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The Suitability of Expert Determination in Settling Oil and Gas Disputes and Its Reception under Scottish Law

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Abstract:
Generally speaking, disputes are inevitable part of commercial relations which needs to be settled, of which oil and gas (O&G) industry is no exception.
O&G industry being a technical, high risk, capital intensive industry requires a fast and cost-effective dispute resolution process that will not disrupt parties operations while promoting parties working relationship.
This paper is a review of current literature and decided cases in the areas of expert determination (ED) in international O&G technical disputes, particularly how Scottish courts view and interpret ED clauses in O&G contracts. It will focus on the reasons why ED is preferred a more suitable means of settling O&G disputes than other forms of alternative dispute resolution and litigation. These reasons stems from the technical nature of oil and gas issues and the appeal of a more timely decision than international arbitration, the final and binding determination of an expert, it is a speedier, more flexible, cost-effective form of dispute resolution. More importantly, ED preserves parties relationship and trade secrets.

Keywords: *Oil and gas law, expert determination, arbitration, alternative dispute resolution, litigation, adjudication, courts, contract clauses, contract terms, case laws, experts.*

1. Introduction

Expert determination (ED) was defined in Heart Research Institute ltd v Prison ltd[i] as ''an informal speedy, effective way of resolving disputes which are of a specific technical character or specialized kinds''.[ii] It is ideal for settling dispute on valuation[iii] or matters relating to technical issues, sale of goods dispute,[iv] oil and gas dispute,[v] insurance wording dispute etc.[vi]
Oil and Gas industry is a technical, high risk and capital intensive industry and as such, parties in the oil and gas industry (host government- HG and the international oil companies-IOC) would require a speedier, cheaper, final and binding mode of dispute that will not disrupt their operations.[vii] This work will analyse why ED is a more suitable, and practicable ADR process for settling oil and gas dispute. It will also review how Scottish legal system views the principle of ED in settling disputes.

2. Suitability of Expert Determination over Other ADR in Resolving Oil and Gas Dispute

The following reasons make ED a more suitable form of ADR for settling oil and gas dispute based on procedural and as well as practical consideration

2.1. Final and Binding Decision:

A decision is final if it is not subject to review and binding because the parties are obliged to comply with the decision.[viii]
Oil and Gas experts would prefer ED to other forms of ADR because of its certainty of finality of dispute which was emphasized by Lord DENNING IN CAMPBELL V EDWARDS.[ix] that ''It is simply the law of contract if two persons agree that the price of property should be fixed by a valuer on whom they agree and he gives that valuation honestly and in good faith, they are bound by it .The reason is because they agreed to be bound by it. If there were fraud or collusion, of course, it will be different. Fraud or collusion unravels everything''. The case of VEBA OIL SUPPLY & TRADING GMBH v CAMPBELL[x] is also to the effect that in cases of fraud or collusion by the expert will not be binding irrespective of whether it affected the result.
After, Lord Denning identified 'fraud' and 'collusion' as an exception to the finality of dispute guaranteed by (E D),The case of JONES v SHERWOOD COMPUTER SERVICES[xi]also applied the same rule in CAMPBELL V EDWARDS but distinguishes between mistake made by the expert in reaching his determination and a departure in material respect where Dillon L.J stated that ''If the mistake made was that the expert departed from instructions in a material respect'' e .g if he valued the wrong number of shares ,or whereas his instructions were to employ an expert valuer of his choice to do that, either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do''.
Also, Knox. j in NIKKO HOTELS (UK) LTD V MEPC PLC[xii] held that ''If the expert has answered the right question in the wrong way his decision will be binding. If he answered the wrong question his decision will be a nullity''.

In addition, a determination can also be challenged if the (ED) lacks jurisdictional foundation which may occur where a contract prescribes the circumstances in which an expert determination should follow and it is not followed

Thus, an expert's determination forms a final and binding contract and it is immaterial whether the expert makes a mistake,[xiii] or the expert is bias,[xiv] his determination as well as the processes is final and binding on the parties.[xv] Thus, courts generally are reluctant to interfere with expert's decision,[xvi] except in cases of manifest error, fraud or collusion, or an expert makes a material departure from the party's instructions.[xvii] These grounds of challenging an expert decision will be considered briefly below.

