

# Model Expert Determination Agreement

Including guidance notes



## **Introduction**

Expert Determination:

- is quick, inexpensive and confidential;
- is informal; and
- produces a binding result.

Expert Determination is used for a wide variety of commercial applications. The most commonly encountered are:

- commercial contracts;
- construction contracts;
- IT contracts;
- rent review;
- valuation of shares in private companies;
- price adjustment in take-overs;
- transfers of pension rights;
- long-term commodity supply contracts; and
- valuations of partners' interests in oil and gas field projects.

Expert Determination can be chosen as the method of dispute resolution either of:

- specific issues; or
- all disputes arising under a contract,

and it can be chosen:

- at the time of signing the contract; or
- later when a dispute arises.

Expert Determination differs from arbitration in its greater informality. Unless the parties agree that it should be, it is not subject to “due process” and can therefore be more flexible. In particular there is no need for a trial-type hearing. Unless the Parties agree otherwise, the Expert may conduct investigations independently of the Parties, and make the Decision based on those investigations without reference to the Parties. Parties should obtain legal advice when embarking on an Expert Determination, but do not strictly need to be legally represented during the procedure.

The expression “Expert” is much more commonly used to refer to expert witnesses. In Expert Determination, the appointed Expert makes the Decision, and is not in any sense a witness.

## Model Expert Determination Agreement

*Text in italics indicates where information has to be added.*

*Text in square brackets indicates where a choice has to be made.*

*Please refer to the guidance notes for commentary on and help with the completion of this Agreement.*

### Date

### Parties

\_\_\_\_\_ (“Party A”)

\_\_\_\_\_ (“Party B”)

\_\_\_\_\_ (“Party C”) etc.  
(jointly “the Parties”) *Add full names and addresses*

\_\_\_\_\_ (“the Expert”)

\_\_\_\_\_ (“the Assistant”)

Centre for Effective Dispute Resolution Limited (“CEDR Solve”) of IDRC, 70 Fleet Street, London EC4Y1EU

### Dispute

(“the Dispute”)

*Here set out details of the contract(s) or other legal relationship(s) and brief details of the dispute(s) to be resolved by expert determination.*

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### **Appointment of Expert**

- 1 CEDR Solve has appointed the Expert to resolve the Dispute. The Parties agree that the Expert will resolve the Dispute by Expert Determination. The Expert will act as an expert and not as an arbitrator.

### **Purpose of Expert Determination**

- 2 Unless the Parties subsequently agree otherwise, this Expert Determination leads to a decision ("the Decision") being issued by the Expert. The Decision will be final and binding on the Parties.

### **Confidentiality**

- 3 The Expert Determination process is private and confidential. The Parties, the Expert and CEDR Solve will keep it confidential except to the extent that it is necessary in order to implement the Decision or is required by law.

### **Independence**

- 4 The Expert and CEDR Solve are independent of the Parties, neutral and impartial, and do not act as advisers to the Parties.

### **Conduct of Expert Determination**

- 5 The Expert will conduct the Expert Determination in accordance with procedural directions which the Expert will seek to agree with the Parties. If they cannot be agreed, the Expert's directions will prevail.

### **Challenge to the procedure**

- 6 The Parties agree that they [are/are not] permitted to challenge the Expert's rulings on issues arising during the procedure including those on the Expert's own jurisdiction.

### **Mediation option**

- 7 At any time before the issue of the Expert's decision the Parties may agree to refer the Dispute to mediation, in accordance with CEDR's Model Mediation Procedure. In that case each of the Parties notifies the Expert and CEDR Solve, and the Expert Determination is suspended. If the dispute is settled by mediation, the Expert Determination comes to an end and the Parties settle the fees and expenses of the Expert and of CEDR Solve. If the dispute is not settled by mediation, the Expert Determination resumes, and if they have been acting as mediators the Expert and the Assistant may take up their previous roles.

### **Reasons in the Decision**

- 8 The Decision of the Expert [shall/shall not] include reasons.

### **Interest**

- 9 The Expert is empowered to award interest as part of the Decision.

### **Fees and expenses**

- 10 Unless the Parties agree otherwise, the fees and expenses of the Expert Determination will be borne by the Parties in equal shares. The fees and expenses will be estimated by CEDR Solve and paid to CEDR Solve as a condition precedent for the Expert Determination to start. The Expert will be paid fees and expenses. Interim bills may be raised by CEDR Solve to cover the Expert's fees at the Expert's option. A final account of the fees and expenses will be sent to the Parties by CEDR Solve when the Decision is ready for issue to the Parties and the Decision will be released on payment by the Parties of any further amounts due. CEDR Solve will reimburse the Expert. If the Parties agree not to proceed with Expert Determination, CEDR Solve will refund a proportionate amount of the fees and expenses advanced, depending on the amount of work done by the Expert and CEDR Solve.

