane Pty Ltd* [2020] NSWSC 751 at [75]–[76], per Hammerschlag J.

135 *Zeki Services Pty Ltd v Traffic Technologies Ltd* [2005] QSC 135 at [32], per Chesterman J; *Glennville Projects Pty Ltd v North North Melbourne Pty Ltd* [2013] VSC 717 at [49], per Vickery J; *Illawarra Community Housing Trust Ltd v MP Park Lane Pty Ltd* [2020] NSWSC 751 at [62], per Hammerschlag J. Compare McHugh, "Expert Determination" (2008) 74 *Arbitration* 148 at 156. Where, however, an expert displays actual bias in favour of or against a party, as opposed to apparent bias, his determination may be invalidated: *Bernhard Schulte v Nile Holdings* [2004] Lloyd's Rep 352; *Owen Pell Ltd v Bindi (London) Ltd* [2008] BLR 436. See also Coggins, "Breaches of natural justice in alternative dispute resolution of construction disputes" (2013) 29 BCL 247 at 251–252; *John Nelson Developments Pty Ltd v Focus National Developments Pty Ltd* [2010] NSWSC 150 at [206]–[216], per Ward J.

136 It has been said that "[t]he obligation on an expert to act impartially is of course a foundational requirement": *McGrath v McGrath* [2012] NSWSC 578 at [12], per Pembroke J. See also *Gull Lexington Group Pty Ltd v Laguna Bay (Banongill) Agricultural Pty Ltd* [2018] VSCA 85 at [62]–[120]. In Singapore, it has been held that "if an expert or an adjudicator has, prior to the relevant appointment, been recently approached by one of the directly interested parties to give a professional opinion or adjudicate on a matter, the expert or adjudicator concerned ought to make this known as soon as practicable to the others involved in the appointment process. Additionally, if the expert or adjudicator concerned either has or has previously had a significant relationship with any interested party, particulars of this too ought to be disclosed without any prompting. A failure to make proper disclosure in a timely manner may raise serious concerns about apparent or actual bias on the part of the expert or adjudicator": *HSBC Institutional Trust Services (Singapore) Ltd v Tosbin Development Singapore Pte Ltd* [2012] SGCA 48 at [71]. The position in Singapore is seemingly broader than that which obtains in Australia, viz. the obligation of an expert to act impartially means not only that he must be impartial, but he must not appear to be partial. This is not to say, however, that apparent bias is a matter which may vitiate an expert's determination: see *Poh Cheng Chew v KP Koh & Partners Pte Ltd* [2014] SGHC 20 at [59], per Lionel Yee JC.

137 *500 Burwood Highway Pty Ltd v Australian Unity Ltd* [2012] VSC 596; *Hopkinson v Hickton* [2016] EWCA Civ 1057.

138 *Kanivab Holdings Pty Ltd v Holdsworth Properties Pty Ltd* [2002] NSWCA 180 at [61]–[62], per Stein JA; *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634 at [45], per VK Rajah J. See also *Sboalhaven City Council v Firedam Civil Engineering Pty Ltd* [2011] HCA 38 at [26] and [39]–[40].

139 *Homepace Ltd v Sita South East Ltd* [2008] EWCA Civ 1 at [18], per Lloyd LJ; *Empyrean Energy Ltd v Daylighting Power Ltd* [2020] EWHC 1971 (TCC) at [8]–[9], per Stuart-Smith J.

140 *Davy Offshore Ltd v Emerald Field Contracting Ltd* (1991) 55 BLR 1 at 78–79, per Judge Thayne Forbes QC.

determination of the expert will be binding (and possibly incapable of review, save on jurisdictional grounds).<sup>141</sup>

23.34 Some expert determination agreements are expressed in terms that the decision of the expert is not binding, but nevertheless the parties are required to participate in the expert determination process as a prelude to any further dispute resolution (eg, arbitration or litigation). Non-binding expert determination is sometimes referred to as "early neutral evaluation".<sup>142</sup> The purpose of making the result of the expert determination non-binding may be to provide the parties with an authoritative guide as to how the dispute might be resolved if elevated to arbitration or litigation, and to encourage the parties to agree a settlement of the dispute along the lines indicated by the expert, rather than elevate the dispute to arbitration or litigation.<sup>143</sup> Some expert determination agreements are worded so that if the amount (if any) determined by the expert to be owing by one party to another is below a certain monetary threshold, the decision of the expert is binding. If the amount determined to be owing is equal to or above the threshold, the expert's decision is not binding upon the parties.<sup>144</sup> Yet a further permutation is for an expert determination agreement to provide that the decision of the expert on a matter in dispute will be finding and binding on the parties, save where one of the parties, within a stipulated period, gives notice to the other that it is dissatisfied with the expert's determination, and requires the matter to be adjudicated upon in another forum (eg, in court, or if agreed in arbitration). In cases where such notice is given, the question of whether

