The Use of Expert Determinations to Resolve Sale and Purchase and Valuation Disputes

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Executive Summary

Expert determination (ED) is a form of alternative dispute resolution (ADR), offering a different way of resolving a dispute to the normal method of resorting to a court or arbitration tribunal. It can be a highly effective, speedy and cost-efficient way of resolving disputes of a technical nature by an expert in that technical field. It is fully accepted as a means of dispute resolution in the UK, US and certain other jurisdictions. In the UK, an expert may give his/her determination by way of a reasoned or non-reasoned (or non-speaking) award, although in civil law jurisdictions such as continental Europe, a reasoned award, along the lines of an arbitration award, may be the normal practice. Legal precedents in the UK provide that an ED is final and can only be overruled in the case of fraud or manifest error by the expert. There is a body of precedent in the UK which covers and supports the use of ED as a method of dispute resolution by non-lawyers.

Introduction

A method of alternative dispute resolution commonly used in the UK, US, Europe and many common law jurisdictions[1] is expert determination ("ED")[2]. This is the resolution of a dispute by an expert in the relevant technical field, who acts as an independent third party, rather than as a judge or arbitrator, to resolve a dispute. The parties in the dispute contractually agree with the expert to submit themselves to the process.

The process is used in a variety of sectors, including construction and infrastructure disputes, domain name disputes and land issues such as rent reviews. Our expertise is in the field of valuation and accounting and we concentrate in this paper on ED as a way of resolving such finance-related disputes.

We have both been involved in a large number of ED, both as expert and as party-appointed adviser. This paper is drawn primarily from our experience in these EDs. We also make reference to the regulatory framework and UK case law where relevant. The Institute of Chartered Accountants in England & Wales ("ICAEW")[3], the Royal Institution of Chartered Surveyors ("RICS")[4], the Academy of Experts ("TAE")[5], the Chartered Institute of

[1] The authors have seen the ED process successfully used in a privatisation dispute in East Africa. The matters in dispute concerned the valuation of items on the completion balance sheet. Interestingly there had been no provision made in advance for an ED procedure; nor was the procedure known in the country in advance of this case.

[2] Kendall on Expert Determination 5th edition, by Clive Freedman and James Farrell, Sweet & Maxwell 2015 - chapter 18 indicates that ED or a similar procedure is reasonably well established in the United Kingdom, Ireland, France, Germany, Belgium, Netherlands, Italy, Norway, Sweden, Ireland, Switzerland, Hungary, Australia, New Zealand, Singapore Kong, Kong, Malaysia, Indonesia, South Africa, India and Argentina.

[3] http://www.icaew.com/en/about-icaew/find-a-chartered-accountant/find-an-independent-expert.

[4] http://www.rics.org/uk/join/member-accreditations-list/dispute-resolution-service/about-dispute-resolution-service/.

[5] https://www.academyofexperts.org/alternative-dispute-resolution/what-expert-determination.

Arbitrators ("CIArb")[6], the World Intellectual Property Organisation ("WIPO")[7] and many other professional bodies each have members who commonly carry out EDs. These professional bodies have developed best practice guidance for the process. As an example, we include the ED rules of TAE in Appendix 1.

ED is used for disputes of a technical nature where the issues are principally over facts or the interpretation of industry or regulatory standards, rather than law. In such cases, it may be quicker and cheaper for the dispute to be resolved by an expert who understands and has experience of the relevant industry, rather than the issues needing to be interpreted by lawyers, assisted by experts, and presented to a judge or arbitration tribunal, who are not usually experts in the industry sector.

Martin Valasek and Frédéric Wilson have said that ED can be distinguished from arbitration as follows;

> *"A comparative study of decisions from around the common-law world suggests that two factors can usefully serve to distinguish arbitration from expert adjudication: the duty of an arbitrator to adjudicate between the competing arguments of the parties (without being able to rely on his or her own subjective opinion, as can an expert adjudicator) and the related duty to comply with rules of procedural fairness."*[8]

Expert Determinations Undertaken by Accountants

In the area of accountancy, ED is used particularly to resolve disputes involving a sale and purchase agreement ("SPA") and valuations. The consideration for the sale of a company may be based in part on the value of the items in the closing balance sheet or it may include an earn-out whereby the vendor is paid a deferred consideration determined by reference to the profits of the company in the years following the sale. In relation to such contracts, disputes often arise regarding the value of balance sheet items such as receivables, contingent liabilities, intangible assets, future tax liabilities and other items.

The purchasing company may change the structure of the successor business by merging it into an existing business or it may change some of the accounting policies of the acquired company to make them consistent with its own or to comply with International Financial Reporting Standards ("IFRS") or US or UK Generally Accepted Accounting Principles ("GAAP"). A completion balance sheet prepared using new accounting policies may differ from that using the old accounting policies and the profits of a restructured business may likewise differ.

The other area in which accountants are used to make EDs is in business and company valuation. This may be in connection with the sale of the whole company or the valuation of the shareholding of a minority shareholder. These disputes may focus particularly on different expectations of the future profitability of the company, and differences of opinion over discount rates or the applicability of minority discounts.

[6] http://www.ciarb.org/dispute-appointment-service/expert-determination/what-is-expert-determination.
[7] http://www.wipo.int/amc/en/expert-determination/rules/index.html.
[8] http://arbitration.oxfordjournals.org/content/29/1/63.

An ED proceeds by way of a contract between the parties and the expert. The parties agree to appoint an expert to determine particular carefully-defined issues, and the parties also agree to be bound by the determination.

One critical part of the ED process is the inclusion in the expert's terms of engagement of a contract term that the expert is appointed as an expert and not as an arbitrator. The result of this is that the determination will be final and binding on the parties. We consider what this means below by reference to the case law. The vast majority of determinations by experts are accepted by the parties.

The Operative Clause

We set out below a common wording seen in a contract regarding the appointment of an expert to determine matters in dispute:

> *"If there are any matters in dispute between the Purchaser and the Sellers which have not been resolved in good faith within a period of 30 days after the end of the Review Period, then the matters remaining in dispute shall be referred at the election of either party for determination to a partner of at least 10 years qualified experience, with experience of acting as an expert, at a mutually acceptable firm of internationally recognised chartered accountants or, if no such partner is able to act, by an independent firm of internationally recognised chartered accountants to be selected, on the application of either of the Purchaser or the Sellers, by the President for the time being of the Institute of Chartered Accountants in England and Wales, who shall be instructed to notify both the Purchaser and the Sellers of his determination within 30 days of such referral, or as soon as practicable thereafter. The selected person shall for the purposes of this Schedule be referred to as the "Expert".*

It is critically important that both parties agree to the appointment of the expert and to the terms of his/her appointment, as this governs the expert's ability to make a binding determination. For example, in the case of *Cream Holdings Ltd v Davenport*[9] , Mr Davenport rejected the terms of appointment of two separate experts who had been appointed by the President of the ICAEW. The first expert firm commenced work on the basis that it had been "chosen" by the President of the ICAEW; however, Mr Davenport rejected its valuation, and the Court of Appeal held that the expert had not been validly appointed because there had to be a tripartite agreement on his terms of engagement. The President of the ICAEW appointed a new expert, but it was only after a further decision by the court of first instance and the Court of Appeal that the expert was able to go ahead and start the ED process.

