

A Brief Overview of Expert Determinations and a Glimpse at this Alternative Dispute Resolution Mechanism in Chile and Portugal



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1. What is an Expert Determination?

1.1. Purpose

An expert determination is an alternative dispute resolution mechanism in which the parties ask an independent, impartial third party with expertise in the matter at hand to render a decision on a specific issue. Depending on the applicable rules and what the parties have agreed, this decision may be binding.

While an expert determination is a dispute resolution mechanism, it can also be used in the absence of a dispute between the parties¹ to

¹ Article 400 of the Portuguese Civil Code expressly provides for cases where the parties may assign to a third party the responsibility of determining a specific contractual obligation, which must be done according to an equitable judgment *ex aequo et bono* unless the parties agree otherwise.

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resolve disagreements on specific technical aspects. For instance, expert determinations are commonly used in price adjustment mechanisms in M&A agreements and usually involve an independent accountant.²

2 Steven H. Reisberg and John G. Koelt, *Report by the Committee on International Commercial Disputes* (New York City Br June 2013), Appendix B, 66-69, which provides the following standard expert determination clause for an M&A agreement:

1.1 The Purchase Price will be [\$100 million], plus or minus the Adjustment Amount. The "Adjustment Amount" (which may be a positive or negative figure) will be equal to the amount determined by subtracting the Closing Working Capital from the Initial Working Capital.

1.2 "Working Capital" as of a given date shall mean the amount calculated by subtracting the Seller's current liabilities included in the Assumed Liabilities as of that date from the Seller's current assets included in the Assets as of that date. The Seller's Working Capital as of the date of the Reference Balance Sheet (the "Initial Working Capital") was [_____] dollars.

2.1 Buyer shall prepare financial statements ("Closing Financial Statements") of the Company as of the Closing Date on the same basis and applying the same accounting principles, policies and practices that were used in preparing the Reference Balance Sheet, including the principles, policies and practices set out in Exhibit _____. Buyer shall then determine the Working Capital as of the Closing Date (the "Closing Working Capital") based on the Closing Financial Statements and using the same methodology as was used to calculate the Initial Working Capital. Buyer shall deliver the Closing Financial Statements and its determination of the Closing Working Capital to Seller within sixty (60) days following the Closing Date.

2.2. If within thirty (30) days following delivery of the Closing Financial Statements and the Closing Working Capital calculation, Seller has not given Buyer written notice of any objection as to the Closing Working Capital calculation (which notice shall state the basis of Seller's objection in reasonable detail) (the "Objection Notice"), then the Closing Working Capital calculated by Buyer shall be final and binding on the parties and be used to determine the Adjustment Amount.

2.3 If Seller gives Buyer an Objection Notice, and if Seller and Buyer fail to resolve the issues outstanding with respect to the Closing Financial Statements and the calculation of the Closing Working Capital within thirty (30) days of Buyer's receipt of Seller's Objection Notice, Seller and Buyer shall submit the issues still in dispute to [name], independent public accountants (the "Independent Accounting Firm") to be resolved.

2.4 The Independent Accounting Firm shall act as an

Unlike other alternative dispute resolution mechanisms (such as arbitration), expert determination clauses are generally not subject to a particular set of substantive or procedural rules, but instead to what the parties agree.³ Thus, the parties can tailor the procedure to their circumstances, and specifically to the type of disputes that may arise from the contract.

An expert determination can be the quickest and most cost-efficient way of resolving valuation or technical issues, especially if the contract clause on which it is based is carefully drafted (i.e. it is not pathological). In fact, time dedicated to carefully drafting an expert determination clause will likely save costs if and when the clause is to be enforced.

1.2. Scope

Expert determination clauses are particularly suited to valuation disputes (e.g. share valuations or price adjustments) or disputes regarding technical issues (in fields such as information technology, accountancy, supply contracts, oil and gas). As a result, they have become a standard feature of M&A agreements, particularly

expert, not as an arbitrator, in resolving the dispute. The proceeding before the Independent Accounting Firm shall be an expert determination under the law governing expert determination and appraisal proceedings.