141 *David Wilson Homes Ltd v Survey Services Ltd* [2001] BLR 267; *Homepace Ltd v Sifu South East Ltd* [2001] EWCA Civ 1 at [29], per Lloyd LJ; *1110 Hay Pty Ltd v Metso Minerals (Australia) Ltd (No 2)* [2018] WASC 125 at [165]–[172], per Derrick J. This may be the case in relation to any matters raised as defences in the expert determination, upon which the expert has rendered his decision: see *Khurana v Webster Construction Ltd* [2015] EWHC 758 (TCC) at [68]–[73], per HHJ Stephen Davies. If an expert determination agreement contemplates the expert making binding determinations of fact, without also deciding the legal consequences of those facts, a court will nevertheless treat the expert's determinations of fact as binding in any proceedings concerning the underlying issues as between the disputant parties: see, eg, *Stone v Chappel* [2017] SASFC 72 at [381]–[389], per Doyle J.

142 The English Technology and Construction Court offers an early neutral evaluation service: see TCC Guide (October 2022) section 7.5. It has been said that early neutral evaluation ought not be encouraged by the courts, but that the courts should be prepared to offer it if the parties request it: Jackson, "Address by Jackson J to TECBAR, TeCSA and SCL" (2005) 21 *Const LJ* 265 at 269.

143 A contract may even require the parties or their representatives to meet with a view to resolving particular matters, so as to avoid the need for adversarial dispute resolution should an agreement be reached. This could occur, for example, were an agreement to provide that in the event of a dispute arising between the parties, their respective appointed experts shall meet to try to agree upon the resolution of the particular matters in controversy. If an agreement is not reached between the experts, there will be no "determination" to bind the parties. Such a process is not, in truth, one of expert determination. It is more in the nature of an attempt to negotiate a settlement: see *Davies Middleton & Davies Ltd v Toyo Engineering Corporation* (1997) 85 BLR 59 at 72–74, per Phillips LJ.

144 Such a clause has been used in New South Wales government contracts: see, eg, *Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2004] NSWSC 823 at [9]; *Campbelltown City Council v WSN Environmental Services Pty Ltd* [2015] NSWSC 155; *Labey Constructions Pty Ltd v Department of Education* [2021] NSWCA 69; *CPB Contractors Pty Ltd v Transport for NSW* [2021] NSWSC 537. It has also been used in private sector contracts: see, eg, *Abigroup Contractors Pty Ltd v Hardesty & Hanover International LLC* [2008] SASC 369 and [2010] SASC 44, which decisions refer to a subcontract that provided for disputes to be resolved by way of expert determination, where *inter alia* the determination of the expert was to be binding if he decided that an amount of up to AUD\$500,000 was payable, but it would not be binding if he decided that a greater amount was owing (ie, it would be a non-binding appraisal).

the expert's determination is binding pending being superseded by a later judgment or award will be a matter of contractual interpretation.<sup>145</sup>

#### (h) Enforceability

23.35 An expert's determination will generally be enforceable through the courts, as a contractual right accruing to the benefit of the successful party.<sup>146</sup> By agreeing to have their dispute resolved by expert determination, the parties are taken to have accepted the decision of the expert tribunal "for better or worse with the attendant risks of error which are inherent in the ordinary human weaknesses of any tribunal".<sup>147</sup> Such a conclusion may be fortified if the expert agreement in question provides that the expert's determination shall be "final and binding",<sup>148</sup> or even just "binding".<sup>149</sup>

23.36 There are, however, limited circumstances in which an expert's determination will not be enforceable.<sup>150</sup>

- The first is where the determination was procured by fraud or collusion.<sup>151</sup> This, it seems, may include where an expert demonstrates bias against a particular party.<sup>152</sup> As a cognate matter, if an expert determination agreement requires the appointed expert to be independent of the parties, and the expert appointed is not independent, this may represent a sufficient departure from the requirements of the contract to render the expert's determination invalid.<sup>153</sup>

145 As to which see, for example, *Kyle Stewart (Contractors) Ltd v United Kingdom Temperance and General Provident Institution* (Unreported, Eng. Ct App, Stephenson and Kerr LJ and Sir David Cairns, 20 April 1982); *Lipman Pty Ltd v Empire Facades Pty Ltd* [2017] NSWCA 217. See also *Kingswood Aluminium Pty Ltd v Watpac Construction (SA) Pty Ltd* [2016] FCA 259. This same issue often arises in relation to the decisions made by dispute boards.

