

Insight

Insight provides practical information on topical issues affecting the building, engineering and energy sectors.

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Expert Determination of
Construction Disputes: The Pros
and Cons



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Kendall on Expert Determination defines expert determination as a means by which the parties to a contract jointly instruct a third party expert to decide an issue between them.¹²The classic use of expert determination, historically, has been for disputes such as rental disputes or share valuations. However, in the construction field it can be used very effectively for technical issues, where true expertise is required to reach a decision, or for valuation disputes where liability has already been determined.

Expert determination remains, however, one of the least used tools in the dispute resolution toolbox for construction disputes. This is despite the fact that, when used appropriately, it can be a cheap, quick and effective form of dispute resolution. The fact that there are very limited grounds indeed for appealing an expert determination can also be a benefit, although conversely the risks of that often put people off using it.

In this *Insight* we look at the pros and cons of using expert determination in the context of construction disputes and examine in what circumstances parties may want to think about using it in priority to the more common forms of dispute resolution such as arbitration, adjudication or litigation.

The Pros

Quick and cheap

Expert determination is a quicker and cheaper procedure than arbitration or litigation which can often take in excess of a year, even years, to reach a conclusion. Although the exact time limits will depend on what the parties have provided for within their contract, typical time limits are likely to be close to an adjudication timetable (i.e. a matter of a few months rather than years). However, given the existence of statutory adjudication for construction contracts, the quick timetable is arguably less of an advantage than it could be in other sectors. Equally this may also make it more useful in circumstances where the Housing Grants, Construction and Regeneration Act 1996 (the "Housing Grants Act") does not apply (for example, on pharmaceutical or nuclear projects).³

The shorter timetable (and the fact there is typically a panel of one expert for any given determination) also helps keep costs down. Unlike arbitration and litigation, where experts are often appointed by the parties to inform the Judge or arbitrators of their expert opinions, expertise is "inbuilt", with an expert determination again saving on costs.

Less likely to damage commercial relationships

It is generally thought that an expert determination is less likely to damage commercial relationships going forward than litigation or arbitration. This is due to a number of factors. First, the process is shorter and less adversarial generally. There is no requirement for a hearing and, indeed, having one is likely to be unusual. Second, it is also confidential so any dispute is not public (unlike the court process). Shorter timescales also mean expert determination is less suited to factual disputes. Although adjudication often proves just how much can be dealt with if it has to be in a limited period of time.

Obviously whether this actually turns out to be the case will depend on the parties' conduct as always with disputes.

Power to carry out investigations

Unless the parties restrict an expert in advance, an expert can conduct their investigations into the issue to be determined without being restricted to the parties' submissions as an arbitrator would be. Indeed, they may also not be obliged to refer the results of their investigations to the parties for comment (unlike an adjudicator or arbitrator).

For parties that want an expert to take the lead and guide them on what information may be required (especially on technical issues) this freedom to get on with and ask questions, carry out tests, etc. can be an advantage over arbitrators who are more restricted to what is provided to them by the parties.

Suited to technical disputes

By definition an expert should have the ability to know the right questions to ask and/or the investigations that may need to be undertaken in relation to technical disputes. Whilst litigation, arbitration or even adjudication typically have party appointed experts guiding a tribunal, the expert in an expert determination is one person with the knowledge to deal with the issue, resulting in not only saving time and costs but also, theoretically at least, in a more targeted and quicker process.

Confidentiality

For those seeking to keep their dispute out of the public spotlight then expert determination (like arbitration) is a useful option. It is also a more private procedure than adjudication due to the limited grounds for resisting the enforcement of a decision.

So what are the cons?

No statutory backup if things go wrong

Unlike arbitration, or indeed statutory adjudication, there are no statutory "backup" rules for expert determination along the lines of the Arbitration Act 1996 or the Housing Grants Act. It is purely governed by what the parties have agreed in their contract.⁴ This means that it becomes very important to get the drafting of any clause for providing expert determination correct.

That said, there are a range of institutions that provide their own rules which can be incorporated into the contract if required. Examples include:

1. The ICC's Expert Rules;
2. The LCIA's standard clause/rules;
3. The IChemE's rules;⁵
4. CEDR's Expert Agreement;
5. The Academy of Experts' Standard Rules.

If the parties do not lay down detailed rules for the expert then the expert can determine how they will proceed.⁶ This means that, for example, an expert is not able to order disclosure of material or compel witness evidence in the same way a Court or Arbitrator would be able to.

There is far less case law on expert determinations than on other forms of dispute resolution generally⁷ which can mean more uncertainty as to procedures. This means that it is even more important to ensure that the provisions within the contract between the parties providing for expert determination are drafted properly.

