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# USING EXPERT DETERMINATION IN CONSTRUCTION DISPUTES

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HOT TOPIC

# USING EXPERT DETERMINATION IN CONSTRUCTION DISPUTES



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**Stephen Sandles** is a quantity surveyor with experience on a wide range of construction and engineering projects using traditional and bespoke forms of contracts in the UK and internationally. He is experienced in preparing and evaluating complex claims for remedial works, extensions of time, thickening, disruption, termination, loss of expense, undertaken contract cost audits and prepared expert and advisory reports.

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**Alex Durning** is a managing director at Ankura, based in Australia. He is a chartered quantity surveyor with a masters in construction law, professional accreditation in expert determination and adjudication and is a 'tested' expert witness. He has 28 years' experience in the construction industry largely on projects in Asia and Australia.

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**Sean Allen** is a senior director at Ankura, based in Dubai. He is a chartered quantity surveyor with over 15 years of experience in the construction industry. He is an appointed quantum expert who specialises in the complex analysis of construction and engineering disputes on projects across the Middle East, Europe, Africa and Australia.

**CD: How popular is expert determination as a method of resolving disputes in the construction sector in your jurisdiction or region? What types of conflict are typically well suited to this method?**

**Farrow:** Expert determination is an infrequently used form of dispute resolution in the construction industry, notwithstanding that it provides the parties with an independent view of their differences at an early stage, and without resorting to the expense of a more formal dispute resolution process. The requirement for expert determination can be included in the parties' original contract, or as a supplemental agreement for the purposes of obtaining independent opinion on a particular issue. Expert determination is a particularly useful dispute resolution process during the execution stage of a project, as it may prevent the parties becoming polarised and the situation leading to wider negative impacts. The process is well suited to both technical and commercial issues, for example whether work carried out is compliant with the contract, or questions related to whether something is a change, its reasonable value or its impact on the project schedule.

**Allen:** The use of expert determination is limited in the Middle East construction industry as arbitration and litigation are the much-preferred options for dispute resolution. However, it is used throughout the region from time to time, largely in

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*Sean Allen,  
Ankura Consulting (Europe), Ltd*

respect of small-scale disputes that focus on one or two overarching issues, such as a point of law or a valuation difference.

**Durning:** Expert determination is not popular in Australia. It is best suited to disputes where the parties seek an expeditious high quality reasoned determination in the lowest adversarial circumstances. Parties often jointly say they seek a reasonable resolution to their dispute. We find in construction that this typically cannot occur without an adjudicative process. Expert determination provides the best framework to achieve a

reasonable resolution. Our best proof of this point is an expert determination where the parties requested an independent merit-based assessment of the disputed claims, without reference to alleged procedural failures or the application of contractual bars. When performed close to the time of the dispute arising, particularly on contracts with a long duration, expert determination provides the best likelihood of the parties minimising disputes and maintaining a positive working relationship.

**Sandles:** Factors that are seen to limit the popularity of expert determination in the UK include a general lack of familiarity with the process, the limited grounds for appeal on binding decisions, and the ability to adjudicate at any time on construction projects. Despite the seeming unpopularity, it is a highly effective method for resolving disputes and can be employed both quickly and cheaply when applied to the resolution of technical or specialist issues but may not be appropriate for legal issues around causation. For example, expert determination can be highly effective in deciding the quantum of a dispute after the liability has already been decided in an alternative forum. While expert determination may not be appropriate in every case, when it is applied in the right circumstances it can work very well and is always worth considering.

**CD: Could you outline the key advantages of expert determination as a dispute resolution tool in the context of a construction dispute?**

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Ankura Consulting (Australia), Pty Ltd*

**Durning:** The two key advantages are flexibility and a fast, high-quality decision. Regarding flexibility, parties can direct the expert to apply certain rules. We saw this when an expert was directed to provide a reasonable rather than contractual based assessment. Also, an expert can use his or her expertise to determine the issue. This is something an adjudicator, arbitrator or judge cannot do. Regarding speed, expert determination is second to adjudication but is faster than arbitration. In Australia, we currently see wait times of at least 28 weeks to more than 40 weeks from hearing to decision. Regarding quality of decision, due to the

greater time and second round of submissions, expert determination is more likely to produce a higher quality and better reasoned determination than adjudication. Furthermore, parties choose an expert they both agree to, whereas in adjudication it is typically the case that the appointing body selects the adjudicator.

