

## Expert Determination Procedure 2014

*Approved by the Dispute Resolution Board of Engineers Ireland, 12 December 2014*



## Preamble

Expert determination tends to be defined by reference to arbitration both as regards what it is and what it is not. In addition in recent years there has been something of a move towards Expert Determination as an alternative to arbitration on the grounds it is generally quicker and cheaper as a process. As a consequence of that expert determination has tended to take on some of the characteristics of arbitration.

In writing this Procedure the approach has been to distinguish between the two processes and provide an expert determination procedure where an independent person, acting fairly and impartially, may decide an issue on a final and binding basis using that person's knowledge of the subject matter of the dispute. Thus unlike an arbitrator, the expert must have expertise in the area but, in making a decision, is not constrained by the procedural requirements of arbitration.

This Procedure is not intended to provide a form of fast track arbitration; that role is already fulfilled by the 100 Day Arbitration Procedure. However it is intended to provide a speedy and inexpensive resolution to a full range of commercial areas including construction as well as some of the traditional ones such as share valuation, rent reviews etc. In addition the process is suitable for use in conjunction with other forms of dispute resolution.

It is felt Expert Determination under this Procedure is appropriate where:-

- There is no, or no significant, dispute on the facts and thus no need for witness evidence and cross examination;
- The subject matter of the dispute is amenable to the expertise of the Expert which may be exercised at the initiative of the Expert without necessarily affording the parties an opportunity for comment; and
- The determination is of a discrete technical issue within the Expert's expertise such as whether an article is defective or the value of a service or item.

On the other hand arbitration is felt appropriate where there are issues of fact in dispute which are best resolved through oral testimony and/or where the parties feel it preferable that any arbitral award should only arise from an arbitrator's consideration of issues and arguments upon which the parties have had an opportunity to make submissions.

The attention of parties availing of this Procedure is specifically drawn to paragraph 4.2 where the default position is that the Expert is to give reasons for any determination. Such an approach may not always be in the parties interests since the giving of reasons will make a determination more susceptible to challenge; consequently the parties should consider carefully, whether in any specific dispute, that default requirement should be altered.

This document is being made freely available electronically on the Engineers Ireland website and is thus available to any person or party who feels it may be of use to them.

Ciaran Fahy  
Chairman, Dispute Resolution Board  
Engineers Ireland  
22 Clyde Road  
Dublin 4

December 2014

## 1.0 GENERAL

- 1.1 The purpose of this Procedure is to provide for speedy and efficient resolution of disputes by expert determination rather than by arbitration or any other alternative process. The parties may agree to use this Procedure before or after the dispute has arisen.
- 1.2 The determination shall be made by a person ("*the Expert*") and, unless agreed otherwise in writing, any determination by the Expert shall be final and binding on the parties.
- 1.3 The following definitions apply in this Procedure:
  - "*Agreement*" means the agreement in writing (whether by a clause in a contract or otherwise) between the parties to submit the Dispute to expert determination;
  - "*Days*" means calendar days less all public holidays established under the Organisation of Working Time Act 1997, and Good Friday;
  - "*Dispute*" means the issues in dispute between the parties which are referred to expert determination in accordance with this Procedure;
  - "*Expert*" means the person who has accepted appointment to determine the Dispute as Expert in accordance with this Procedure;
  - "*President*" means the current President of Engineers Ireland or any Vice President of the institution acting on behalf of the President;
  - "*Procedure*" means this Engineers Ireland Expert Determination Procedure 2014. If the Expert Determination Procedure 2014 has been amended, the version current at the time of the appointment of the Expert shall be used.

