

## CHAPTER 42

### EXPERT DETERMINATION: CONVENTIONAL AND ISLAMIC APPROACH\*

#### Introduction

Expert determination is a flexible alternative procedure for the resolution of disputes based upon the decision of an independent third party. The third party is now commonly known as an expert and he is a person who has been chosen for expertise in the issue between the parties. Expert determination is found in a wide range of commercial applications, from rent reviews to breach of warranty claims, from construction disputes to pension scheme transfers and from computer disputes to oil field exploration. It is a simple, informal and contract-based dispute resolution process. Expert determination had its origin in non-contentious valuation and it is increasingly being used for technical as well as valuation issues and for general dispute resolution. Expert determination is confidential and a private process. It provides cost efficient resolution for disputes and problems. The process is quick and a mutually acceptable timetable can be set by the parties. The outcome of expert determination is final and binding, unless otherwise agreed in advance. It is used to resolve issues on both small and large sums. The amounts at stake, sometimes run into millions. Expert determination is found in some of the largest corporate acquisitions. Television and sport have provided the most high-profile single expert determination

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\* This chapter is contributed by Dr. Md. Zahidul Islam.

yet — the dispute about the British Sky Broadcasting (BSkyB) contract for televising rugby championship matches.<sup>1</sup> The continuing adaptation and development of expert determination into new areas show that its usefulness is appreciated by lawyers and other professionals.

### **Expert Determination: Conventional Approach**

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There is nothing very new about expert determination.<sup>2</sup> It has been a feature of English commercial and legal practice for the last 250 years. The first reported case was in 1754: *Belchier v. Reynolds*.<sup>3</sup> The procedure originated to deal with circumstances where parties wish to set up machinery for determining a price without negotiations, often where the obligation to make a payment arises in the future, with options. An option is, typically, a contract, a deed, or a will made by a party by which one party grants to the other the right to buy property from the first party at a future date. An option may say that the price for the purchase at that future date will be determined by a valuer acting as an expert if the parties cannot agree on the price at that time.

Expert determination is usually found in contracts. When there are disputes about expert determination, the courts apply the law of contract, which is the most important area of law for this subject. Thus, while all the usual contractual rules about offer and acceptance, consideration, intention to create legal relations, illegality, mistake, misrepresentation, reputation, breach, discharge and so forth, are relevant to understanding the contractual context of the reference to the expert. Those rules may also have a direct bearing on whether a decision of an expert can be enforced.

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1 A Redfern '*Expert Determination* by John Kendall' Arbitration International Vol 13(4) (1 December 1997).

2 DJ Clegg, M van Gemert 'Determination of the reference dose for chlorpyrifos: proceedings of an expert panel' J Toxicol Environ Health B Crit Rev 1999 Jul-Sep; 2(3): 211–55.

3 (1754) 3 Keny 87.

The law reports are the most significant source of expert determination. Law reports provide information about the practical application of expert determination, but the very fact that each of those cases would have resulted from a dispute which the parties could not settle by agreement and had to take to court, may make them an unrepresentative sample of the applications of expert determination. An important decision, *Jones v. Sherwood Computer Services Plc*<sup>4</sup> was first published 18 months after the judgment following a complaint from the judge in *Nikko Hotels (UK) Ltd v. MEPC Plc*,<sup>5</sup> that it had not been reported — *Nikko v. MEPC* was a property case; *Jones v. Sherwood* was not a property case, but on the sale of a business. It also marked a major change in the law.

### Qualifications Of An Expert

According to the conventional approach, an expert need not be an individual person. A firm, such as a firm of accountants which has been appointed auditors to a company, can be an expert. Even a company can be an expert. It is usual, for instance, in trust deeds used in the capital market to provide that disputes about remuneration of the trustee are to be resolved by a merchant bank acting as an expert.<sup>6</sup>

Clauses which provide for the expert to be a firm or company are usually found in commercial applications. The courts do not appear to have been troubled by the notion of an issue being determined by the expert other than an individual. This may demonstrate one of the essential features of expert determination, namely that it need not be a personal process. It certainly underlines the court's policy of giving effect to the contract between the parties rather than seeking to establish general

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<sup>4</sup> [1992] 1 WLR 277, CA.

<sup>5</sup> [1991] 2 EGLR 103.

<sup>6</sup> C Freedman, J Farrell *Kendall on Expert Determination* (2015).

rules about who is qualified to act as an expert. It is therefore essential to examine the expert clause which should state who the expert should be:

- (1) a named individual, firm or company;
- (2) the individual, firm or company holding a particular position;  
or
- (3) a member of a particular profession or a holder of a particular academic or professional qualification; and
- (4) if there are any special criteria for the expert's suitability.

#### *A Named Individual, Firm Of Company*

Usually, referring issues to a named individual is not advisable unless a dispute has already arisen. The reason for this is that some time may pass after the making of the original contract containing the reference to the specifically named individual. By the time a dispute arises, that individual may have died, retired, become ill, have a conflict of interest or be otherwise unavailable or unsuitable. The nominee may simply refuse to conduct the reference. In these circumstances the expert clause is almost certain to fail completely, and the parties may have no remedy at all, by expert determination or any other means. However, where any dispute that does arise or is likely to arise quite soon, there may be some merit in nominating a named individual. Referring issues to a named firm or company can run into similar problems, but again, it is appropriate when a dispute has already arisen. Naming specific experts in the expert clause may allow an awkward party to create an intractable deadlock.<sup>7</sup>

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7 A Redfern '*Expert Determination*' by John Kendall' Arbitration International Vol 13(4) 1 December 1997.

*An Individual, Firm, Or Company Holding A Particular Position*

Referring issues to the firm holding a particular position is especially popular in share valuation and other functions entrusted to the firm of auditors.

