



Expert determination in Irish dispute resolution

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Expert determination is a private and confidential method of dispute resolution whereby disputing parties appoint an independent expert (**the expert**) to determine an issue or issues in dispute between them.

This form of alternative dispute resolution (**ADR**) can be of particular value in cases involving a technical dispute where it allows the parties to have their dispute resolved by an individual with the requisite background knowledge to make the determination.

Expert determination is most commonly suggested as a form of ADR in the dispute resolution clause of a commercial agreement, for example in a share purchase agreement. This clause will generally provide that any dispute arising between the parties in relation to matters within the contract must be referred to an expert.

Each expert determination clause should be modified to suit the type of agreement concerned. Care must be taken when drafting these clauses as the scope of the expert's appointment, the process and even the name of the expert may be set out in the agreement. The process is based on the provisions of the contract / agreement and there is no legislative footing on which to fall back should anything be omitted in the drafting of the clause.

Unless the parties agree otherwise, the role of the expert is to produce a binding determination.

Ogier advises and regularly assist clients in drafting precise expert determination clauses tailored to specific agreements, ensuring that the scope of the expert's appointment, the process and all necessary details are clearly outlined. In addition, the Dispute Resolution team has significant experience in acting on behalf of clients engaged in an expert determination process.

| Expert determination versus arbitration

Expert determination is frequently used as an alternative to arbitration on the basis that it is quicker and more cost effective for the disputing parties

Although they are both types of ADR, they differ in several respects. Expert determination is a less formal process than arbitration and oral hearings are not required. The parties are free to agree the expert's terms of appointment to suit the nature of the dispute. Unlike arbitration, the expert does not operate a quasi-judicial function and should draw on their own experience in their field.

Appointment of the expert and the agreement

The expert is an independent party who is hired to act impartially to decide the issue in dispute. Experts tend to be specialists in a particular area that is the subject matter of the dispute and will often be named within the contract. If the contract does not name a specific expert, the appointment of the expert can either be done by a joint agreement between the parties or the parties can refer the appointment of the expert to an appointing body. The expert is normally selected based on their expertise in the area in dispute, for example, a valuation expert may be appointed to resolve a dispute over the value of shares in a share purchase agreement.

Experts are often conferred with wide powers under the agreement and will use their own experience and knowledge to reach the expert determination.

The terms of the agreement are agreed between the parties and the expert. The process is conducted in private and the determination usually remains confidential. The determination is not an enforceable court order but is binding as a matter of contract law. The expert's determination is final and binding on the parties except for limited circumstances as set out below.

Cost

Expert determination is quicker and less expensive than litigation or arbitration. The parties will normally be jointly required to make payment of the expert's fee which will depend on the nature, complexity and value of the dispute.

Procedure

Once appointed, the parties will have a preliminary meeting with the expert to discuss the issues in dispute, agree on how the process will work (including a timetable for submissions) and any other arrangements as may be required including the terms of appointment of the expert.

The expert may require the parties to deliver written submissions on the issues in dispute, instead of holding an oral hearing. The parties are at liberty to decide that an oral hearing is necessary, but this is rare. Once the written / oral submissions have been considered and any investigation conducted, the expert will produce a written determination. There are no witnesses in an expert determination. The expert is not entitled to make an award of costs in the determination unless the parties specifically agree to it.

Challenging the determination

Although the determination issued by the expert is final and binding, there may be a time period provided in the agreement whereby the parties can reject the determination in writing. If there is a rejection, the parties may wish to pursue litigation or refer the dispute to arbitration.

If the expert materially deviates from their instructions, the determination may be set aside. Similarly, if the expert makes an error in law or in fact or is guilty of fraud, there may be grounds for the determination to be set aside.

Conclusion

Expert determination can be a less expensive, highly effective method of dispute resolution. Its flexibility and lack of formality makes it an appealing process for parties who want a quick, binding decision on an issue(s) in dispute. However, there is risk of an unfavourable outcome against which there may be no appeal. Care should be taken in the wording of the reference to expert determination and / or in the terms of reference to the expert to ensure that the process entered into is what is envisaged by the parties.

How Ogier can help

Our Dispute Resolution team can provide expert guidance on crafting precise terms for expert determination. For assistance, contact our team via the details provided below.

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

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