146 *Campbell v Edwards* [1976] 1 WLR 403 at 407, per Lord Denning MR; *Jones v Sherwood Computer Services plc* [1992] 2 All ER 170 at 181–182, per Balcombe LJ; *Menolly Investments 3 SARL v Cerep SARL* [2009] EWHC 516 (Ch) at [74]–[85], per Warren J; *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* [2013] VSCA 179 at [15]–[18]. The absence of any statutory backing for expert determination gives rise to the consequence that any enforcement proceedings must be predicated on contract, not statute: *Lainson Holdings Pty Ltd v Duffy Kennedy Pty Ltd* [2019] NSWSC 576 at [59], per Hammerschlag J.

147 *Frank H Wright (Constructions) Ltd v Frodoor Ltd* [1967] 1 WLR 506 at 524, per Roskill J; *Jordan v Norfolk County Council* [1994] 1 WLR 1353 at 1358, per Sir Donald Nicholls V-C; *Geowin Construction Pte Ltd (in liq) v Management Corporation Strata Title No 1256* [2006] SGHC 245. The fact that a party has agreed to be bound by an expert's decision may have the consequence that, if the party attempts to withdraw from the expert determination process before a determination has been delivered, the party will nevertheless be bound by the expert's determination should the expert be capable of rendering a determination despite the conduct of the recalcitrant party: see *APM Group (Aust) Pty Ltd v Galwin Pty Ltd* [2006] VSC 325 at [56], per Hansen J.

148 *Yashwant Bajaj v Toru Ueda* [2019] SGCA 69 at [60].

149 *K&J Townmore Construction Ltd v Kildare & Wicklow Education and Training Board* [2019] IESC 666.

150 It has been said that "in recent years there has been a trend against setting aside expert determinations except in limited circumstances": *Firedam Civil Engineering Pty Ltd v Shoalhaven City Council* [2009] NSWSC 802 at [6], per Tamberlin AJ (his Honour's decision was upheld by the High Court: [2011] HCA 38).

151 *Campbell v Edwards* [1976] 1 WLR 403 at 407, per Lord Denning MR; *Baber v Kenwood Manufacturing Co Ltd* [1978] 1 Lloyd's Rep 175 at 181, per Sir David Cairns; *Veba Oil Supply & Trading GmbH v Petrotrade Inc* [2002] BLR 52 at 61 [33], per Simon Brown LJ; *Straits Exploration (Australia) Pty Ltd v Murchison United NL* [2005] WASCA 241 at [16], per Wheeler JA; *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634 at [27]–[29], per VK Rajah J; *Pob Cheng Chew v KP Koh & Partners Pte Ltd* [2014] SGHC 20 at [56], per Lionel Yee JC. See also *The "Glacier Bay"* [1996] 1 Lloyd's Rep 370 at 377–378, per Neill LJ.

152 Which certainly includes *actual* bias. In Singapore, it is unclear as to whether *apparent* bias also constitutes a basis for impugning an expert's determination: *Pob Cheng Chew v KP Koh & Partners Pte Ltd* [2014] SGHC 20 at [59], per Lionel Yee JC.

153 *Hopkinson v Hickton* [2016] EWCA Civ 1057 at [13], per Patten LJ.

- The second circumstance is where the expert, in arriving at his decision, exceeded his contractual mandate, so that the decision reached does not correspond with the question referred to the expert.<sup>154</sup> Put another way, an expert's determination will be made in excess of his jurisdiction (and will therefore be of no legal effect) where the expert has departed in a material respect from his instructions.<sup>155</sup> This may occur where, for example, the expert has answered a question that was not addressed to him.<sup>156</sup> But if an expert has answered the right question in the wrong way, his decision will nevertheless be binding, unless the error made by the expert is to be characterised as producing a decision which does not answer the criteria laid down by the contract for a valid decision by the expert.<sup>157</sup> However, even if an expert has answered (whether rightly or wrongly) the question addressed to him, the expert's determination may still be held invalid if it otherwise fails to correspond to the contractual requirements for such a determination, for example if the determination was made late, and the contract does not countenance a late expert's determination being valid.<sup>158</sup>