*Qualification By Profession Or Experience*

Referring issues to a member of a particular profession has become more and more prevalent in parallel with the growth of the importance of the professions and the diversity of technologies. The professions most often specified are surveyors, accountants, actuaries and engineers. The qualification may be membership of a particular professional body or the holding of a professional certificate or academic degree. Academic degrees are rarely stipulated. In fields where there are no professional or academic qualifications, the expert may be required to have relevant experience. This may be contentious, as this is not all that easy to prove, unlike membership of a professional body.

Nevertheless, unless the expert clause specifies, or unless it is agreed by the parties before the appointment is made, the expert may not need any particular qualification at all. This is illustrated by what at first sight, is the odd proposition of a clause where one of the parties, or an agent of one of the parties, is to make the decision, subject to the same general principles as clauses requiring a decision to be made by an independent third party. In one case, the expert appointed by the appointing authority had no relevant experience — the court relied on this as one of a number of reasons why the proposed expert determination procedure was unsatisfactory. The court then declined to stay proceedings commenced in breach of the expert clause.<sup>8</sup>

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8 *Ibid.*

### *Criteria For An Expert's Suitability*

The expert clause may lay down criteria for the expert's suitability. Where this is a matter of education, training and experience, it is best to specify an academic degree, professional certificate or membership of a professional body. A clause which says no more than that the expert is to be 'suitably qualified', can provide material for a wasteful argument if a dispute arises subsequently. The available pool of people eligible to be appointed as an expert may in any event be small, and being too specific about the requisite qualifications may reduce the size of the pool or become impossible to source. This results in the expert clause defeating its own object, with no expert appointed. In arbitration, whole court cases have been devoted to the credentials of potential appointees and if they qualify as 'commercial'; and whether a disinterested executive official of an insurance or reinsurance company could continue to act as arbitrator after he had retired from his executive post. The consequence of the purported appointee's qualifications not being in accordance with the clause is that the appointment may be unacceptable.<sup>9</sup>

Some expert clauses seek to make the appointing authority (or its President) responsible for ensuring that the expert has suitable qualifications. A clause of this type could be relied on in an action against an appointing authority for failing to appoint a suitably qualified person. The argument would run that the appointing authority would have seen the clause (as they always ask to do) before making the appointment; would have taken a fee for making the appointment; that the arrangement was therefore a contract incorporating the clause about suitability; and that an aggrieved party could sue for breach of that term of the contract. Some appointing authorities seek to exclude their potential liability. In 1993, the Royal Institution of Chartered Surveyors (RICS) removed a number of surveyors from its list of experts and arbitrators. In 1995, the RICS published its 'Criteria for Arbitrator and Independent Expert Appointments'. The criteria states that the

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9 M Ladd 'Expert Testimony' 5 Vand. L. Rev. 414 (1951-1952).

President has an absolute discretion on who is included in, and who has removed from, the President's Pool. Among the requirements are: (generally) being under 65 years of age; attendance on courses in the law and practice of arbitration; experience; competence; satisfactory, monitored, performance; and attendance at continuing professional development courses. In the case of experts only, the criteria extends to regular involvement in the market-place appropriate to the declared area of expertise; attendance at a training course which deals with setting up an expert appointment and conducting it to a conclusion; and a working knowledge of rent review case law and the way case law has dealt with points of construction. Where there is no clause of this type, the aggrieved party would have to argue that there was an implied term in the appointment contract that the authority would appoint a suitably qualified person.<sup>10</sup>

### **The Expert Clause**

Expert determination arises out of a contract and the agreement to refer disputes to expert determination must be expressly specified in the contract. If the parties to a contract want to refer their disputes to an expert and to keep the dispute out of court, this must be specified in the contract. This might be the kind of provision that can bind the parties in advance. In every contract where an expert determination is to be used, there is a clause which refers questions arising under the contract to an expert, of which contains a number of ancillary provisions.

The method in which expert determination is incorporated into the agreement depends on the type of reference contemplated. Here are some examples:

- (1) Articles of association of a private company may say that the share price on a compulsory transfer is to be certified by the auditors.

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<sup>10</sup> J Kendall, C Freedman *Expert Determination* (2001).

- (2) An agreement for the sale and purchase of a business may reserve a number of issues to expert determination, such as the profit figure for a company or the net asset value of a business. Those issues appear in various parts of the agreement and expert determination is applied to those issues by one expert clause. The expert clause specifically refers to those other clauses and states that expert determination is to be applied to issues arising under them. It is more often the case that the expert clause does not specifically refer to those other clauses, so a later review will therefore involve careful trawling through the agreement to make sure all the instances are noted.
- (3) A construction contract may provide for the determination by an expert of technical issues in a dispute clause providing for arbitration of non-technical issues.
- (4) The dispute clause of a construction contract may refer general disputes to an expert for determination.
- (5) A commercial lease refers rent review disputes to an independent surveyor who is to act as an expert, but gives the landlord the option to give notice that the surveyor is to act as an arbitrator. This operates as an expert clause unless the landlord exercises the option.<sup>11</sup>

There is nothing to stop the parties agreeing, after a dispute has arisen, to refer their dispute to expert determination and this is done from time to time in the same way as arbitration agreements entered into after a dispute has arisen. The same law and the same rules of construction apply both to clauses in agreements entered into before a dispute has arisen and subsequent agreements to refer, entered into after a dispute has arisen. The latter is sometimes known as *ad hoc* references.<sup>12</sup>

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11 P Hibberd, P Newman *ADR and Adjudication in Construction Disputes* Vol 142 (1999).

12 J Kendall, C Freedman *Expert Determination* (2001).



An agreement to refer an issue to expert determination need not be in writing but modern commercial practice makes oral agreements for expert determination most unlikely. Parties are likely to create at least one piece of paper when making an agreement of sufficient complexity to incorporate expert determination. In any case, the problems of proving the terms of an oral agreement may be insurmountable.

