Expert Determination
– is it ADR?

by CHRIS MAKIN

WHEN FRAMING THE Civil Procedure Rules, Lord Woolf had the clear intention of encouraging parties in dispute to go away and settle their differences, perhaps with the help of trained professionals. We see this in CPR Part 1 – The Overriding Objective:

1.4(1) The court must further the overriding objective by actively managing cases.

1.4(2) Active case management includes:
(e) encouraging the parties to use an ADR procedure if the court considers that appropriate, and facilitating the use of such procedure...

By far the most popular form of ADR is mediation, but is expert determination ADR? Let’s look at this process in more detail.

Expert Determination ("ED") is not arbitration. Both are private systems of dispute resolution leading to a binding result, but with differences. Expert determiners are subject to little or no control by the court, and from their decisions there is virtually no appeal, whereas arbitration is based on statute, and the court has extensive powers to overturn an unfair award. Case law on ED would fill a very slim volume! The arbitrator, like the judge, must base his decision only on the evidence presented, whereas the expert determiner can make his own enquiries and investigations, and does not even have to present his findings to the parties before announcing his decision.

Parties in dispute must, with their advisers, consider carefully the best method of resolving their differences. At one extreme is litigation: closely bound by statute and case law, with fixed procedures, and the decision taken by a judge allocated to the case. Once the process starts, the parties lose control; it's like dancing with a gorilla - the dance stops only when the gorilla chooses to let go. In arbitration, the parties have the choice of arbitrator; but again, once the process starts, the parties lose control. Mediation is at the other end of the spectrum: the parties choose the mediator, and stay in control throughout the process. The case settles only if the parties agree, and if it fails (few do!) their legal rights are intact, and they can still have their day in court.

ED sits somewhere between arbitration and mediation. The parties choose a determiner with the skills relevant to the dispute, and he then controls the process, but only on the terms agreed at the outset.

This is the fundamental difference: the ED process is controlled by contract, not by statute and case law. But the procedure tends to follow an established pattern, so that both sides feel that it has been fair. For many disputes the Rules published by the Academy of Experts (www.academy-experts.org) are suitable. Based loosely on the court process, the claimant makes Submissions to the expert, the defendant makes a Response, and the claimant makes a Counter-Response. Each includes all the arguments which an advocate would use at trial, and all the relevant documents. For very complex disputes, I have my own procedure whereby both sides make Submissions, Responses and Counter-Responses.

Once the expert has considered all of these, possibly made his own enquiries and asked questions of the parties, his decision is issued. The finding is normally "non-speaking" – that is, without stating reasons. That may seem disappointing after all the trouble taken to produce Submissions, but that is what the parties need – an end to the dispute.

How then is a determiner appointed? Either from a dispute resolution clause in a contract, in case of possible future dispute, or once a dispute arises. For example, in the sale of a company, it is normal for the vendors’ and purchasers’ accountants to get together and agree the completion accounts which will fix the price of the shares. The sale/purchase contract will provide that, if they cannot agree, an expert shall be appointed by the President of the Institute of Chartered Accountants in England & Wales. As with other professional bodies, the President has a secretariat to deal with requests, and I am frequently appointed as expert in such matters.

Or an appointment is made once a dispute arises. This, for example, is how I came to be appointed to determine the closing capital account of a solicitor who had retired, when his continuing partners could not agree his entitlement. These briefly are the advantages of the process:
- Privacy: only the parties are even aware of the dispute
- Speed: a dispute could be resolved in as little as 30 days. I confess that one of mine lasted for seven years, but it was hugely complex, and for example we had to wait a few years for a decision on overseas trusts from the Tax Commissioners
- Choice: the parties can appoint the right expert to understand the problem
- Final & binding: absent fraud or manifest error, there is no appeal against the expert's decision, which is what the parties need – finality
- Impartiality: the expert will act fairly
- Relationships: ED is a technical process, far less likely to destroy business relationships than a hard-fought court case

So is it ADR? Yes and no! It is an alternative to going to court, and the parties can choose their expert and the detailed terms of his appointment. After that, all must act under the contract they agreed at the outset. And quite soon they should see an end to their dispute, with a good chance that they will continue to do business together.

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