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# CORPORATE & COMMERCIAL ALERT

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### Expert determinations – “*final and binding*”?

The resolution of disputes by way of expert determination has for long been a useful and common contractual provision inserted in commercial agreements. Expert determination is an entirely consensual process in terms of which the parties to a contract agree to refer certain types of disputes that may arise between them for adjudication to an independent third party. The independent third party is typically, but not necessarily, an expert (but not an arbitrator) with recognised expertise in the relevant subject matter and is required to utilise his or her own industry knowledge and skills to adjudicate on the dispute.

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CLIFFE DEKKER HOFMEYR

## Expert determinations – “final and binding”?

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The resolution of disputes by way of expert determination has for long been a useful and common contractual provision inserted in commercial agreements. Expert determination is an entirely consensual process in terms of which the parties to a contract agree to refer certain types of disputes that may arise between them for adjudication to an independent third party. The independent third party is typically, but not necessarily, an expert (but not an arbitrator) with recognised expertise in the relevant subject matter and is required to utilise his or her own industry knowledge and skills to adjudicate on the dispute.

And given the recent Supreme Court of Appeals (SCA) judgment of *Seale and Others v Minister of Public Works and Others* (899/2019) [2020] ZASCA 130 (15 October 2020) which confirms that “agreements to agree” or to “negotiate in good faith” will essentially only be enforceable if there is a deadlock-breaking mechanism in the agreement, the use of expert determinations will no doubt continue to feature very prominently in this context.

The use of expert determination has gained considerable attraction due to the fact that it is generally a practical, informal and inexpensive way of resolving disputes between contracting parties whereby the parties are able to determine the nature of the disputes to be resolved as well as the procedure thereof. The inherent benefit of expert determination is that the parties are able to reach commercial certainty on a range of commercial and technical issues that could have otherwise resulted in the parties having to exhaust a considerable amount of funds and time

in referring those disputes to a more formal adjudication process. However, it is common for commercial agreements to provide for the use of both expert determination and other dispute resolution processes (such as negotiation, mediation and arbitration) conjunctively.

Parties will generally cater for a precise and narrow set of valuation or technical issues to be referred to the expert for determination. One such example can be found in commercial transactions whereby the parties agree that the valuation of shares sold under pre-emptive, forced sale or put/call options shall be referred to an independent expert for determination. Another example can be found in property related assessments whereby the parties agree that the market and/or fixed rental assessments shall be referred to an expert valuer for adjudication.

However, consider then what would happen where (i) an expert valuer or umpire is jointly appointed by parties to a contract and (ii) one of the parties is not happy with the expert determination and wants to have that determination set aside? Put differently, in light of the fact that the parties specifically catered for and elected to refer such dispute for adjudication to an independent expert, is it permissible for the courts to interfere with and set aside that determination? This was one of the more interesting questions dealt with in the recent SCA decision of *Transnet National Ports Authority v Reit Investments (Pty) Limited and Another* (1159/2019) [2020] ZASCA 129 (13 October 2020).

The facts applicable to the case are complex but essentially boiled down to a dispute between the parties as to the valuation of the rental property payable by

## Expert determinations – “final and binding”?...continued

The facts applicable to the case are complex but essentially boiled down to a dispute between the parties as to the valuation of the rental property payable by Reit to Transnet in terms of five long-term lease agreements entered into between them and Reit’s attempt to set aside the valuation of the property made by the independent expert valuator who was jointly appointed by them.

Reit to Transnet in terms of five long-term lease agreements entered into between them and Reit’s attempt to set aside the valuation of the property made by the independent expert valuator who was jointly appointed by them. Reit argued that ‘instead of determining the market value of the land, to which [the independent expert valuator] had to apply the contractually stipulated fixed percentage to establish the annual rental, [the independent expert valuator] determined (contrary to the terms of the contract) the market-related rental in respect of the properties’.

The clause central to the dispute between the parties that provided for a deadlock-breaking mechanism in relation to the determination of the rental by Transnet was worded as follows –

*“If [Reit] is not prepared to accept [Transnet’s] determination of the market value, it shall forthwith notify [Transnet] accordingly, whereupon the value shall be determined by sworn appraisal... Such appraisal shall be undertaken by a sworn appraiser to be selected by the parties jointly. If the parties cannot agree on one sworn appraiser, each party shall appoint one sworn appraiser to undertake the valuation jointly with the one appointed by the other party, and if these two appraisers cannot agree on their valuation, they shall jointly select a third as umpire, whose valuation shall be final and binding on the parties.”*