- Thirdly, a determination will not be enforceable where the jurisdictional foundation for the expert determination was lacking, for example because the expert was not correctly appointed in accordance with the relevant contract, which may occur where a contract prescribes the circumstances in which an expert determination may be brought, yet the party who purported to commence the expert determination did not follow the contractual procedure.<sup>159</sup>

23.37 The fact that an expert has made a mistake in his determination, or his determination is unreasonable, is not usually a basis for the determination being set aside.<sup>160</sup> This may be the case even if the terms of the relevant expert determination agreement require the expert to make his decision "according to law", and in making his decision the expert has committed an error of law.<sup>161</sup> Having said this, it is not uncommon for expert determination agreements to provide that the expert's determination will not be binding upon the parties if it is tainted by a manifest error.<sup>162</sup> A "manifest error" is an error "that may easily be seen by the eye or perceived by the mind", which means that it must be plain and obvious on the face of the expert's written decision.<sup>163</sup> In similar language, the concept of manifest error encompasses "oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion".<sup>164</sup> A "manifest error" is much more than an "arguable error".<sup>165</sup>

23.38 The usual consequence of a court finding that an expert's determination is unenforceable is to declare exactly that. There may, however, be circumstances where it is

<sup>159</sup> See, e.g., *Hardesty & Hanover International LLC v Abigroup Contractors Pty Ltd* [2010] SASC 44, where an expert's determination was held to be invalid because the party who commenced the expert determination did not first attempt to mediate the particular dispute, as required by the contract.

<sup>160</sup> *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 335–336, per McHugh JA; *British Shipbuilders v VSEL Consortium PLC* [1997] 1 Lloyd's Rep 106 at 109, per Lightman J; *Kansuoh Holdings Pty Ltd v Holdsworth Properties Pty Ltd* (2001) NSW ConvR at [47]–[48], per Palmer J; *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173 at [51], per Nettle JA; *Evergreat Construction Co Pte Ltd v Preamere Engineering Pte Ltd* [2006] 1 SLR(R) 634 at [41]–[42], per VK Rajah J; *Firedam Civil Engineering Pty Ltd v Shoalhaven City Council* [2009] NSWSC 802 at [12]–[18], per Tamberlin AJ; *Barclays Bank plc v Nylon Capital LLP* [2011] BLR 614 at 623 [34], per Thomas LJ; *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* [2011] HCA 38 at [26]–[27]; *Eliana Construction and Developing Group v Sidrak* [2014] VSC 418 at [41], per Dixon J; *1110 Hay Pty Ltd v Metso Minerals (Australia) Ltd (No.3)* [2018] WASC 230 at [139], per Derrick J; *Yashwanth Bajaj v Toru Ueda* [2019] SGCA 69 at [56]; *Carlisle Homes Pty Ltd v Nexus Office Pty Ltd* [2023] VSC 753 at [14]–[18], per Croft J. Compare *TMW Pramerica Property Investment GmbH v Glasgow City Council* [2017] CSOH 152 at [15], per Lord Tyre. Whether or not such a decision should be set aside is not a matter for the discretion of the court, it is a question of whether there has been contractual compliance: *Shell UK Ltd v Enterprise Oil plc* [1999] 2 Lloyd's Rep 456 at 470, per Lloyd J.

<sup>161</sup> *Lainson Holdings Pty Ltd v Duffy Kennedy Pty Ltd* [2019] NSWSC 576 at [38]–[53], per Hammerschlag J. It seems unlikely that such a term would be implied into a contract: *Alliance v Regent Holdings Incorporated* [1999] EWCA Civ 1953.

<sup>162</sup> *Dixons Group plc v Murray-Oboynski* (1997) 86 BLR 16 at 32, per Judge Bowsher QC. See also *Comoco (UK) Ltd v Phillips Petroleum Co* [1998] ADRLJ 55 [QBD, Morison J]; *North Shore Ventures Ltd v Anstead Holdings, Inc* [2012] Ch 31 at 52 [51]–[53] [53], per Sir Andrew Morritt C; *Lau v Wan Yuk Lin* [2013] HKCFI 67 at [9], per Harris J; *Amey Birmingham Highways Ltd v Birmingham City Council* [2018] EWCA Civ 264 at [83]–[91], per Jackson LJ. In one Australian case it was held that it is impermissible to go beyond the face of the expert's determination for the purpose of determining whether he made a "manifest error": see *Glenwill Projects Pty Ltd v North North Melbourne Pty Ltd* [2013] VSC 717 at [67]–[69], per Vickery J. There is, however, Australian authority which suggests that a "manifest error" need not be one which is obvious: *TX Australia Pty Ltd v Broadcast Australia Pty Ltd* [2012] NSWSC 4 at [20], per Brereton J. Moreover, in the United Kingdom there is Supreme Court authority that extrinsic evidence may be adduced to determine whether an expert's determination (or equivalent) contains a "manifest error": *Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] UKSC 2 at [33], per Lord Hamblen JSC.

