

# EXPERT DETERMINATION

In its simplest terms expert determination is a relatively quick, cost effective and binding method of dispute resolution. It is also hailed as being an informal process but, as I explore briefly in this article, establishing the rules for an expert determination is anything but an “informal” process.

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## THE NATURE OF EXPERT DETERMINATION

Expert determination is specifically suited to isolated disputes of a technical or specialist nature such as whether a piece of equipment is functioning in accordance with the specification or the valuation of works carried out etc. It is not suited to major disputes which have complex issues of causation and which require the review of large amounts of documentation and possibly the submission of witness evidence. Similarly, it is not suitable for disputes which are essentially of a legal nature or hinge on matters of contract interpretation.

Although the process is relatively fast and informal it is not to be confused with adjudication. Expert determination is a procedure founded in the contract between the parties by means of an express provision entitling the reference of a dispute or disputes to an expert or by means of an ad-hoc agreement. Unlike litigation, arbitration (the Arbitration Act 1996) and adjudication (the Construction Act 2009) there is no substantial body of case law or statutory provision that governs the procedure of an expert determination, the rights of the parties, the powers of the expert etc. These and other numerous related matters must be the subject of agreement between the parties either at the time they enter into the contract or as and when the matter is referred. I touch on a few of these matters below.

## THE APPOINTMENT

Some may consider it expedient to name the expert in the contract but such an approach could ultimately be self-defeating. It may transpire that at the time the dispute is referred the named expert may not be able to act for reasons such as illness, pressure of other work or conflicts which were not apparent at the time he agreed to be named. In the circumstances, and in the absence of a default appointment mechanism, the parties may face difficulties in getting a court to step in and appoint a new expert or stipulate the use of any particular nominating procedure.

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As a means of avoiding this scenario the express provisions should allow the parties to agree the name of the expert at the time the dispute is referred and if agreement is not reached within a stipulated timescale allow for application to be made to a nominating body such as the RIBA, ICE, IChemE, RICS or the IMechE etc.

## THE PROCEDURE

The procedure for managing the reference may be set out in the express provisions of the contract, which in turn refer to a separate set of rules or may be set out in the Terms of Reference (which is a document agreed between the parties at the time the matter is referred to the expert). The matters to be addressed include the timetable for submission of documents, the need for meetings, site visits, equipment testing, the date for the issue of the expert's decision etc.

It is not difficult to foresee the parties falling out once a dispute has arisen with the consequence that one of the parties may no longer see any benefit in an expert determination and may become obstructive. It is therefore preferable that the key issues of the procedure are set out in the express terms of the contract, leaving matters of detail to be determined by the expert. An expert has no statutory powers to compel the parties to comply with a timetable or set of procedures thus dragging a recalcitrant party through the process can be very time consuming and expensive. As this could be a very real prospect a solution would be to give the expert binding powers within the contract to finally determine the procedure, or at least those matters that are not already agreed within the express terms.

An example of a procedure and the depth of detail to be considered is the IChemE "Rules for Expert Determination", Fourth Edition, 2005.

## SCOPE OF POWERS

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It is an absolute pre-requisite to a speedy and cost effective expert determination that the expert's powers are clearly agreed at the outset. Whilst the Terms or Reference, or similarly named document, will deal with the specifics of the individual dispute and the exact matter to be determined by the expert it is the powers granted to him which govern the manner in which he reaches that decision and the type of decision he may make. For instance, does the expert have the power to make his own enquiries, to decide matters of fact, to order disclosure of documents, to decide on interpretation of the contract, to engage assistants, to revise or overrule the decisions of the architect, engineer or project manager etc.

Examples of the type of decisions an expert may be empowered to make are contained in Section 10 of the above IChemE Rules and include the power to:

- (i) order the payment of money and interest;
- (ii) order a party to do or refrain from doing something; and
- (iii) make an order for provisional relief.

With regard to the expert's power to overrule or revise the decisions of the project manager etc. matters to be considered are does the power apply to all decisions of the project manager or does it exclude those decisions of the project manager that are stated within the contract as being final and binding? Taking the point further does the expert, having overruled a decision, have the

power to award any cost or losses incurred by a contractor in compliance with the original decision?

If the expert's decision is said to be final and binding does this mean that a decision given by the expert in respect of an interim certificate of payment is binding upon all subsequent interim certificates and the final certificate? It is important to consider the implications of such a provision on all of the other provisions of the contract and to expressly deal with the same. Given that expert determination is designed to be final and binding (and thus exclude any future reference to arbitration or litigation) the parties may wish to limit or restrict the types of dispute that may be referred to the expert and may do so by expressly listing those types of dispute in the express provisions.

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