On the facts and evidence of the case, the SCA rejected Reit’s arguments and noted the following by restating previous precedents –

- I. *‘...a valuer...reaches his decision based on his own knowledge, independently or supplemented if he thinks fit by material (which need not conform to the rules of evidence) placed before him by either party. Whenever two parties agree to refer a matter to a third for decision, and further agree that his decision is to be final and binding on them, then, so long as he arrives at his decision honestly and in good faith, the two parties are bound by it...’*
- II. *‘...the power of the courts to interfere with an expert’s decision in review proceedings is severely circumscribed’*
- III. *‘...a valuation can be rectified on equitable grounds where the valuer does not exercise the judgment of a reasonable man, that is, his judgment is exercised unreasonably, irregularly or wrongly so as to lead to a patently inequitable result...This is also the position in respect of the referee’s report – it can only be impugned on these narrow grounds’*

The crux of the dispute, the SCA stated, was fundamentally whether the independent expert had acted in accordance with his mandate from the parties and, if so, whether his

## Expert determinations – “final and binding”?...continued

The crux of the dispute, the SCA stated, was fundamentally whether the independent expert had acted in accordance with his mandate from the parties and, if so, whether his determination was otherwise manifestly unjust.

determination was otherwise manifestly unjust. The SCA confirmed that the mandate given to the independent expert was in accordance with what both parties had ultimately agreed to and found it untenable for a court to interfere with the determination of the valuation in the absence of the independent expert straying outside of his mandate, acting in bad faith, dishonesty or in any other improper manner and reiterated that *‘it is now well established that an expert’s bona fide determination or award will not be lightly interfered with by the courts’*.

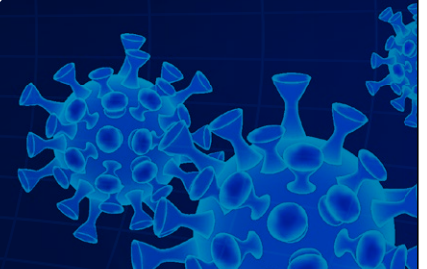
Where a party challenges a decision by an independent expert, the standard for setting aside such determination should be high, and rightly so. Ultimately, it was the parties, who by consensus and their own volition, elected to cater for the referral of such dispute for adjudication to an independent expert and must therefore

rely on the expert to decide on the matter and abide by that decision. Given this reminder in the Transnet case of the very high threshold that an aggrieved party needs to cross in order to set aside an expert determination, and the fair degree of subjectivity to which any valuation is susceptible (as also referenced in the Transnet case), parties should consider the extent to which their agreement needs to provide for exceptional circumstances under which either or both of them may “back out” of an expert determination which would otherwise be binding, and to have an ability to rescind the transaction, for instance by having caps and floors in the context of put and call option agreements. Absent such a provision, the expert’s determination would be binding save only for a patently inequitable valuation.

*Boipelo Diale and Yaniv Kleitman*

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## 2019 THE LEGAL DEALMAKER OF THE DECADE BY DEAL FLOW

**2019**  
**M&A Legal DealMakers of the Decade by Deal Flow: 2010-2019.**  
 1<sup>st</sup> by BEE M&A Deal Flow.  
 1<sup>st</sup> by General Corporate Finance Deal Flow.  
 2<sup>nd</sup> by M&A Deal Value.  
 2<sup>nd</sup> by M&A Deal Flow.

**2018**  
 1<sup>st</sup> by M&A Deal Flow.  
 1<sup>st</sup> by M&A Deal Value.  
 2<sup>nd</sup> by General Corporate Finance Deal Flow.  
 1<sup>st</sup> by BEE M&A Deal Value.  
 2<sup>nd</sup> by BEE M&A Deal Flow.  
 Lead legal advisers on the Private Equity Deal of the Year.

**2017**  
 2<sup>nd</sup> by M&A Deal Value.  
 1<sup>st</sup> by General Corporate Finance Deal Flow for the 6th time in 7 years.  
 1<sup>st</sup> by General Corporate Finance Deal Value.  
 2<sup>nd</sup> by M&A Deal Flow and Deal Value (Africa, excluding South Africa).  
 2<sup>nd</sup> by BEE Deal Flow and Deal Value.

## DealMakers

**2016**  
 1<sup>st</sup> by M&A Deal Flow.  
 1<sup>st</sup> by General Corporate Finance Deal Flow.  
 2<sup>nd</sup> by M&A Deal Value.  
 3<sup>rd</sup> by General Corporate Finance Deal Value.

**2015**  
 1<sup>st</sup> by M&A Deal Flow.  
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 Equity



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EMEA  
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