2.5 The determination by the Independent Accountants shall be final and binding on the parties, except in the event of manifest error.

3 While most jurisdictions have arbitration-related laws or regulations that govern certain aspects of the award resulting from an arbitral proceeding, they typically have no laws governing any aspect of expert determinations.



as a means to establish the value of specific assets at a later date, such as in a share purchase agreement involving completion accounts.

Expert determination clauses can also be particularly effective in long-term contracts, in which it is typically in the parties' interest to have a determination at several stages of the contract to enable its completion and facilitate future discussions on the same issue. This is the case, for instance, in construction contracts.⁴

1.3 The Expert's Role and Authority

Expert determination clauses are not generally governed by legal provisions, and the clauses operate entirely on a contractual basis. Thus, the parties to the

4 On the matter of expert determinations in the construction sector, we refer to the article *On Dispute Boards*, by César Sanabria Oviedo, published in Issue 5 of the *Investment Arbitration Outlook*.

agreement define the exact scope of the experts' authority, which means that the expert's responsibility depends entirely on the contract granting him or her authority and he or she has no powers other than those expressly granted by the parties to the contract.

It is often said that 'the value of the experts lies, above all, in their valuation and industry expertise.'⁵ Indeed, the expert's role is to set a price, a compensation or a figure, when this is necessary to resolve a dispute or complete an agreement. When determining a figure, experts will only base their analysis on facts; they do not conduct a legal analysis of the parties' rights under the contract.

Although not expressly regulated,

5 See Wolfgang Peter and Daniel Greineder, 'Conflicts between Expert Determination Clauses and Arbitration Clauses' *Global Arbitration Review* (6 December 2019) <www.globalarbitrationreview.com> accessed on 30 November 2020.

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While arbitral awards can be enforced based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and can be challenged in most jurisdictions on limited grounds, an expert's decision or determination, unless re-classified as an arbitral award, is not governed by the New York Convention

experts are in principle free to draw their own conclusions without necessarily thoroughly examining all the evidence. They may reach their conclusions without hearing the parties, but they may also decide to take a fact-finding approach, subject to the cooperation of the parties and, as the case may be, third parties, as experts have no authority to compel third parties to collaborate.⁶

2. Expert Determination Clauses

2.1 Types

As already mentioned, unlike other means of alternative dispute resolution, expert determination clauses are not generally governed by substantive or procedural rules, but rather what the parties stipulate. Thus, an expert's powers and how he or she is to reach his or her determination are governed by the applicable expert determination clause, which the parties can tailor to the circumstances, and in particular the

type of disputes arising from the contract – thus avoiding unnecessary delays and higher costs.

Expert determination clauses usually cover (or should cover): (i) the scope of the issue(s) to be determined (generally valuation and other technical issues); (ii) the number of experts; (iii) the expert(s)' qualifications, appointment (or appointing authority or mechanism), and their duty to act independently and as an expert as opposed to as an arbitrator; (iv) how the determination will be conducted and other procedural rules; (v) how the decision will be issued;⁷ (vi) whether recourse to the expert determination is optional or mandatory; (vii) whether the decision is final and binding and, if so, whether it can, in any way, be challenged;⁸ (viii) whether or not the expert can award interest or costs; and (ix) how the expert(s)' fees are to be paid.

While expert determination clauses

⁷ For instance, if the decision needs to be in writing and reasoned.

⁸ For instance, in the event of fraud or manifest error.

are usually not governed by local law, several international institutions provide their own rules, guidelines and template clauses, such as the ICC's Expert Rules,⁹ the LCIA's standard rules, the CEDR's Expert Agreement,¹⁰ the Academy of Experts' Standard Rules¹¹ and the World Intellectual Property Organisation ('WIPO') Expert Determination Rules¹².

If expert determination clauses do not provide sufficiently detailed rules for the expert to be able to issue a decision, the expert may determine, jointly with the parties, how he or she is to proceed.