While the expert may have been validly appointed by a professional body, that appointment will be no more than naming of the expert. Issues such as the remuneration of the expert and acceptance of the expert's business terms and conditions will not have been dealt with; further, the appointment letter will need to clarify exactly what is to be determined. The expert will not be able to commence work until a tripartite agreement dealing with these matters is in place.

[9] *Cream Holdings Ltd v Davenport* [2011] EWCA Civ 1287.

The *Cream Holdings Ltd v Davenport* case also illustrates the tension that can arise where an expert is appointed by a professional body in accordance with the contract, but one party does not accept his/her appointment. The appointment is valid, but the expert may need to seek judicial support before taking up his/her appointment.

Some contracts may include a timetable for the ED that is unachievable and does not give the expert sufficient time to carry out a fair process. In our experience, parties have generally been prepared to compromise and agree to vary the timetable to agree to the expert's suggestion. However, in the absence of such agreement, the expert will be bound by the timetable in the agreement, absent any court or tribunal order varying the timetable.

The Involvement of Lawyers

Before moving on to consider first the professional guidance and second how the process works in practice, we consider the role of lawyers in the process and compare this to arbitration.

First, as the expert is not generally a lawyer[10], there is normally no need for lawyers to be involved at all. However, often clients have instructed their lawyers to assist them to resolve the dispute and it is the lawyer who has recommended the client to refer the dispute to ED, or is advising the client throughout the process. In our experience, lawyers are often involved in four areas:

1. The appointment of the expert and agreeing the terms and scope of his/her determination. This is a critical stage - the expert is only able to determine the issues which have been agreed in the letter of appointment as being the issues in dispute, and the issues to be determined need to be agreed by both parties before the expert can start work. The normal practice is for both parties and the expert to sign the letter of instruction of the expert before the expert commences work.
2. As noted above, an issue can arise where the contract provides for the expert to be appointed, for example by the President of the ICAEW, but where one party does not want to participate in the process. One of the authors has been involved in a process (as party-appointed adviser) where one party refused to take part in any way in the appointment of the expert, the settling of the expert's terms and providing submissions and evidence to the expert. Navigating the refusal by one party in this way is a task to be undertaken by legal advisers, as can be seen by the decision in *Cream Holdings v Davenport* referred to above. (We deal later on with how far the expert can resolve these matters.)
3. During the process, the parties may or may not want their lawyers to remain involved. In our experience, clients may either decide to conduct the entire process themselves, or they may instruct other accountants to act for them in making submissions to the expert, or they may instruct either solicitors or barristers to make their submissions for them (or they may instruct both an accountant and a lawyer). The role of the lawyer during the process is thus to act as an advocate for their client before the expert, to monitor the extent to which his/her client and the other party are abiding by the agreed process and to be aware of any issues where the expert may potentially be stepping outside his/her agreed scope.

[10] In fact, one other area in which ED is used is disputes on particular issues of law, such as foreign law, or the interpretation of a particular clause in a contract. In such cases, it would be normal for the expert to be a lawyer.

4. Finally, the parties will usually want their lawyers to review the expert's determination. If they are unhappy with the determination, they may wish their lawyer to consider whether there are any grounds for challenging the determination – although as will become apparent, such grounds are rare and it is difficult to challenge the result. As the ED is a contract between the parties, any challenge to it would generally need to be made to an arbitration panel or the High Court in accordance with the dispute resolution procedures in the underlying contract.

Comparison with Arbitration

It is standard practice for the expert to include in the letter of appointment a clause stating that the appointment is to act as expert and not as arbitrator. A standard appointment clause is, thus, as follows:

> *"Pursuant to agreement between the Parties, x is appointed as the Expert to determine matters relating to this matter. His/her appointment will be as expert and not as arbitrator, and the Determination will be final and binding on both Parties."*

This clause is included to ensure that the appointment, process and any decision are not subject to any challenge under local arbitration law, for example the Model Law or, in England, Wales and Northern Ireland, the Arbitration Act 1996. The Arbitration Act 1996 provides for challenge in the case of:

a) the substantive jurisdiction of the tribunal;
b) serious irregularity affecting the tribunal, the proceedings or the award; or
c) a point of law[11].

However, experts have developed practices that are similar to arbitration (and other formal dispute resolution processes) which can be seen in the context of the principles of natural justice such as the impartiality of the expert, hearing both sides and having a transparent process.

Therefore experts seek to ensure they have no conflict of interest either in having an interest in the outcome of the dispute, or by way of some relationship with one of the parties.

Other practices commonly used are:

- all substantive communications, both on the substance of the dispute and on the administration of the process, are communicated simultaneously to both parties; and
- if a party requests an oral hearing or a conference call, both parties are present and are involved in the planning of the oral hearing. Whereas arbitrations normally proceed by way of the issue of procedural orders as to, for example, the date for a pleading to be filed or the length of hearing, experts do not normally reserve themselves powers to issue procedural orders; rather the process between the expert and the parties is consensual.

A further key difference is the oral hearing. While a key element in the arbitral process is the oral hearing, with submissions and examinations of witnesses, in EDs oral hearings are not

[11] Arbitration Act 1996, clauses 67 to 69.

that common and examination of witnesses is highly unusual. The determination process is essentially paper-based.

Determinations, like arbitral awards are in writing and include details of the scope and jurisdiction of the appointment, a summary of the submissions by the parties and the expert's determination of all the issues he/she was appointed to determine.

One further key difference with arbitration emerges here. There are three forms of determination commonly used by experts:

- non-reasoned (or non-speaking);
- reasoned; and
- fully reasoned.

Which form is used must be agreed in advance with the parties. Only the reasoned determination, which may follow a similar structure to an arbitration award (although it will typically be shorter), bears any relation to an award or judgment in other formal dispute resolution processes.

The non-speaking determination is, in our experience, becoming less common. In the past it had been common for the expert simply to provide, for example in the case of a valuation of shares, a single figure as his/her determination with no explanation as to how the figure has been reached. Parties increasingly want some form of explanation - hence the use of reasoned determinations.

