

Expert Determination



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What is an Expert Determination?

- Contractual referral to third party with particular expertise to decide an agreed issue
- Affords a quick decision
- Suited to narrow issues
- Usually less adversarial
- Contractually binding unless set aside

“Parties who refer a dispute to an expert must be taken to have recognised that mistakes may be made, both of fact and law, but they are prepared to take that risk because they place a high degree of confidence in their chosen expert.”

Moore-Bick LJ – *Premier Telecom Communications Group v Webb* [2016] BCC 439

Key Differences with Arbitration

- No statutory control or standard form rules
- No automatic stay of proceedings
- Expert uses their own skill and judgement
- Costs jurisdiction
- Decision is only enforceable as a contract

Practical Considerations

- Availability of pre-action disclosure under CPR r.31.16?
 - Cf. *Travellers Insurance Co Ltd v Countrywide Surveyors Ltd* [2010] EWHC 2455 (TCC) – binding arbitration agreement.
- Can the Expert decide a point of law?
 - Yes, if it is within the scope of the mandate
 - Questions on jurisdiction should be made before the Expert's determination:
Mercury Communications Ltd v DG of Telecommunications [1996] 1 WLR 48

Tips for Drafting – the Referral

- The issue to be determined
- Required qualifications/experience
- Appointment process
 - nomination of expert by professional body
- Duty to co-operate
 - *Cream Holdings Ltd v Davenport* [2011] EWCA Civ 1287

Tips for Drafting - Terms of Reference

- Procedural framework
- Power to order disclosure
- Whether expert is to give reasons
- Discretion to award costs or interest

Finality

Very limited grounds on which expert determination can be set aside

- Not acting within scope of instruction
 - *Jones v Sherwood Computer Services Plc* [1992] 1 WLR 277
- “In absence of manifest error or fraud”
 - *Veba Oil Supply & Trading GmbH v Petrograde Inc* [2002] 1 All ER 703
- Procedural unfairness
 - *Griffin v Wainwright* [2017] EWHC 2122 (Ch)

Summary of Advantages

- Expert will be chosen for their particular expertise
- Gives the parties more flexibility & control
- Quicker & cheaper than arbitration or litigation
- Finality
- Confidentiality

Thank you for listening

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