<sup>163</sup> *Veba Oil Supply & Trading GmbH v Petrotrade Inc* [2002] BLR 52 at 61 [33], per Simon Brown LJ. See also *Halifax Life Ltd v The Equitable Life Assurance Society* [2007] EWHC 503 (Comm) at [82], per Cresswell J; *Memody Investments 3 SARL v Cerep SARL* [2009] EWHC 516 (Ch) at [86], per Warren J; *711 Hogden Pty Ltd v Tairua* [2016] NSWSC 697 at [50], per Stevenson J.

<sup>164</sup> *Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] UKSC 2 at [34], per Lord Hamblen JSC.

<sup>154</sup> *Legal & General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 335–336, per McHugh JA; *British Shipbuilders v VSEL Consortium PLC* [1997] 1 Lloyd's Rep 106 at 109, per Lightman J; *Kansuoh Holdings Pty Ltd v Holdsworth Properties Pty Ltd* (2001) NSW ConvR at [47]–[48], per Palmer J; *AGL Victoria Pty Ltd v SPI Networks (Gas) Pty Ltd* [2006] VSCA 173 at [51], per Nettle JA; *Evergreat Construction Co Pte Ltd v Preamere Engineering Pte Ltd* [2006] 1 SLR(R) 634 at [41]–[42], per VK Rajah J; *Firedam Civil Engineering Pty Ltd v Shoalhaven City Council* [2009] NSWSC 802 at [12]–[18], per Tamberlin AJ; *Barclays Bank plc v Nylon Capital LLP* [2011] BLR 614 at 623 [34], per Thomas LJ; *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* [2011] HCA 38 at [26]–[27]; *Eliana Construction and Developing Group v Sidrak* [2014] VSC 418 at [41], per Dixon J; *1110 Hay Pty Ltd v Metso Minerals (Australia) Ltd (No.3)* [2018] WASC 230 at [139], per Derrick J; *Yashwanth Bajaj v Toru Ueda* [2019] SGCA 69 at [56]; *Carlisle Homes Pty Ltd v Nexus Office Pty Ltd* [2023] VSC 753 at [14]–[18], per Croft J. Compare *TMW Pramerica Property Investment GmbH v Glasgow City Council* [2017] CSOH 152 at [15], per Lord Tyre. Whether or not such a decision should be set aside is not a matter for the discretion of the court, it is a question of whether there has been contractual compliance: *Shell UK Ltd v Enterprise Oil plc* [1999] 2 Lloyd's Rep 456 at 470, per Lloyd J.

<sup>155</sup> *Veba Oil Supply & Trading GmbH v Petrotrade Inc* [2002] BLR 52 at 55 [1], per Simon Brown LJ, at 62 [43], per Dyson LJ. Simon Brown LJ went on to hold (at 57 [13]) that a "material" departure from instructions is one which is not *de minimis* or trivial. See also *Halifax Life Ltd v The Equitable Life Assurance Society* [2007] EWHC 503 (Comm) at [80]–[81], per Cresswell J; *AIC Ltd v ITS Testing Services (UK) Ltd (the "Kruis Palm")* [2006] EWHC Civ 1601; *Poh Cheng Chew v KP Koh & Partners Pte Ltd* [2014] SGHC 20 at [38] and [42], per Lionel Yee JC; *Lainson Holdings Pty Ltd v Duffy Kennedy Pty Ltd* [2019] NSWSC 576 at [39], per Hammerschlag J. The grounds upon which an expert's decision may be reviewed by a court are similar to those applicable where a court embarks upon judicial review of an administrative decision. There are, however, certain points of distinction with judicial review; e.g., administrative action is not necessarily reviewable only for administrative error: *Dowmer Engineering Power Pty Ltd v P&H Minepro Australasia Pty Ltd* [2007] NSWCA 318 at [17], per Basten JA.

<sup>156</sup> *Straits Exploration (Australia) Pty Ltd v Murchison United NL* [2005] WASC 241 at [17], per Wheeler JA. If, furthermore, an expert has acted with "gross negligence", it is suggested that that may afford a sufficient basis for it being held that the decision of the expert does not meet the requirements of his contractual mandate, and is therefore invalid, in the same way as "gross negligence" may invalidate an otherwise "final and binding" certification or determination of a contract administrator, as to which see paragraph 5.145.