### **Implementation of the Decision**

- 11 The Parties agree to implement the Decision within [e.g. - seven] days of its being published to them.

### **Challenge to the Decision**

- 12 The Parties agree they [are/are not] permitted to challenge the Decision in any legal proceedings or otherwise.

### **No liability**

- 13 The Parties expressly acknowledge that neither the Expert nor CEDR Solve shall be liable to the Parties for any act or omission whatsoever in connection with this Expert Determination.

### **Role of CEDR Solve**

- 14 CEDR Solve appoints the Expert. The Expert is responsible for the procedure from then on. CEDR Solve may be consulted by any of the Parties to this Agreement in case of difficulty. Should the Expert be unable to complete the task, CEDR Solve will appoint a substitute Expert within a reasonable time.

### **After the Decision**

- 15 None of the Parties will call the Expert or CEDR Solve (or any employee, consultant, officer or representative of CEDR Solve) as a witness, consultant, arbitrator or expert in any litigation or arbitration in relation to the Dispute and the Expert and CEDR Solve will not act voluntarily in any such capacity without the written agreement of all the Parties.

### **Law and jurisdiction**

- 16 This Agreement shall be governed by English law and under the jurisdiction of the English courts. All the Parties to this Agreement agree to refer any dispute arising in connection with it to mediation first.

**Signed**

On behalf of Party A \_\_\_\_\_

On behalf of Party B \_\_\_\_\_

[Signed on behalf of Party C \_\_\_\_\_]

Signed by the Expert \_\_\_\_\_

Signed on behalf of CEDR Solve \_\_\_\_\_

**Schedule**

CEDR Solve professional support fee	£	
Expert's fees	£	per hour
Payment to be made on account by each Party	£	by [date]

## **Guidance Notes**

### **Essential Information**

The CEDR Model Expert Determination Agreement includes CEDR Solve as well as the Parties to the Dispute and, of course, the Expert. The role of CEDR Solve is defined in paragraph 14 of the Agreement.

The section “Dispute”, when completed, sets out how the dispute arose with a brief description of the issue(s).

Paragraphs 1 and 2 establish the appointment of the Expert, that the process is Expert Determination, and that the result is a Decision, which will be final and binding on the Parties. Paragraphs 3 and 4 establish the confidentiality of the process and the independence of the Expert and CEDR Solve.

### **The Procedure**

Once appointed, the Expert will wish to establish the procedure. Paragraph 5 states that the Expert will seek to agree the procedure with the Parties, and that if agreement cannot be reached, the Expert’s directions will prevail.

Procedural directions may deal with any or all of the following:

- a timetable for the submission of case summaries and supporting documents to the Expert with copies to each other;
- whether submissions are to be simultaneous or sequential;
- whether there should be one round or two rounds of submissions;
- whether the Expert has the power to call for documents; or
- whether the Expert has the power to award costs.

### **Challenge to the procedure**

Paragraph 6 gives the Parties the choice whether they have the right to challenge the Expert Determination procedure before the Decision is issued. CEDR Solve strongly encourages Parties to give up this right. This enhances the use of Expert Determination, is in the spirit of ADR and allows the Expert to do the work for the Parties as agreed without the time and expense of court applications.

### **Mediation option**

Paragraph 7 provides that the Parties may agree to refer the dispute to mediation at any time before the Decision is made, provided the fees and expenses to date are paid, and that CEDR Solve will organise the mediation.

### **Reasons in the Decision**

Paragraph 8 gives the Parties a choice as to whether to include reasons in the Decision. The inclusion of reasons increases the cost, but may make the resolution of the Dispute by this means more attractive and therefore worth the extra cost.

### **Interest**

The Expert does not have the power to award interest unless the Parties agree, so paragraph 9 gives the Expert that power.

### **Fees and expenses**

Paragraph 10 deals with fees and expenses, some of which are payable in advance.

### **Consequences of the Decision**

Paragraphs 11 and 12 deal with the consequences of the Decision. The Parties agree to implement it within an agreed period, and have a choice whether to challenge the Decision. A Decision can be challenged only on very limited grounds arising from its fundamental validity, and not from differences on issues of fact, law or professional opinion. The effect of excluding the right to challenge a Decision is uncertain.

### **No Liability**

Paragraph 13 gives immunity from liability to the Expert and CEDR Solve.

### **Role of CEDR Solve**

Paragraph 14 explains CEDR Solve's role, in making the appointment and other arrangements, and collecting the fees and expenses.

### **After the Decision**

Paragraph 15 ensures that those involved in the Expert Determination do not get involved in future proceedings without the consent of all the Parties.

### **Law and Jurisdiction**

Paragraph 16 establishes English law as the governing law of the Agreement, with disputes referred first to mediation and then to the English court. It may be necessary in international cases to provide that the language of the Expert Determination is to be English.