

Separating an expert determination clause in the event of termination

December 4, 2024 James Brown, Fiona Cain, Zainab Al-Qaimi

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A recent ruling from the English High Court in *Dandara South East Ltd v Medway Preservation Ltd* [2024] EWHC 2318 (Ch) has provided guidance on a novel point for which there was no decided authority – whether an expert determination clause can be separable from the underlying contract, in the same way that an arbitration clause is so separable and remains effective in the event of termination unless the parties have otherwise agreed.

Factual background

The dispute arose from a contract between two parties concerning the sale of land. The contract included a condition precedent that required certain earthworks to be completed by the Defendant prior to the sale of the land. The Claimant served a termination notice on the basis that the condition precedent had not been satisfied and commenced court proceedings seeking repayment of its deposit. In response, the Defendant applied for a stay of proceedings, asserting that the court did not have jurisdiction on the basis that the dispute should be resolved through expert determination (as specified in the contract). The Claimant rejected this, contending that since the contract had been terminated the relevant provision no longer applied and that it was not separable from the contract. They also argued that the factual complexities of the dispute rendered expert determination inappropriate.

The clause in question

The contract, at clause 28, mandated that “*any dispute or difference between the parties as to any matter under or in connection with this contract shall be submitted for the determination of an expert*”. Further, it provided that the expert’s determination was to be “*conclusive and binding on the parties save in the case of manifest error or omission*”.

However, there was also a clause in the contract (clause 31) which stipulated that “*each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this contract or its subject matter or formation (including non-contractual disputes or claims)*”.

The court’s judgment

The court carefully examined the construction and scope of clause 28, noting that expert determination clauses are often carved out of the primary jurisdiction given to the court (or arbitral tribunal). In doing so, parties provide for some disputes to be resolved by the courts (or tribunal), and others by an expert. The absence of language to that effect in this case, however, led the judge to interpret clause 28 as an all-embracing provision, requiring all disputes concerning the contract (including those related to its termination) to be subject to expert determination.

However, the court acknowledged that the “one-stop shop” interpretation of clause 28 did not negate the effect of clause 31 in its entirety. It was held that where a party fails to comply with the expert’s determination, the other party can apply to court for an order to enforce it. By construing the clauses in this way, the court was able to resolve what may otherwise have been a conflict between clauses 28 and 31.

As to the issue of separability, the court acknowledged that it is well understood that, by virtue of section 7 of the Arbitration Act 1996, the principle of separability applies to arbitration agreements. The court determined that there was no reason in principle why an expert determination clause could not similarly be separable from the underlying contract. It was a question of the parties’ intentions and given that the court had found that the parties had intended for *all* disputes related to the contract to be resolved in a prescribed form of dispute resolution, the burden was on the Claimant to show why the parties would objectively have intended the courts to resolve some disputes, which they had not.

Commentary

The judgment confirms that where a clause providing for disputes to be determined by an expert is interpreted as a “one-stop shop”, the principle of separability will apply, and the provision will survive the termination of the contract. It is however important to note that “one-stop shop” expert determination clauses are not common. Instead, where expert determination is included in a dispute resolution clause, it is typically only to resolve certain disputes, with other disputes being resolved by the courts or in arbitration. As a result, careful drafting will be required to ensure that a clause providing for expert determination is not interpreted as conferring jurisdiction on the courts in the event of termination where that is not the intention of the parties.