Less suited to factual disputes

Precisely because of the lack of ability to compel evidence from witnesses and disclosure, expert determination is less suited to very fact heavy disputes. These often require disclosure and detailed witness evidence to fully get to the bottom of matters. For those reasons, as well as the shorter

timescales for expert determination, these types of dispute are less suited to expert determination.

Limited grounds for appeal

There are very limited grounds for appealing an expert's decision. Depending on your position (and often whether you have won or lost) this can be both an advantage and a disadvantage.

In broad terms there are three main grounds for mounting a challenge:

1. The decision made by the expert has exceeded his jurisdiction and therefore the parties have not agreed to be bound by it;
2. The decision has been vitiated by fraud or dishonesty;⁸
3. The expert was biased in reaching his decision.

In relation to jurisdiction this will ultimately be a question for the courts to determine, although the expert may decide to make a preliminary decision.⁹ This is the case even where the contract provides that the expert can determine his own jurisdiction.¹⁰

In terms of what sets the expert's jurisdiction, this is a question of what has been agreed between the parties and will be down to interpreting the contract provisions and what the parties have referred to the expert. For example, some expert clauses refer particular types of dispute arising under the contract only. If one party has referred a dispute that does not fall within the clause then, absent the other side's agreement, the expert will not have jurisdiction. Further, there is no general assumption in favour of the resolution of all disputes by an expert in the same way there is for arbitration. Accordingly in *Permisson Homes Ltd v Woodford Lane Ltd*¹¹ it was held that an expert does not have jurisdiction to decide on the rectification of an agreement (in contrast to the *Fiona Trust*¹² decision on arbitration).

It should also be noted that unless the parties have made express provision for it, a decision cannot be overturned for manifest error. It would be binding

notwithstanding that. However, it is common for parties to expressly provide that a decision should not be enforced where there is a manifest error (defined as an error "that may easily be seen by the eye or perceived by the mind"¹³).

Finally, while there are only limited grounds for appeal against an expert's decision, experts can be liable in negligence to the parties who appointed them. This is because unlike an arbitrator they are not immune from suit for their conduct or decision¹⁴.

Confusion as to status

Parties providing for expert determination need to be careful that they don't use conflicting terminology that may open the door to one of the parties arguing that in fact "the expert" is an arbitrator or an adjudicator. If their drafting confuses the various different methods of dispute resolution (the classic being to provide that the expert shall act as an arbitrator), this opens the door to unnecessary and distracting disputes which won't get the underlying issues between the parties resolved. Particular care is therefore necessary when drafting expert determination provisions.

Summary

Expert determination is worth thinking about, including as an option for dispute resolution in construction contracts, particularly where there may be complex technical issues in dispute further down the line. Used properly it can provide a quick and relatively cheap method of dispute resolution that has a degree of finality (due to the limited grounds for appeal) that can prevent disputes running on for longer than necessary. The availability of adjudication has, perhaps, dented the need for expert determination in the construction sector. That said, for technical disputes in particular, the use of a true expert to run the process and make their own investigations can in certain circumstances still be potentially very useful.

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Footnotes

1. By Claire King. With thanks to Laura Bowler for her research.
2. See Clive Freedman and James Farrell, *Kendall on Expert Determination*, 5th edition (Sweet & Maxwell: London, 2015).
3. See section 105(2) of the Housing Grants Act.
4. See Julian Bailey, *Construction Law*, 2nd edition, vol. III, ch. 23.24.
5. See Rules for Expert Determination, *The White Book*, 5th edition (2016), for their latest update.
6. *Barclays Bank Plc v Nylon Capital LLP* [2011] BLR 614 at 623.
7. See Andy Cree and Catherine Piercy, "Expert Determination becoming more familiar", *Construction Law*, June 2016.
8. See Denning in *Campbell v Edwards* [1976] 1 WLR 403 at 407 where he states: "If there was fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything."
9. *Barclays Bank Plc v Nylon Capital LLP* [2012] 1 All ER (Comm) 912.
10. *Barclays Bank Plc v Nylon Capital LLP* [2012] 1 All ER (Comm) 912.
11. [2011] EWHC 3109 (Ch) at [21] – [22].
12. *Fiona Trust and Holding Corp v Privalov, Fili Shipping Co Ltd v Premium Nafta Products Ltd* [2007] UKHL 40.
13. *Dixons Group plc v Murray-Oboynski* (1997) 86 BLR 16 at 32.
14. See Julian Bailey, vol. II, ch. 10.176. See also *Sutcliffe v Thackrah* [1974] AC 727.

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