

## EXPERT DETERMINATION Q&amp;A

CHSpurin

**What amounts to expert determination and to what extent is an expert determination subject to judicial challenge?*****Definition of Expert Determination***

- *Expert Determination is a process for settling disputes about facts (value of works done - satisfactory works and issue of certificates - including extensions of time - variations etc)*
- *Expert Determination may be contracted into before the event by the parties as a contractual mechanism for settling disputes about facts between the parties to a contract. Alternatively, the parties to a dispute about facts may refer that dispute to an expert for determination.*
- *The crucial distinction between expert and judicial / quasi-judicial determination lies in the fact that the scope of the dispute is limited to questions of fact and does not extend to questions of law or involve mixed questions of law and fact.*

*Thus once the question of fact is determined the expert determinator becomes functus officio - his role ends immediately: whereas the judicial / quasi-judicial decision maker goes on first to determine questions of law - applies the determined facts to the determined law and reaches a further decision or award.*

- *What happens after an expert has made a determination depends upon the procedure set out in the contract.*
- *Thus a construction contract may specify that the figure determined by the contract administrator become due etc.*

***Challenging the determination of an expert.***

*There are two potential ways of challenging the determination of an expert*

- a) *By following the mechanism (if any) provided in the contract - this may specifically provide for an appeal process to court or adjudication or some other higher decision maker etc - and in particular it is made clear that the construction adjudicator under the HGCRA Process may open up any certificate or other determination of a construction administrator [Clause 20(a)] unless the contract otherwise requires. By contrast, FIDIC specifically states that the adjudicator / DAB may open up any determination of the contract administrator. Such opening up can go to the merits of the determination - or to the figures - values determined by the expert.*
- b) *By way of judicial review - this is merely a challenge on the grounds of due process for bias or a failure to exercise discretion or take into account relevant factors - this is expressly not a challenge to the merits.*

*Under UK Law and the HGCRA Construction Scheme, the determination of the expert will only be absolute, final and conclusive if the underlying contract says so, but this cannot preclude judicial review. Similarly, it is possible to make a decision final and binding at the international level - but similarly this cannot preclude judicial review.*

*Challenging the determination of an expert may be difficult if the power to determine is expressed to be entirely arbitrary - based on the whim or absolute discretion of the expert - particularly if the determination is not accompanied by any explanation. Some contracts requires reasoning - others do not. It is safer to require views to reserve the scope for a challenge - but where the parties want a quick and final decision, free from outside prying eyes then a requirement not to deliver reasons may be adopted.*

*However, at all times, where the determination requires the expert to formulate an opinion - it is essential that the expert forms a view and does not merely adopt the view of another without canvassing all other views first. Where the expert does not have to consult it is important to ensure that he is not approached by one party - but not the other so that the only way that he can form a view is by doing so himself.*