2.1.1. Manifest Error

This has been construed as an oversight or obvious blunder capable of affecting the determination,[xviii] or an error that can be easily perceived by the eyes, mind or an error that is plain and obvious on the face of the decision to warrant it to be set aside.[xix] The court in plethora of cases has held that for manifest error to invalidate the decision of an expert, it must have been a plain and obvious error and not a possibility of error.[xx] Thus, where an expert acts ultra vires his powers, then he can be challenged on grounds of manifest error.[xxi] For instance in HARDESTY & HANOVER INTERNATIONAL LLC V ABIGROUP CONTRACTORS PTY LTD[xxii] where an expert's determination was held to be invalid, the party who commenced the expert determination did not first attempt to mediate the particular dispute as required by the contract

2.1.2. Fraud or Collusion

Where an expert's decision is tainted with fraud or collusion, then his decisions will not be binding on the parties.[xxiii] Fraud or collusion occurs when one of the parties has given an incentive to the expert to influence his decision.[xxiv] In HICKMAN V ROBERTS,[xxv] the court held that the building owner could not rely on the certificate where the architect had allowed himself to be influenced by the building owner in a manner inconsistent with his position as a certifier.

2.1.3. Departure from Instructions

An expert's decision can also be set aside where the expert has materially departed from his instructions or exceeded his jurisdiction.[xxvi] This is premised on the fact that ED is one of contract, and the Expert should perform his own part of the contract.[xxvii]In HARDESTY & HANOVER INTERNATIONAL LLC V ABIGROUP CONTRACTORS PTYLTD,[xxviii] an ED was held to be invalid because the expert did not first attempt to mediate the particular dispute as required by the contract. Also in ALLIANCE V REGENT HOLDINGS INCORPORATED, [xxix] JONES V JONES,[xxx] where the expert had valued a machinery himself as against the party's instructions that he should employ an expert valuer of his choice to do so his decision was a nullity. In SHELL UK, LTD & ANOR V ENTERPRISE OIL PLC& ORS,[xxxi] where an expert had failed to use a specific software as specified in the contract his decision was invalidated on that grounds.

However, where the departure is so trivial,[xxxii] or the parties had given the expert a wide discretion on how to reach his decision, then it cannot be said that he departed from his instructions.[xxxiii] See the case of Simeon Brown L.J in VEBA OIL SUPPLY AND TRADING GMBH V PETROTRADE INC to the effect that where the expert's departure is so trivial not to make a possible difference to the parties, then the parties will be bound by his decision

2.2. Speed

Expert determination can make a determination in minutes, days or weeks as required.[xxxiv] This is because an expert can give a binding and final decision based on his expertise without conducting inquiries or adopting adjudicatory rules which are characterised by tendering evidence, hearing submissions and incessant adjournments.[xxxv]

ED is governed by the parties' contract and not by statute or case laws, since an agreement to refer disputes to ED are contractual.[xxxvi] The speed and cost-effectiveness of ED was further reinforced in the case of OWEN PELL (LTD) v BINDI (LONDON)[xxxvii] that ''it is important to bear in mind the nature of expert determination. There are benefits to parties who choose this route. For example, it may provide a quick solution, the parties are able to limit their exposure to costs, the parties achieve certainty and finality''. ''(ED) differs from arbitration in its greater informality, unless the parties agree that it should be, it is not subject to due process and can therefore be more flexible. In particular, there is no need for a trial-type hearing, unless the parties agree otherwise, the expert may conduct investigations independently of the parties and make the decision based on those investigations without reference to the parties.''[xxxviii]

Furthermore, the case of HEART RESEARCH INSTITUTE LTD V PRISON LTD[xxxix] defines (ED) as ''an informal, speedy, effective way of resolving disputes which are of a specific technical character or specialized kinds''. (ED) process is usually abridged with features like for example the expert has no power to administer oaths and take evidence on oath. The parties can agree they will have written statements verified by statutory declaration but there is no mechanism for oral cross examination on oath[xl].

