



Expert determination and forensic accounting

This practical perspective is intended for members of the ICAEW Forensic & Expert witness community new to the process of expert determination. Its aim is to provide an insight into this process and the role of the forensic accountant as expert determiner and/or adviser.

This practical perspective is not advice for acting as expert determiner and should not be used as such. It reflects an understanding of the current law of England and Wales as it relates to expert determination, based on research undertaken. This is not legal advice and should not be relied upon as legal advice, which, if required, should be obtained from a suitably qualified legal adviser.

The discussion below includes words and phrases common in the contexts of litigation and arbitration. However, expert determination is not subject to any pre-set rules or statutory involvement and is informal. The use of such words and phrases is for convenience of expression only and should not be interpreted as suggesting that any formality necessarily applies.

WHAT IS EXPERT DETERMINATION?

Expert determination is one of a number of private (confidential) dispute resolution methods. Together they are referred to as alternative dispute resolution (ADR). Other ADR methods include, in particular, arbitration and mediation.

These methods of ADR (including expert determination) are alternatives to court-based dispute resolution (litigation). They can offer the disputing parties a less costly process, a quicker result, privacy and control (the process requires parties' consent), including choice of the 'dispute resolver'.

In an expert determination an independent expert (the expert determiner) is jointly appointed by the parties to decide one or more issues between them. The process is based on a contractual agreement between the parties, who agree that the decision will be final and binding except in the event of fraud or manifest error.

Unlike an expert witness who assists the court or tribunal, the expert acting as determiner decides the matter.

OTHER FORMS OF ADR ARE DIFFERENT

Expert determination is different to the other forms of ADR. Indeed, whilst arbitration may appear similar, it is critically different. In England and Wales, arbitration is supported and controlled by the Arbitration Act 1996. Although there is much case law surrounding expert determination (and of course arbitration) there is no similar statutory involvement.

Unlike the arbitrator, the determiner is not immune from actions for negligence. In mediation, the mediator does not make a decision but helps the parties arrive at their own settlement.

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WHEN IS EXPERT DETERMINATION USED?

Expert determination is ordinarily used in relation to technical issues. The determiner is chosen for his/ her expertise in the relevant specialist area.

APPOINTMENT AS EXPERT DETERMINER

There are a number of ways expert determiner appointments are made. These include, for example:

- under a dispute resolution clause within a contract (e.g., a company 'Sale and Purchase Agreement') between the parties which pre-exists the dispute;
- under a company's Articles of Association; and
- by agreement between the parties after a dispute has arisen.

The parties jointly select and appoint the determiner. In the absence of agreement, they may seek to authorise the head of the relevant professional body, such as the President of the ICAEW, to select an expert from amongst its members to act as expert determiner and make the appointment on their behalf.

TERMS OF REFERENCE

Ordinarily and in outline, the expert determiner is likely to be required:

- to use his/her own specialist knowledge and experience to reach a decision based on his/her own investigation of the issues;
- to act 'fairly' and impartially; and
- to otherwise complete the assignment in accordance with the agreed terms of reference.

WHAT'S INVOLVED?

The expert determination process is informal. There are no procedural rules except for those agreed by the parties with the expert determiner. For example, the Civil Procedure Rules (CPR) issued by the Ministry of Justice (including Section 35, which relates to expert witnesses in court proceedings) and the 'rules of evidence', or some form of both, will only apply if it is agreed that they should apply.

Subject to the parties agreeing the powers of the expert determiner, procedural directions are likely. The process applied should reflect the needs of the case and the parties' requirements. At the initial stages, directions issued by the determiner may relate to, for example:

- disclosure of documentation;
- submissions; and
- timetable.

It should be noted that the submissions form part of the expert determiner's investigation and it will be for the expert determiner to decide how to use them. Typically, for the purpose of transparency and subject to confidentiality constraints, the determiner will agree to share any submissions received from one party with the other party.

The timetable may involve the setting of deadlines for exchange of submissions, the responses to those submissions and for responses to any requests by the expert determiner for further information and clarification. The timetable may be flexible, subject to the discretion of the expert determiner, to allow for circumstances arising which may affect adherence to it.

It is possible that the expert determiner may wish to meet with the parties on a joint or individual basis to obtain further information and clarification. Whilst there is no formal obligation on the expert determiner to share the results of any such enquiries of one party with the other, issues in respect of perceived fairness and impartiality may be seen as more likely to arise if they do not.

To ensure complete transparency in the process, it is generally best practice for expert determiners not to meet the parties separately, although there may be circumstances where an expert determiner chooses to hold separate meeting(s) with each party, in which case particular care must be taken. Where meetings are held, it may be appropriate for a detailed note of meetings to be prepared and agreed as being a fair reflection of the meeting.

In each individual case the conduct of the investigation will be a matter for the expert determiner and the parties and should be agreed at the outset. The parties may have agreed the determination procedure prior to the appointment of the expert determiner. Whilst the aim should be to give effect to the parties' intentions, there may be circumstances which require a departure from what the parties had initially negotiated between them. In such circumstances, to avoid this being a bar to the appointment as expert determiner, the terms of reference should be agreed at the start to arrive at a process where both parties are satisfied with the approach.

