

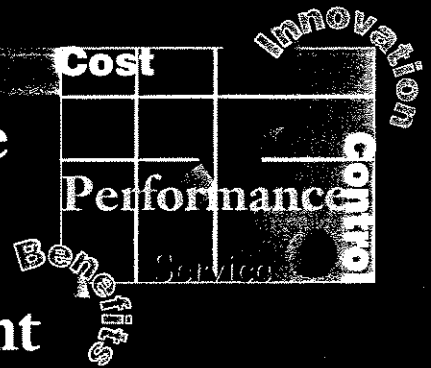
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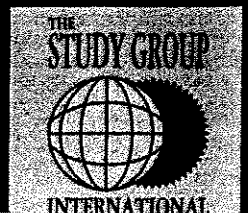


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WORLDWIDE INFORMATION

John Kendall, Expert Determination, 2nd Edition 1996, FT Law & Tax, London

Reviewed by Christopher R. Seppala, Partner, White & Case, Paris

Expert Determination by John Kendall, a litigation partner with Allen & Overy, London, is a fine book on an important new subject in the area of dispute resolution. Expert determination refers to a procedure whereby parties to a contract appoint a third party to decide issues between them by a decision which is final and binding on them. The third party, who is now commonly known in England (according to Mr Kendall) as an "expert", is the person who has normally been chosen for his expertise on the issues between the parties. Mr Kendall's book is reportedly the first systematic treatment of this subject under English law.

While expert determination has its origins in valuation (eg the valuation of, for purposes of sale, land, or shares in a privately-owned company), it is now increasingly used to determine all issues or disputes under a contract, in place of litigation or arbitration. An example is the role of the engineer in deciding disputes under the well-known FIDIC (*International Conditions of Contract for Civil Engineering Construction*). Under the FIDIC conditions, all disputes under the contract are to be referred to the decision of the engineer (who is appointed and paid by the owner or employer) as a pre-condition to arbitration. If the engineer's decision on a dispute is not challenged within a specified time period, thereby allowing it to be referred to arbitration, the decision becomes final and binding on the parties.

John Kendall's book is clear, well-organised and comprehensive. It is divided into 18 chapters, each of which is broken down into numerous sub-chapters, making

it very easy to use as a reference work for specific information (eg the differences between expert determination and arbitration), without the need to read more than necessary. The book includes as appendices, a series of precedents or models of expert determination clauses.

I would only take exception to his statement that 'Expert determination is not recommended in international contract'. While it is true that the decision of an expert may not be enforced as an award under 1958 New York Convention, and this limits the value of the procedure, expert determination has been used in the FIDIC conditions for 40 years. The procedure for the settlement of disputes by a panel of experts in the Channel Tunnel construction contract (which Mr Kendall in fact refers to) was based on the FIDIC disputes clause and is reportedly a great success. As a result of the experience with the Channel Tunnel and other construction contracts, FIDIC is now gradually replacing the traditional procedure for the settlement of disputes by the engineer with a procedure for the settlement of disputes by an independent adjudicator or dispute adjudication board – a practice already widespread (with variations) in domestic US and English construction contracts. This is likely only to reinforce the importance of expert determination in international construction contracts, at the expense, I believe, of international arbitration.

In conclusion, Mr Kendall's book is a unique work in a field of growing importance. It is recommended to all lawyers who desire to deepen their knowledge of international dispute resolution. **IHCI**