However, litigation on the other hand according to Lord Wolf Report[xli]: ''The defects identified in our present system were that it is too expensive in that the costs often exceed the value of the claim; to slow in bringing cases to conclusion……. the difficulty of forecasting what litigation will cost and how long it will last induce the fear of the unknown''

2.3. Flexibility

Since ED is one of contract, parties can by their contract define the procedures suitable to the particular circumstances of the dispute.[xlii] More so, ED is more flexible since it is not subject to due process except the parties agree otherwise.[xliii]The parties in an ED enjoy a high level of autonomy which gives them a greater knowledge of how the factual evidence is likely to be decided.[xliv]

However, parties should trade with caution in order not to over regulate the expert, so that the aim of choosing an ED which is to give a quick, cost efficient, final, binding and confidential decision will not be defeated.[xlv]

2.4. Informal Procedure:

There is no procedural code under ED, the procedure for expert determination is governed solely by the clause of the contract and the appointed expert's terms of reference.[xlvi]

Also, an ED involves an informal, non-judicial, non-adversarial procedure and as such, the expert gives his decisions based on his expertise without following any adjudicatory rule, nor is he bound to act judicially.[xlvii]

Further, the court does not exercise any degree of supervision over the conduct of an expert and an expert is not required to adopt a minimum standard of procedural fairness.[xlviii]Lord Denning stated in CAMPBELL v EDWARDS the courts have a non-interventionist trend showing less willingness to intervene in the contractual machinery agreed between parties .Indeed the primacy of the law of mistake in expert determination[xlix] was reaffirmed in cases like FRANK WRIGHT (CONSTRUCTION) LTD V FRODOR LTD [l] where it was stated that ''By agreeing to have their dispute resolved by expert determination, the parties are taken to have accepted the decision of the expert tribunal for better or worse with the attendant risks of error which are inherent in the ordinary weakness of a tribunal''.

Furthermore, except the parties agree otherwise, an expert is not bound to give his decision on the basis of submission or evidence put before him.[li] He can carry out investigations or findings into the dispute and can proceed to give his decision based on the finding without the parties being aware of such findings.[lii]

An expert is not obliged to apply the rules of natural justice unless the terms of the contract require him to do so as seen in ZEKE SERVICES PROPERTY LTD V TRAFFIC TECHNOLOGIES LTD[liii] where it was stated that ''There is a clear distinction between arbitration and (ED). The court exercises a degree of supervision over the conduct of arbitrations and minimum standards of procedural fairness are required. There are no such safe guards with respect to expert determination…..because the expert decides solely by the use of his eyes, knowledge, and skill, he is not acting judicially, he is using the skill of a valuer''.

Also, In SPORT MASKA V Z.H.C[liv] it was stated that ''An arbitration award may be set aside because the procedure fails to conform to the statutory standard of fairness which is closely derived from the principles of natural justice, no such remedy is generally available to invalidate an expert's decision''.

Unless the agreement between the parties expressly requires it, there is no requirement for the expert to apply all of the rules of natural justice. Thus, for example in an(ED) it may be that:[lv]

(A)There is no requirement that all matters put to the expert by a party are discussed with the other party and the other party is not given an opportunity to respond.

(B)The expert can use his own knowledge and expertise when deciding the case without giving the parties a chance to respond.

(C)If there is no opportunity to cross examine witnesses such evidence will not be tested in a traditional manner.

(D) where the expert is not required to give reasons for his determination the parties may not be able to find out why they lost, assess the merits of the decision or how they can improve their prospects of success, should they choose to refer the matter to arbitration or litigation.

Also, an expert normally acts inquisitionally and does not hear evidence, the determination may not be based on all the available evidence.[lvi]

Again, except the parties agree otherwise, an expert is not bound to give reasons for his decision, but where he gives an insufficient reason, the court by its inherent powers may refer the dispute back to the expert to give further reasons.[lvii] This was the case in DEAN V PRICE[lviii] where it was stated that ''If the auditors had chosen to be silent ,I do not think any court would have obliged them to explain their reasons; but they were not strong minded enough to do that''.

Also,it is almost automatic that when reasons for an expert determination are given it will be subject to appeal as seen in KANIVAH HOLDINGS PTY LTD V HOLDSWORTH PROPERTIES LTD[lix] where it was stated that ''unless the contract clearly provides that the experts valuers reasons for a determination are unexaminable, then either party to the contract is entitled to call into question whether the determination conforms with the contract requirements''. The case states the advantage of not giving reasons and it stated ''That question is not for the valuer to determine in effect but by exercising a discretion not to disclose reasons, deprives the parties means of ascertaining the matter themselves. The contract may entitle the valuer to give only a non-speaking valuation.''