## 2.0 REFERRAL OF DISPUTE

- 2.1 Any party may commence expert determination by writing to another party in accordance with the Agreement and providing details of the Dispute.
- 2.2 This written notice shall include the following:
- Relevant contact details;
  - details of the Dispute and a demand that it be referred for determination by an Expert;
  - copy of the Agreement;
  - a proposal of one or more persons to act as Expert.
- 2.3 If the parties have not agreed on the choice of Expert within 21 Days of the written notice in rule 2.1 above, either party may apply to the President for appointment of an Expert. Such an application shall be set out in such detail as required by the President and accompanied by the appropriate fee.
- 2.4 The President shall, within 14 Days of receipt of the application, make the appointment and shall notify the parties and the Expert in writing of the appointment.
- 2.5 Once the person appointed, whether by the President or by agreement of the parties, has agreed terms and accepted, the Expert shall immediately write to the parties to confirm the appointment.
- 2.6 The parties agree the Expert is an expert in the subject matter of the Dispute.
- 2.7 The Expert shall determine the Dispute in accordance with this Procedure and shall not act as arbitrator, adjudicator or expert witness.
- 2.8 The Expert shall be independent of the parties, shall act impartially and shall treat the parties fairly. If any circumstance arises, which might reasonably call into question the Expert's independence or ability to act impartially and fairly, the Expert shall immediately notify the parties in writing. If both parties express dissatisfaction with the appointment, the Expert shall immediately resign. If only one of the parties raises issues about the Expert's independence or capacity to act impartially and fairly, the Expert shall, having consulted with the parties, determine whether to proceed or resign. Any such determination shall be final.
- 2.9 If the Expert resigns pursuant to Rule 2.8 or through any incapacity, a replacement Expert shall be appointed in accordance with this Rule 2.

### 3.0 PROCEDURE

- 3.1 The Expert shall, after consultation with the parties and in accordance with this Procedure, decide how the process is to be managed. The Expert may convene such meetings, whether physically, by teleconference / web-conference or otherwise, as the Expert feels appropriate to clarify the issues in dispute and to finalise the process and timetable.
- 3.2 If there is disagreement between the parties concerning the scope of the Dispute to be referred to expert determination, the Expert may make a determination on this matter after consultation with the parties. Any such determination shall be final.
- 3.3 The Expert may, after consultation with the parties, decide the method of communication to be used. Generally this will be in writing with all communications to and from the Expert copied to the other party and marked as such.
- 3.4 The parties shall cooperate with the Expert and comply promptly with any requests/directions from the Expert.
- 3.5 The Expert may:
- Rely on the Expert's own expertise in the subject matter of the Dispute;
  - initiate lines of inquiry which the Expert feels will assist in the making of the determination;
  - carry out such inspections or non-destructive testing as the Expert deems appropriate;
  - meet the parties separately or together to discuss any aspect of the Dispute.
- 3.6 The Expert is not obliged to:
- hold a meeting/hearing with the parties;
  - report back to the parties on the outcome of any enquiries or discussions provided for under Rule 3.5.
  - provide the parties with an opportunity to comment on matters the Expert may consider significant notwithstanding that these matters have not been raised by the parties.

#### 4.0 DETERMINATION

- 4.1 The Expert shall determine the Dispute without delay after receipt of the parties' submissions and the conclusion of any meeting/hearing.
- 4.2 The Expert's determination of the Dispute shall be in writing, signed and dated by the Expert. Unless otherwise agreed by the parties, it shall contain a statement of reasons for the determination in such form as deemed appropriate by the Expert.
- 4.3 The Expert may correct the determination for any clerical mistake, an error arising from an accidental slip or omission, a miscalculation of figures or a mistake in the description of any person, thing or matter or a defect of form. Any such correction shall be made within 10 Days of receipt of the determination by the parties.
- 4.4 Subject to any correction of the Expert's determination under rule 4.4, the Expert determination process shall conclude once the Expert has issued the determination to the parties.

#### 5.0 MISCELLANEOUS

- 5.1 The parties shall pay their own costs arising from the expert determination and shall share the costs of the Expert, together with any associated costs, equally on a joint and several basis.
- 5.2 The Expert's fees shall be reasonable and proportionate and the basis for such fees shall be set out and agreed in the Expert's terms at the outset. The Expert may hold any determination until all outstanding fees have been paid.
- 5.3 The Expert and the parties, including their advisers and representatives, shall maintain the confidentiality of the expert determination process and may not use or disclose to anyone outside of that process the Expert's determination, or any information received or obtained, except to the extent:
  - The parties agree otherwise in writing;
  - the information is in the public domain already;
  - disclosure is required for the purposes of any legal proceedings relating to enforcement of the Expert's determination;
  - disclosure is otherwise required by law.
- 5.4 The Expert shall not be liable to the parties or any person claiming through them for any matter arising out of or in connection with the expert determination

process or the way in which it was conducted and the parties shall not themselves bring any such claims against the Expert.

- 5.5 Engineers Ireland, together with the President, its servants and agents, shall not be liable for any act or omission in connection with any appointment made or any expert determination conducted under this Procedure.