Expert determination clauses typically provide that the experts' decision or determination is final and binding. However, they may also state that, under certain circumstances, the expert's decision will not be final and may ultimately be challenged in court or arbitration. This type of clause is commonly found in multi-tiered resolution or multi-step clauses and normally combines a variety of means of dispute resolution alternatives in a successive or phased manner, by steps,

⁹ The ICC provides four template clauses, which vary depending on whether the expert determination is mandatory or optional, binding or not, as well as whether recourse to arbitration is an option, <<https://iccwbo.org/dispute-resolution-services/experts/administration-experts-proceedings/suggested-clauses-referring-to-the-icc-rules-for-the-administration-of-expert-proceedings/>> accessed 30 November 2020.

¹⁰ See <<https://www.cedr.com/wp-content/uploads/2019/10/CEDR-Expert-Determination-Agreement-2019.pdf>> accessed 30 November 2020.

¹¹ See <<https://academyofexperts.org/knowledge-hub/tae-rules-for-expert-determination/>> accessed 30 November 2020.

¹² See <<https://www.wipo.int/amc/en/expert-determination/rules/>> accessed 30 November 2020.

levels or stages, in which recourse to litigation or arbitration is typically the last resort. For instance, some construction contracts (such as the various models of the General Conditions of Contracts published by the International Federation of Consulting Engineers ('FIDIC')) include a dispute settlement board to assess in a swift and simple manner any issues arising in the course of the execution of works. Even though its decision is binding on the parties, it is not final, as the parties have recourse to arbitration.

Moreover, parties can agree to split clauses, to the extent that some disputes arising from an agreement refer to one method of dispute resolution, such as a court or tribunal, while others that derive from the same agreement refer to another, such as an expert determination. In this case, the parties must clearly distinguish between the two categories of disputes to ensure that no dispute is left without a remedy and, at the same time, avoid as much as possible disputes as to which is the applicable dispute resolution method.

2.2. A Glimpse at the Expert Determination Mechanism in Chile and Portugal

As mentioned, since parties are in principle free to agree on the content of their agreements, expert determination clauses are generally valid. While expert decisions are not binding in the same way as a judgment, they are contractually binding on the parties. Therefore, if one of the parties does not respect the

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⁶ Ibid.



expert's decision, the other party will have to resort to a different conflict resolution mechanism.

2.2.1. Chile

Stepping back from the private sector, in which parties are free to agree to an expert determination mechanism either in a contract or after a dispute arises, the Chilean regulation on concessions is particularly interesting. Since 2010, all concession contracts must include an expert determination clause. This is specifically provided for in Chile's Public Works Concessions Law (Public Works Concessions Law),¹³ which regulates public-private partnerships under which private companies are entrusted with the execution, conservation or repair of public works in exchange for the right to exploit what is being constructed in the terms provided in the respective concession contract.

In 2010, the Public Works Concessions Law was amended and a 'Technical Panel' was created to resolve technical or economic discrepancies arising between the parties (i.e. between the concessionaire and the Chilean Ministry of Public Works) during the execution of a concession contract. Article 36 of the Public Works Concessions Law expressly states that the Technical Panel will render a reasoned 'technical recommendation' that will not be

¹³ This amendment to the Public Works Concessions Law was passed on 20 January 2010, through Law 20410. See <Decreto-900 18-DIC-1996 MINISTERIO DE OBRAS PÚBLICAS - Ley Chile - Biblioteca del Congreso Nacional (bcn.cl)> accessed 29 April 2021.

binding on the parties. This provision also states that the Technical Panel's recommendation will not prevent the concessionaire from bringing the dispute to the Arbitral Committee or the Court of Appeal of Santiago,¹⁴ even if the dispute refers to the same facts. In this case, the Arbitral Committee or the Court of Appeal of Santiago may take the technical recommendation into account when issuing its judgment; however, the decision by the Technical Panel has no precedential value.