**Farrow:** Key advantages of expert determination are the opportunity for early engagement in a dispute resolution process, lower costs, less emphasis on following a litigation-orientated approach, speed, and parties being given the opportunity to resolve their differences based on an independent expert review of the subject. Creating a litigation-orientated approach often polarises parties, which can harm the project management if the works are still ongoing. A mechanism that provides for early independent engagement can create an improved site atmosphere and allow the contentious issue to be resolved and put to bed.

**Sandles:** Allowing parties to go straight to an expert with the knowledge to deal with the issue provides for an efficient process. Unlike arbitrators and adjudicators, the expert determiner is typically, unless restricted under contract, not confined to parties' submissions and has the power to carry out investigations and tests, ask questions and guide parties on the information required to determine the dispute. It is clear to see how less experienced

parties could benefit from such an investigative approach. A further benefit is the greater certainty and confidentiality afforded by the limited grounds for challenging expert determinations.

**Allen:** The key benefit of expert determination is that it provides a quicker and cheaper alternative to arbitration and litigation, while still providing a suitable timetable for the dispute, and, if agreed, a final, binding decision – issues commonly associated with adjudication and mediation. Importantly, in the Middle East, expert determination allows parties to agree on the language of proceedings and appoint an expert who has specialist knowledge in the subject matter of the dispute. This avoids the risks commonly associated with local courts, where a judge may be assigned who does not possess such knowledge; and the parties are made to present their case in Arabic, raising a 'lost in translation' risk. Expert determination also offers privacy under less adversarial circumstances than other processes, mitigating unwanted public relations and making it more likely for parties to maintain relationships – an important benefit if a dispute arises part way through a mega project.

**CD: On the flipside, what are the potential disadvantages of expert determination?**

**Allen:** Because expert determination is not frequently used in the Middle East, parties are often less familiar with the process, and do not fully appreciate the implications of an expert determination. This can cause frustration, which is further exacerbated by the limited grounds on which to challenge a determination and the absence of any statutory support in governing the process. Furthermore, if parties have not agreed to a binding decision, the process can be used tactically to prolong the dispute resolution process. Consequently, parties need to be fully aware of the implications of expert determination and ensure that the terms of their expert determination agreement are very carefully drafted.

**Farrow:** Probably the main downside is having a single expert or firm research the subject and make a determination. This is particularly so if the issue in dispute is complex and dealing with a topic where there is a wide range of industry or technical views. In such cases, the expert must have the ability to analyse complex situations and be able to consider, debate and deal with the range of industry views to a level which gives both parties confidence in the determination.

**Durning:** The two main disadvantages of expert determination are that it is often non-binding and absent any oral cross-examination. Where the parties will not accept the determination or

negotiate their own resolution, it is easy to conclude that if the result is non-binding, why bother? Due to the adversarial nature of the construction industry, this can occur. Achieving a correct determination often turns on the assessment of competing factual issues or expert opinion – whether to believe person A or B. Oral cross-examination can be the best tool available to a determiner when deciding disputed facts. Expert determination is often a ‘documents only’ process and thus is unsuitable where there are significant and material disputed facts. However, this can be overcome by written agreement with parties, and we have seen it work well where the oral evidence was limited to party appointed experts.

**Sandles:** Since expert determination is governed and enforced according to what parties have agreed in the contract, unintended consequences can result where the scope or procedures for expert determination are poorly drafted. For example, the expert may not have jurisdiction where clauses limit the expert to determining specific disputes. The limited grounds for challenging an expert determination in the UK – such as fraud, partiality or material departure from instructions – can also result in a disadvantage. For example, the application of the wrong methodology may not be grounds for challenge if it was done in good faith, regardless of the quantum that might follow from such an error.



**CD: When deciding whether expert determination should be binding or non-binding, what risks and benefits do the parties need to weigh up?**

**Sandles:** The limit of the scope and nature of disputes intended to be referred for expert determination are risks that require careful forethought at the pre-contract stage. This could reduce the occurrence of complex or legal disputes which are not suited to this forum. Examples of isolated technical or specialist disputes that do work well in this forum include whether the output of a power station is in accordance with the specification, and the appropriate quantum for remedial works, or particular variations. Conversely, an expert evaluation could be an option for parties wanting to benefit from an independent third party, while maintaining control of their ability to negotiate a settlement.