However, If the parties agree that the expert should give reasons for the decision and the expert fails to do so, he will be ordered to do so by the court.[lx]

2.5. Maintenance of Relationship

The non-adversarial or judicial nature of ED makes it a less hostile way of settling disputes particularly where parties intend to maintain their relationship and continuing performance of the contract unlike other forms of ADR such as Litigation which is adversarial, and antagonistic.[lxi] Litigation is not considered by oil and gas experts because a trial basically involves a winner and a loser which is typically an adversarial process which may divide the parties making them enemies even when they did not start out like that .This is particularly problematic where there is some reason for the parties to maintain a relationship afterwards. Litigation is therefore a process focused on finding fault, not just adversarial but antagonistic.[lxii]

It is important to note that business relationships are important in the oil and gas industry and the (ED) promotes cordial relationships even after the resolution of disputes but Litigation apparently does the opposite.

ED is therefore suitable for long-term contracts and service agreement such as the oil and gas contracts.[lxiii] It is important to note that business relationships are important in the oil and gas industry and the (ED) promotes cordial relationships even after the resolution of disputes but Litigation apparently does the opposite.

2.6. Cost

in ED, there is no need for a trial-type hearing which can result in lengthy and costly dispute resolution. [lxiv] Unless the parties agree otherwise, the expert may conduct investigations independently of the parties and make the decision based on those investigations without reference to the parties.[lxv] ED therefore is a more cost effective method of settling oil and gas dispute as was reinforced in the case of OWEN PELL (LTD) V BINDI (LONDON)[lxvi] ''It is important to bear in mind the benefits to parties who choose this route (ED), it may provide a quick solution; the parties are able to limit their exposure to costs, the parties achieve certainty and finality''.

2.7. Confidentiality

ED unlike other forms of ADR such as litigation is carried out in private and as such, it guarantees to protect business information and trade secrets.[lxvii] Since ED is non-adversarial, the general disclosure obligations obtainable in arbitration and litigation does not apply to ED.[lxviii] According to the Centre for Effective Dispute Resolution, Schedule 21[lxix] provides that ''Each expert determination process shall be private and confidential. The parties, theexpert (and any expert and /or professional adviser appointed by him) shall keep the existence and subject matter of each expert determination process and Determination private and confidential, except to the extent that is necessary in order to implement or enforce a Determination or is required by law''.

In addition, Article 18.2(e) AIPN Model[lxx] provides that ''All….expert determination relating to a dispute(including a settlement resulting from negotiation or mediation or arbitration proceeding and memorials, briefs or other documents prepared for arbitration) are confidential and may not be disclosed by the parties, their employees ,officers ,directors ,counsel, consultants and expert witnesses except in accordance with (Article 15.2) to the extent necessary to enforce Article 18 or any arbitration award ,to enforce other rights of a party, or as required by law ;provided however that breach of this confidentiality shall not void any settlement, expert determination award.

However, in Litigation, the majority of court hearings are in public and this may be undesirable in some business disputes, where one or both of the parties may prefer not to make public the details of their financial situation or business practices because of potentially damaging publicity. nor do they want sensitive information becoming available to the public at large, including their competitors.[lxxi]

Furthermore, parties can also by an expert clause contained in the contract impose on the expert a duty of confidentiality in respect of all information, data and documents which he receives in the course of his reference.[lxxii]

2.8. Expertise/Experience

In an ED process, the expert's decision is made by an expert who has a specialist knowledge and experience in the field of the dispute.[lxxiii] Since the oil and gas industry involves technical matters such as valuation of profit oil, or method of sharing profit between the HG and the IOC, ED is suitable for resolving dispute of such nature.[lxxiv]

2.9. Enforceability

Since ED is one of contract, a breach of the determination is enforceable as a breach of contract by commencing a legal proceeding by way of declaration or specific performance of the contract.[lxxv] See the case of OWEN PELL LTD V BINDI LONDON LTD (SUPRA),[lxxvi]where the claimant succeeded in bringing an action before the high court of London to enforce the decision of the expert which the parties had mutually agreed to be bound by.

