Expert Appraisal Or Determination

- A A de Fina[1]

Introduction

The use of Experts as valuers or assessors has been a long established practice in common law jurisprudence. It is only comparatively recently that Experts have been seen and generally utilised as appropriately providing a formalised service in avoiding disputes or resolving disputes once they have arisen.

The increased interest in Expert Determination in Australia appears, perhaps coincidentally, to have occurred with the active and organised promotion of mediation. Such promotion often unnecessarily painted formal dispute resolution processes as generally undesirable.

This theme was in part taken up by influential commentators, one observing that expert appraisal was being adopted "*[to] avoid arbitration with its perceived delays and cost*"[2].

In many disputes and in many areas of trade or commerce parties are now seeking to submit to expert appraisal or determination rather than arbitration. In such a role the Expert is in effect becoming an adjudicator.

Because of the significant degree of commonality in many aspects of the processes, absolute distinctions between valuation, appraisal, determination and assessment are difficult.

However, essentially in all of the processes the Expert is applying his own expertise, knowledge, and experience to decide the pre-existing rights or obligations of one or other or all of the parties to a dispute other than in a judicial or quasi judicial manner.

Generally, the courts of Australia have been reticent in interfering with a dispute process established by consent of the parties, whether arbitral or otherwise. Most challenges to the expert processes which have been the subject of curial proceedings have been mounted on grounds of alleged ousting the jurisdiction of courts or that the process was void for uncertainty arising from failure to specify procedure. Essentially courts have almost universally held to the principle of freedom of contract recognising that by agreeing to final determination by an expert process the parties have acted with appropriate autonomy and have not ousted or purported to oust jurisdiction of the court by use of such terms as "*final and binding*" or "*conclusive*"[3].

Courts have also held that failure to specify procedure did not necessarily void an agreement to enter into an expert determination process[4].

Successful challenge involving the process has been generally limited to circumstances where the Expert has acted outside the terms of appointment[5].

However, apparently contrary to the general position adopted by courts of other Australian jurisdictions, in a recent decision a court in Western Australia permanently stayed a reference to expert determination finding the particular clause of a contract providing for expert determination by its terms was void and against public policy in that it purported to oust the jurisdiction of the court and prescribed a procedure entirely unsuited to the resolution of disputes that might arise out of the contract. A particular distinction in this case was that, although related to engineering, the dispute principally involved significant issues of law with a claim of approximately $400,000 and a cross claim of approximately $3.6 million[6].

Formal Rules

Prompted by the gaining popularity of expert appraisal or determination in Australia, The Institute of Arbitrators and Mediators Australia in 1997 promulgated rules for expert appraisal/determination. These Rules are the first attempt in Australia to formulate general rules[7] intended to be widely applied ("the Rules"). Relevant extracts of the Rules are footnoted to this article.

Although reflecting and adopting some commonly held principles of expert appraisal as it is applied in Australia and to some extent in other western common law countries[8], the Rules are perceived as having some serious shortcomings and limitations, including some of interpretation.

The initiating provisions of Clauses 1[9] and 2[10] of the Rules appear not sufficiently clear as to establish the intended finality in a determination which may be made. There is not provided in Clause 2 a time limitation for agreement between the parties, in default allowing application by one party for the appointment of an Expert by the Institute. This lack giving rise to potential frustration of an initial agreement to the process.

Additionally, jurisdiction of the Expert is not clearly established by the terms of Clause 2 or Clause 4(a)[11]. Particularly, the meaning of the term "*[Expert] in the relevant subject matter of the dispute*" as provided in Clause 2 may not arise as an issue where the parties agree. However absent agreement, the third party appointing provisions require for certainty more expansive and express provisions as to the meaning and qualification of the term "*Expert*".

The requirement by Clause 4[12] that the Expert must make a determination in accordance with the law imposes duties and obligations upon an Expert who may not be knowledgeable or conversant with the law such that it is possible that some determinations will be open to successful challenge.

The requirement also by Clause 4(b) that the process must be conducted "*[i]n accordance with the requirements of procedural fairness*" without further qualification may not only be in conflict with the provision of Clause 4(c) permitting the Expert to "*[r]eceive any information in such manner as the Expert thinks fit*", but deny the Expert the facility to make enquiries or investigations independent of the parties within and relying upon his expertise for the purposes of the determination - such facility being either necessary or appropriate in some referrals to the process.

That the Expert is not bound to observe the rules of natural justice has been advanced as an appropriate characteristic of expert appraisal[13].