### **Appointing An Expert**

Where the expert clause establishes the identity of the expert conclusively, it is not necessary to provide for the selection and appointment of the expert. However, these cases are rare and probably the only exception encountered with any frequency is the appointment of a company's auditors to value its shares. Naming a particular individual, firm or company in the expert clause can cause problems.

Several expert clauses provide that the parties should, in the first instance, try to agree on the expert to whom the issue will be referred. This usually involves informal discussions about various candidates. This method of appointment has the merit of being quick and cheap, but without the sanction of a clause dealing with appointment where the parties cannot agree — it is no use at all where one party makes a policy decision to wreck the expert determination by rejecting every nominee proposed by the other party. More formal methods of appointment by agreement have been devised, such as the 'list' system — parties exchange lists, sometimes with a points system, with a view to appointing a name (or, names) appearing on both lists. But that could also fail to produce an appointment. The parties therefore need to have agreed that, where they cannot agree on the identity of an expert, the appointment may be made by a third party.<sup>13</sup>

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13 *Ibid.*

A well-drafted clause must state that, if the parties cannot agree on who the expert should be, a specified body will make the appointment on the application of either party. That body, almost always a professional association, then becomes known as the appointing authority. The function of the appointing authority is simply to appoint the expert, not to supervise the subsequent conduct of the reference, as the case for some arbitrations which are supervised by arbitration bodies such as the International Chamber of Commerce or The London Court of International Arbitration. A professional body acting as an appointing authority should have some understanding of its functions; this might be illustrated by publishing rules for one of the systems of private dispute resolution.<sup>14</sup>

### **Absence of Effective Appointment Mechanism**

Where an appointment provision is necessary, but the clause does not include one, there can be difficulties. Without the appointing authority, there is no means by which an expert can be appointed. The court does not have the power to appoint experts. Its power to appoint arbitrators arises under statute, and there is no similar statutory provision for experts, and no inherent power.<sup>15</sup>

There used to be a particular difficulty in clauses providing for the appointment of valuers by each party who would then refer the matter to an umpire. Draftsmen found an answer by providing that, if either party neglected to appoint a valuer, the valuation provided by the other party's valuer would be binding. But, where the clause did not contain that useful provision, an awkward party ran no risk in simply refusing to appoint a valuer, with the result that the reference could not go ahead and there was no way of obtaining a valuation.

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14 A Redfern, M Hunter *Law and Practice of International Commercial Arbitration* (2004).

15 *Ibid.*

For many years the court refused to help, but the House of Lords overturned the old authority in *Sudbrook Trading Estate Ltd v. Eggleton*.<sup>16</sup> Under the lease in *Sudbrook*, the valuers appointed were to refer the matter to an umpire but the lessors had refused to appoint their valuer to discuss and seek to agree the value of the reversions with a valuer appointed by the lessees. The result was that, the procedure was deadlocked and no umpire could be appointed, because that could be achieved only by an act of the two valuers after they had both been appointed. The House of Lords broke the deadlock by ordering an inquiry to be conducted by the court into the value of the reversions — it did not order the lessors to appoint a valuer. The court cannot supply the valuation if provisions in the contract for ascertaining the value are an essential element of the contract, for example, where the valuation is to be carried out by a named individual who has special knowledge relevant to the valuation.<sup>17</sup>

Some expert clauses (like some arbitration clauses) provide that in default of agreement, only one party can apply to have the dispute resolved. This is quite lawful. There is no rule that the right to appoint has to be mutual in arbitration and no reason why the same should not apply to expert determination. In long-term contracts where the expert clause is applied to price review, such as rent review clauses in commercial leases, the practical effect of the landlord having the sole right to appoint an expert and not exercising that right is that the price/rent cannot be revised downwards. In a rent review case where this occurred, tenants applied to the court for an inquiry as to the rent payable, which would have led to the court determining the market rent. The court refused to do so, distinguishing *Sudbrook* on the grounds that the landlord was under no express obligation to appoint an expert and the contractual machinery had not broken down. In another case in similar circumstances, but with slightly different wording, another

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<sup>16</sup> [1983] AC 444.

<sup>17</sup> J Kendall, C Freedman *Expert Determination* (2001).

judge reached the opposite decision and made a declaration that the landlord was bound to apply to the appointing body for a valuer to be nominated. The Court of Appeal agreed with the judge that it was right for the court to make an order to prevent the landlord frustrating the contractual machinery, but expressed doubt as to whether it was correct for the landlord to be bound, to apply to the appointing body. An alternative would have won for the court to substitute its own machinery, such as ordering an inquiry as to the appropriate revised rent.<sup>18</sup>

### **Challenging The Decision Of Experts**

Challenges to decisions are made in court proceedings between the parties such as the following:

- (1) an application for an injunction which, as well as being a court order stopping the reference, can also be used to stop further performance of the contract following the decision;
- (2) an application for an order for specific performance which is a court order that the decision be put into effect for example, a sale of property at an expert's valuation;
- (3) defence to court proceedings, typically an application for summary judgment, brought to enforce the decision;
- (4) an application to strike out either side's claim;
- (5) an application to the court for a ruling on an allegedly ambiguous document.

An application for a declaration can accompany any of the above.<sup>19</sup>

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18 C Freedman, J Farrell *Kendall on Expert Determination* (2015).

19 J Kendall, C Freedman *Expert Determination* (2001).

### *Bringing A Claim Against The Expert*

In bringing a claim against the expert by suing for negligence, it is the expert, rather than the decision, which is being challenged. An attempt to join the expert in challenge proceedings as a co-defendant with the other party to the determination was disapproved in *Campbell v. Edwards*.<sup>20</sup> There were two possible outcomes to the challenge to the decision. Investigations might show that the expert had not been negligent, in which case the action against the expert would fail; alternatively, investigations might show that the expert had been negligent, in which case it would be possible to set the determination aside, and the claimant would have suffered no loss. That was in 1975 when it was easier to set aside a determination. Since the early 1990s, setting aside a determination has become much more difficult and a claimant does not succeed simply by showing that the expert was negligent. There has to have been a material departure from instructions. On this basis there is no reason why joinder should not now be allowed in an appropriate case. However, the most likely course is for a party dissatisfied with a determination to consider challenging it first, and then proceeding to sue the expert in the light of:

- (1) the unavailability of that remedy; or
- (2) the unsuccessful result in an action challenging the award; or
- (3) a successful result in that action, if loss has still been suffered.