Extent of Use

To give an idea of the extent of use of EDs in financial matters the tables below show the number of applications to the President of the ICAEW and the subsequent appointments over the last four years and the applications to the RICS scheme over the past three years. In addition to the figures shown below, a large number of EDs are simply agreed between the parties and consequently the overall number of EDs in the UK is considerably higher than this.

Table 1: Applications for ED to the President of the ICAEW and subsequent appointments made

Year	Applications received	Appointments made
2013	49	41
2014	49	43
2015	53	42
2016	49	34

Table 2: Applications to the RICS scheme

Year	Applications received
2014	1,166
2015	1,310
2016	1,345

Outline of a Typical ED Process

Choosing the Expert

The ED process begins with the choice of the expert. Where possible, the expert is chosen and appointed by agreement between the parties. For example, the forensic accounting teams at the large accounting firms and boutiques tend to know each other, and they may recommend an expert from one of the other firms who they know has experience and a strong reputation for acting as an independent expert. Proposed experts also need to ensure they are conflict free and able to take on the work.

Where the parties are unable to agree together on an expert, the sale and purchase or other agreement typically includes a provision for the expert to be appointed by the President of the Institute of Chartered Accountants in England and Wales (the "ICAEW") or the Royal Institution of Chartered Surveyors ("RICS")[12] or a similar body. In this case the appointer chooses an expert and, subject to conflict, the parties have no further say in the choice and are therefore unable to challenge the appointment.

The ICAEW has a secretariat which chooses a suitable expert, based on the nature and size of the dispute, the industry concerned and any other specific requirements[13] (for example, in a large cross-border dispute we worked on, the contract provided for the expert not to come from one of the countries of the parties to the dispute).

The Terms of the Appointment

Once chosen or appointed, the expert negotiates his/her terms of engagement and agrees the issues in dispute with the parties. It is common for the expert to draft the terms of engagement based on a standard template, and then to sign a letter of engagement with both parties; this commonly also includes the procedures he/she will follow in the process. Whilst this process should be simple, as the parties should decide what it is that they want the expert to determine before referring the issue to the expert, this process can be very protracted and a reluctant party may decide deliberately to disagree with the issues submitted to the expert, thereby delaying the start of the procedure[14].

The actual process adopted by the expert is completely flexible, and has to be agreed by the parties and the expert before the appointment is finalised. The Academy of Experts ("TAE") has developed its own recommended structure, which we include as Appendix 1[15].

[12] Details of the RICS scheme can be found at http://www.rics.org/uk/join/member-accreditations-list/dispute-resolution-service/about-dispute-resolution-service/.

[13] See, for example, details of the ICAEW scheme, at http://www.icaew.com/en/about-icaew/find-a-chartered-accountant/find-an-independent-expert.

[14] In one case we worked on, which was a dispute between two large multinationals, we took a draft of our letter of instruction to an initial meeting of the parties, and managed to agree the terms, print the letter of instruction and get it signed by both parties at the initial meeting, thus saving a lot of potential discussion and disagreement.

[15] Appendix 1 - http://www.academyofexperts.org/system/files/documents/ed_rules_booklet.pdf. The ICAEW's rules for ED are based on TAE's rules.

The standard template acts as the starting point for negotiations, and it may be varied according to the needs of the parties, the size and number of items in dispute, the parties' desired timetables, the expert's preferences and any other issues which one party regards as particularly important (assuming that the other party accepts these issues).

As it is important for the expert to retain complete impartiality during the process, he/she will normally copy both parties in on all correspondence and will forward all submissions received from one party to the other party[16]; consequently, in the past, the expert would request multiple copies of each submission, but now he/she will tend to agree with the parties that all communications may be carried out by email or via some form of electronic document room.

An ED process is typically specified in a contract between the parties, and will therefore naturally be the agreed form of dispute resolution once the relevant dispute arises.

The Process

Typically, the process may run as follows:

1. Within five working days of signing the letter of appointment, the parties are required to provide the expert with copies of the basic factual documents in relation to the dispute. These will include the contract, financial statements and similar items.
2. Within a further 10 working days, each party provides the expert with a detailed first submission, setting out full details of each issue, its arguments on the issue and why it thinks it is right and full supporting documents.
3. Within a further 15 working days, each party provides the expert with a detailed submission setting out its response to each of the issues in the other party's submission. As with the first submission, this should include full details and supporting documents.
4. Within a further five working days, the expert prepares and circulates questions of clarification to both parties. These questions may be addressed to both parties or only to one party; in any event, to ensure transparency, all questions are sent to both parties.
5. The parties have 10 working days to respond to the expert's questions.
6. The process of asking questions and receiving responses may be repeated or indeed continue until the expert is happy both that he/she has sufficient understanding of all the issues in dispute for him/her to make his/her determination and that both parties have had the opportunity to make all the points they need to make on the issue or to respond to the other party's points.
7. In rare circumstances, there may be an oral hearing. We discuss this further below.
8. Once the expert has received all the submissions and responses to questions that he/she requires, he/she can make his/her award. This may be specified to be within say five working days in the case of an unreasoned award or within 15 working days or longer in the case of a reasoned award.
9. As the award can only be challenged on the basis of fraud or manifest error, the parties are bound by the award.

[16] Sometimes, parties will try to communicate with the expert directly on substantive matters. It is important not to entertain such contact unless both parties are aware and agree to such communications. Administrative matters are less of an issue but the expert needs to be alert to suggestions that the parties have not been treated equally.

The agreed process usually contains a provision for either the expert or either party to request an oral hearing[17]. The purpose of such an oral hearing is for the parties to explain a particular issue to the expert, if that particular issue is difficult to explain in writing or may be dealt with more quickly by way of oral hearing. Alternatively, the purpose may simply be for one of the parties to "have its day in court", perhaps for senior executives to feel that they have been able to present their position clearly to the expert, so that they are more prepared to accept the expert's determination.

In our experience, oral hearings are rarely requested and they can add to the time and complexity of the process, as each party may wish to bring along numbers of lawyers and accountants, all of whom may want to speak. For example, the oral hearing in one case on which we were the experts involved 40 people and it was inevitably difficult to find a convenient date and a location that was acceptable to both parties. However, in another case, there were some complex spreadsheet models involved, and it helped us to watch the parties demonstrate how the models worked, particularly as we wanted to use one of the models for the purposes of our determination. In a further case the parties both agreed to make oral but separate submissions to the expert following the closure of the written submissions.

In our experience, while some hearings are of little use, some are very useful and in some cases the parties themselves feel the need to see and directly address the expert. The expert needs to approach the determination with an open mind on such matters.

It is important for the expert to make the determination solely on the basis of information that has been submitted, in the same way a judge or arbitrator makes his/her decision. If the expert is aware of some information that has not been submitted but which seems to him/her to be important, our approach would tend to be to request the parties to comment on its relevance by way of the Question and Answer process (see points 4 to 6 of the previous schedule).

