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EXPERT DETERMINATION

A FANTASTIC RESOLUTION ALTERNATIVE FOR LONG-LASTING CONSTRUCTION DISPUTES

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Note: this article is fact and evidence based, not a legal opinion.

Dispute resolution cases, especially in construction, can take a very long time. This is often due to the amount, quality and complexity of the documentation involved which can make award process long and uncertain. The amount of time spent in such processes may be translated into large amounts of money spent until the award is obtained.

For the last 20 years, the so-called Alternative Dispute Resolution methods (ADRs) have been increasingly utilized in lieu of standard litigation. This is a phenomenon that is not a privilege of specific jurisdictions, it is arguably a widespread reality.

In the USA, for instance, the US Department of Justice issued a report on the comparison of ADR and Court-Ordered Proceedings showing the amount of time and money saved by ADR Proceedings. The results are staggering with USD 15 Million of Litigation or Discovery Expenses saved, 13 thousand days of attorneys saved and almost 2 thousand months of litigation avoided in 2017.

The most known and utilized method of ADR is the Arbitration. Other methods are Mediation, Conciliation, Dispute Boards, Adjudication, Expert Determination. In this article we will introduce the Expert Determination method as an ADR that is growing in popularity, globally, for several good reasons.

What is Expert Determination?

Expert Determination is defined by Chartered Institute of Arbitrators (CIARB)¹ as:

Expert determination is a private and confidential method of dispute resolution whereby disputing parties appoint an expert to determine a matter of fact, valuation or law, in a final and binding manner. Where an expert's decision is not binding but advisory, then this process is known as "Expert Evaluation".

This means that the parties can select an expert, which may be one person or multiple persons, depending on the case, to help the parties resolve their dispute, instead of going into litigation or other more expensive and long processes such as arbitration.

Why is this method less time-consuming?

This is not a regular litigation. After the Expert(s) has been appointed, the usual process is for the parties to present their cases to the expert(s) who will, then, analyze and issue the Expert Determination (expert opinion and decision about the dispute). There will not be multiple filings and rebuttals. It is all done at once.

Therefore, if you want to be successful in this method of ADR, you should have all your documents well organized and prepared for the Expert to review and consider in their decision process.

How to start an Expert Determination proceeding?

The parties can agree to utilize this method when a dispute arises, or this procedure can be defined in the contract from the beginning. There are even some multi-tiered clauses, that call for Expert Determination prior to Arbitration, for example.

Either way, once the parties decide to begin an Expert Determination proceeding, they can choose an expert jointly or refer the appointment to an appointing body. Many Chambers or Institutes of Arbitration, such as International Chamber of Commerce (ICC), CIARB, World Intellectual Property Organization (WIPO), The Academy of Experts (TAE), Resolution Institute, Royal Institution of Chartered Surveyors (RICS), Institute of Chartered Accountants in England and Wales (ICAEW), German Arbitration Institute (DIS), have rules and list of experts for this Proceeding.

The cost of the Expert Determination proceeding is split between the parties. This avoids conflict of interest for the Expert.

Parties with disputes who are looking for an alternative way to settle their case, especially for cases that require an expert witness can take a step back before going to litigation or arbitration and have their case at least “Expert Evaluated”.

CIARB provides examplesⁱⁱ of disputes that can go to Expert Determination:

- *Share valuation in private companies*
- *Valuation of businesses*
- *Valuation of property*
- *Measurement and rates in construction projects*
- *Rent Reviews*
- *Price adjustment and take-overs*
- *Transfer and valuation of pension rights*
- *Long term commodities supply contracts*
- *IT contracts*

Why choose Expert Determination?

As explained Expert Determination is faster, less costly, and expert oriented.

Pinsent Masonsⁱⁱⁱ cites:

Expert determination is a confidential and binding process that can offer an effective means of settling a technical issue or dispute. It is an impartial and flexible process.

The conclusion of Brian C. Willis^{iv}:

A baseline set of rules for expert determination will provide more predictability and speedier outcomes at lower cost, which is often the primary goal of parties seeking alternative dispute resolution in the first place.

Harvey j. Kirsh, C.Arb. also summarizes well its benefits^v:

Despite its informality, this procedure can produce a compelling, streamlined and cost-efficient resolution of a difficult technical issue, to the satisfaction of the disputing parties.

Like any other ADR, Expert Determination is not a critic free method, but it is definitely a method with proven track record of success and should be considered by parties pursuing a quick, technically fair and relatively cheap resolution for their disputes.

The author of this article has done a number of Expert Determinations and at CONEXIG we possess multiple Experts that can help you settle your case in a desirable fashion. Do not hesitate to contact us for further information¹.

ⁱ <https://www.ciarb.ie/services/expert-determination.236.html> visited on 16/05/2022

ⁱⁱ <https://www.ciarb.ie/services/expert-determination.236.html> visited on 16/05/2022

ⁱⁱⁱ <https://www.pinsentmasons.com/out-law/guides/expert-determination> visited on 16/05/2022

^{iv} <https://www.floridabar.org/the-florida-bar-journal/resolving-disputes-by-expert-determination-what-happens-when-parties-select-appraisers-accountants-or-other-technical-experts-to-decide-disputes/> visited on 16/05/2022

^v <https://adric.ca/the-use-of-expert-determination-in-resolving-construction-disputes/> visited on 16/05/2022

¹ All content on this article is intended for general information only, and should not be construed as legal or financial advice applicable to your particular situation. Before taking any action based on this article, you should consider your personal situation and seek professional advice.