

Book Review - Dispute Resolution; Expert Determination, Kendall, J., Longman, London, 1992, SC \$80, 188 pp. including index.

- Review by Philip Davenport,
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This appears to be the first book ever devoted exclusively to expert determination.

The author is an English solicitor but so far as concerns expert determination, there appears to be no important distinction between the law in England and the law in Australia. The increasingly common practice of including in contracts expert determination clauses as well as or instead of arbitration clauses makes this book timely. The book is an excellent introduction to the subject.

The author points out that references to experts are not legal proceedings and the decision of an expert is not enforceable without court action. He lists the essential elements for an expert determination clause including the date for payment of the amount determined and the "awarding" of interest. Expert determination is a contractual arrangement and the expert does not have the powers which the law gives an arbitrator.

The book includes a chapter dealing with the "limited right" of challenge to the validity of an expert's decision and refers to the important recent Court of Appeal decision in England, *Jones v Sherwood Computer Services* [1992] 1 WLR 277. However, one of the most likely arguments which will be raised by a dissatisfied party to an expert determination is that the process was in fact arbitration.

The book includes a chapter on the distinction between an arbitrator and an expert and mentions the important Queensland case *Capricorn Inks v Lawter International* which is the subject of *Expert Appraisal - Challenging an Award*, [1989] #6 Australian Construction Law Newsletter p.12. The equally important Canadian case, *Sports Maska inc. v Zitter* [1988] 1 S.C.R. 564 is not mentioned. It is in the area of the distinction between expert determination and arbitration that the coverage in the book is disappointing.

At pp.152-3 the author says:

"The crucial stage may soon be reached when the English courts will have to decide whether to dismiss a challenge to a decision by an expert on all disputes arising under a contract, both general and technical. ... Until recently, the technical nature of the question put to the expert was a special factor, but this is ceasing to be the case with the extension of expert determination into general dispute resolu-

tion. If the courts accept this development, a new form of dispute resolution will have been created, allowing parties' legal rights to be determined without the procedures and safeguards that have always been thought essential. This is a major public policy issue on which the courts may soon have to make a judgment."

Unfortunately, the author does not attempt to arrive at an answer to this issue. While the issue remains unresolved, those drafting an expert determination clause must consider very carefully the possible ramifications of referring all disputes to an expert for determination.

The case of *Sudbrook Trading Estate Ltd. v Eggleton* [1983] AC 444 is mentioned but there is no real discussion of the nature of a clause which empowers an arbitrator or an expert to create contractual terms. This is a fascinating area which needs exploration.

The book includes some precedents but none specifically designed for construction contracts. Overall, it is an excellent little book. The only real criticism is that it deals so briefly with the subject. □