If it is expected that a claim may be made against the expert, it is prudent to keep the expert informed as to the course being followed.<sup>21</sup>

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<sup>20</sup> [1976] 1 WLR 403 at 409, CA.

<sup>21</sup> J Kendall, C Freedman *Expert Determination* (2001).

### *Limitation*

An action to challenge a decision must, generally, be brought within six years of the decision where the contract to refer issues to the expert is under hand and 12 years in the less common case of its being under seal. Time runs from the date of the breach, probably no later than the date of the publication of the decision. Where the decision has been obtained by fraud, the limitation period may be extended.

### **Grounds For Challenge Of The Decision Of Experts**

Fraud (or dishonesty) and partiality have always been valid reasons for refusing to uphold an expert's decision. A number of cases where the courts have held that parties are bound by the decision of the expert contain general statements to the effect that the decision would not be binding in the event of fraud or collusion. An example is *Campbell v. Edwards*,<sup>22</sup> where Lord Denning MR said:

If there were fraud or collusion, of course it would be very different.  
Fraud or collusion unravels everything.

Most of the cases which deal with collusion, improper attempts to influence the expert and partiality are construction contract certification cases, and usually the issue has been whether the contractor can recover without the necessary certificate from the architect or engineer. However, the same legal principles are applied to cases where the contractor has sought to overturn a certificate which is alleged to be unduly favourable to the building owner. The leading case is *Hickman v. Roberts*,<sup>23</sup> where it was held that the building-owner could not rely on the absence of a certificate where the architect had allowed himself to be influenced by the building-owner in a manner

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<sup>22</sup> [1976] 1 WLR 403 at 409, CA.

<sup>23</sup> [1913] AC 229, HL.

which was inconsistent with his position as certifier.<sup>24</sup> A certificate was held to be ineffective where the court found that, although there had been no improper attempt to influence the engineer, he had appeared to assume the role of adversary more than that of a professional man holding the scales. Where the expert must act independently (which is almost invariably the case), there is an implied term that the parties will not seek to interfere with the expert's independence.

### *Lack Of Independence*

A distinction must be drawn between being independent on the one hand, and reaching an independent decision on the other. The fact that the proposed expert has a conflict of interest does not usually provide grounds for objection, nor grounds for challenge that the expert is in fact appointed. Whilst it is not an essential requirement that an expert should be independent, an expert entrusted with the duty of issuing certificates under contractual arrangements between two other parties is nevertheless under a duty to act fairly and impartially. In cases where there is a conflict of interest, there is generally a greater willingness on the part of the court to find that the decision is invalid.

Thus, the court may hold that as a matter of construction, the expert clause requires the appointment of an expert not closely associated with one of the parties. The court intervened on construction grounds in two cases about service charges under lease — in both cases the expert clause appointed the landlord's agent as the expert to determine the amount of the service charge. In the first case, *Finchbourne Ltd v. Rodrigues*,<sup>25</sup> the landlord's agents turned out to be wholly owned by the landlord. It was held that the lease contemplated the appointment of someone other than the landlord, and that agents wholly owned by

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<sup>24</sup> R Clay *Hudson's Building and Engineering Contracts: Construction Law International* 6(1) 2011 p 33.

<sup>25</sup> [1976] 3 All ER 581, CA.

the landlord did not qualify. In the second case, *Concorde Graphics Ltd v. Andromeda Investments SA*,<sup>26</sup> the court disallowed service charges certified by the landlord's usual managing agents because the clause referred to the decision by the landlord's surveyor 'in case of difference'. The words 'in case of difference', were held to import an 'essentially ... arbitral' function and an 'impartial ... holding of the balance between landlord and tenant', something the landlord's managing agents could not do, and therefore the landlord ought to have appointed another firm of surveyors to resolve the dispute.<sup>27</sup>

### *Unfairness In The Decision Procedure*

Questions are raised about the fairness of procedures adopted by experts. No one would argue with the general proposition that experts' procedures should be fair. Difficulties arise over how to assess whether a particular procedure followed by an expert is fair, and specifically whether the rule of natural justice requiring 'due process' applies to expert determinations. Do the procedures have to allow each side to have its say, and to know what the other side is saying, at all stages? In *Sutcliffe v. Thackrah*,<sup>28</sup> it was held that there are cases which refer to experts being under a duty to act fairly but there is no general requirement that the rules of natural justice must always be followed (*Hounslow LBC v. Twickenham Garden Developments Ltd*);<sup>29</sup> and there is no objective standard of fairness which must be complied with in all expert determinations. In each case, the terms of the contract must be considered in order to decide whether, in the circumstances which have occurred, the decision of the expert is a decision made in accordance with the terms of the contract.

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26 (1983) 1 EGLR 53.

27 J Kendall, C Freedman *Expert Determination* (2001).

28 [1974] AC 727, HL.

29 [1971] Ch 233 at 269–70.