**Allen:** Parties ultimately need to weigh up what they want from the process. Do they want an independent opinion on the matter? Do they want a small aspect of a bigger dispute settled? Do they want an interim position decided that can be reviewed later? Do they want an issue to be finally resolved? What parties want will determine whether the expert determination should be binding or not. Obviously, a binding decision will provide finality to the dispute with

limited grounds to challenge, whereas a non-binding decision will provide strategic flexibility to refer the dispute to other forums of dispute resolution, if a party does not like the expert's decision.

**Durning:** There are various pros and cons of choosing a binding process or not. With a binding process, finality is achieved, with limited grounds for appeal. With a non-binding process, parties maintain greater control and a strategic expert determination may provide the key to a negotiated resolution of the dispute. From a practical perspective, the parties can hedge against the risk of a commercially damaging binding determination by prescribing a maximum value of dispute that can be determined as final and binding. When deciding whether an expert determination should be binding, parties should also consider whether they are ready, or how long will it take to be ready, to properly present and prove their case. We often find that parties in construction disputes are not as ready as the site team reports.

**Farrow:** If the subject is complex – legally, factually and technically – and there is a significant risk of an erroneous determination, parties will be reluctant to agree to a binding opinion. In these situations, it might be said that a non-binding decision is the best option, although this means that the expert determination process is not a dispute resolution method, but merely a facilitation process. However, there is something to be said for a

facilitation process because parties are likely to have a range of commercial and technical differences of opinion, while the substance of the expert determination may just be one. Having a non-binding opinion on one issue may help them negotiate a resolution of a basket of differences or disputes.

**CD: In those jurisdictions where adjudication is recognised under some sort of statutory framework and is legally enforceable – such as the UK, Australia and Singapore – how does expert determination compare? What notable similarities and differences exist, that might steer parties to choose one method over the other?**

**Farrow:** Statutory adjudication is the industry's preferred route to follow for commercial issues such as valuation of the work, delays and extensions of time and final account disputes. The award is temporarily binding but not final because the adjudicator's decision is subject to review through litigation or arbitration. However, binding expert determination would be final and so resolves a dispute finally. Technical differences of opinion are probably better managed through the expert determination route, because if it were handled through adjudication, both parties would each appoint a technical expert and the adjudicator would decide between them, the award of which could

be opened up in litigation or arbitration. Hence, the adjudication route does not necessarily resolve the parties' dispute.

**Allen:** There is currently no statutory adjudication process within the Middle East. But it will be interesting to see whether this is introduced into the region in the future, and if so, how successful it would be alongside the commonly used contractual mechanism of dispute adjudication boards (DABs).

**Durning:** Both adjudication and expert determination are typically 'documents only' and seek to provide an expeditious and cost-effective resolution. Adjudication is faster – typically complete in Australia within one month of starting – and cheaper. An expert determination can be nearly as fast – we have seen an expert determination issued within five weeks of the respondent's response – especially when the adjudicator's time is extended, with an adjudicator's decision issued nine weeks after the respondent's response. Adjudication is almost always based on one round of documents which present polar opposite positions and provides an applicant's best chance of being successful. Expert determination is typically based on two rounds of documents. The second round, if it includes independent expert opinions, provides greater scope

for agreement on and narrowing of the issues in dispute and decreased likelihood of the determiner being misinformed. This is preferable where the parties wish to maintain a positive working relationship.

**Sandles:** Statutory adjudication for construction projects in the UK has arguably impacted the growth of expert determination since any party can

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refer a dispute to adjudication at any time. While adjudication is temporarily binding, it is noted that most disputes referred for statutory adjudication are not subsequently litigated or arbitrated for final determination. Statutory adjudication is a 'one size fits all' solution and lacks the finesse and finality of expert determination in resolving discrete technical and specialist issues arising under a contract.

**CD: How important is it for parties to carefully draft any clause in a commercial contract that provides for expert determination? What aspects need to be considered?**

**Allen:** Given the absence of any statutory support in governing the expert determination process in the Middle East, and the limited grounds on which to challenge a decision, parties are fully reliant on the terms of their expert determination agreement. Therefore, any clause in a construction contract that provides for expert determination needs to be very carefully drafted. The key aspect to consider when drafting any expert determination clause is whether the decision is binding or not. If the decision is not binding, it is unlikely to provide anything more than a drawn-out negotiation. The other important aspect is to set out the procedure. If this is not provided for, it will need to be agreed by the parties, which may be difficult once the process has started.