By way of contrast, an arbitrator, unlike the expert determiner, can only undertake an investigation if permitted by the parties and ordinarily must share the results with them.

The expert determiner may also be required to determine the allocation of certain costs of the process (usually limited to the determiner's own costs).

THE FORM AND CONTENT OF THE EXPERT DETERMINER'S DECISION

The decision is made in writing and may be by letter to the parties or in some other form of written notice to them.

In arbitration, under the Arbitration Act 1996, written reasons are ordinarily required unless the parties choose otherwise.

By contrast, unless it is agreed that they are required by the parties (and this is often the case), the expert determiner need not give reasons. The decision may simply provide a 'one line' answer(s) to the particular question(s). This can be referred to as a 'non-speaking' determination. However, for the purposes of maintaining a record, the expert determiner may have prepared a form of detailed report which the expert determiner privately holds on file, showing the evidence considered and the reasoning behind the determination. However, it is common for the parties to request a reasoned determination, sometimes simply so that they can understand the conclusion reached but it may be required for governance purposes at larger corporates.

ENFORCEABILITY OF THE DECISION

An expert determination decision is enforceable as a contract. Such decisions are therefore of an entirely different status to arbitration awards and court judgments. Arbitration awards and court judgments offer greater enforceability both domestically and internationally.

To support the enforceability of the decision, the expert determiner will need to ensure that the requirements of the engagement are met.

The nature of expert determination makes it relatively resilient to effective challenge, particularly where no reasons are given. However, the existence of numerous court cases in this area provides evidence that challenges are made.

Challenges can relate to issues involving, amongst other things:

- the appointment process;
- jurisdiction;
- nature of the appointment (e.g., is it an arbitration?);
- mistake (eg, failing to comply with remit);
- fairness;
- impartiality, collusion; and
- fraud.

WHAT IS FAIR?

Fairness in litigation and arbitration is founded on the principles (also referred to as rules) of natural justice. These are fundamental requirements of justice in deciding disputes between parties under these systems.

The Arbitration Act (Sec 33) makes reference to these rules as they form part of a mandatory general duty imposed on arbitration tribunals constituted under the Act. For the purposes of this practical perspective, the relevant provisions are:

- ‘... to act fairly and impartially as between the parties...’
- ‘... giving each party a reasonable opportunity of putting his case and dealing with that of his opponent...’

The second ‘limb’ represents ‘the doctrine of due process’.

Expert determination does not amount to either legal proceedings at court or arbitration proceedings.

Accordingly, there is no general requirement that the rules of natural justice should apply. Therefore, and in contrast with litigation and arbitration, there is no general framework for assessing the ‘fairness’ of procedures and the resulting decision. However, in principle, the requirements that the expert determiner should act fairly and impartially are standard.

Furthermore, it is noted that due process is not a general requirement of expert determination unless so agreed by the parties. Accordingly, ‘fairness’ does not necessarily mean that due process should apply.

In expert determination, ‘fairness’ in relation to procedure or the decision appears likely to be assessed by reference to the particular contractual circumstances in each case. This may also include consideration of the relevant commercial context in which the determination takes place.

THE ROLE OF THE FORENSIC ACCOUNTANT

Ordinarily, situations that members might come across where expert determination is chosen as the method of resolution may include disputes relating to:

- share/business valuation;
- completion accounts; and
- deferred consideration (corporate acquisition).

Since the expert determiner appointed in respect of these matters is likely to be an accountant selected for his/her relevant expertise, it is unlikely that the expert determiner will need other accountants as expert witnesses in connection with those matters.

However, it is possible that a determiner may inform the parties at the outset or during the course of proceedings that, subject to their agreement, he/she requires expert assistance in respect of key ancillary matters which are outside the scope of his/her expertise. These are typically for legal matters but might also include particular technical issues outside of the expert determiner's area of expertise.

ADVISER

An accountant engaged by a party as a forensic accounting adviser to an expert determination process may act in the background advising in relation to the content of that party's submissions and the responses to the submissions of the other party.

In view of the need to communicate technical matters, the instruction may also include preparing and presenting the submissions on behalf of the appointing party, and attending any meeting(s) with the expert determiner as may be required.

The engagement by a party as forensic accounting adviser, and also in a possible advocacy type role, is a private matter between that party and the accountant. The intended approach should be discussed and terms of reference agreed. Members would be advised to carefully consider any 'advocacy' requirement based on their skills and expertise in this regard, and seek to construct acceptable terms of engagement accordingly.

ETHICAL ADVICE

If you are ever in doubt as to whether or not your conduct is ethical, you should step back from the situation and analyse it. It often helps if you put your thoughts down on paper or take a second opinion. Section 100 of the Code of Ethics (paragraphs 100.16 – 100.20) includes a framework for ethical conflict resolution. This outlines a series of steps that can help you not only to identify the problem but also to resolve the ethical conflict. In resolving such ethical conflicts it is important that you make a file note to explain the rationale for your position. This will help if your conduct is later challenged.

ICAEW members, affiliates, ICAEW students and staff in eligible firms with member firm access can discuss their specific situation confidentially with the Ethics Advisory Service on +44 (0)1908 248 250, via webchat or via e-mail ethics@icaew.com.

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