Another issue that arises is confidentiality between the parties. We have emphasised above how it is vital that the expert is and is seen to be independent, and we usually do this by copying all of one side's submissions to the other party. However, this may not work in a situation where, for example, one party has sold a factory producing one product to the other party and is still a competitor of the other party. In such circumstances, confidentiality club arrangements will need to be set up, whereby certain documents may be declared to be confidential and not disclosed to the other side, but they are still disclosed on a confidential basis to an independent lawyer appointed by the other side.

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[17] The provision for an oral hearing in the TAE rules is as follows:

> *"Part II: Procedural Rules & Requirements…*
> *Rule 2: Meetings/hearings*
> *1. If he considers it necessary, the Expert may at any stage hold a meeting or teleconference/web conference with the parties to clarify the issues in dispute and make such orders as he considers necessary for the fair and expeditious determination of the dispute.*
> *2. All parties will be given at least 7 days notice that such a meeting/teleconference/web conference is to be held.*
> *3. At least 3 days before such a meeting or teleconference/web conference the Expert must inform the parties in writing of any specific matters to be addressed at the meeting.*
> *4. The Expert may also hold a substantive hearing if he considers it necessary to determine the dispute.*
> *5. All parties will be given at least 10 days notice that such a substantive hearing is to be held.*
> *6. At least 5 days before such a substantive hearing the Expert must inform the parties in writing of any specific matters to be addressed at the hearing."*

One issue that does arise quite often in our experience is where the issues referred to the expert for determination include legal points. We deal with this issue separately below.

The Non-Speaking Determination

Although in our experience increasingly less common, sometimes the parties prefer an unreasoned or non-speaking award, which may be a single sheet of paper, simply setting out what the expert is instructed to determine and what his/her determination is; if for example, he/she is instructed to determine the value of a shareholding in a company, the determination may be limited to a single number. This is something that many lawyers, particularly those from a non-UK and an arbitration background, often find difficult to understand. However, in our experience, many clients prefer an unreasoned determination because it is more final, more likely to be free from manifest error, more difficult to appeal and cheaper for the expert to produce. A non-reasoned determination we issued read as follows:

> *"Dear Sirs*
>
> ***Expert Determination in the matter of x and y***
>
> ***Introduction***
>
> *Further to my appointment as the Independent Expert in this non-reasoned Expert Determination in accordance with Section x to the Sale and Purchase Agreement dated y ("SPA"), I was instructed to determine the calculation of Relevant Turnover and any Deferred Payment payable by x to y.*
>
> ***Process***
>
> *As agreed with the parties in my engagement letter dated x and in subsequent email correspondence, I received a number of submissions and replies to questions from the parties.*
>
> *I have read and considered all the information provided to me by both x and y. Acting as an Independent Expert and not as an Arbitrator I have reached my own determination on the disputed matter.*
>
> ***My Determination***
>
> *In accordance with my engagement letter dated x, my determination is that Relevant Turnover for the year ended z was x. As this exceeds the Revenue Target of x, in accordance with Clause x of the SPA, the Deferred Payment payable by x to y is z.*
>
> *I would like to thank the parties for their co-operation in this Expert Determination."*

The Reasoned Determination

More commonly, particularly where there are complex arguments concerning issues of GAAP, often dependent on a detailed analysis of the facts – some of which may be disputed – a reasoned or fully reasoned determination may be required.

In SPA disputes such determinations can run into hundreds of pages where there are a large number of disputed items to deal with. In our experience, determinations will generally follow the structure of an introductory section and then subsequent sections dealing with determinations of individual issues and then a final section dealing with determinations that follow from the individual determinations, such as the allocation of fees.

The Introductory Section

The introductory section will generally contain the following:

- background to the appointment, for example the SPA between the parties and the operative clause by virtue of which the expert has been appointed;
- the expert's terms of reference, reflecting the appointment of the expert;
- any matters which have been in or are still in dispute which have not been referred to the expert;
- the process followed by the expert for the purpose of the determination – this will often include a statement that the parties have agreed to the process by signing the expert's engagement letter and by participating fully in the process;
- structure of the determination;
- **c**onfirmation of Independence; and
- what the expert considers to be the key contractual requirements for the determination. This is likely to include an analysis of, for example, the GAAP requirements in the SPA, particularly where there are issues over the hierarchy, that is which accounting treatments take precedence.

The Determination of Individual Issues

In respect of each issue in dispute the following structure may be used:

- background to the issue;
- summary of the issue by reference, for example, to how the matter is referred to in any dispute notices between the parties prior to the expert's appointment;
- recitation of the submissions by each party;
- an analysis of the submissions and any factual matters in dispute;
- determination of any factual matters in dispute; and
- the determination of the matter in dispute.

Two matters should be noted here. First the expert should be aware that he/she may very well have to make a determination of a disputed factual matter. If so it is important that the expert confirms with the parties that he/she has the authority to determine such matters. We deal with this, and the related but more controversial issue of the determination of matters of law below.

Second, in reaching a determination of the technical matter in dispute, particularly where there are a number of accounting considerations underlying any particular treatment, the expert may need to go through a detailed analysis of each of these considerations. This may involve a series of individual determinations before an overall conclusion is reached on the issue in dispute.

The Final Section

Finally, the expert may be required to make a determination of other matters, which flow from the individual determinations. These can include:

- determination of which party pays how much of the expert's fees, perhaps based on the "success" of each party, or perhaps left up to the expert's own judgement; and
- the overall amount payable by one party to the other, for example, earn-out consideration, which will follow mechanically from the individual determinations.

One can readily appreciate how the final overall document can be a complex and lengthy piece of work.

Examples Arising from our Experience in Accounting EDs

In order to understand how ED of an accountancy dispute operates in practice, in the next section, we set out some examples of items that we have had to determine, and some of the issues that arose.

Completion Balance Sheets

It is common, in Sale and Purchase Agreements where the purchase consideration is based on the balance sheet, or assets less indebtedness, for the value of assets and liabilities to be determined according to a hierarchy. First, there are often specific provisions within the SPA which define how the item is to be valued (and this may be different to normal accounting standards); for example, land and buildings may be based on a valuation carried out on a certain date, or accrued holiday pay may be calculated in a specified way. Second, the assets and liabilities may be determined in accordance with the company's current accounting policies and procedures; this is generally to ensure that the purchaser does not get a windfall gain or loss as a result of it changing the accounting policies to agree to its own. Thirdly, where neither of the first two provisions apply, the items are to be valued in accordance with IFRS or GAAP.