2.10. Lack of Immunity

Another reason why ED is attractive to oil and gas experts is the lack of immunity which the expert has unlike other ADR such as arbitration and litigation, where the judges and arbiter have judicial immunity in relation to their acts or omission.[lxxvii] The fact that an expert lacks immunity and can be sued for negligence has been reaffirmed in plethora of cases.[lxxviii] This makes for more care. In PALACATH V FLANAGAN [lxxix] where it was held that the valuer will be open to a claim in negligence by the party which has lost out as a consequence of the negligence because he is neither an expert witness nor an arbitrator and cannot claim any immunity in relation to acts or omission performed by him. Also in ARESON V CASSON BECKMAN RUTLEY,[lxxx] it was held that a valuer who is not acting judicially is not immune from suit with respect to maters arising from the valuation and can be sued for negligence.

3. Reception of Expert Determination under Scottish Law

It has become clear under Scottish law that arbitration may not meet the needs of the parties in all the situations in which commercial disputes arise, leading to a better appreciation of ED. The practice of ED as an ADR mechanism has since developed such that matters of ED, valuation, certification cannot necessarily be a reference to arbitration.[lxxxi] The Scottish laws has been silent on this in the past. This part of this work is concerned with how, 'whether, and to what extent the Scots law recognised an ED.

In light of recent case law (including the Macdonald Estates case) Scottish law has drawn a distinction between arbitration and other forms of dispute resolution (ED) as different from each other each having its regime.

Thus, ED is now distinguishable from arbitration in the following sense;

What expert determination involves in any particular case will depend on the parties' agreement, and may differ according to the context.[lxxxii] There has been a corresponding development in language in Scotland that the use of the word 'expert' is not conclusive,

phrases such as 'acting as an expert and not as an arbiter' has become standard legal terminology, employed in countless commercial contracts.[lxxxiii]

Again, a person who sits in a judicial or quasi-judicial capacity, as an arbiter ordinarily does, decides matters on the basis of submissions and evidence put before him, whereas an expert, subject to the provisions of the contract, is entitled to carry out his own investigations and come to his own conclusion regardless of any submissions or evidence adduced by the parties themselves.[lxxxiv] His decisions are based on expertise and investigation of his own.[lxxxv]

Further, since sec 3 is applicable only to arbitrations,[lxxxvi] an expert determination cannot be appealed against by stated case; and, where such a right of appeal exists, the avoidance of stated case procedure may in practice be one of the principal reasons for agreeing on expert determination rather than arbitration.[lxxxvii]

ED does not apply to stated case procedure like in arbitration,[lxxxviii] Thus in Macdonald Estates case (para.21) it was stated that "the avoidance of stated case procedure may in practice be one of the principal reasons for agreeing on expert determination rather than arbitration. ED can be broadly distinguished from arbitration in not being judicial in character.[lxxxix]

Furthermore, expert is not entitled to immunity which an arbitrator enjoys,[xc] an expert does not act judicially but gives his decision on the bases of his skills and expertise,[xci] stay of proceedings under S.9(4)[xcii] does not apply to ED.[xciii]

Macdonald's case went further to state that (at para.22) "expert determination, understood as an alternative to arbitration, has taken root in Scottish legal practice, as a consequence of its attractiveness to the commercial community as a relatively quick and informal means of resolving matters of disagreement or potential disagreement".[xciv]

Notwithstanding these notable differences as stated above, it may be difficult to draw a boundary between ED and arbitration as most times, the terminology which the parties refer to their dispute clauses such as "expert'', arbitration", is not a conclusive proof of the ADR process which the parties intended.[xcv]

However In order to ascertain the parties intention as to the ADR process intended, the court will look at the terms of the parties contract, it is immaterial the terminology which the parties used.[xcvi] In MACDONALD'S CASE, the court while construing the wordings of the contract such as "independent expert", " the independent expert was to act as an expert not as an arbiter" etc. held that the parties intended an ED as such words are unusual in an arbitration.[xcvii] Also, the phrase that an expert is to act as an expert and not an arbiter has been held in plethora of cases to mean an inference to ED.[xcviii]