The Technical Panel will be formed by leading professionals with technical, economic or legal expertise in the infrastructure concessions sector, specifically by two lawyers, two engineers and an expert in economic or financial sciences. The members of the Technical Panel will exercise the role for six years and may not be appointed again for successive periods.

The law provides that the costs of managing and operating the Technical Panel and half of the members' fees will be paid for by the Chilean Ministry of Public Works through its inclusion in the yearly budget by way of the Budgets Law, while the other half of the members' fees (regulated by the Public Works Concessions Law) will be paid for by the concessionaires.

Although the amendments to the Public Works Concessions Law are relatively

¹⁴ Article 36 bis of the Public Works Concessions Law states that any dispute or claim may be resolved by an Arbitral Committee or the Court of Appeal of Santiago.

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recent, there has been controversy as to how little the Technical Panel and the Arbitral Committee were used between 2010 and 2014. Some private actors linked to the concession industry have even claimed that the new dispute settlement system institutions have acted as a barrier or deterrent to filing claims.¹⁵ However, between 2015 and 2020 the Technical Panel handled 55 disputes concerning the execution of 19 public works concessions, of which 58% (32) related to the scope of concepts and clarifications and 30% (17) to higher compensation.¹⁶ It is not known how

¹⁵ Ministerios de Obras Públicas, 'Concesiones de Obras Públicas en Chile. 20 Años' 68: <http://www.concesiones.cl/Documents/libro-Concesiones_obras-publicas-chile-20.pdf> accessed 2 December 2020.

¹⁶ Technical Panel website <<https://www.panelconcesiones.cl/OpenDocs/Default.aspx?argCarpetaId=506&argInstanciaId=66&argDocumentoId=3068>> accessed 2 December 2020.

many of these disputes were ultimately brought before the Arbitral Committee or the Court of Appeal of Santiago. Nevertheless, in light of the figures, in Chile, at least in the public works area, expert determination clauses have unquestionably contributed to resolving discrepancies relatively swiftly.

Chile also has an expert determination process in the electricity sector. In 2004, the General Electrical Services Law ('LGSE') created an 'Expert Panel' to resolve through binding decisions disputes arising from the application of the electricity legislation. This panel is an independent body formed by seven professionals, highly qualified in the electricity sector: five engineers, who need not be Chilean, and two lawyers. The LGSE states that the panel is financed by the companies

in the electricity sector who generate, transmit or distribute electricity. Article 211 of the LGSE provides that the Expert Panel's decisions are binding on all the parties and cannot be appealed before any administrative or judicial authority. However, the Chilean Minister for Energy has the power to declare the Expert Panel's decision inapplicable by rendering a reasoned resolution. The legal nature of the Panel is widely debated since it does not qualify as a court under Chilean law. However, its decisions are legally binding on the parties and have *res judicata* effect.¹⁷ Since 2004, 256 disputes have been brought before the Expert Panel, all of which are available for consultation on the Panel's website.¹⁸

Finally, the public transport sector also has an expert determination process. Since 2009, Law 20378 on public transport allowance created an 'Expert Panel' to determine monthly adjustments to the rates of the public transport system of three specific districts of Santiago City.¹⁹ It is formed by three professionals, who decide the rates that will finance the Chilean public transport system in the three districts. This decision needs to be notified to

¹⁷ For more details on this matter, see Nicolas Carrasco, Claudio Valenzuela and Nicolas Palma, 'El panel de expertos de la ley general de servicios eléctricos: consideraciones para una decisión consecuencialista' (Ius et Praxis [online]. 2020, vol.26, n1), 101-123 <https://scielo.conicyt.cl/scielo.php?script=sci_arttext&pid=S0718-0012202000100101&lng=es&nrm=iso> accessed 2 December 2020.

¹⁸ Expert Panel website <<https://www.panelexpertos.cl/discrepancias/tramitadas/>> accessed 2 December 2020.

¹⁹ Specifically, Santiago Province and the districts of San Bernardo and Puente Alto.