Communications between the expert and one of the parties, when the other party is unaware that the communications have taken place, commonly give rise to suspicion. Some communications with one party alone may be unavoidable and are frequently innocuous, but where that is not the case, the court may hold that the decision cannot stand. Each case must be decided by reference to the seriousness of what took place in the circumstances in which it occurred. A case where the decision was held to be invalid is an Australian case, *Capricorn Inks Pty Ltd v. Lawter International (Australasia) Pty Ltd*,<sup>30</sup> in which the experts made their decision on the basis of a much larger claim which had not been disclosed to the other party. The experts were accountants appointed to assess damages. They were held to have acted outside the terms of the agreement by considering the undisclosed claim. Their terms of reference were contained in a letter written on behalf of both parties, without any explicit reference to fairness in those terms. The accountants' error lay in receiving and acting upon a further claim which had not been in their terms of reference and had not been notified to the other party. That further claim increased the figure from AUD50,000 to AUD212,796. The accountants' contract with the parties was to assess damages claimed in the terms of reference. They broke that contract by taking the later (and much larger) claim into account. The court found that the accountants' determination on the larger amount was not within the terms of the agreement, and remitted that part of the decision to a judge in chambers for consideration of liability on grounds other than the determination.<sup>31</sup>

There is dicta to the effect that the certifier under a construction contract should give both parties an equal opportunity to explain its case: *Page v. Llandaff and Dinas Powis Rural District Council*.<sup>32</sup> In a New Zealand case, the Court of Appeal decided that communication between

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30 [1989] 1 Qd R 8.

31 J Kendall, C Freedman *Expert Determination* (2001).

32 (1901) Hudson's BC 4th Edn Vol 2 p. 316.

the certifier and the employer is not of itself grounds for quashing the certificate, and that something further must have transpired in the course of the discussions which would make it necessary, as a matter of 'common justice', that the other party to the contract should be given the opportunity of answering the contentions: *Nelson Carlton Construction Company v. AC Hatrick (NZ) Ltd.*<sup>33</sup> However, it is doubtful whether a failure by an expert to follow this course would always be sufficient to invalidate the decision. The seriousness of the failure in the particular circumstances is likely to be the determining factor.

### Unfairness In The Decision Itself

The cases referred to above have been concerned with unfairness in the decision-making process, as opposed to allegations that the decision itself is a wrong decision and therefore unfair. In most cases the answer would be that the parties must abide by the decision of their chosen decision-maker even if it is wrong. But the courts are more willing to hold the decision of an expert to be invalid on the ground of unfairness if the expert is the agent of one of the parties and the contract provides no machinery for review at the decision.

In *John Barker Construction Ltd v. London Portman Hotel Ltd*,<sup>34</sup> it was held that a construction contract certification case illustrates how the court may approach a case where the contract provides no machinery for review of an unsatisfactory decision by one party's agent. An architect's determination of an extension of time was held to be invalid on the grounds that it was not a fair determination and was not based on a proper application of the provisions of the contract. *Beaufort Developments NI Ltd v. Gilbert-Ash NI Ltd*<sup>35</sup> was an unusual case as the parties had deleted from the contract the standard clause which provides

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<sup>33</sup> [1965] NZLR 144.

<sup>34</sup> (1996) 83 BLR 31.

<sup>35</sup> [1999] 1 AC 266, HL.

for review of the architect's decision by arbitration. The finding that the decision was not based on a proper application of the provisions of the contract may, be regarded as a finding that the expert departed from instructions in a material respect. However, the judgment was also based on the finding that the decision was an unfair determination, being 'fundamentally flawed in a number of respects'. In *Jones v Sherwood Computer Services Ltd plc*,<sup>36</sup> this was harder to reconcile with other authorities, which were not referred to in the judgment, but can be explained by reference to the judge's interpretation of the requirements of the contract, given the unusual facts. If the parties had intended that the grounds of challenge were intended to be so limited as to exclude challenge in the case of 'an aberrant, uninformed or unfair decision' (provided that there was no fraud or patent excess of powers), he would have expected the contract to say so. As it did not, the judge found that it was an implied requirement of a valid decision that the expert should act lawfully and fairly.<sup>37</sup> The judgment is not easy to reconcile with the general principle that an expert's decision cannot be challenged on the ground that the expert has answered the right question in the wrong way. Its applicability is probably limited to cases where the parties have failed to make express provision for review of a decision made by a certifier who is the agent of one of the parties.<sup>38</sup>

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36 [1992] 1 WLR 277, [1992] 2 All ER 170, CA.

37 *Ibid.*

38 *Balfour Beatty Civil Engineering Ltd v. Docklands Light Railway Ltd* (1996) 78 BLR 42.

## Expert Determination: Islamic Approach

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*Fatwa* given by the *Muftis* closely resembles expert determination.<sup>39</sup> *Fatwa* comes from the Arabic word *afta* which means, 'to describe or enlighten.' In addition, according to *al-Mu'jma al-Wasit*, *fatwa* means, 'solution to any problem, whether related to *Syariah* or legal matters.' The plural versions are *fatawi* and *fatawa* while the form *istifta* means to enquire opinion whether on *Syariah* or other subjects.<sup>40</sup> The word *ifta* and its derivatives appear in the *Qur'an* 11 times which have categorically expressed the denotation of requesting for a formal answer on certain issues. The *Qur'anic* statements such as, 'expound to me my vision' (*Surah Yussuf*: 43); 'nor consult any of them' (*Surah al-Kahf*: 22); 'just ask their opinion' (*Surah al-Saffat*:11); respectively indicate the meaning of 'exposition of certain issues', 'providing formal response' and 'deliverance of formal opinion on pending issues.' With regards to *fiqh* and Islamic jurisprudence, the word designates the deliverance of formal legal opinion by an individual cleric or formal institution. Such opinion could be delivered in a form of opinion, advice or counselling. The following are some of the *Qur'anic* verses in which the word *fatwa* is clearly employed. The *Qur'an* states:

Then ask them (i.e. these polytheists, O *Muhammad*): Are they stronger as creation, or those (others like the heavens and the earth and mountains) whom We have created? Verily, We created them of a sticky clay (*Surah al-Saffat*:11).

