

Introduction

Expert Determination:

- is quick, inexpensive and confidential;
- is informal; and
- produces a binding result.

Expert Determination is used for a wide variety of commercial applications. The most commonly encountered are:

- commercial contracts;
- construction contracts;
- IT contracts;
- rent review;
- valuation of shares in private companies;
- price adjustment in take-overs;
- transfers of pension rights;
- long-term commodity supply contracts; and
- valuations of partners' interests in oil and gas field projects.

Expert Determination can be chosen as the method of dispute resolution either of:

- specific issues; or
- all disputes arising under a contract,

and it can be chosen:

- at the time of signing the contract; or
- later when a dispute arises.

Expert Determination differs from arbitration in its greater informality. Unless the parties agree that it should be, it is not subject to “due process” and can therefore be more flexible. In particular there is no need for a trial-type hearing.

Unless the Parties agree otherwise, the Expert may conduct investigations independently of the Parties, and make the Decision based on those investigations without reference to the Parties.

Parties should obtain legal advice when embarking on an Expert Determination, but do not strictly need to be legally represented during the procedure.

The expression “Expert” is much more commonly used to refer to expert witnesses. In Expert Determination, the appointed Expert makes the Decision, and is not in any sense a witness.

Expert Determination Agreement

Text in italics indicates where information has to be added.

Text in square brackets indicates where a choice has to be made.

Please refer to the guidance notes for commentary on and help with the completion of this Agreement.

Date _____

Parties

_____ (“Party A”)

_____ (“Party B”)

_____ (“Party C”) etc.

(jointly “the Parties”) *Add full names and addresses*

Trevor Harrison (“the Expert”)

The Old Bakery, Station Road, Groombridge, Tunbridge Wells, TN3 9NB, UK

Dispute

(“the Dispute”)

Here set out details of the contract(s) or other legal relationship(s) and brief details of the dispute(s) to be resolved by expert determination.

Appointment of Expert

1 The Expert is appointed to resolve the Dispute. The Parties agree that the Expert will resolve the Dispute by Expert Determination. The Expert will act as an expert and not as an arbitrator.

Purpose of Expert Determination

2 Unless the Parties subsequently agree otherwise, this Expert Determination leads to a decision (“the Decision”) being issued by the Expert. The Decision will be final and binding on the Parties.

Confidentiality

3 The Expert Determination process is private and confidential. The Parties and the Expert will keep it confidential except to the extent that it is necessary in order to implement the Decision or is required by law.

Independence

4 The Expert is independent of the Parties, neutral and impartial, and does not act as adviser to the Parties.

Conduct of Expert Determination

5 The Expert will conduct the Expert Determination in accordance with procedural directions which the Expert will seek to agree with the Parties. If they cannot be agreed, the Expert's directions will prevail.

Challenge to the procedure

6 The Parties agree that they [are/are not] permitted to challenge the Expert's rulings on issues arising during the procedure including those on the Expert's own jurisdiction.

Mediation option

7 At any time before the issue of the Expert's decision the Parties may agree to refer the Dispute to mediation in accordance with an agreed procedure. In that case each of the Parties notifies the Expert and the Expert Determination is suspended. If the dispute is settled by mediation, the Expert Determination comes to an end and the Parties settle the fees and expenses of the Expert. If the dispute is not settled by mediation, the Expert Determination resumes, and if he has been acting as mediator the Expert may take up his previous role.

Reasons in the Decision

8 The Decision of the Expert [shall/shall not] include reasons.

Interest

9 The Expert is empowered to award interest as part of the Decision.

Fees and expenses

10 Unless the Parties agree otherwise, the fees and expenses of the Expert Determination will be borne by the Parties in equal shares. The fees and expenses will be estimated by the Expert and paid to the Expert as a condition precedent for the Expert Determination to start. The Expert will be paid fees and expenses. Interim bills may be raised to cover the Expert's fees at the Expert's option. A final account of the fees and expenses will be sent to the Parties by the Expert when the Decision is ready for issue to the Parties and the Decision will be released on payment by the Parties of any further amounts due. If the Parties agree not to proceed with Expert Determination, the Expert will refund a proportionate amount of the fees and expenses advanced, depending on the amount of work done by the Expert.