If the parties agree that the expert's decision is final and binding, they are obliged to comply with it; failure to do so gives way to contractual liability by the breaching party

the Chilean Ministry of Transport and Communications, which may send observations to the Expert Panel. These observations are not binding to guarantee the Panel's autonomy and independence. All the Expert Panel's decisions are available for consultation online.²⁰

Hence, besides the availability of expert determination mechanisms in the private sector, in which contracting parties are free to include an expert determination clause with the abovementioned features in their contracts, Chilean law offers at the very least three types of expert determination processes in the public sector.

2.2.2. Portugal

Portugal has no specific law governing expert determinations. They are only used in private contracts and are subject to the parties' free will. Therefore, the above rules (or, more accurately,

²⁰ Experts Panel website <<http://www.panelexpertostarifas.cl/index.php>> accessed 2 December 2020.



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best practices) on how to draft expert determination clauses apply.

Another important aspect is the evidentiary value of an expert decision in the event of a subsequent (judicial or arbitral) dispute, as this is not expressly regulated.

3. Main Differences Between Expert Determinations and Arbitration

Similarly to arbitration, expert determination is a dispute resolution mechanism that typically results in a binding decision. However, there are fundamental differences between expert determination and arbitration. Indeed, 'just as arbitration is not litigation, so too arbitration is not Expert Determination or valuation.'²¹

3.1. Expert Determination v Expert Evidence in Arbitration

Whilst using experts in arbitration is common, this should not be mistaken for expert determination. The parties or the court itself may request the involvement of experts in litigation or arbitration to examine a fact that requires special expertise. In this circumstance, the expert opinion is a means of evidence, but the experts do not decide the question of fact and their opinion is not binding on the court. Ultimately, it is for the court or arbitrator to weigh up the evidentiary value of the expert's opinion in resolving the case.

²¹ Gary Born, *International Commercial Arbitration, Chapter 2: Legal Framework for International Arbitration Agreements* (Kluwer Law International 2014), 259.

Conversely, expert determination is not a means of evidence, but rather a form of alternative dispute resolution in which it is the expert who decides the matter referred to him or her, in a manner that is binding on the parties, unless the expert determination clause states otherwise (e.g. if the clause clearly states that the expert determination is not binding and is only indicative or that it can be challenged before an arbitral or judicial court).²²

3.2. The Expert's Decision is not Enforceable

The main difference between expert determination and arbitration is that, while arbitral awards can be enforced based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (known as the 'New York Convention') and can be challenged in most jurisdictions on limited grounds, an expert's decision or determination, unless re-classified as an arbitral award, is not governed by the New York Convention.

Indeed, arbitration is a jurisdictional process and, hence, arbitrators must hear a dispute and hand down an award that is enforceable in terms similar to a judgment handed down by a court. Conversely, the expert's decision in

²² Mauricio Almeida Prado, 'Chapter 3: Challenges of Expert Determination in M&A Transactions', in Filip J.M. De Ly and Paul-A. Gélinas (eds), *Dispute Prevention and Settlement through Expert Determination and Dispute Boards* (Dossiers of the ICC Institute of World Business Law, Volume 15 (Kluwer Law International; International Chamber of Commerce, 2017), 44.

an expert determination procedure is binding solely on the parties. If the parties agree that the expert's decision is final and binding, they are obliged to comply with it; failure to do so gives way to contractual liability by the breaching party. However, the expert's decision has no *res judicata* effect and, as such, cannot be enforced.

4. The Close Ties Between Expert Determinations and Arbitration

4.1. Challenging the Expert's Decision

As explained, the expert's decision is only contractually binding on the parties because it is not directly enforceable in the same way as arbitral awards, so it can only be enforced by initiating proceedings as regulated in and based on a contract. However, there are limited grounds on which an expert's decision can be challenged:²³

(i) On the ground that the expert has exceeded his or her powers, given that a determination will not be binding on

²³ Clive Freedman, *Chapter 2: Expert Determination, The common law perspective*, 31-34.

the parties if the expert acts outside the scope of the authority they assign him or her. Normally, the parties do not confer power on the expert to decide on matters of law. However, there is no general rule preventing the parties from doing so.