<sup>157</sup> *Nikko Hotels v MEPC plc* [1991] 2 EGLR 103 at 108, per Knox J. This approach to error has been adopted in relation to statutory adjudications under Part II of the Housing Grants, Construction and Regeneration Act 1996 (UK). The grounds on which an adjudicator's decision may be challenged under the UK legislation are discussed in Chapter 24. If an expert makes an error of law in reaching his decision (ie, in answering the question referred to him), such an error may render the expert's decision voidable or even void if the decision of the expert on the particular matter of law was not something on which the parties contemplated the expert making (rightly or wrongly) a binding decision: see *Barclays Bank plc v Nylon Capital LLP* [2011] BLR 614 at 626 [63]–627 [72], per Lord Neuberger MR. See also *John Nelson Developments Pty Ltd v Focus National Developments Pty Ltd* [2010] NSWSC 150 at [228]–[232], per Ward J; *Poh Cheng Chew v KP Koh & Partners Pte Ltd* [2014] SGHC 20 at [38] and [43]–[44], per Lionel Yee JC.

<sup>158</sup> *Contrast Freeman NO v Eskom Holdings Ltd* [2010] ZAGPJHC 137, where it was held that a late-issued adjudicator's decision under the NEC form would not (in a purely contractual context) be invalid simply because it was issued late. A similar approach was taken in *Aligned Services Group Pty Ltd v Citi-Con (Vic) Pty Ltd* [2022] VSC 286 at [51]–[57], per Stynes J.

appropriate for the court to go further and to direct the expert to come to a new decision, or to reconsider the matters for determination in light of the court's judgment.

(ix) *Contractual adjudication*<sup>167</sup>

**23.39** Contractual adjudication, as opposed to statutory adjudication,<sup>168</sup> involves the adjudication of a dispute that takes place pursuant to a contractual procedure. The contractual procedure may be written explicitly into a construction or engineering contract, or indeed incorporated by reference.<sup>170</sup> The procedure may be available for a broad or as particular a type of dispute as the parties may agree.<sup>171</sup> Contractual adjudication may be regarded as a species of expert determination.<sup>172</sup> In *Cape Durasteel Ltd v Rosser & Russell Building Services Ltd*,<sup>173</sup> HHJ Lloyd QC held:

"It is plain that 'adjudication' taken by itself means a process by which a dispute is resolved in a judicial manner. It is equally clear that 'adjudication' has as yet no settled special meaning in the construction industry (which is not surprising since it is a creature of contract and contractual procedures utilising an 'adjudicator' vary as do forms of contract)."<sup>174</sup>

**23.40** Contractual adjudication is different from arbitration in the sense that an adjudicator's decision will usually be temporarily binding in nature, whereas an arbitrator's award is final and conclusive.<sup>175</sup> Where a contract contemplates disputes being resolved

<sup>166</sup> *Pob Cheng Chew v KP Koh & Partners Pte Ltd* [2014] SGHC 20 at [80], per Lionel Yee JC.

<sup>167</sup> For some of the history of contractual adjudication, see McGaw, "Adjudicators, experts and keeping out of court" in Uff and Lavers (eds), *Legal Obligations in Construction* (Centre of Construction Law, London, 1992) chapter 30. Contractual adjudication, in China, is regarded as "experimental": Lin, "Practical views on litigation of construction contract and dispute resolution in China" [2014] ICLR 380 at 397.

<sup>168</sup> As to which, see Chapter 24. In practice, there may be little difference between contractual adjudication and statutory adjudication, and the legal treatment accorded to each by the courts: see, eg, *Clarke Quarries Ltd v PT McWilliams Ltd* [2010] BLR 520 [IEHC]; *Herbosh-Kiere Marine Contractors Ltd v Dover Harbour Board* [2012] BLR 177 (where a purely contractual adjudication was reviewed by the court as if it were an adjudication under Part II of the Housing Grants, Construction and Regeneration Act 1996 (UK)). However, as suggested earlier in this chapter there may be circumstances in which it is important to distinguish between the two. See also *Stefanutti Stocks (Pty) Ltd v S8 Property (Pty) Ltd* [2013] ZAGPJHC 249 at [5]–[7], per Wepener J (considering the adjudication provisions of the JBCC Services 2000 Principal Building Agreement).