In another verse the *Qur'an* states:

They ask thee for a legal decision. Say: *Allah* directs (thus) about those who leave no descendant or ascendant as heirs. If it is a man that dies, leaving a sister but no child, she shall have half the inheritance: if (such a deceased was) a woman, who left no child, her brother take

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39 SK Rashid 'Peculiarities and Religious Underlining of ADR in Islamic Law' 4th Asia Pacific Mediation Forum Conference (June 2008).

40 B Al-Bustani *Udaba al-Arab fi al-Jahiliyyah wasadr al-Islam* (1980).

her inheritance: if there are two sisters, they should have two-thirds of the inheritance (between them): if there are brothers and sisters, (they share), the male having twice the share of the female. Thus doth *Allah* make clear to you (His law), lest ye err. And *Allah* hath knowledge of all things (*Surah al-Nisa*: 176).

Furthermore, the *Qur'an* states:

They ask your legal instruction concerning women, say: *Allah* instructs you about them (*Surah al-Imran*:127).

Therefore, conceptually, a *fatwa* signifies the jurist's explanation of laws on frequently asked questions. It is the law expounded by a *mufti* to an enquirer in a non- restrictive form. Hence, the enquirer is not restricted nor bound by the laws arising from the *Mufti's fatwa*.<sup>41</sup> The enquirer (individual) has the right to seek *fatwa* from another *Mufti* or *Muftis*. Furthermore, he can apply the *fatwa* from another *Mufti*, provided the *Mufti* is *alim* or pious and well qualified to issue *fatwa*. Several Muslim intellectuals describe the process of issuing *fatwa* as describing *Allah's* (s.w.t) law generally and comprehensively in accordance with the demands of *Syariah* guidelines.<sup>42</sup>

In a religious sense, issuing *fatwa* is collective obligation on Muslims. If a part of the community stands up for the responsibility of issuing *fatwa*, the rest of the community will be relieved from that responsibility, and if none in the community stands up, the whole of the community is in sin. However, it becomes a personal obligation (*wajib*) on a scholar or pious person to give *fatwa* where no other scholars are available.<sup>43</sup>

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41 M Mudzhar *Fatwas of the Council of Indonesian Ulama: A study of Islamic Legal Thought in Indonesia 1975–1988* (1990).

42 Wahbah Al-Zuhayli *Usul al-Fiqh al-Islami* (1986).

43 *Ibid.*

### **Fatwa And Its Significance**

According to the *Qur'an* the ultimate aim of sending the *Prophet* (s.a.w) was to explain the *Qur'anic* message to people. *Al-Qur'an* states:

We sent them with clear signs and scriptures: and We have sent down unto thee (also) the message: that thou mayest explain clearly to men what is sent for them, and that they may give thought (*Surah al-Nakhl: 44*).

This verse clearly mentions that, the first and foremost responsibility of the messengers of *Allah* (s.w.t) was to guide people by issuing a ruling in case of any need. The companions of the *Prophet* (s.a.w) continued such profession. They carried out the duties of explaining and teaching Islam to others. For instance, the role of the *Mufti* was very much emphasised, where he was seen as an expositor of the *Syariah* law to the masses. Imam al-Nawawi said that *alim* is the intermediary between *Allah* (s.w.t) and his slaves.<sup>44</sup> This clearly indicates the expository role of the *Mufti*. Hence, the *Mufti* should be a pious person who is an expert in the field of his *fatwa*. He is also expected to have intellectual capacity to analyse and search past *fatwa* as well as make rational choices. He should not be content with only extracting and narrating *fatwa* from the other jurists. A *Mufti* who makes a *fatwa* based on rumours and instincts will become a sinner and his action is prohibited.<sup>45</sup> Such *Mufti* is sinful because of his blatant lie towards *Allah* (s.w.t) and *Rasullullah* (s.a.w). Malik reported in his compilations that the *Prophet* (s.a.w) said:

Anyone, who issues *fatwa* without knowledge, will bear the sin of such a *fatwa*.<sup>46</sup>

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44 Yahya Ibn Sharaf Al-Nawawi *Al-Majmu Sharh Al-Muhadhab* (2002).

45 *Ibid*.

46 Imam Malik *Al-Muwatta*. Translator Aisha Abdarahman at-Tarjuman and Ya'qub Johnson (1982).

*Fatwa* can vary from one *Mufti* to another, depending on the knowledge level of the *Mufti*. Hence, a person who wants to obtain a *fatwa* should be selective. If there are two opinions from different scholars, the individual should apply one of them. The importance of *fatwa* and the difficulty of issuing *fatwa* without in-depth knowledge in Islam, means that the authority or people should refer to those who possess specific expertise along with sufficient mastery in the relevant *Syariah* area. However, it should be noted that early Muslim jurists used to exercise great caution in matters of *fatwa*. Both the rightly-guided Caliphs as well as all Companions of the *Prophet* (s.a.w) used to show extreme caution before giving any *fatwa*. Sometimes, they would completely decline from carrying out the process. They held deep respect for the person who did not hasten in delivering *fatwa*. When asked about a certain religious issue, the Companions of the *Prophet* (s.a.w) used to give chance to others in an attempt to avoid the responsibility of answering them.<sup>47</sup> Sometimes, the *Prophet* (s.a.w), when asked about certain matters, would decline to answer until receiving revelations and making clear to the Companions, that, he who issues *fatwa* without having sound religious knowledge will bear the burden of the one to whom he issued a *fatwa*.<sup>48</sup>

### The Principles of *Fatwa* Issuance

*Fatwa* is one of the most respectable religious tasks because the *Mufti* is issuing a ruling in the name of *Allah* (s.w.t). He is entrusted with his religion and the *Syariah* and is doing the job of *Prophet Muhammad* (s.a.w) in conveying *Allah's* (s.w.t) message. Therefore, whoever is assuming the office of *Mufti*, must be well qualified so as to render his job in the best way. Because of the importance of *fatwa*, the scholars have laid down criteria upon which a *fatwa* is either accepted or rejected. Such criteria consists of the qualifications of the *Mufti*, methodology of

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47 Yahya Ibn Sharaf Al-Nawawi *Al-Majmu Sharh Al-Muhadhab* (2002).