(ii) On the ground of material departure from the terms of the contract, since the decision must be made in accordance with the terms of the contract. Note that the more a contract regulates how the expert should resolve a dispute, the greater the risk that a dissatisfied party will find grounds to challenge the expert's decision in court.

(iii) On the ground that the decision was mistaken. Unless the contract contains some limitation such as 'in the absence of manifest error', a court cannot analyse whether an expert who has complied with the requirements of the contract has reached an incorrect decision. If the expert has answered the right question but has reached the wrong conclusion, the determination is still binding. This changes if the expert has answered the wrong question or has materially

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departed from his or her instructions. In this case, the decision may not be binding.

(iv) On the ground that the expert was not independent. While it is clear that the expert must not act fraudulently or collude with one of the parties, there is no general rule that the expert must be entirely independent of the parties and neutral. While a decision by a judge or arbitrator will not be upheld if it 'appears to be partial' 'actual partiality' needs to be proven in expert determinations.

(v) On the ground of unfairness. Expert decisions need not comply with an objective standard of fairness. However, an expert is always well-advised to act fairly and to avoid conduct that could give rise to suspicions, as this will minimise the risk of the losing party finding grounds to challenge the decision (whether or not that challenge may ultimately be unsuccessful).

In this respect, Austrian and German courts have recognised some of the following reasons to declare that an expert's decision or determination is not 'binding': (i) the expert determination goes beyond the agreed scope of the determination; (ii) the expert opinion is 'obviously' inequitable or incorrect; (iii) the parties claim that the Expert Determination proceedings have not been fair, in particular if the parties have not been involved and thus their right to be heard has been infringed.²⁴

²⁴ Christian Klausegger, 'Chapter III: The Arbitrator and the Arbitration Procedure, Ad Hoc Expert Determination



4.2 What is the Probative Value of Expert Determinations in Arbitration in Chile and Portugal?

As mentioned, unlike arbitral awards, the expert's decision is not directly enforceable. Normally, if the parties decide to include an expert determination clause as an alternative dispute resolution mechanism, it precedes another dispute resolution mechanism such as arbitration. In Chile, as in Portugal, if a party dissatisfied with an expert determination decides to bring the discrepancy to court or arbitration, the arbitrator or court may take it into account in rendering its award or judgment, but the expert's decision

– Useful Tool or "Too Much of a Headache", in Christian Klausegger, Peter Klein, et al. (eds), *Austrian Yearbook on International Arbitration*, Volume 2013 (Manz'sche Verlags- und Universitätsbuchhandlung; Manz'sche Verlags- und Universitätsbuchhandlung 2013), 174.

does not create precedent. It may have a bearing on the award or judgment, but it is up to the court or tribunal to assess the facts of the case. This also applies to the recommendation issued by the Technical Panel regulated in the Public Works Concessions Law of Chile.

5. Conclusion

Expert determination clauses are an alternative dispute resolution mechanism in which the parties to an agreement appoint a third party, who usually has technical knowledge, to decide disputes arising from the agreement. The expert's decision is binding on the parties but not enforceable as an arbitration award or court judgment. This notwithstanding, this type of dispute resolution mechanism has advantages since (i) the parties are free to decide the skill-set of the expert who is to settle the

dispute; (ii) the expert must follow the procedure set out in the agreement or, in the absence of a procedure, designed and agreed to by the expert and the parties; and (iii) the dispute can be resolved swiftly compared to arbitration and court proceedings (30 days, for instance, or as the contract establishes).

Given the significant number of sophisticated contracts executed worldwide between specialist parties in the areas of construction, mining, electricity, etc., it seems there is an increasing need for all jurisdictions to regulate the matter. If not, expert determination clauses will mostly depend on the contracting parties' autonomy. Chile is a good example of such specific regulation, particularly in the concessions, electricity and public transport sectors.

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