Receivables

Whilst it may seem that an obvious way of deciding whether any particular receivable was valid at the date of completion is to see whether or not the customer has paid, it may be more difficult if the vendor still expects the customer to pay or the customer has gone into liquidation after completion and the purchaser claims therefore that no receivable should have been recognised in the completion balance sheet. A further common issue is where the vendor claims that the customer would have paid, but that the purchaser has not bothered to collect the debt for some reason.

Liabilities and Contingent Liabilities

There are accounting rules governing when a liability or provision should be recognised in a set of accounts. However, in practice, there is an element of judgement involved – for example, a company may recognise a liability for an adverse judgment in a legal case, and

then it wins the case after completion and does not have to pay anything – so there can be a dispute over whether the provision should have been recognised in the first place.

Tax

As future tax liabilities are often a significant area of uncertainty, it is common for tax issues to be covered by a separate set of completion warranties. However, where tax liabilities are part of the completion balance sheet to be determined by the expert, there can be disputes over whether a particular amount that has been demanded by the tax authorities but disputed will ever actually be paid.

Valuations

Future Revenue

A fundamental element of any valuation is often the parties' views of the likely future revenue and the future growth profile of the company, particularly if the company is being valued on a Discounted Cash Flow ("DCF") basis. The expert will have to make sure that both parties have provided full explanations of what they expect the future revenue of the company will be, and the expert will then need to evaluate which is the most likely, on the basis of the information provided to him/her.

Discount Rate

In a DCF valuation, where the company is valued on the basis of an estimate of its future cash flows, discounted back to a particular date using a discount rate to take account of the time value of money and risk, the discount factor can have a very large impact on the valuation. Consequently, the expert will need to receive submissions by the parties on the appropriate discount rate and all its elements, and then make his/her own determination of it.

The Determination of Facts and the Determination of Matters of Law

The expert is appointed to determine matters within their technical expertise for example the application of an accounting policy. Inevitably, whatever the technical nature of the dispute, there is a factual context to the matter and the expert faces two issues, namely what facts are relevant to reaching a determination on the disputed item and second what happens when there is a dispute over a relevant fact itself.

As to the first issue there may be a disagreement between the parties over the relevance of certain facts. For example, a typical issue faced in earn-out disputes is the extent to which a particular occurrence is an exceptional event or something expected to occur periodically. The dispute will arise because exceptional items may fall to be excluded from the determination of a level of profitability. Each side may use in its arguments particular events which may or may not support prior occurrence. The expert has to determine whether or not certain undisputed factual matters are of relevance to the consideration of exceptionality.

More difficult is where there is a dispute over whether a factual matter has occurred at all, because, say, there is ambiguity in a document or missing information.

In both cases the expert is required to reach a view and the expert can expect to formalise their finding on the matter in dispute.

Far more controversial is where the expert is faced with a legal dispute, because ultimately the expert will be making a determination of a legal matter.

Where the points are relatively simple and are within the ability of an intelligent accountancy expert to determine, a usual approach will tend to be to request full details of the issue and both party's views on the issues, supported by legal opinions if necessary, by way of the question and answer process explained above, and then to make a determination on the basis of those submissions.

Examples of legal matters that we have seen, on which the expert had to make a determination, include:

- the likelihood of an appeal court overturning the decision of a court of first instance;
- the definition of "free cash" in an SPA; and
- whether a valuation should be based on a methodology required by the laws of a particular jurisdiction.

It is arguable the extent to which these legal matters are truly matters of law, although in the final example there was a legal issue around whether foreign law applied in the first place – that is an issue that is regularly debated in arbitrations. However, as long as the expert has the authority to do this and the parties have agreed to be bound, while it may seem surprising to have an accountant or valuer decide matters of a legal nature, within the context of the ED process there is nothing controversial about it.

In rare situations it may be necessary to take independent legal advice on the matter, agreeing with the parties who to seek the legal opinion from, and to share that legal opinion with the parties. We have seen this arise in a situation where the parties had agreed that the independent legal advice itself is to constitute an opinion on which the expert is to rely – which is really providing for the determination process to have two separate experts in different disciplines.

Therefore, whether the matters to be determined are factual or legal (or whether it is unclear), the expert needs to have obtained authority to resolve all the issues; otherwise there is a risk of a challenge to the expert on the basis of exceeding authority.

Advantages of the Process

So, what are the advantages and disadvantages of ED? In our opinion, these include the following:

1. The expert is generally chosen because he/she has expertise in the type of work and experience of a particular sector that is subject to the dispute; this may save a lot of time in the submissions, because the expert understands the outline of the dispute. Thus, if the dispute is over a completion balance sheet, the expert chosen is likely to be an accountant; if particular oil and gas or golf course knowledge is needed, an expert may be chosen who has expertise in that industry. Arbitrators may also be

selected for their industry knowledge – but in practice, they are often simply chosen for their legal expertise and experience of the arbitration process.

2. It is generally cheaper and quicker than litigation or arbitration, and it results in a final resolution of the dispute, which is difficult to appeal[18]. It follows, of course, that, if a party wants to delay the resolution of the dispute or wants to be able to appeal the decision, then ED is less likely to be suitable. The reason it tends to be cheaper and quicker is that there are fewer individuals formally involved (fact witnesses, lawyers, expert witnesses), and the parties send their submissions directly to the expert, although they may engage their own industry expert to assist in preparing their submissions. Furthermore, the expert may set, or may be required by the parties to set, a clear timetable – so, for example, we have seen large disputes resolved in 60 days or less.
3. The process is entirely confidential. Indeed, the very existence of the process is likely to be confidential.
4. It results in a final resolution of the dispute, because, as will be shown below, it is very difficult to appeal or overturn. This may be a good thing if you represent the party that won, but it may not be so good if you represent the party who lost.
5. There is limited involvement of lawyers. For a client who wants a final resolution of the dispute, in a robust way and who has no particular desire to go to court or arbitration or to have an oral hearing, this helps to make the process quicker and cheaper.

The Expert – Creature of his/her Appointment or Architect

The expert is a creature of his/her appointment, not the architect. There is no *Kompetenz-Kompetenz* doctrine in ED, that is the expert does not have the competence, or jurisdiction, to rule as to the extent of his/her own competence on an issue before him. As will be demonstrated below the commonest way to challenge an ED is to show that the expert exceeded his/her contractual authority, for example, he/she deviated from the scope of his/her instructions, that he/she relied on alleged facts he/she should not have relied on, or determined something he/she was not appointed to determine.

That said, unlike an arbitrator (or a court) the expert has the ability to agree with the parties the extent of his/her authority at the time of his/her engagement and at any time up until the issuance of the determination.

Challenges to the Expert and the Determination

As we have explained above, the established precedent in the UK is that EDs are a form of private dispute resolution, driven by a contract between the parties, and the courts will not interfere with the expert's determination, except in the case of fraud or manifest error. In the case of challenge of an ED, such a challenge goes to the High Court in England.

