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REPRINTED FROM:
CORPORATE DISPUTES MAGAZINE
JUL-SEP 2017 ISSUE



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PERSPECTIVES

FOCUS ON EXPERT DETERMINATION – A VALUABLE TOOL IN THE ADR ARSENAL

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Anyone involved in the management and resolution of commercial disputes should be familiar with the wide range of dispute resolution options which are available over and above court litigation (or its established alternative, arbitration) and keep them in mind when drafting dispute resolution clauses in their contracts. The more traditional routes of litigation and arbitration may not necessarily be the most appropriate choice.

In addition, for those already involved in litigation or who intend to litigate, it is important to be aware that promotion of alternative dispute resolution (ADR) is one of the key ways in which the courts are trying to reduce the costs of the litigation process. The civil courts system in England and Wales is

experiencing a period of significant reform and the focus now, more than ever, is on litigating at proportionate cost. Parties should explore all options for settlement in the early stages of a dispute and respond promptly and constructively to any settlement approaches made by the other party. Failure to do so may lead to costs penalties.

While mediation is probably one of the most well-known of the ADR options, this article considers expert determination, which is a mechanism very frequently encountered in English law contracts but which can also be misunderstood. It is important for a party committed to expert determination to understand what it actually means.



What is expert determination?

Expert determination is an alternative process to court litigation or arbitration in which an appointed expert decides an issue (or issues) in a binding way. It is not to be confused with expert evidence, which is provided by an expert witness to assist a court or arbitral tribunal in relation to matters requiring technical or specialist knowledge. It is also not to be confused with adjudication (a dispute resolution method commonly used in the construction industry) or with arbitration itself.

In expert determination, the parties appoint an expert in the relevant field to reach a binding

decision on an issue which is often of a technical or legal nature. Traditional examples include a surveyor in relation to rent reviews or an accountant in relation to a share valuation, although it is commonplace now to find expert determination clauses in commercial contracts across a broad range of sectors. While the process can be used as a 'cheap and cheerful' way of resolving a fairly narrow, discrete, technical issue, it can also be used to resolve an entire dispute. Compared with litigation or arbitration, the process is generally more informal, quicker and cheaper. It can often be less adversarial, though that is not always the case. There is also no right of appeal from an expert's

decision, and opportunities to challenge a decision are very limited. Expert determination can therefore be an attractive option for commercial parties keen to reach a swift, final and cost-effective resolution, while preserving their business relationship.

A key feature of expert determination is that the expert's jurisdiction to decide a dispute derives from the contractual provisions which have been agreed between the parties. There is no standalone set of procedural rules to support the expert determination process, as there is with litigation or arbitration, and the courts are generally reluctant to interfere with the contractual bargain struck by the parties. This can be an advantage, because it provides the parties with the flexibility to shape the process themselves. However, it also means that very careful thought needs to be given to the drafting of the expert determination clause in the parties' contract (and the more detailed terms of the expert's appointment which are usually agreed separately). If there are gaps in the drafting or it is unclear or ambiguous, parties could find themselves wasting precious time and money in court in order to resolve areas of uncertainty.

Key issues for the parties to consider at the drafting stage include: defining what matters/disputes will be resolved through expert

determination; the trigger for expert determination (the clause may provide that the parties will seek first to resolve the dispute through negotiation, for example); how and by whom the expert will be

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appointed; the procedure to be followed (the parties could specify this, or it could be left to the discretion of the expert); whether the expert has the power to order parties to disclose documents; whether the expert is required to give written reasons for his or her decision; and whether the expert has the power to rule on issues involving interpretation of the parties' contract.

The English Court of Appeal confirmed in the 2011 case of *Barclays Bank plc v Nylon Capital LLP* that it is ultimately for the court, not the expert, to determine disputes in respect of the expert's jurisdiction. Even where a contract contains a widely-drafted, all-encompassing expert

determination clause (providing that any issue can be determined by an expert), the courts have said that there is no presumption in favour of resolution by an expert. The courts are especially wary of interpreting an expert clause so as to give the expert jurisdiction to deal with disputes as to the proper meaning of the contract. In *Persimmon Homes Ltd v Woodford Land Ltd* the court decided that it, not the expert, should decide disputes of contractual construction even though the expert was an eminent and experienced lawyer.

Experts' decisions are open to challenge in very limited circumstances so, jurisdiction issues aside, the court will only become involved if there has been fraud or collusion, bias on the part of the expert, or the expert has materially departed from his or her instructions. It is often said that an expert has jurisdiction to decide the right question wrongly, but does not have any jurisdiction to decide the wrong question at all.

Practical advice

Expert determination is a valuable tool. It may not be suitable in every case, but it offers flexibility, finality, and a cheaper, faster, commercial alternative to the more traditional dispute resolution options. The process can be what the parties want it to be.

The issue could be dealt with by the expert entirely on paper and without a hearing; or the process could effectively be run as a trial, with oral evidence and cross-examination. Parties should give very careful thought to this at the drafting stage. It is crucial for the expert determination clause to be clear, precise and unambiguous. If a jurisdiction point does arise, it is better to pause and have the point decided first, rather than proceeding with the determination only for it to result, potentially, in a wasted effort.

Finally, from a cross-border perspective, it is important to note that expert determinations cannot be directly enforced abroad but can be indirectly enforced in the same way as any other contract. The parties have agreed to be bound by the expert's determination of disputes and a breach of contract claim is available if they fail to do so. Care should be taken to ensure that an English judgment would be enforceable wherever the defendant (or their assets) are located. 



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