



Expert Determination – Briefing Note

Disputes are a fact of life. Almost every transaction has the potential to produce disagreement. In the last two decades, however, we have seen a significant change in the way in which those disagreements are resolved. Increasingly, the court room is seen as a weapon of last resort and more and more disputes are settled by negotiation or more structured forms of alternative dispute resolution (ADR), such as mediation and expert determination.

Expert determination is a binding dispute resolution process which can be a highly effective tool for resolving disputes at a fraction of the cost and within a fraction of the time of taking a case through the courts or through a formal arbitration.

Although it used to be the case that expert determination was only used to resolve technical issues, this is no longer the case. The modern approach sees expert determination being used across the board, for disputes of almost any nature including those which turn on a technical issue and those which involve questions of contractual interpretation. More and more organisations are coming to realisation that expert determination is likely to be suitable for nearly all disputes that could arise under a service contract.

Of course, not every dispute will be suitable for expert determination; factual disputes which will rely heavily on oral evidence may not be suitable, but we consider this to be the only notable exception and these kinds of dispute will be few and far between in relation to service contracts.

We are confident, therefore, that the vast majority of disputes which arise under service contracts will be suitable for expert determination and by opting to include the expert determination provisions in your contract, you will provide a sure-fire way of shortcutting the litigation process and resolving the dispute.

Expert determination is not an alternative to negotiation, but rather a recognition that there are instances where negotiations can reach stalemate. It is often a good approach for public bodies which will invariably be minded to act reasonably and to have issues resolved quickly and fairly to minimise any disruption to public services.

Expert determination has many advantages over mediation, arbitration and litigation:

- The expert is usually a specialist with expertise and knowledge relevant to the dispute;

- The expert's determination is usually done on paper. The parties will make written representations but there is generally no need for a hearing or face to face meeting between the parties;
- The expert determination process is:
 - much cheaper and faster than arbitration or litigation;
 - less adversarial than arbitration or litigation (meaning the parties are more likely to maintain a positive relationship); and
 - confidential (meaning potentially unwelcome publicity can be avoided and reputations remain intact).
- Unlike mediation, the expert's determination is legally binding. This provides certainty for all parties and allows everyone involved to move on from the dispute.

Although it is possible to arrange an expert determination on an ad hoc basis (after a dispute has arisen), it makes much more sense to incorporate a provision for expert determination in the contract itself as this provides certainty for all parties. For that reason, the updated NHS Terms and Conditions (Contract Versions) now include an optional 'expert determination' provision.

As a final thought.... we have found that when parties are aware that unresolved disputes will be escalated to binding expert determination (which may or may not go their way), they are much more motivated to come to the table at an early stage to try to find a pragmatic way of resolving the dispute amicably before the expert determination process is triggered.

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