While fraud and manifest error is the mantra commonly quoted, in reality there are many other situations in which a successful challenge can be made. So, fraud can be taken to

[18] The expert does have to be paid by the parties, as in arbitrations, and this is a cost which would not be incurred in a court process. Whilst the expert often splits his/her fees equally between the parties, his/her fees may also be split on a basis determined by himself/herself or according to a formula agreed by the parties; such a formula may be written in such a way as to discourage the parties from submitting immaterial items to ED.

include collusion or partiality. Exceeding authority is a breach of the tripartite contract. We now consider these areas of challenge as follows:

- lack of agreed appointment;
- mistake;
- manifest error;
- material departure from instructions;
- the determination of questions of law; and
- fraud, collusion and impartiality.

Lack of Agreed Appointment

The first point to make is that an expert proceeding without agreement from both parties, despite their appointment by a body such as the ICAEW is going to lead to a challenge to any determination, or a determination that is unenforceable.

Cream Holdings Ltd v Davenport noted above makes this point. We have also been involved in a case where an expert failed to get an engagement letter approved by both parties and proceeded to run a determination process where one party provided no input whatsoever. The subsequent determination was ignored altogether, and all matters resolved in an arbitration on the contract.

Mistakes in the ED

The courts have traditionally been reluctant to intervene in a contract between two parties and this includes where an expert has made a mistake in a determination.

As Lord Denning said:

> *"It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be different. Fraud or collusion unravels everything."*[19]

In another case[20] Dillon LJ expressed the approach as follows:

> *"On principle, the first step must be to see what the parties have agreed to remit to the expert, this being, as Lord Denning M.R. said in Campbell v Edwards, a matter of contract. The next step must be to see what the nature of the mistake was, if there is evidence to show that. If the mistake made was that the expert departed from his instructions in a material respect - e.g., if he valued the wrong number of shares, or valued shares in the wrong company…or if the expert had valued machinery himself whereas his instructions were to employ an expert valuer of his choice to do that - either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do."*

[19] *Campbell v Edwards* [1976] 1 All ER 785.
[20] *Jones v Sherwood Computer Services* [1992] 2 All ER 170.

There is a clear difference identified here between a mistake and a material departure from instructions, which we will consider later.

However, in a more recent case,[21] Lord Neuberger expressed the following concern after making reference to the analysis of Dillon LJ in *Jones*:

> *"If the expert "valued the wrong number of shares", it is scarcely controversial to suggest that his decision could not stand if it was challenged in court...But what if the expert had valued the right number of shares on the wrong basis (e.g. because of his misinterpretation of the company's articles of association...?)"*

What is clear is if the expert can determine all questions of law and fact then the parties may well be stuck with the decision even if he/she makes a mistake[22].

Manifest Error in the ED

A common formulation in the appointment letter is that a determination is not to be challenged unless there is fraud or manifest error. This clearly widens the ability to challenge a determination on the grounds of a mistake.

However, it would appear that it does not widen the scope that much. In the Veba Oil case[23] Simon Brown L J stated at paragraph 33:

> *"if parties wish to contract on the basis that they will not be held to mistakes made by the expert in the course of carrying out his instructions, they must needs include a term like this with regard to manifest error. But if they do, is it then really to be said that provided only the mistake is obvious, the determination will be avoided irrespective of whether it could affect the outcome? In this context I am inclined to think not. Take the very error committed in Frank H. Wright (Constructions) Limited v Frodoor, the erroneous inclusion of a 'not' in the report. I do not think that that ought properly to be regarded as a "manifest error". Rather I would extend the 'definition' of manifest errors as follows: "oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion""*

So, many mistakes or potential mistakes are not capable of being considered manifest errors. This can be illustrated by the Walton Homes case[24]. Walton Homes agreed to buy land from Staffordshire County Council, for a fixed amount plus an overage once planning permission had been granted. Walton then contracted to sell the land to a third party conditional on the third party obtaining planning consent, which it duly obtained increasing the original sales price by some ten times. The parties failed to agree on the amount of the overage and by the SPA the matter was referred to an independent Chartered Surveyor as expert and his determination was, in the absence of manifest error, stated to be final and binding upon the parties with all matters of fact and law in dispute relating to the calculation of the overage to be subject to the determination.

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[21] *Barclays Bank plc v Nylon Capital LLP* [2011] EWCA Civ 826.
[22] We deal with some of Lord Neuberger's other comments in that case below.
[23] *Veba Oil Supply & trading GmbH v Petrotrade Inc* [2002] 1 All E.R. 703.
[24] *Walton Homes Ltd v Staffordshire County Council* [2013] EWHC 2554 (Ch).

The dispute concerned the interpretation of the words *"the [planning] Permission does not exist"*.

The expert surveyor retained counsel to advise him as to the meaning of the words *"the [planning] Permission does not exist"*. Counsel reached the conclusion that the argument put forward by Walton Homes was incorrect and the expert simply relied on that advice and adopted it for the purpose of his determination. The issue which came before the High Court was whether the expert surveyor had made a *"manifest error"* in making his determination on what was meant by planning permission that it included *"the recommendation of the planning officer and the decision of the planning committee to accept that recommendation. In my view, both are to be assumed not to exist. "*

The Judge referred to a well-known book on partnership law[25] which states that manifest error *"applies only to errors in figures and obvious blunders, not to errors in judgment, e.g. in treating as good debts which ultimately turn out to be bad, or in omitting losses not known to have occurred. All errors are manifest when discovered; but such clauses as those referred to here are intended to be confined to oversights and blunders so obvious as to admit no difference of opinion"***.**

The Judge concluded that it was impossible to say that the determination of the expert surveyor in light of Counsel's opinion was manifestly erroneous. He stated:

> *"Manifest is a word which gives a very limited window of opportunity to challenge. The examples given in the various authorities…show that it is something like an arithmetical error, or a reference to a non existent building and the like. There is nothing "manifestly wrong" about the decision of [Counsel]."*

Similarly, a difference of opinion over the correct way of valuing a receivable or calculating a discount rate is unlikely to be a manifest error, unless the expert has departed completely from accepted industry practice. For example, in *Pontsarn Investments Ltd v Kansallis-Osake-Pankki*[26] an expert surveyor was appointed to determine the open market rent, on the assumption that the premises were "*vacant but fit for immediate occupation and use*"; the landlord was dissatisfied with the ED and challenged it, but the court considered that the expert had carried out his instructions and his decision was final and binding.

A further example of what is not a manifest error is seen in *Dixons Group plc v Murray-Oboynski*[27].