<sup>169</sup> Compare Blunt, "Adjudicators' Time Defaults" (2001) 17 *Const LJ* 371 at 371, where the expression "construction adjudication" is used to refer to a non-Scheme adjudication under the Housing Grants, Construction and Regeneration Act 1996 (UK). It is respectfully suggested that such terminology is apt to confuse. "Construction adjudication" refers to agreements to adjudicate which arise out of a contract, but which may be unrelated to or unaffected by any statute. It is acknowledged, however, that there is not any accepted or uniform meaning of "adjudication": see Black, "The plain of Shinar: Towards a Taxonomy of Dispute Resolution" [1999] ADRLJ 34.

<sup>170</sup> *Abbas v Rotary (International) Ltd* [2012] NIQB 41.

<sup>171</sup> See, by way of illustration, *A-G (HK) v Trafalgar House Construction (Asia) Ltd* [1996] HKCFI 562, which concerned a dispute resolution procedure agreed between the government of Hong Kong and a contractor, under a contract for the construction of the Tsing Ma Bridge. The contract only permitted disputes over payments under the contract and/or extensions of time for completion of the works to be referred to adjudication.

<sup>172</sup> Expert determination was discussed earlier in this chapter, and the commentary concerning expert determination is generally applicable to contractual adjudications. See also Kendall, "Adjudication and Expert Determination" in Thornton and Godwin (eds), *Construction Law: Themes and Practice* (Sweet & Maxwell, 1998) chapter 6. In one South African case, contractual adjudication was treated as if it were arbitration: *Motho Construction Group (Pty) Ltd v University of Mpumalanga* [2023] ZAMPMBHC 38 (NEC 3 form).

<sup>173</sup> (1995) 46 Con LR 75.

<sup>174</sup> (1995) 46 Con LR 75 at 85.

<sup>175</sup> *A Cameron Ltd v John Moxlem & Co plc* (1990) 52 BLR 24 at 38, per Mann LJ. There are limited rights of appeal in relation to an arbitrator's award (see Chapter 25). It is, however, open to parties to agree in their contract that an adjudicator's decision is or may become final and binding: see, eg, the FIDIC Red Book (2nd edition,

initially by contractual adjudication, and on a final basis by arbitration, the scheme of the contract will often be that the adjudicator's determination is to be enforced even if arbitration proceedings have been commenced.<sup>176</sup> Furthermore, an adjudicator operating pursuant to a contractual procedure may be expressly prohibited by the terms of the adjudication agreement from conducting a hearing at which the parties may make submissions.<sup>177</sup> The absence of a right to be heard in a contractual adjudication distinguishes it from an arbitration, where there is a right to be heard.<sup>178</sup> On the other hand, it is open to contracting parties to confer upon an adjudicator a relatively free hand in determining the procedure to be applied in a contractual adjudication.<sup>179</sup>

(x) *Breakdown of agreed procedure*

**23.41** Where a party who pursues a claim has agreed to participate in a procedure for the resolution of a dispute, such as mediation, expert determination or contractual adjudication, and the procedure breaks down without the fault of that party, the court will not have any jurisdiction to fill the lacuna in the procedure, or remedy the breakdown, unless the contract contemplates the court being able to do so. What is permissible, though, is for the party who pursues the claim to take it to court for resolution, rather than be caught without an avenue for redress due to the breakdown of the agreed dispute resolution procedure.<sup>180</sup> That said, where a contract contemplates a person identified by the contract performing a valuation or an adjudicative role, and there is a breakdown in the procedure concerning that person's valuation or adjudication, yet the court does not consider it is best placed to render a decision on the particular matter, the court may nevertheless seek to fulfil the contract's intent by, for example, appointing an expert or (in Australia) a referee to hear the parties and render a report or decision on the particular matter, at least in such cases where the contract does make the valuation or adjudication of the specific person named by the contract an essential and indispensable part of the parties' bargain.<sup>181</sup> In cases where the valuation or adjudication by a specific person is regarded as an indispensable part of the parties' bargain, but a legal issue has arisen that,

2017) clause 21.4.4. It is also open to contracting parties to agree upon the scope for arbitral or curial review of an adjudicator's decision: see, eg, *Amey Birmingham Highways Ltd v Birmingham City Council* [2018] EWCA Civ 264 at [11], considering a regime which contemplated disputes being decided by contractual adjudication, with any party dissatisfied with the adjudicator's decision being entitled to challenge the decision in court, but only on a question of law. Other disputed issues were to be referred to arbitration following a contractual adjudication.