The role or function of the dispute settler: The court in Macdonald's case in reaffirming the decision in Holland's case,[xcix] held that if an expert is to give his decision based on his expertise that he does so not under a judicial capacity. It therefore follows that where a dispute clause requires a judicial enquiry, it is an arbitration, but where it doesn't require an enquiry, then it is an ED.[c] in same vein, Lord Esher in explaining the ordinary case of an ED stated that "if a man is appointed based on his skill to make a valuation, that he makes such valuation based on his knowledge and expertise and not as a judge, and therefore, such process cannot be an arbitration".[ci]

The effect of the Decision: The core reasons why parties commit their dispute to ED is to have a final and binding decision.[cii] Hence, if a procedure as set out in the parties contract does not lead to a final and binding result, then the system is not an ED.[ciii]in Macdonald V WILLIAM LIVING STONE,[civ] where in the parties agreed to be bound by the final decision of an expert account in respect of their account dispute except in cases of manifest error, the court in rejecting the 1st defenders contention that there was manifest error in the experts decision on the issue of life policy held that the fact that the expert settled the account wrongly does not override parties agreement to be bound by the experts decision; that for a challenge on manifest error to be allowed, it must be one that is obvious, clear and beyond reasonable contradiction, and as such, there was no prima facie evidence of manifest error adduced by the 1st defender. See also the case of REDDING PARK DEVELOPMENT case,[cv] the court held inter alia that although the expert had exceeded its jurisdiction in paragraph 67 of the 2nd determination, that such did not invalidate his entire decision since such an error was not material to make his entire decision a nullity.

4. Conclusion

From the foregoing, it can be said that oil and gas experts would prefer ED as a suitable means of settling their dispute based on the reasons adduced above in this work.

Further, notwithstanding that ED is a suitable ADR process for the oil and gas industry, parties to a contract who have chosen ED as a means of settling their dispute should not over burden the expert with procedures as this might deprive them of the essence of submitting to ED, which is to have a quick, cost effective, final, and binding decision.

Furthermore, it is important for parties to clearly state with certainty the ADR process which they wish to adopt in settling their dispute. This is because, parties are held by their contractual choice of dispute as held in the case of BARCLAYS BANK PLC V NYLON CAPITAL LLP,[cvi] and reaffirmed in the case of FRANK WRIGHT (CONSTRUCTION) LTD V FRODOR LTD, [cvii] to the effect that ''By agreeing to have their dispute resolved by ED, the parties are taken to have accepted the decision of the expert tribunal for better or worse with the attendant risks of error which are inherent in the ordinary weakness of a tribunal''.

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lvii. Halifax Life v Equitable Life [2007] EWHC 503 (Comm), [2007] 2 All ER (Comm) 672
lviii. [1953] 1 CH 590
lix. [2002] NSWCA 180
lx. Susan Blake ,Julie Browne, A Pratical Approach To Alternative Dispute Resolution(Second Edition Oxford Univerty Press 2012)
lxi. Steve Wilson etal, "Access to Justice: Final Report, English Legal System", (First Edition Oxford University Press 2014) p. 574
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lxiii. For example, production sharing agreement usually has a long term of 20- 30 years. See S. 77 of the Uganda petroleum (exploration, development and production) Act of 2013 which provided a period of 20years for production license.
lxiv. ibid
lxv. Nicholas Gould etal, "Dispute Resolution in the Construction Industry", (First Edition Thomas Telford Publishing, 1999).
lxvi. OWEN PELL (LTD) V BINDI (supra at n25).
lxvii. Pinsent Masons (n30).
lxviii. John Kendall et al (n19).
lxix. CEDR model Determination Agreement (as amended) London Cyc le Hire Scheme Agreement(August 2009) <http:www. http://m.tfl.gov.uk/cdn/static/cms/documents/lchs-schedule21-cedr-model-determination-agreement.pdf last viewed on 6/5/2014
lxx. AIPN 2002 Model Form of International Operating Agreement Optional Provision .Charloette J. Wright, Rebecca A. Gallum ,International Petroleum Accounting (First Edition Penwell Corporation 2005)
lxxi. Steve Wilson (n 19) 574
lxxii. ibid
lxxiii. Cooley UK LLP, " Expert Determination Clauses: Are Decisions Binding", (2008) available at> http://www.inhouselawyer.co.uk/index.php/contract/5548-expert-determination-clauses-are-decisions-binding> accessed 13th March 2015.
lxxiv. Robert Gaintskell, "Engineers Dispute Resolution Handbook", (First Edition Thomas Telford Publishing 2006).
lxxv. see the case of Owen Pell Ltd V Bindi London Ltd (supra at n25), where the claimant succeeded in bringing an action before the high court of London to enforce the decision of the expert which the parties had mutually agreed to be bound by.
lxxvi. Owen Pell Ltd V Bindi London Ltd, supra (n25)
lxxvii. In Scotland, under the mandatory rules (Rule 73-75) of the Scotland Act 2010, the arbitrator and its tribunal is immune from suit arising from the performance of his function, unless the arbitrator acts in bad faith, or where the liability arises from the arbitration resignation.
lxxviii. Palacath V Flanagan (1985) ALL ER 161, Sutcliffe V Thackrah (1974) A.C , Areson V Casson Beckman Rutley (1977) AC 405 , [1975] 3 All ER 901
lxxix. [1985] 2 ALL ER 161
lxxx. Casson Beckman Rutley (1977) AC 405 , [1975] 3 All ER 901
lxxxi. This was one of the rulings of the Lord Chancellor in Macdonald Estates Plc V National Car Parks Ltd (2009) CSIH 79A.
lxxxii. Arenson v Casson Beckman Rutley & Co
lxxxiii. Macdonald Estates Plc. (n54)
lxxxiv. ibid
lxxxv. ibid
lxxxvi. Arbitration Act 1996
lxxxvii. by Megaw LJ in Baber v Kenwood Manufacturing Co Ltd