48 *Ibid.*

*fatwa* issuance, and basic principles of *fatwa* composition, upon which *fatwa* validation and indictment are determined. The basic elements of such criteria are highlighted as follows:

### *Fatwa Issuance*

*Fatwa* issuance requires obtaining the necessary knowledge and qualification including Arabic language, the *Qur'an* and the *Sunnah*, and the codified literature of the Islamic jurisprudence. A true perception can only be achieved under constant guidance and supervision of distinguished experts recognised in the field.

### *Scholarly Aptitude And Character*

Another important factor that *fatwa* issuance requires is obtaining aptitude and scholarly character where a person is not permitted to issue a *fatwa* until and unless he develops an aptitude and a deep scholarly character which enables him to distinguish between basic principle and their causes.<sup>49</sup> The required level of aptitude and character is attained when he is permitted by an expert to undertake the delicate and highly responsible trust of issuing *fatwa*.

### *Single Juristic View*

If there is only one view (for example, in the *Hanafi* school) in the particular question, then, that view is binding, unless there is cogent, textual evidence to the effect that such a view is based on an underlying cause which is absent in the particular case.<sup>50</sup>

### *Multiple Juristic View*

If there is more than one juristic view on a particular question, then it is obligatory to adopt that view which has been preferred by the scholars of *tarjih* (those classical jurists who have achieved distinction in the

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49 Muhammad Ibn Muhammad Al-Ghazali *Al-Mustasfa Min Ilm Al-Usul* (1986).

50 *Ibid.*



field, by reason of their deep learning, piety and capacity to distinguish between competing arguments having regard to ever changing circumstances and new situations).<sup>51</sup>

#### *Reliance Upon Authentic Juristic Work Only*

The *Mufti* is obliged to rely exclusively on the recognised and authentic works of Islamic law. He is precluded from relying upon work which is not recognised, unless such reference is in accordance with established principles. In any event, he cannot base his reference upon a classical jurist who is not recorded to be amongst the preferred classical jurist of distinction (*Ashab al-Tarjih*). It is imperative that the *Mufti* is able to distinguish between the works upon which reliance can be properly placed, and those which cannot be relied upon for various reasons including weak narrations.

#### *Prioritisation*

Priority is to be given to the preferred view as expressed in the text where there is a difference of opinion amongst the classical jurists on a particular question. The view is selected according to expressed preference in the text by the use of clear and expressive words such as, 'the *fatwa* accords with this view'. In the absence of expressed clear preference in the text, the particular text and juristic work must be examined in context to determine the author's preference for a particular viewpoint.

#### *Competing Juristic Views*

It is an extremely delicate and complex task to prefer one view over another. A number of guidelines have been laid down, but ultimately the selection of the appropriate rule is based on the aptitude, skills, intuition, depth of learning of the particular *Mufti* having regard to divine accountability and sincerity of purpose, devoid of ulterior motive.

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51 *Ibid.*

### *Adopting The View Of Zahir Al-Riwayah*

In the event where the classical jurists of distinction have not preferred any view at all, then it is obligatory to adopt the view expressed by the Zahir al-Riwayah. If the latter itself expresses a difference of opinion, then the most recent view (the latest) should be adopted.

### *Mafhum-Mukhalif As Principle Of Interpretation Of Juristic Text*

*Mafhum-Mukhalif* refers to the case where the contrary intent is inferred from the ordinary meaning of an expression.<sup>52</sup> The Prophet (s.a.w) once said that *Zakah* is payable in respect of camels that graze on their own. The contrary meaning is that no *Zakah* is payable on domesticated camels. The *Mafhum-Mukhalif* is an acceptable principle of interpreting juristic text, provided that the context permits such an interpretation.

It is a consensus among the scholars that weak juristic narrations should not be adopted as a general rule.<sup>53</sup> It is not permissible to issue a *fatwa* which is based on a weak narration, except in the case of necessity as interpreted by an extremely competent *Mufti* having deep insight, perception, intuition, and skills and having the capacity to distinguish between different arguments based on their strengths and weaknesses.

### **Similarities And Differences Between *Al-Qadha'* And *Al-fatwa***

Several scholars regard *fatwa* as a component of *al-Qadha'*. Their conclusion is based on the following verse:

... from you (*Muhammad*) on issues relating to women, say: “Allah provides an explanation (*Fatwa*)” (Surah Al-Imran: 176).

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52 M Ibn Abi Bakar Ibn Qayyim *Ilam Al-Murwaqi'in 'Aan Rabi Al-Alami'n* (1985).

53 *Ibid.*

There is also a consensus amongst Islamic scholars that *fatwa* is part of adjudication. Nevertheless, there are some major differences between al-Qadha and al-Fatwa. This is because, while *fatwa* is a legal ruling without making it binding, *Qadha* is communicating the legal ruling while making it binding. In this case, *fatwa* is more on advising and guiding without any binding authority. Similarly, the person who issues a *fatwa* is a *Mufti* and the one who gives judgment or issues a ruling is a *Qadhi*. *Qadhi* is restrictive and must be implemented; *fatwa* merely explains the *Syariah* law on general issues and is not restrictive. Furthermore, *qadha* creates laws that must be carried out and usually involve two opposing parties. A *fatwa*, on the other hand, only clarifies issues raised by either one or more parties in the absence of any conflict.

