

Expert Determination Misconception and Misapplication

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Introduction

A long tradition in common law jurisprudence has been the use of a person or persons with specialised expertise to determine specific issues between disputing parties.²

For the most part this process was applied to valuations of, for example, the value of shares, property, partnerships and the like, and called ‘Expert Determination’.

Whilst this traditional valuation process continues to be applied in Australia, over recent years there has been rapid growth and adoption of the process, particularly in the engineering, building and construction industries on the basis that it is a relatively cheap and comparatively expeditious means of resolution of disputes compared with the generally more costly and alleged delayed means of arbitral proceedings and even more costly and delayed curial proceedings.

Nature of the process

An agreement to implement an ‘Expert Determination’ process ordinarily arises in a contract between the parties incorporated at the formation of the contract or when a dispute or disputes arise.

To satisfy the requirements of expertise, the dispute resolver is required to have training, qualification, skill or experience in the subject matter of the dispute.

It is then put into effect by a contract entered into by the parties and the person or persons agreed to act as experts for the purpose of the process.

Where an Expert Determination clause is included as a term of a contract between the parties and which provides ‘... That any or all disputes arising shall be submitted to Expert Determination for final resolution’ will be void and of no effect as being contrary to public policy in purporting to oust the jurisdiction of the Court.³

This ordinarily arises from the apparent belief in the drafters that an arbitration clause can be converted into an ‘Expert Determination’ clause merely by replacing the word ‘arbitration’ by ‘Expert Determination’.

1 LFIAMA.

2 For example, *Re Dowdy and Hartcup* (1885) 15 QBD 426 at 429.30.

3 *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd* (1998) 4 BCL 277.

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As the relationship between the disputing parties and the expert(s) is one of private contract, the parties are free to impose (subject to the normal limitations) such terms and conditions or process as they desire and it is in this area that problems have arisen rather than adopt rules of Expert Determination produced by relevant professional bodies.⁴

The Expert's role is one of inquisition and applying the Expert's own expertise.

The Expert must be expert in the subject matter of the dispute.⁵

The amplitude of process in Expert Determination was the subject of *Northbuild Constructions Pty Ltd v Discovery Beach Project Pty Ltd*.

Certain disputes arose between the parties to a construction contract in Queensland. These disputes gave rise to both an arbitration and an Expert Determination.

The matters referred to Expert Determination involved questions of both fact and law. As a consequence joint experts, a lawyer (replaced) and a quantity surveyor were appointed by the parties.

At the prompting and formulation of the Experts, the parties agreed that the Experts could take oral evidence and allow cross examination essentially changing the function of the Expert Determination process to being quasi-judicial akin to an arbitration.

By majority, the Court of Appeal⁶ held to the effect that such empowering by the parties did not change the process from an Expert Determination to an arbitration which could be consolidated with an arbitration already on foot dealing with other claims relating to the same project.

That the Experts in this case considered that to carry out their function it was necessary to implement a quasi-judicial process suggests that:

- the nature of the matters referred were not appropriately the subject of an Expert Determination; or
- the Experts appointed were inappropriate to deal with the subject matter of the reference to Expert Determination.

By their agreement to the Experts suggestion to empower the Experts to implement a quasi-judicial process, it cannot be construed that this validly empowered the Experts to administer an oath or affirmation.

Absent the adducing of evidence under oath or affirmation questions of compellability or perjury arise but, more importantly, the probative value of such evidence adduced is questionable.

That the parties agree a process which is quasi-judicial and is consistent with what otherwise would be an arbitration does not mean that the process becomes an arbitration which is instituted by 'An agreement in writing to refer present or future disputes to arbitration'.⁷

4 For example, Law Societies or Institutes, Dispute Resolution Institutes.

5 *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Ltd* (1998) 4 BCL 277.

6 [2008] QCA 160 per Muir JA, Mackenzie AJA, Atkinson J dissenting.

7 Commercial Arbitration Acts s 4.

Further, the description of the role as an Expert Determiner expresses the parties' intention but is not conclusive.⁸

The Expert cannot unilaterally impose upon the parties a quasi-judicial role (as in *Northbuild*) without the express approval of the parties notwithstanding the power generally given to the expert to determine procedures.

Issues of contested mixed fact and law cannot be dealt with by an Expert and should be referred to a court or to arbitration.

Where an Expert Determination clause or agreement provides to the effect that '... The expert shall act as an expert and not an arbitrator' such provision is determinative.

Essentially, in its traditional form, the role of the Expert is inquisitorial, not required to hear the parties,⁹ to take evidence in the absence of the parties and act solely on his or her own opinion¹⁰ and as such is not bound by the Rules of Evidence or to provide procedural fairness¹¹ but the parties may include an express contractual provision requiring procedural fairness.¹²

Ordinarily the Expert will proceed to determine the dispute on the basis of agreed facts submitted by the parties but there is an implied term that the Expert should act fairly and impartially.

There is no procedural code for Expert Determination as there is for arbitration.¹³

Absent any obligations of procedural fairness an Expert is not required to take evidence in the presence of the parties or to disclose such evidence so obtained to the parties contrary to provisions of procedural fairness.