lxxxviii. Under S. 3 of Administration of Justice Scotland Act of 1972, a provision which is now akin to Rule 41 of Scotland Arbitration Act 2010, while an appeal can be brought against an arbitral award on the basis of an error under Scots law , Rule 69 .
lxxxix. ibid
xc. Sutcliffe V Thackrah (supra at n42); Areson V Casson Beckman Rutley(supra at n42).
xci. Areaon V Areson (1977) AC 405, Re an Arbitration Dawdy V Hart Cup (supra at n48).
xcii. Arbitration Act of 1996.
xciii. Wilky property Holding Plc V London & Surrey Investments Ltd (2011) EWHC 2226(CH) to the effect that part 8 proceedings obtainable under S.9 (4) of the Arbitration Act of 1996 is not applicable to expert determination.
xciv. Macdonald Estates PLC (n54)
xcv. Macdonald Estates Plc V National Car Parks Ltd (supra at n57)
xcvi. Sean Ibbettson, Arbitration versus Expert Determination: the pros and Cons (2011) available at> http://www.bristows.com/articles/arbitration-versus-expert-determination-the-pros-and-cons> accessed 17th March 2015; David Wilson Homes ltd V Survey Services Ltd (2001) ALL ER (COMM)449: where the court held that a dispute clause is an arbitration because it contemplated a judicial inquiry and not by the terminology used,(per Long More L.J); Taylor V Yielding (1912)56 S.J 253@254: the court held that " you cannot make a valuer an arbitrator by calling him so and vice versa" (per Neville J).
xcvii. Ibid; Fraser Davidson, “Arbitration", (2nd edition, W. Green, Edinburgh, 2012
xcviii. Cott UK Ltd V Barber(1997) 3 ALLER 540 @ 548 (per lord Hegarty), Wilky property Holding Plc V London & Surrey investments Ltd (supra at n62)
xcix. Holland House Investments Ltd V Crabbe and Edment (2008) SC 619.
c. David Wilson Homes ltd V Survey Services Ltd (supra at n 65).
ci. Re an Arbi tration Dawdy V Hart Cup (supra at n48).
cii. Chris Makin, " Expert Determination: is it ADR", available at> http://www.dispute-mediation.co.uk/content/documents/ED%20-%20is%20it%20ADR.pdf> accessed 12th March 2015.
ciii. John Kendall etal (n 19).
civ. Findlay Macdonald, Peter McLean V William Living Stone & anor (supra at n16).
cv. Redding Park Development Company Limited V Falkirk Council (2011) CSOH 202.
cvi. Barclays Bank Plc V Nylon Capital LLP (2011) ECWA CIV 826
cvii. Frank Wright (Construction) Ltd V Frodor Ltd [1967] 1 WLR 407