The provision by Clause 4(c)[14] that the Expert must make the determination on the basis of the information submitted by the parties and the Expert's own expertise and apply such weight as the Expert deems appropriate (given that the Expert is already required to apply procedural fairness) allows that the Expert is not required to give equal weight to the competing elements. However, that the Expert is mandatorily required to apply the information submitted by the parties cannot allow total disregard of such submissions. That is, to give the submissions no weight whatsoever. The submissions of themselves are not necessarily evidence and thus to that extent the determination in real terms may be flawed. The provision by Clause 4(i)[15] for broad ranging confidentiality raises serious questions of interpretation. Even if there were, by the terms of the Rules, obligations of confidentiality it would appear that there are not sanctions that could be reasonably applied for breach. For integrity of the process, the proceedings and submissions relating to the process should appropriately be kept confidential by the Expert and by the administering authority but wider amplitude extending to the parties is unclear.

The provision in the Rules at Clause 7(j)[16] that empowers the Expert to determine jurisdiction and the proper construction and application of the Rules and the process would, in most instances, appear sufficient, subject to the previous observation on jurisdiction. However, this again raises the issue of the capacity and knowledge of the Expert to so deal. An alternative scenario may be to empower the appointing authority to determine jurisdiction. In any event, the trigger for resolution as presently provided is a *[d]ispute arising between the parties.* Such questions as provided in Clause 7(j) may appropriately arise at the initiative of the Expert. Whether conflicting submissions of the parties in response to the Expert's question so initiated constitute a "*dispute*" is unclear.

The meaning and effect of the provision of Clause 7(b)[17] empowering the Expert to make declarations or directions requires clarification as to nature and extent of such power, particularly in the context of enforceability.

The provision by Clause 8[18] requiring monies for security for the costs of the process, including the Expert's fees, to be lodged at or before the commencement of the process would, in many circumstances, appear impossible to satisfy in the sense that other than where a process is to be carried out by the Expert for a fixed sum (whether or not subject to adjustment) for example by reference to time taken, no reasonable predetermination of the costs of the process can be made before the process actually begins as provided in Clause 3(c)[19].

Clause 10[20], which is intended to provide for exclusion of liability and indemnity, is at best curiously worded and on its proper construction probably of no effect. Given the perceived shortcomings identified in this article, and in any event the inherent difficulties in the concept and process of expert appraisal or determination at the present stage of development in Australia, a provision in the Rules which as far as possible will be effective in limiting liability for both the Expert and the creators, administrators and appointers under the Rules would appear essential.

The provisions of Clause 11[21] without further qualification may give rise to unintended and costly consequences where the dispute goes to a fundamental of the contract.

Read as a whole the provisions of Clause 4, including particularly but not only the obligation to determine "*[a]ccording to law*"[22], to "*[c]onduct the process in accordance with the requirements of procedural fairness*"[23], to "*[n]ot consult with a party other than in the presence of the other party*"[24], to allow legal representation[25], and allow the Expert to interpret the rules and decide jurisdiction[26] and the descriptions in Clause 5[27] using the terms "*dispute*", "*claimant*" and "*respondent*" raise questions as to whether the process under these Rules is in fact quasi-judicial and an arbitration notwithstanding the disclaimer in Clause 3(b)[28]. If the process is an arbitration (on the proper construction of the Rules) the attendant statutory consequences will seriously affect many of the provisions of the Rules.

In these Rules a prospective problem is the apparent conflict or difficulty arising between the obligations of the Expert under differing provisions of the Rules. The selection of the Expert as being knowledgeable in the subject matter of the dispute may, and in many instances will necessarily give rise to appointment of a person who may have little or no knowledge of the substantive law, or the procedural law as it applies to the requirement of

procedural fairness. However, if the process under these Rules is to be wider utilised and adopted then desirably:

(a) there is implemented training of persons to act as Experts, which of itself presupposes anticipation of engagement as an Expert; and/or

(b) the provision of appropriate guidelines on conduct to persons appointed as Experts.

The Rules should provide a matrix which as far as possible brings the finality and certainty contemplated and intended inherently in the process in its general philosophy.

The only remedy for failure to comply with or put into effect an appraisal or determination appears to lie in an action for breach of contract. In this context the process does not have the benefit of finality and enforceability to the statutory extent available in arbitral proceedings[29].

Absent further clarification by more detailed rules or supporting guidelines and notwithstanding the purported attempt to limit or avoid liability as contained in the Rules, at the very least there would appear exposure to suit on the part of an appointed Expert whose determination is successfully challenged or who fails for whatever reason to deliver a determination. Among other things that person or their estate or assigns may face a claim for thrown away costs and/or refund or reimbursement for monies paid to the person in the role of Expert by the parties or one or other of them.

The Rules are couched in terms inferring and allowing the Expert only to be a single natural person. It is possible to contemplate particular disputes where the process itself would be appropriate, but where the "*Expert*" role might best be carried out by a company, partnership, or firm consisting of more than one person.

However, as a developing process, these Rules for expert appraisal or determination as it is conducted in Australia are a valiant attempt. They will no doubt be the subject of continual refinement and interpretation.

Internationally Effective rules

As expert appraisal and determination as a concept is not generally to be governed by any single substantive law, the process is appropriately open to globalisation. That much has already been done in various parts of the world with a significant degree of commonality lends credence to this observation.

