Balance of power

Chris Pamplin looks at whether the court can override an expert determination decision

IN BRIEF

- It is always appropriate for the court to make the final decision on matters of law such as the expert's jurisdiction.
- The question of whether the expert or court should consider the issue first should be decided by the dictates of justice and convenience.

There is a general presumption that, where parties have made an agreement for a particular form of dispute resolution, that agreement will be binding on both parties and they should be held to it (see *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, [1993] 1 All ER 664). In *Barclays Bank v Nylon Capital* [2011] EWCA Civ 826, [2011] All ER (D) 214 (Jul), the Court of Appeal considered how far this presumption should be applied to the jurisdiction of an expert appointed under an expert determination (ED) clause, and whether the agreement reached by the parties could overreach the powers of the court to determine the expert's jurisdiction.

Venture capital

Barclays Bank v Nylon Capital revolved around what had to be paid to whom when Barclays pulled out of a joint venture with Nylon Capital. Barclays issued claims against Nylon seeking declarations by the court that they were not obliged to pay anything. Nylon applied to stay the action in the High Court pending settlement of the dispute by way of an ED procedure provided by the agreement. The High Court rejected Nylon's arguments because it considered that the clause only applied to any dispute regarding the amount of any payment and not a dispute as to whether any payments were actually due. Nylon appealed.

Intention

The construction of an arbitration clause should start on the assumption that the parties, as rational businessmen, were likely to have intended that any dispute arising out of the relationship should be decided by the arbitration tribunal. Where there is any disagreement regarding the extent of an arbitrator's jurisdiction,

the provisions set out in the Arbitration Act 1996 will be applied. However, a distinction is to be made between arbitrators and expert determiners. The latter are not subject to any formal procedural code and, consequently, have been subject to little control by the courts.

In the first instance, the extent of jurisdiction has been for the expert to determine. In *Mercury Communications Ltd v The Director General of Telecommunications* [1996] 1 WLR 48, [1996] 1 All ER 575, Lord Justice Hoffmann said that although the court might act to correct a decision maker who has stepped outside its authority, the court should not intervene and declare in advance what the limits of that authority will be.

In the Court of Appeal, Lord Justice Thomas, giving the leading judgment, distinguished ED clauses from arbitration clauses on the basis that arbitration is usually an alternative to court proceedings to determine all of the issues between the parties. ED clauses, on the other hand, generally presuppose that there may be more than one type of dispute resolution procedure.

Both Thomas LJ and Lord Neuberger MR made the point that the jurisdiction of the expert may be open to challenge in the courts when it involved pure points of law. Neuberger LJ added that there was a powerful argument for saying that a valuation by an expert, even where it was agreed to be "final and binding", could be challenged in court if it could be shown to have been based upon a mistake of law.

Neuberger LJ thought that it would be sensible for parties to consider the referral of any point of law to the court to decide as a preliminary issue. Alternatively, if the parties agreed to leave a point of law for the expert to decide, they should seek to agree whether the expert's decision was to be final and binding. If it was not to be binding, then he thought it would be sensible for the expert to give an indication of the extent to which the determination would have differed if he had decided the point of law the other way.

Procedural challenges

The court next considered challenges to ED on matters of procedure. Noting that there was no procedural code for ED, the court found that, unless the parties specify the procedure, then the expert determines how to proceed. It will be rare for procedural challenges to succeed.

Turning to the question of whether the expert should be permitted to decide the jurisdictional extent under the terms of any agreement, the Court of Appeal reaffirmed the ruling in *Mercury Communications*. The interests of justice and convenience will affect whether the expert or court should decide the question first. In every case, it was for the court to determine whether it was faced with a dispute that was real or hypothetical. If it was real, then it was for the court to decide whether it was in the interests of justice to determine the matter itself, rather than allowing the expert to determine it first. In the *Barclays* case it was clear that the dispute as to jurisdiction was not hypothetical and it was in the interests of justice for the court to rule on this. *Barclays* was not pre-empting the contractual machinery. It was asking for the issue of interpretation of the agreement (whether the expert was entitled to say payment was due) to be determined.

Ultimate decision maker

The rationale applied by the Court of Appeal was centred firmly on the assertion that it is always the court that is the ultimate decision maker on whether an expert has jurisdiction. Dismissing the appeal, the court held that this was clear law. This was so even if a clause purported to confer that jurisdiction on the expert in a manner that was final and binding. NLJ

Dr Chris Pamplin is the editor of the UK Register of Expert Witnesses (*nlj@jspubs.com*; *www.jspubs.com*)