Similarly, the scope of *fatwa* is more far reaching as compared to *qadha*. A free person, a slave, man or woman can give a *fatwa*. Even an illiterate can offer a *fatwa*, if the person is well versed in the relevant subject matter. In contrast, *qadha* can only be issued by a *Qadhi*, who is free, pious and fulfills other criteria. A *Mufti* can issue a *fatwa* to himself, his family and close friends because *fatwa* is merely an explanation of law in general. This does not apply to *qadha* because it takes into consideration the relationship between the judge and the party seeking justice. A *fatwa* should always be consistent. Thus, a *Mufti* should not discriminate against people when issuing *fatwa*, for example by issuing different rulings for family members and the public. *Qadha* is not linked to worship. *Fatwa* however, is an integral aspect of worship, so a *Mufti* can issue *fatwa* relating to cleanliness, prayer and *zakah*.

### **Appointment Of Qadhi And Mufti**

As for the appointment of the *Qadhi*, it is the responsibility of the ruler of the community. Hence, the *Qadhi*'s ruling is binding. As for the *Mufti*, if he is restricted to appointment by the ruler, his *fatwa* will be binding. If he is not restricted, his *fatwa* will not be binding to the parties because it is not supervised by the authority. It is, however, important that *fatwa* should be undertaken by those who are qualified to do so and whom people view as qualified, as well as the custom of the Companions.

### Application Of *Fatwa* In The (Four) Islamic Schools Of Law

The history of classical Islamic jurisprudence shows how early Muslim jurists worked to meet the changing needs in each generation, polity, and geographical area through fresh *ijtihad* within the constraints of *Syariah*. The *Fuqaha* accept legitimate variations in legal decisions based on sociological factors. While reconciling their ideologically diverging views within the purview of the norms and values of the *Syariah*, they employ deductive as well as inductive methods in legal interpretations and decisions, thus ensuring that the emerging ruling is ideologically Islamic, rational, idealistic and dynamic that meets the needs of the society.

### Multiple Views

The active exercise of *ijtihad* by scholars who have differing interpretations of the teachings of the *Syariah* based on different interpretations, cause divergent views to appear among them. However, the reason for multiple views on a single case is merely caused by the greater number of students who studied with the *Imams* — *Shafi'e*, *Hanafi*, *Maliki* and *Hanbali*. Those students constitute primary sources for the multiplicity of views in a single case. Ibn Taymiyyah mentioned:

- (1) The great number of those who studied with the *Imams* led to different transmissions reaching us from them about what is connected to a single case. The *Imam* may have retracted one position and changed his opinion in a matter because he may have come across proof which he did not previously know; or social circumstances may have changed; or the state of one asking for the *fatwa* may have changed. The one who stayed with the *Imam* for a certain period of time, transmitted a view and did not transmit the *Imam's* retraction and change of opinion when it took place.
- (2) Using the transmissions already mentioned as a basis for deduction by the *Imam's* students, they used to arrive at answers for cases that the *Imam* did not mention by using analogies based on the original text. This operation is called '*Takhrij*'. It designates using the text of the *Imam* as basis for the derivation

of rulings for new secondary cases by means of analogy. It is a type of *Ijtihad* which is called '*Ijtihad* in the school'. Due to the many transmissions from the *Imam*, there are several possibilities of deduction based on his views and legal reason.

- (3) At certain times for example, the students of Malik and his companions would undertake unrestricted affiliated *Ijtihad*. A great example of this case is Ibn Rushd. However, most of them were limited to the principles of their *Imam*, although at times their *Ijtihad* led them to disagree with some of the views of their *Imam* according to their preference for certain evidence and legal reason.

This, without a doubt, is a fact which enriched the Islamic school of law, but at the same time, it is also a reason for the confusion among *Muftis*, *Qadhis* and rulers in the generations in which the process of *Ijtihad* came to a halt since they needed to select a specific verdict in order to issue their *fatwa* and resolve disputes.

### Approved Verdicts In *Fatwa* Sentence

The existence of multiple verdicts on a single case made it necessary to compare them in respect of their transmission, those who espouse them, and their proof. This comparison was undertaken by scholars of the school called *Mujtahid* in *fatwa*. That is the level of *Mujtahid* who confine themselves to comparing transmitted verdicts by means of preference (*tarji'h*) and then state their preference for some verdicts over others, based on the strength of the proof, the strength of the transmission or the suitability of its application according to the circumstances of the time and the similar method which is not considered to be independent or dependent inference.

### The Preferred Verdict

In technical usage, the preferred verdict is that whose proof is strong, but that is only in respect of a *Mujtahid* in the school who is able to examine the strength of the evidence in transmission and meaning. As for the imitator, *Mufti* and *Qadhi* who are limited in *fatwa* and judgment, their preference would match that of the scholars of the school who have the

full qualifications for exercising preference. Any other verdict opposing the preferred verdict is considered weak in respect of a *Mujtahid* — whose evidence is weak in respect of a *Mujtahid* in the scholar or that the scholars of the school qualified to exercise preference are considered to be weak.

### **The Verdict which is Equal to Another**

This is the rank when verdicts are equal in respect of evidence or those who support them, and it is not immediately clear which of them should be preferred. When the *Mufti* and *Qadhi* are *Mujtahids* they can examine the proof and choose one of them for *fatwa* or sentence. As for the *Mufti* and *Qadhi* who imitate, they choose one of the two without following desire or appetite. Similarly, it is permitted for the *Mufti* but not *Qadhi* to inform the one who asks for the *fatwa* of the two verdicts as that does not lead to confusing the common people. One should mention that Sheikh Khalil has a specific technical term for this situation which he mentioned in his introduction to his *Mukhtasar*, ‘When I mentioned two or more verdicts that is because I did not find any textual preference in connection to them.’<sup>54</sup>

### **Conclusion**

Expert determination is a mechanism of alternative dispute resolution, having emerged and originated in the West during the last few decades. It is found in a wide range of commercial applications. Islamic history is full of cases in which thousands of problematic issues and disputes were referred to *Muftis* and the answers given by them constituted a collection of *fatwa*. In fact, *fatwa* has become an integral part of Islamic legal history, both past and present.

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54 Khalid Ibn Ishaq *Mukhtasar Khalil fi Fiqh Imam Malik* (1922).