**Farrow:** The challenge is to identify and define those subjects that would apply to any expert determination process. For example, most disputes are a combination of contractual interpretation and law, the competing facts related to the issue and events, and the engineering or science related to

the topic. A technical expert, for example, cannot opine on legal matters, but has to make assumptions as to what they are, similarly in setting out what the assumed facts are. Hence, clauses need to be drafted such that the expert opines on topics that they are expert in. Fortunately, there are several model clauses which parties can use in drafting their contracts or bespoke agreements.

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**Durning:** The parties should obtain appropriate legal advice in drafting any dispute resolution clause, but from a technical perspective – there are two key aspects to be considered when drafting the clause. First, is the determination binding? We have seen this work best where determination of disputes below a prescribed value are stated to be final and binding. When this occurs, the smaller value items are resolved but the parties remain free

to negotiate their own settlement or to arbitrate or litigate the big issues. The second key aspect is to prescribe a default procedural timetable for any expert determination which can only be varied by the written agreement of the parties. Without this, scope exists for one party – in our experience the respondent – to adopt a ‘go slow’ strategy with the expert.

**Sandles:** Drafting should consider the limitations an expert determiner will have in the field of their expertise. For example, issues to be considered under a technical dispute could fall into several disciplines and would benefit from the expert considering submissions from other experts on matters falling outside of the expert determiner’s expertise. Any such procedures require forethought as to how this will work in practice. Other powers of the expert requiring careful consideration include the extent to which the expert should make enquiries, or whether the expert can overturn previous decisions of the project manager, engineer or architect.

**CD: What developments do you expect to see in expert determination over the months and years ahead? To what extent do you expect parties in the construction industry in your jurisdiction or region to prioritise this form of dispute resolution over adjudication, mediation, arbitration or litigation, for example?**

**Durning:** Unfortunately, while disputes are inevitable on all construction projects, we do not expect to see any developments in expert determination. This is largely because most construction projects in Australia are either set up to be or are in any event administered and managed in an adversarial fashion. If this dynamic changes to a position where parties genuinely seek to work together to successfully deliver projects and resolve disputes in the most expeditious and cost-effective manner, then a growth in the use of expert determination could occur. However, while this makes sense for the construction industry, we consider it unlikely to occur. Parties working on contracts where relationships are soured or cashflow needs preclude any alternative will continue to prefer adjudication. For major projects, parties that can afford to do so will continue to prefer arbitration or litigation at a date substantially later than the practical completion of the project.

**Allen:** In the current geopolitical climate, expert determination has potential to increase in popularity in the Middle East as it provides time and cost benefits compared to arbitration and litigation, while also offering a more certain decision than mediation. However, its development will likely be limited in the region given its dependence on the market providing disputes which are suitable for expert determination. The giga projects currently progressing in the Middle East may not present the types of smaller disputes

for which expert determination is better suited. Furthermore, the dominance of arbitration and litigation in the Middle East is also likely to restrict the development of expert determination. However, if parties can be persuaded to deviate from the more familiar dispute resolution process, and the market provides suitable disputes, then the benefits offered by expert determination can help it develop throughout the region, though this will likely require time.

**Farrow:** It is anticipated that there will be little change in how expert determination is used or its popularity. In the UK, statutory adjudication is now the foundation of dispute resolution procedures where available. Where it is not, arbitration is the most frequently used process, and it is linked to this latter situation where expert determination is most likely to flourish, because it is a natural step prior to formalising arbitration proceedings. From experience, expert determination has a high rate of

success in creating conditions upon which parties are able to resolve their differences, at a much lower cost than formal dispute resolution procedures.

**Sandles:** The lack of any significant increase anticipated in the popularity of expert determination in the UK should not be seen as a deficiency of this tool when compared to other forms in the toolbox of dispute resolution. Rather, it is particularly well suited to discreet technical disputes that would benefit from having someone with the required expertise make a quick decision. It is not something that ought to be prioritised over adjudication, mediation, arbitration or litigation, but a tool to be used effectively alongside these established forums, to promptly hit the nail on the head on discreet technical or specialist issues that invariably arise on construction projects. [CD](#)