Limitations

Certain disputes, particularly those involving contested issues of fact and/or law where credit is an essential part of the enquiry, or relating to conduct such as allegations of negligence or alleged breaches of statute law prohibiting misleading and deceptive conduct, cannot be resolved by an Expert Determination and any agreement to refer to an Expert Determination is void and of no effect.¹⁴

Importantly, the Expert appointed to effect an Expert Determination must be an expert in the subject matter of the dispute.¹⁵ It is not sufficient for an appointing or nominating body to appoint in a complex technical dispute a lawyer with some passing knowledge of the subject matter of the dispute or a person with experience and knowledge in arbitration as if the two processes required the same expertise and process.¹⁶

8 *Age Old Builders Pty Ltd v Swintons Pty Ltd* [2003] VSC 307.

9 *Capricorn Inks, Zehe Services* *ibid* at 28.

10 *Palacath Ltd v Flanagan* [1985] 2 All ER 161, 166.

11 *Zehe Services v Traffic Technologies Ltd* [2005] QSC 135, 322.

12 *Haunslow London Borough Council v Twickenham Garden Developments* [1971] Ch 233.

13 *Kordall, Freedman and Farrel* "Expert Determination".

14 *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd* (1998) 4 BCL 277.

15 *Ibid*.

16 *Ibid*.

Where the Expert is required to conduct the proceedings affording *procedural fairness* at its fundamentals to require each party to being made aware of the case against it and be given an opportunity to answer that case, this would seem contrary to the philosophical and traditional rationale for Expert Determination and will likely defeat the purpose of a quick and relatively inexpensive determination.

However, where the parties by their contract with the Expert or the applicable governing rules¹⁷ require the giving of reasons, such reasons may be examined by a court as to the adequacy.¹⁸

Most rules governing Expert Determination provide to the effect that ‘The Expert shall adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay and expense ...’¹⁹ but this must be construed in the context of other rules providing that the Expert is not an arbitrator and not ‘deemed to be acting in an arbitral capacity’.²⁰

An Expert Determination does not enable compellability of witness or perjury or unsworn witnesses.

Other than as might be provided in an agreement between the parties and the Expert, and to that extent only as permissible by law, an Expert has no protection against suit for negligence or anything done or not done in the course of the Determination compared with statutory protection of arbitrators. Some Institutional rules, where they are adopted, include exclusion of liability for acts or omissions.²¹

An advantage of Expert Determination but not uniquely²² is the ability of the parties to impose conditions of confidentiality both on each other and the Expert.

Contra, an arbitration which is by its nature a judicial process which requires the determination of a dispute on the basis of the evidence placed before the tribunal by the parties, an Expert Determination involves the Expert making his or her own independent investigations.²³

The fundamental test remains – the ‘Expert’ must be expert in the subject matter of the dispute.

Implementation

Parties or their advisors have seen fit to create a unique regime but often provide for a nominated third party to make the nomination or appointment of the Expert(s)²⁴ without adopting the complimentary Rules of that third party.

If the nominated third party fails or refuses to nominate or appoint (as the case may be) an Expert then the Expert Determination agreement made between the disputing parties fails and is of no effect.

17 IAMA Rules for Expert Determination r 10.2.

18 *Firedam Civil Engineering Pty Ltd v Shoalhaven City Council* [2009] NSWSC 802.

19 IAMA Rules for Expert Determination r 5(3).

20 *Ibid* r 5(1).

21 *Ibid* r 17; Law Society of New South Wales Rules for Expert Determination Rule.

22 See confidentiality provisions of Commercial Arbitration Acts s27E and ff.

23 *Sutcliffe v Thackarah* [1974] AC 727, 735 per Lord Reid.

24 For example ‘The President for the time being of the Law Institute of (State or Territory)’; ‘The President for the time being of the Australian Society of Accountants’.

Some professional bodies now refuse to make a nomination or appointment because of a perceived exposure to suit if the person nominated or appointed fails to satisfy the necessary criteria or fails to carry out the function appropriately.

Any misconception by the Expert(s) on the required function, misconceiving or erroneously construing the question(s) to be answered, or applying the wrong test(s) will be an error of law such that the outcome can be set aside by a court.²⁵

Liability of expert

Most institutional rules for Expert Determination incorporate a clause provision such as that of the Law Society of NSW in the following terms.

‘Rule 5.1 Except in respect of any fraud, the parties release the Society, its officers, employees and agents, and the Expert from any liability of any kind whatsoever arising out of or in connection with the Expert’s nomination, appointment, Expert Determination Process, or the Expert’s determination’.²⁶

However, a term to be implied by law into the contract made between the parties and the Expert is that the Expert Determiner would exercise reasonable care and skill.²⁷

Failure of the Expert to satisfy these criteria would likely give rise to suit for damages.

25 Re *Kearsly Shire Council* [1947] 47 SR (NSW) 416.

26 See also IAMA Rules for Expert Determination r 17.

27 *Astley v Austrust Ltd* (1999) 73 ALJR 403.