> *"As a matter of first impression, I find that on the true construction of the words of the agreement taken as a whole … for an error on the part of Mr Jackson to be manifest it must be plain and obvious on the face of his written decision. The error must be*

[25] Lindley & Banks on Partnership (paragraphs 10-73).
[26] *Pontsarn Investments Ltd v Kansallis-Osake-Pankki* [1992]1 EGLR 148.
[27] *Dixons Group plc v Murray-Oboynski* [1997] All ER (D) 34.

> *manifest: the terms of the agreement do not contemplate an error which after a lengthy enquiry may be made manifest."*[28]

Two cases where manifest errors were found are *Macro v Thompson*[29] and *Shell UK Ltd v Enterprise Oil Plc*[30].

In *Macro* the court intervened where a valuer of shares had made a mistake in calculating share values. Part of a sale process involved valuation of the shares in the two separate companies, but an error had occurred where the valuer had calculated the figures wrongly in each case because the valuer had arrived at his valuation upon the basis of the wrong company's assets.

In *Shell* the judge found that one party had been disadvantaged by the expert using an alternative computer package incompatible with that party's own package requiring guess work by the expert and therefore the expert's decision would not bind the parties.

In each of these decisions, the finding against the expert seems to have been based at least as much on a material departure from instructions by the expert, first in valuing the wrong company and second in using the alternative software.

However, in *Homepace Limited v SITA South East Limited*[31], the Court held that the lease provided for the expert to determine the validity of a notice of termination of a lease. As the surveyor only took into account the value of the minerals on the site and not the reserved minerals, the Court held that the expert had not proceeded on the correct basis, and thus his decision was not binding on the parties. The basis on which the expert had actually made his determination was only known because of the expert's letters to the disgruntled party after the determination; if the expert had not entered into such communications and thus if the basis of his determination had not been clarified, it appears that his determination would have been binding.

At paragraph 36 the Court stated:

> *"Mr Hill need not have responded to the requests for clarification of his certificate and his report. If he had not done so, he could not have been compelled to explain himself. However, since he did so, and thereby made clear the basis on which he had proceeded, it seems to me that the court must look at his explanations when considering what was the reasoning which led him to issue his certificate, and whether it was prepared on the correct basis."*

And then at paragraphs 49 and 50:

> *"As I have said, the certificate itself does not disclose any error. The report of which it forms part hints at an error, in that the exclusion of the Reserved Minerals is shown*

[28] Similarly in *IIG Capital LLC v Van Der Merwe* [2008] 1 All ER (Comm) 435, Lewison J held that a manifest error '*is one that is obvious or easily demonstrable without extensive investigation*' and in *Conoco (UK) Ltd v Phillips Petroleum Co (UK) Ltd* ([1996] CILL 1204,) Morrison J said that a manifest error referred to "*oversights and blunders so obvious as to admit no difference of opinion*".
[29] *Macro v Thompson* [1997] 1 BCLC 626, C.
[30] *Shell UK Ltd v Enterprise Oil Plc* [1999] 2 Lloyd's Rep 456.
[31] *Homepace Limited v SITA South East Limited* [2008] EWCA Civ 1.

> *as taking out of consideration 50,000 tonnes of stone from within the area for which planning permission already existed. In Mr Hill's letter of 24 August 2005 he says in terms that he left the Reserved Minerals out of account; in his letter of 6 September 2005 he says that he proceeded on the basis that the tenant is not entitled to remove from the land any limestone which is suitable for use as building stone.*
>
> *On the construction of the lease which I consider to be correct, as indicated above, this was the wrong reading of the lease. Mr Hill should not have left the Reserved Minerals out of account, or at most he should have disregarded one year's entitlement on the part of the landlord, i.e. 12,000 tonnes."*

And on this basis the certificate did not proceed on the correct basis. The lesson from this case is that any expert should be extremely careful about entering into any communication with the parties about his/her determination after it has been issued.

Material Departure from Instructions

A material departure from an expert's instructions is one of the few areas that has been defined by the courts as one of the few grounds upon which a party can challenge an ED. As was said by Knox J in *Nikko Hotels (UK) Ltd v MEPC plc*[32]:

> *"If* [the expert] *has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity"*.

Shafi v Rutherford[33] is a classic example of departing from instructions.

Ms Shafi and Dr Rutherford formed a company and acquired a number of items of equipment under lease. They later decided to part company by way of the sale of Ms Shafi's shares to Dr Rutherford, the price to be based on a set of completion accounts. A dispute arose concerning the proper treatment of the leases in the completion accounts. A chartered accountant was appointed to resolve the dispute.

In the company's accounts the leases were treated as operating leases and thus as giving rise to only a small amount to be taken into account as a liability. The expert concluded that they were not operating leases but finance leases, and therefore that they should be treated on that basis. However, he also concluded that he was prevented by the terms of the agreement from treating the leases in that way, and was bound to treat them as operating leases, contrary to the facts.

The court (and the Court of Appeal) held that the expert was wrong to conclude that his computations were constrained in the way in which he concluded they were. The court said:

> *"The expert had committed an error in considering he was prevented from embarking on the task of applying the correct policy. This was an error in interpreting his jurisdiction, or, putting it a different way, was a material departure from the scope of his instructions."*

[32] *Nikko Hotels (UK) Ltd v MEPC plc* [1991] 2 EGLR 103.
[33] *Shafi v Rutherford* [2014] EWCA Civ 1186.

Interestingly, the court was, if necessary, prepared to have gone further and hold that the expert committed a manifest error.

Errors Regarding the Determination of Questions of Law

We have noted above that if the parties refer a matter of law to the expert then it will not intervene even in certain circumstances where there is a mistake. Therefore in *Premier Telecom Communications Group Ltd v Webb*[34], the claimants claimed that the expert firm had materially departed from its instructions in that it had made decisions on questions of law which had not been intended to be decided by the expert. The Court of Appeal found that the parties had agreed that the expert firm had the decision-making authority in relation to all the issues being challenged and thus the determination of the expert was not open to challenge.

The run of cases described so far does need to be considered in the light of *Barclays Bank v Nylon Capital*[35]. Lord Neuberger made the following comments (which did not form part of the decision) in paragraphs 69 et seq which we reproduce at length because they seem to set out the relevant issues regarding a challenge to an ED arising from the nature of the determination, what the expert has been authorised to determine plus the suggestion that the courts may intervene where there is an issue of law to be determined.

