

RICS Hong Kong Dispute Resolution Professional Group

Independent Expert Determination

The role of an independent expert

Expert determination is a process in which an independent and neutral third party, acting as an expert rather than judge or arbitrator, is appointed to provide a confidential and binding determination of a dispute (as an independent expert or “expert determiner” – not to be confused with an “expert witness”). The independent expert’s appointment is governed either by the original contract between the parties, or by a post contract agreement. Such agreements often provide for appointment and rules prescribed by a nominating body, such as the RICS.

A chartered surveyor acting as an independent expert must have in-depth knowledge of the subject matter of the dispute (otherwise they are not an expert) and is free to make their own investigations. The duty of an independent expert is to make a proper and reasonable investigation and to arrive at a non-negligent decision, tested by what may be expected from the body of professional opinion. The independent expert may choose, or be so required by contract, to receive, and may take into account, evidence and arguments from the parties to a dispute, but, unlike arbitration, cannot usually be bound by them.

The expert is required to give each party a reasonable opportunity to be heard, and to respond to the other party. Usually the independent expert will receive written submissions from each of the parties, and subsequently may convene joint meetings or hearings as he deems appropriate. Following the conclusion of this process the independent expert will make his determination.

The independent expert’s decision, known usually as a “determination” is usually stated to be final and binding. Unless the parties expressly agree otherwise, the expert’s decision can only be challenged on limited grounds, for example, if the expert has answered the wrong question and/or there is evidence of fraud or partiality. There is some legal uncertainty as to whether a determination is final and binding in the absence of any express contractual term to that effect. Unlike arbitration, the independent expert does not, unless the terms of his/her appointment provide otherwise, have the power to determine who pays the costs. In most cases therefore each party will bear their own costs.

An independent expert should be able to:

- Base their determination upon their own knowledge and their investigations to discover the facts and all other information, including principles of law, relevant to the issues in dispute;
- Settle their own contractual terms with the parties, e.g. as to remuneration, extent of inspection, assumptions; and
- Carry out the whole of the expert determination by their self.

The advantages of independent expert determination

Expert determination has the following advantages over other methods of dispute resolution:

- It is particularly suited to disputes on discrete technical issues, for example, those requiring the expert input of an Chartered Surveyor, including disputes of quantum, valuation or quality of work and/or materials
- It is much cheaper, quicker and less formal than arbitration or litigation
- It is less adversarial and therefore can preserve business relationships
- The independent expert's decision can be final and binding

Working knowledge

There is no governing applicable ordinance in Hong Kong, but there is some case law in other jurisdictions concerning the appointment, and conduct, of a surveyor acting as an independent expert.

FURTHER REFERENCE

RICS practice standards – www.rics.org/guidance (accessible to RICS members only)

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Date of publication of this document: June 2010

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