

Expert Determination - what it is - how it works, opportunities for experts

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Expert determination

1. It is the job of an **ARBITRATOR**, best known in sporting terms throughout the world as **referee** in football and **umpire** in tennis, to examine the positions of two parties in objective disputes and to judge and possibly also assess these on the basis of objective criteria.

The question of **EXPERT DETERMINATION** will always arise in situations where two or several persons take different views about one and the same thing and these views cannot be reduced to a common denominator, i.e. to one level or one amount.

Even in cases in which, try as they may, the parties cannot align their opinions or ideas the call arises for a neutral, independent, qualified person who can or could mediate between the existing differences.

Consulting an "**ARBITRATOR**" in contentious or controversial matters is basically the **second phase** of conflict resolution if it is assumed that a discussion between the parties represents the **first phase** of disagreement. The equivalent to the **ARBITRATOR** or **EXPERT DETERMINER** in personal disputes is the **MEDIATOR**.

MEDIATORS are consulted in Germany if, for example, there is a dispute in a family, between husband and wife, in matters of inheritance or in the case of arguments with neighbours.

The **third phase** of dispute resolution in Germany is referred to as **voluntary jurisdiction**, i.e. an **ARBITRAL TRIBUNAL**. **ARBITRAL TRIBUNALS** usually consist of two assessors, usually experts for the fields of expertise to which the dispute refers. There is also an **ARBITRAL UMPIRE** (chairman), usually a law expert, elected by the two **ARBITRATORS** (the experts). The two experts are or can be appointed by the respective parties upon their choice.

This facility of dispute resolution by an arbitral tribunal is not the subject of my paper but had to be mentioned for the sake of completeness.

The **fourth phase** of dispute resolution is to bring the case before court in accordance with the law, such as the **ZPO** (German Code of Civil Procedure) and the **BGB** (German Civil Code). This area of **justice** is also not the subject of my paper today.

Today, in many cases the courts make use of **EXPERT DETERMINATION** further to proceedings once the legal side of the dispute has been clarified (so called Court Annexed Arbitration). This always happens if the legal dispute can basically be settled but the value of a thing or the use of certain things and objects is still unclear. In cases such as these German courts frequently recommend that the parties agree on an **EXPERT DETERMINER** who can then set about clarifying the objective questions on behalf of both parties.

2. In concrete terms, what is **EXPERT DETERMINATION** and what weight does “**EXPERT OPINION**” ultimately carry?

There must first be a written agreement between the parties that the matter in dispute is to be “amicably” settled with the assistance of a neutral, qualified person with experience of disputes. There are no restrictions to the nature of contractual agreement. Under German law, the German Civil **law pertaining to contracts for work and services under the BGB** (German Civil Code) provides the basis for commissioning an expert. Accordingly, a contract is to be drawn up in which the tasks of the **EXPERT** for the actual case in question are described exactly.

The arrangements and agreement can be made by the parties without the involvement of other institutions, but the written form is mandatory. However, the parties themselves determine **what** is to be assessed and **how** it is to be assessed and stipulate this in their contract or in the instructions given to the **EXPERT**.

Similar to a court instruction to take evidence (court instruction to commission an expert to draw up an opinion on defined questions), the expert is commissioned by the parties. He must strictly observe the instructions given to him and their content. He will primarily be required to assess objective matters and not the legal situation even if it cannot be ruled out that the **EXPERT DETERMINER** must be acquainted with and also understand the legal background to a certain extent.

Under German law an expert is prohibited from providing legal advice during the course of his work. The German law on legal advice restricts these activities to a few professional groups, and predominantly to lawyers and judges.

An **EXPERT DETERMINER** can be selected and determined for a broad variety of activities and is not obliged by law to accept an **INSTRUCTION** given to him by the parties. He may also refuse it.

In selecting a suitable expert, associations, appointing institutions such as architect and engineer chambers, chambers of commerce and crafts, and also courts, professional organisations and other bodies may similarly be helpful in suggesting suitable persons who are able to prepare an **EXPERT DETERMINATION** or implement **ARBITRAL EXPERT PROCEEDINGS**.

3. Once the instructions have been issued to the **EXPERT**, he must first check whether he is able to accept the task with which he has been entrusted. He may have no special personal links with one or the other party involved in these proceedings. Under the German Code of Civil Procedure (German law on the implementation of legal disputes in civil law) any connection of the expert with one party would trigger a “**suspicion of partiality**”, i.e. the neutrality and thus the objectivity of the **EXPERT** in question would be injured or could no longer be guaranteed by the latter.

Furthermore upon accepting instructions the expert must check whether he has a sufficient level of expertise to assess or evaluate the facts of the case. An overestimation of expertise on the part of the consulted expert would not be helpful to the proceedings and could lead to the expert encountering problems **himself** afterwards i.e. having liability claims asserted against him due to an **incorrect** or **faulty opinion**.

During the **EXPERT DETERMINATION PROCEEDINGS** the **parties** are obliged to support the expert in his work and above all to supply him with the requisite documents and information required in connection with the case. This is referred to as “**duty of the parties to co-operate**”.

4. The wording of the **EXPERT DETERMINATION AGREEMENT** made by the parties is not subject to any restrictions but may possibly have legal consequences as regulated by the law (e.g. in the Civil Code). However, the type and design of the agreement is not tied by any fixed conventions.

The agreement entered into by the parties means that the **findings made by the expert** are ultimately **binding** on them unless they are **evidently unfair** or **evidently incorrect!** As far as the **EXPERT DETERMINER** is concerned this means that he must have made serious mistakes such as basing his assessments on incorrect data or must have made arithmetical or spelling mistakes which then led to wrong results, causing his opinion to be evidently incorrect.

An **EXPERT DETERMINATION REPORT** must have the same structure as a general expert opinion at court. The **statement of facts** must be followed by the **analysis**, and then the **assessment and evaluation**. It must end with a **summary**, possibly with figures and reference values.

5. **EXPERT DETERMINATION** can be used almost everywhere in all areas. The instrument of expert determination is frequently used in the fields of buildings and construction, insurance, tenancy disputes, agricultural lease matters, inheritance disputes and divorces.

Enforcement is not possible on the basis of an expert determination, because this is a relationship between the disputing parties purely under private law and not under procedural law. This means that the judgement of the **EXPERT** has no direct legal effect which could be enforced or asserted with the assistance of a court of law.

EXPERT DETERMINATION should only be assumed by qualified and experienced experts because not only expertise in the specialised field is required but also the personal ability to mediate between the parties in dispute. He must always be aware of his neutral function of **conflict advisor** and **conflict mediator** and where necessary have the personality to assume a mediating role.

Making a specialised technical statement is often not enough to settle differences of opinion. Convincing argumentation will also frequently be required to bring about an appropriate understanding by one or the other party.

WHY EXPERT DETERMINATION? It's faster because there are no great regulatory requirements, no special deadlines and because it can be obtained involving only a few people (time is money)!

EuroExpert is the ideal platform to provide successful co-operation for all member countries at a European level for experts in general and expert determination in particular.

This is why Germany and the BVS explicitly support the work of EuroExpert.