

Guide to expert determination

About this guide

This guide provides a summary of the way in which some disputes can be resolved through expert determination, and answers some of the most frequently asked questions about the process.

What is expert determination?

Expert determination is a procedure by which the parties to a dispute appoint an independent and neutral expert to determine the dispute in private. Like arbitration, it allows trade secrets and other sensitive information to be kept out of the public domain. The expert will be a person with specialist or technical knowledge relevant to the dispute.

Why choose expert determination?

Generally, expert determination is suitable where the dispute primarily concerns a valuation, or a technical matter, which requires an expert's opinion which a Court judge would normally be unequipped to deal with.

Expert determination is less suitable as a method of dispute resolution when the matters to be decided are likely to give rise to factual disputes which will require the consideration of a large amount of documentary and witness evidence. It is also less suitable when the issues at the centre of the dispute are legal, rather than technical.

In addition, the remit of the expert's powers will be limited to those specified in the expert determination clauses of a contract and this, allied to the lack of developed law on the procedures supporting expert determination, can lead to uncertainty, delay and further costs.

What are the differences between expert determination and other forms of dispute resolution?

Expert determination is a less formal procedure than litigation or arbitration. There is no statutory appeal procedure and, except in extreme circumstances, an expert's decision is likely to be final and legally binding. Expert determination can be attractive because it resolves the dispute in private and is generally cheaper, quicker and less formal than arbitration or litigation when suitably employed. It also allows the parties to continue their business relationship by resolving issues through what may be perceived as a less adversarial process. Expert's decisions and judgments are difficult to appeal or challenge through the Courts.

Unless it is agreed beforehand, experts will not have the power to award costs. The parties will usually bear their own legal costs and will also be responsible for paying the expert's costs. If the parties agree, the expert may conduct their own investigations into the dispute and can take anything relevant into account, but only within the bounds of what the parties have agreed. Agreeing the expert's terms of reference may not be straightforward. If an expert is negligent a party may be entitled to sue him for damages.

Who should the expert be?

Unlike in arbitration, the Court has no power to appoint an expert. Generally, the parties will agree an expert and his terms of reference. Sometimes the parties will instruct a professional body to appoint an expert (for example the Royal Institution of Chartered Surveyors).

How do I enforce an expert determination?

The parties will have agreed that the expert's determination will be final and binding on both parties and will be enforceable through the Courts in England and Wales.

In other jurisdictions, an expert opinion cannot usually be enforced without commencing a new action. Expert determination may therefore be inappropriate for international contracts in which overseas enforcement may be required.

Can an expert's opinion be challenged?

The parties should establish between themselves on what grounds, if any, the determination can be challenged. Unless they provide otherwise, the expert's decision can only be challenged in extreme circumstances, such as fraud, failure to follow instructions, manifest error or partiality.

About us

We are experienced in all types of dispute resolution and will be able to advise you as to the option(s) most appropriate for your circumstances. If you have any questions about this guide or any other matters please do not hesitate to contact one of the following members of our Dispute Resolution Group at disputeresolution@bwblp.com or

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