Implementation of the Decision

11 The Parties agree to implement the Decision within [e.g. - seven] days of its being published to them.

Challenge to the Decision

12 The Parties agree they [are/are not] permitted to challenge the Decision in any legal proceedings or otherwise.

No liability

13 The Parties expressly acknowledge that the Expert shall not be liable to the Parties for any act or omission whatsoever in connection with this Expert Determination.

After the Decision

15 None of the Parties will call the Expert as a witness, consultant, arbitrator or expert in any litigation or arbitration in relation to the Dispute and the Expert will not act voluntarily in any such capacity without the written agreement of all the Parties.

Law and jurisdiction

16 This Agreement shall be governed by English law and under the jurisdiction of the English courts. All the Parties to this Agreement agree to refer any dispute arising in connection with it to mediation first.

Signed

On behalf of Party A _____

On behalf of Party B _____

[Signed on behalf of Party C _____]

Signed by the Expert _____

Guidance Notes

Essential Information

The Expert Determination Agreement includes the Parties to the Dispute and, of course, the Expert.

The section “Dispute”, when completed, sets out how the dispute arose with a brief description of the issue(s).

Paragraphs 1 and 2 establish the appointment of the Expert, that the process is Expert Determination, and that the result is a Decision, which will be final and binding on the Parties.

Paragraphs 3 and 4 establish the confidentiality of the process and the independence of the Expert.

The Procedure

Once appointed, the Expert will wish to establish the procedure. Paragraph 5 states that the Expert will seek to agree the procedure with the Parties and that if agreement cannot be reached, the Expert’s directions will prevail.

Procedural directions may deal with any or all of the following:

- a timetable for the submission of case summaries and supporting documents to the Expert with copies to each other;
- whether submissions are to be simultaneous or sequential;
- whether there should be one round or two rounds of submissions;
- whether the Expert has the power to call for documents; or
- whether the Expert has the power to award costs.

Challenge to the procedure

Paragraph 6 gives the Parties the choice whether they have the right to challenge the Expert Determination procedure before the Decision is issued.

Parties are strongly encouraged to give up this right. This enhances the use of Expert Determination, is in the spirit of ADR and allows the Expert to do the work for the Parties as agreed without the time and expense of court applications.

Mediation option

Paragraph 7 provides that the Parties may agree to refer the dispute to mediation at any time before the Decision is made, provided the fees and expenses to date are paid.

Reasons in the Decision

Paragraph 8 gives the Parties a choice as to whether to include reasons in the Decision. The inclusion of reasons increases the cost, but may make the resolution of the Dispute by this means more attractive and therefore worth the extra cost.

Interest

The Expert does not have the power to award interest unless the Parties agree, so paragraph 9 gives the Expert that power.

Fees and expenses

Paragraph 10 deals with fees and expenses, some of which are payable in advance.

Consequences of the Decision

Paragraphs 11 and 12 deal with the consequences of the Decision. The Parties agree to implement it within an agreed period, and have a choice whether to challenge the Decision. A Decision can be challenged only on very limited grounds arising from its fundamental validity, and not from differences on issues of fact, law or professional opinion. The effect of excluding the right to challenge a Decision is uncertain.

No Liability

Paragraph 13 gives immunity from liability to the Expert.

After the Decision

Paragraph 15 ensures that those involved in the Expert Determination do not get involved in future proceedings without the consent of all the Parties.

Law and Jurisdiction

Paragraph 16 establishes English law as the governing law of the Agreement, with disputes referred first to mediation and then to the English court. It may be necessary in international cases to provide that the language of the Expert Determination is to be English.

(This document is based upon the CEDR Model Expert Determination Agreement, October 2006)