

Expert Determination – what is the benefit?

When framing the Civil Procedure Rules, Lord Woolf had the clear intention of encouraging parties in dispute to go away and settle their differences, perhaps with the help of trained professionals. We see this in **CPR Part 1 – The Overriding Objective**:

1.4(1) The court must further the overriding objective by actively managing cases.

1.4(2) Active case management includes-

(e) encouraging the parties to use an ADR procedure if the court considers that appropriate, and facilitating the use of such procedure...

Parties in dispute must, with their advisers, consider carefully the best method of resolving their differences, and it is wise to choose the dispute resolution method from the outset, when a contract is entered into. At one extreme is litigation: closely bound by statute and case law, with fixed procedures, and the decision taken by a judge allocated to the case. Once the process starts, the parties lose control; it's like dancing with a gorilla - the dance stops only when the gorilla chooses to let go. In arbitration, the parties have the choice of arbitrator; but again, once the process starts, the parties lose control. Mediation is at the other end of the spectrum: the parties choose the mediator, and stay in control throughout the process. The case settles only if the parties agree, and if it fails (few do!) their legal rights are intact, and they can still have their day in court.

Expert determination sits somewhere between arbitration and mediation, since the parties choose a determiner with the skills relevant to the dispute, and he then controls the process, but only on the terms agreed at the outset.

The expert determination process is controlled by contract, not by statute or case law. But the procedure tends to follow an established pattern, so that both sides feel that it has been fair. The claimant makes submissions to the expert, the defendant makes a response, and the claimant makes a counter-response. Each includes all the arguments which an advocate would use at trial, and submits all the relevant documents. Once the expert has considered the submissions and responses, possibly made his own enquiries and asked questions, and perhaps held meetings with the parties, his decision is issued once his fees are paid. The finding is normally "non-speaking" – that is, without stating reasons. That may seem disappointing after all the trouble taken to produce their submissions, but that is what the parties need – an end to the dispute.

So the determiner, as we have seen, is appointed either under a dispute resolution clause in a contract in case of a future dispute, or by agreement once a dispute arises. For example, in the sale of a company, it is normal for the vendors' and purchasers' accountants to get together and agree the completion accounts which will fix the price of the shares. The sale/purchase contract will typically provide, if they cannot agree, that an expert shall be appointed by the President of the Institute of Chartered Accountants in England & Wales. As with other professional bodies, the President has staff to deal with requests.

Even if no contractual clause exists an appointment can still be made once a dispute arises by agreement between the parties.

These briefly are the advantages of the process:

- Privacy: only the parties are even aware of the dispute

- Speed: a dispute could be resolved in as little as 30 days. I confess that one of mine lasted for seven years, but it was hugely complex, and one cause of delay was that we had to wait a few years for a decision on overseas trusts from the Tax Commissioners
- Choice: the parties can appoint the right expert to understand the problem
- Bespoke procedure: the parties and the expert can use a standard set of rules such as those published by The Academy of Experts, or adjust them for their particular needs, or even agree totally bespoke rules
- Final & binding: absent fraud or manifest error, there is no appeal against the expert's decision, which is what the parties need – finality
- Impartiality: the expert will act fairly
- Relationships: expert is a technical process, and far less likely to destroy business relationships than a hard-fought court case

Expert determination can be an effective alternative to going to court, and the parties can choose their expert and the detailed terms of his appointment. But after that, all must act under the contract they agreed at the outset. So it is less prescriptive than litigation or arbitration, but without the freeform nature of mediation. And quite soon the parties should see an end to their dispute, with a good chance that they will continue to do business together.

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