

Model Clause for Expert Determination

In recent years the relatively high cost of formal dispute resolution has led to an increase in demand for alternative dispute resolution processes. Expert determination is one such process that has gained acceptance over the past decade.

Expert determination is a contractual process by which the parties to a dispute agree to appoint an appropriately qualified expert to resolve their differences. Typically the expert retains a high degree of discretion as to the process to be followed and the determination may be expressed as final and binding or non-binding.

Compared to more formal dispute resolution processes, such as court proceedings or arbitrations, expert determination has the advantage of speed and cost-efficiency. In particular, expert determinations are well adapted to resolving disputes of an essentially technical nature. They may also be more flexible and user-friendly and assist in preserving business relationships where strictly adversarial proceedings may not.

Against this background the Queensland Law Society has considered it appropriate to draft a Model Clause for Expert Determination (Clause). Among other things, the Clause:

- establishes procedures to assist the parties in the identification of disputes;
- contemplates the joint appointment of an expert, failing which either party may request the President of the Queensland Law Society to make an appointment;
- empowers the expert to conduct the determination in a flexible manner, while at the same time giving each party a reasonable opportunity to make submissions;
- maintains the confidentiality of information disclosed by the parties during the course of the determination; and
- depending upon the intention of the parties, may be expressed as final and binding or non-binding.

While it is hoped that the Clause will be adopted by commercial parties in a wide variety of circumstances, the Queensland Law Society recognises that the Clause may not be suitable in every case. In particular, the parties should consider specifying the types of disputes to which the Clause applies and whether it is appropriate to agree upon the identity of the expert(s) in advance.

As always the parties should consider whether any dispute resolution process would be more appropriate in the circumstances and obtain independent legal advice before incorporating the Clause into any agreement.

The model clause is available to members on the QLS website.

1 Disputes

Part 1 – Notification procedures

1.1 Non-severance of clause 1

Clause 1 shall survive despite the fact that the contract has been terminated or deemed invalid.

1.2 Notification of parties to dispute

- (a) Should at any time a party assert that a dispute exists between the parties arising out of or in connection with the contract that party may submit a written notice ('**Notice of Dispute**') to the other party specifying:
 - (i) the nature of the dispute that has arisen;
 - (ii) the areas of expertise it considers are required to resolve the dispute;
 - (iii) the major issues for determination, and
 - (iv) the relief or outcome being sought.
- (b) Within *[insert number]* days of receipt of the Notice of Dispute, the other party shall provide a written response ('Notice of Response') stating its position in relation to the dispute, including:
 - (i) a statement of the areas of expertise it considers are required to resolve the dispute;
 - (ii) any additional issues that should be referred for determination; and
 - (iii) any comment on the relief or outcome referred to in the Notice of Dispute.
- (c) Within *[insert number]* days of receipt of the Notice of Response, the parties must take reasonable steps to resolve the dispute.

1.3 Referral of dispute to expert determination

If the dispute is not resolved within the period referred to clause 1.2(c), either party may refer the dispute for an expert determination, pursuant to this clause.

Part II – The expert

1.4 Appointment of expert

- (a) The parties may agree to appoint a particular person the expert.
- (b) Failing agreement between the parties, either party may request the President for the time being of the Queensland Law Society ('**President**') to appoint the expert. The request shall include copies of the Notice of Dispute and Notice of Response, and include a request that the President appoint the expert as soon as possible and advise the parties in writing of the appointment.
- (c) Where the President is requested to appoint an expert in accordance with clause 1.4(b), a party shall not make any request or suggestion that a particular person be appointed as the expert.

1.5 Replacement of expert

If the expert appointed under clause 1.4 dies or resigns during the expert determination, the parties may agree to appoint a substitute expert in accordance with the procedures established by clause 1.4.

1.6 Disclosure

- (a) If the expert becomes aware at any stage of any circumstance that might reasonably be considered to adversely affect the expert's capacity to act independently or impartially, the expert must inform the parties immediately.
- (b) In such circumstances the appointment of the expert will terminate, unless the parties agree otherwise.

1.7 Role and powers of the expert

The expert **will**¹:

- (a) act as an expert and not as an arbitrator,
- (b) act independently of, and act fairly and impartially as between the parties, giving each party a reasonable opportunity of presenting its case and countering any arguments of any opposing party, and a reasonable opportunity to make submissions on the procedure or the expert determination,
- (c) proceed in any manner he or she thinks fit,
- (d) determine whether it is appropriate to co-opt legal or other technical expertise to assist his or her coordination of the dispute,
- (e) conduct any investigation which he or she considers necessary to resolve the dispute,
- (f) examine such documents, and interview such persons, as he or she may require; and
- (g) make such directions for the conduct of the expert determination as he or she considers necessary.

Part III – Procedure of expert determination

1.8 Steps leading to commencement of expert determination

- (a) Within *[insert number]* days after the expert has been appointed, the expert shall provide the parties with an estimate of the fees and disbursements in the expert determination. Unless otherwise agreed by the parties *[and expert]*, the parties shall provide the expert with a security deposit in a form acceptable to the expert in the amount of the estimate.²
- (b) The parties agree to comply with any procedural directions the expert may give in the preparation for or in the course of a preparatory conference.

¹ The parties may elect to replace 'will' with 'may'.

² The parties should consider whether to include an option for the parties to select different expert if costs are excessive.

1.9 Representation and attendance

During any conference or any stage of the expert determination, the parties may wish to be represented by a legal representative and other persons with information or knowledge relevant to the expert determination.

1.10 Obligations of parties

- (a) The parties shall take all reasonable steps for the expeditious and cost-effective conduct of the expert determination. These steps include but are not limited to complying without delay with any direction or ruling by the expert as to the procedural or evidentiary matters.
- (b) The parties release, discharge and indemnify the President, officers, employees and agents of the Queensland Law Society and the expert from and in respect of any act, omission or liability which would otherwise exist in relation to the appointment of the expert or any part of the expert determination.

1.11 Confidentiality

Confidential information disclosed to the expert by the parties or by others attending in the course of the expert determination shall not be divulged by the expert, unless authorised in writing by both parties. The parties agree that they will not compel the expert to divulge records, reports or other documents (electronic or otherwise) received by him or her while serving in that capacity, or testify in regard to the expert determination in any adversarial proceeding, judicial forum or body.

1.12 Determination of expert

The determination of the expert:

- (a) must be in writing, accompanied by reasons,
- (b) will be final and binding;³ and
- (c) is not an arbitration within the meaning of any statute.

1.13 Costs

Each party will:

- (a) bear its own costs in respect of any preparation and/or representation at any expert determination, and
- (b) pay one-half of the expert's costs and any incidental costs of facilitating the expert determination, including (but not limited to):
 - (i) venue,
 - (ii) hired equipment; and
 - (iii) refreshments.

³ The parties may replace (b) with 'is non-binding'.

1.14 Payment of interest

Unless otherwise agreed by the parties the expert determination may include the payment of interest on any monetary component of the expert determination in such amount as the expert may determine.

1.15 No suspension of contractual obligations

The referral of a dispute for expert determination under this clause does not suspend the contractual obligations of the parties under the contract.