> *"Accordingly, it seems to me that, where a contract requires an expert to effect a valuation which is to be binding as between the parties, and there is an issue of law which divides the parties and needs to be resolved by the expert, it by no means follows that his resolution of the issue is incapable of being challenged in court by the party whose argument on the issue is rejected…*
>
> *Accordingly, if the decision-maker has acted upon what in the court's view was the wrong meaning, he has gone outside his decision-making authority", and, it seems to me to follow that the court can review, and, if appropriate, set aside or amend his decision. While certainty and clarity are highly desirable, it is, regrettably, inappropriate to consider that issue further in this case.*
>
> *I appreciate that, in cases of this sort, the advantage of leaving all points of law to the final determination of the expert is that it results in a relatively quick and cheap process for the parties. However, it must be questionable whether the parties would have intended an accountant, surveyor or other professional with no legal qualification, to determine a point of law, without any recourse to the courts, even if it has a very substantial effect on their rights and obligations. It would, I suggest, be surprising if that were the effect of an expert determination agreement, when the Arbitration Act 1996 gives a right (albeit a limited and prescribed right) to the parties to refer points of law to the court. That Act applies where the parties have entered into an arbitration agreement, which gives them a much greater ability, in law and in practice, to make representations and to involve lawyers in connection with the arbitration, than parties enjoy in connection with the great majority of contractual expert determinations.*

[34] *Premier Telecom Communications Group Ltd v Webb* [2014] EWCA Civ 994.
[35] *Barclays Bank v Nylon Capital* [2011] EWCA Civ 826.

After a point of law has arisen, the parties may often be well advised to consider whether to refer it to court as a preliminary issue. If they do not, they may also think it sensible to try and agree whether the expert's decision on the point will be treated as final and binding or whether the disappointed party should have the right to refer the issue to the court. If the latter, then the expert should indicate whether, and in precisely what way, his determination would have been different if he had decided the point the other way: that may help the disappointed party decide whether it is worth challenging the decision, and it may also assist the parties in arriving at a settlement.

Sometimes, it is not possible to show that the expert has made a mistake of law in arriving at his valuation, because he has not expressed a view on the issue of law, and it cannot be said that he was under a duty to do so, and it is not clear from his determination how he must have decided the issue. In such a case, it seems to me that there would be no basis for challenging the determination on the basis of error of law. For the reasons already given, if the expert needs to determine a point of law which divides the parties, he may think it right not only to decide the point and say how he has decided it, but to indicate what the valuation would have been if he had decided the point the other way."

It is worth noting that these reservations may not reflect current judicial thinking. In *Premier Telecom Communications Group Ltd v Webb*[36] Moore-Bick LJ said the following:

"My only reservation concerns the suggestion that an error by the expert on any point of law arising in the course of implementing his instructions might justify setting aside the determination. The judge treated this as an open question on the basis of certain comments made by Lord Neuberger M.R. in Barclays Bank v Nylon Capital. It is necessary to remember, however, that those comments were obiter and that neither of the other members of the court expressed agreement with them. It is possible that the parties might by their agreement define the terms of the expert's mandate in such a way that any error of law on his part rendered his decision invalid, but in many cases to do so would risk undermining the whole purpose of the reference. Ultimately, however, as Lord Denning observed in Campbell v Edwards [1976] 1 W.L.R. 403, 407 (and as Lord Neuberger himself was at pains to emphasise in Barclays Bank v Nylon Capital), it all comes down to the construction of the contract under which the expert was appointed to act. Only by construing the contract can one identify the matters that were referred for his decision, the meaning and effect of any special instructions and the extent to which his decisions on questions of law or mixed fact and law were intended to bind the parties."

One of the challenges to the expert in that case was regarding an assumption that they were required to make for the purposes of an expert valuation. The appellants in the case contended the expert had misunderstood that requirement. However, the appellants could not point to anything in the report itself which showed that the expert had departed from their instructions.

[36] *Premier Telecom Communications Group Ltd v Webb* [2014] EWCA Civ 994.

Moore-Bick LJ said this:

> *"I incline to the view that an instruction of this kind on a matter central to the valuation is one that goes to the heart of the valuer's task and that the parties intended that any dispute about its meaning was to be decided by the court. However, it is unnecessary to resolve that question, because, for the reasons I have given, I think it is clear that Grant Thornton applied the instruction in the correct way and that is sufficient to dispose of this challenge to their report."*

Fraud, Collusion and Impartiality

As noted above, in the contractual relationship, Lord Denning said

> *"If there were fraud or collusion, of course, it would be different. Fraud or collusion unravels everything."*[37]

Fraud would include a situation where an expert was bribed in some way to determine the issues in a manner favourable to the briber.

Cases involving direct fraud or collusion are likely to be extremely rare. More of a risk is where there is a lack of impartiality by the expert because perhaps of influence by one of the parties. However, an appearance of impartiality is not enough. The determination of an expert can only be challenged if there is actual bias ‑ the appearance of bias is not enough[38]. This explains how auditors have been able and indeed required sometimes to value shares in an audit client. Given this is essentially contract law parties can choose to appoint as the expert someone who is clearly not independent.

Summary on Successful Legal Challenges to Determinations

We have set out the circumstances in which challenges can be made (and will fail) in some detail for a couple of reasons. First, as practising experts we are concerned to ensure that our determinations can withstand challenges and manifestly so. We believe that our colleagues in other firms take the same view. Second, parties when entering into the determination process need to be assured that there will be finality to a process that promises finality – whatever the parties think once the determination is issued, when it is inevitable that one party (or perhaps both in multi-issue determinations) will be disappointed.

With those thoughts in mind we summarise the challenges to a determination as follows:

- experts and parties need a clearly drafted letter of instruction, setting out the procedure and what is to be determined;
- experts should ensure that any changes to procedure or matters to be determined are confirmed with the parties prior to issuing the determination;
- parties can be given some degree of protection from a negligently prepared determination by insisting on manifest error clauses and a reasoned determination;

[37] *Campbell v Edwards* [1976] 1 All ER 785.
[38] *Macro v. Thompson* (No 3) [1997] 2 BCLC 36. Note that the Macro cases are the same issues but different challenges.

- experts should clearly set out what their determinations are in a reasoned determination and say as little as possible in a non-speaking determination;
- experts should check and re-check their determinations;
- experts should refrain from any post determination communication with the parties; and
- fraud is extremely rare, but experts and parties should refrain from unilateral communications with the parties.

A series of failures in the above are likely to result in a challenge, the most likely of which is a departure from instructions, but such a challenge is as likely to be framed as a manifest error as well.

Conclusion

ED is a form of ADR that can be a highly effective, speedy and cost-efficient way of resolving technical disputes. It is fully accepted as a means of dispute resolution in many jurisdictions. Legal precedents in the UK provide that an ED is final and can only be overruled in the case of fraud – which is rare or manifest error or a material departure from instructions by the expert. Recent cases have set out circumstances in which errors or departure from instructions by an expert will result in a successful challenge. There are a number of basic rules that expert should follow, from their appointment, through the procedure to the final determination to ensure that the risk of a successful challenge is minimised.

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