<sup>176</sup> See, for example, *Rodpaul Construction (Pty) Ltd v MEC: KwaZulu-Natal Provincial Department of Public Works* [2023] ZAKZPHC 84 (NEC3 form of contract).

<sup>177</sup> The rules of natural justice do not necessarily apply to contractual adjudications as they may in statutory adjudications: see Freedman, "Non-Statutory Adjudication: Is It Expert Determination, or Something Different?" (2011) 27 *Const LJ* 3.

<sup>178</sup> *Cape Durasteel Ltd v Rosser & Russell Building Services Ltd* (1995) 46 Con LR 75 at 83, per HHJ Lloyd QC (considering the JCT Works Contract Conditions (Works Contract/2)).

<sup>179</sup> See, eg, *Framatome v Eskom Holdings SOC Ltd* [2021] ZASCA 132 at [23] (considering non-statutory adjudication under the NEC3 form of contract). See also *Raubex/Nodoli Construction Joint Venture v MEC: Free State Department of Police, Roads and Transport* [2023] ZAFSHC 56.

<sup>180</sup> *Dixon v South Australian Railways Commissioner* (1923) 34 CLR 71 at 95, per Isaacs J; *Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd* (1997) 82 BLR 39 at 57–58, per HHJ Lloyd QC; *Rhodina Chirex Ltd v Laker Vent Engineering Ltd* [2004] BLR 75 at 89 [54], per Auld LJ. See also *JF Finnegan Ltd v Sheffield City Council* (1988) 43 BLR 124 at 138–139, per Judge Sir William Stabb QC; *Turville Heath Inc v Chartist Insurance UK Ltd* [2013] BLR 302 at 310 [62]–311 [64], per Edwards-Stuart J.

<sup>181</sup> See *500 Burwood Highway Pty Ltd v Australian Unity Ltd* [2012] VSC 596 at [419]–[426], per Vickery J. Compare *Pob Cheng Chew v KP Koh & Partners Pte Ltd* [2014] SGHC 20 at [101]–[103], per Lionel Yee JC.

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# CONSTRUCTION LAW

VOLUME I

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## PREFACE TO THE FOURTH EDITION

A little over four years have passed since the publication of the third edition of this book.<sup>1</sup> In the intervening period much has happened. New and amending statutes and regulations have been furnished from the quills of parliamentary draftspeople. Some 2,345 new judgments and awards are cited in this edition.<sup>2</sup> Yet, despite this, the changes to the construction law landscape may be regarded as incremental, as opposed to seismic. And indeed many things are unaltered.<sup>3</sup>

The jurisdictional scope of the book remains as before, with its focus on four jurisdictions (in the broad sense):<sup>4</sup> England,<sup>5</sup> Australia,<sup>6</sup> Hong Kong and Singapore. The following is a selection of developments in those jurisdictions since late 2019, together with a prognosis for future developments, which must of necessity be covered in a later edition.<sup>7</sup>

### England

England has seen large shifts in certain legislation. In the field of construction law there are two legislative changes that stand out.

First, there has been (and continues to be) an overhaul of statutes and regulations to reflect (and effect) the UK's withdrawal from the European Union ("Brexit"), which took effect on 31 January 2020. Brexit has, in turn, fomented a review of public procurement laws,<sup>8</sup> which will lead to the enactment of the Procurement Act 2023.<sup>9</sup>

Secondly, the Building Safety Act 2022 (UK), and its subsidiary legislation, have by degrees created a new paradigm for the undertaking of residential building work, and for accountability where work falls short of safety requirements. Over many centuries the British parliament has enacted laws as a means of trying to reduce or (even better)

<sup>1</sup> The text of the third edition was current to 28 November 2019.

<sup>2</sup> One thing that is remarkable regarding the case law emanating from the period of late 2019 to February 2024 is how little of it concerns issues arising from the global COVID pandemic, which had an impact on so many construction and engineering projects across the planet.

<sup>3</sup> For example, the four major forms of contract referred to for illustrative provisions (see paragraph 1.53) have not been replaced.

<sup>4</sup> Australia being multi-jurisdictional.

<sup>5</sup> England & Wales, abbreviated to "England" and "English law".

<sup>6</sup> Where, within Australia, illustrative focus is given to the laws of New South Wales (the most populous state, with the largest economy).

<sup>7</sup> Or to put it in the language of W. B. Yeats, the following text is "set upon a golden bough to sing ... of what is past, or passing, or to come": *Sailing to Byzantium*.

<sup>8</sup> Discussed in Chapter 4.

<sup>9</sup> The Act received Royal Assent on 26 October 2023, but is yet to take effect.