The Court of International Arbitration Australia has recently published its Rules for Expert Determination[30].

Particularly these Rules:

(i) provide flexibility of process but are at all times reliant on specialist expertise;

(ii) provide a fabric for dealing with transnational matters, but are also appropriate for domestic matters;

(iii) allow for the appointment of more than one person or a partnership or corporation as the Expert;

(iv) allow for submission of a wide range of matters;

(v) allow in certain circumstances for the application of merchant law;

(vi) avoid concepts which may be limited to a particular culture or system of law;

(vii) may be used on an ad hoc basis by replacement of the provided default appointee of the Expert in the event of failure of parties to agree an Expert.

The present developments in Australia may contribute to such globalisation and the creation of processes which are of considerable benefit to traders and the commercial community at large.

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Footnotes

1. Past President, The Institute of Arbitrators Australia.
   Past President, Australian Centre for International Commercial Arbitration.
   Chairman, The Institution of Engineers Australia Standing Committee on Contracts and Dispute Resolution.
   Vice President International Federation of Commercial Arbitration Institutions.
   Member, Cours Europeene d'Arbitrage.
2. Jacobs M, *Commercial Arbitration Law and Practice* (1990) Law Book Company Limited at 12.47.
3. see - *Atlantic Civil Pty Ltd v Water Administration Ministerial Corporation* (1992) 39 NSWLR 468; *Fletcher Construction Australia Limited v MPN Group Pty Ltd* (unreported), Supreme Court of New South Wales, 14 July 1997 per Rolfe J; *Fletcher Construction Australia Limited v State of New South Wales* (unreported), Supreme Court of New South Wales, 1 December 1997 per Hunter J.
4. see - *Triarno Pty Ltd v Triden Contractors Ltd* (1992) 10 BCL 305.
5. for example, *A Hudson Pty Ltd v Legal General Life of Australia Limited* (1985) 1 NSWLR 701 on appeal (1986) 61 ALJR 280.
6. *Baulderstone Hornibrook Engineering Ltd v Kayah Holdings Pty Ltd* (unreported), Supreme Court of Western Australia, 2 December 1997 per Heenan J.
7. Some special purpose rules have been developed and applied, e.g. Department of Public Works of New South Wales, Road Traffic Authority of New South Wales - Standard Form Contract.

8. United States of America
United Kingdom
New Zealand
South Africa.

9. *1.* *By submitting the dispute to expert determination in accordance with these Rules ("the Process"), the parties have agreed to participate in good faith in the Process and that the determination of the dispute by the expert will be final and binding upon them.*

10. *2.* *The Process shall be effected by an expert in the relevant subject matter of the dispute ("the Expert") agreed upon and appointed jointly by the parties. In the event of a failure by the parties to agree as to the appointment of the Expert, either party may request the President for the time being or a State or Territory Chapter Chairman of The Institute of Arbitrators and Mediators Australia to make the appointment, and the person so appointed will be deemed to be the Expert.*

11. *4(a)* *The function of the Expert is to make a determination on the dispute as submitted by the parties, in accordance with these Rules.*

12. *4(b)* *The expert must make the determination according to law and must conduct the Process in accordance with requirements of procedural fairness.*

13. P Davenport "*Experts and Arbitration*" (1991) #21 Australian Construction Law Newsletter 4.

14. *4(c)* *The Expert must make the determination on the basis of information received from the parties and the Expert's own expertise. The Expert is not bound by the rules of evidence and may receive any information in such manner as the Expert thinks fit.*

15. *4(i)* *All proceedings and submissions relating to the Process (including the fact that any step in the Process is occurring) must be kept confidential between the parties and the Expert. No information relating to or arising out of the Process may be divulged to any other person, except with the prior written consent of the parties or as may be required by law or to the extent necessary to enforce the determination by the Expert.*

16. *4(j)* *Any dispute arising between the parties in respect of any matter concerning these Rules or the Process, (including the Expert's jurisdiction) shall be submitted to and determined by the Expert.*

17. *7(b)* *[T]he Expert may also make declarations or directions in the determination.*

18. *8.* *Each party will bear its own costs and will share equally the costs of the Expert and the Process. Security for costs must be deposited by both parties at the commencement of the Process, at the direction of the Expert. The Expert shall direct the disbursement of the security monies progressively or at the conclusion of the Process.*

19. *3(c)* *The process shall commence with the acceptance by the Expert of the appointment by notice in writing to the parties. The process shall conclude when the Expert has notified the determination of the dispute in writing to the parties. In the event of the Expert being unable to conclude the Process within a reasonable time by reason of the Expert's illness, death, failure to act or other cause, the process will terminate and the dispute will then be determined by a further expert appointed in accordance with Rule 2 above.*

20. *10.* *Except in the case of fraud, the Expert, The Institute of Arbitrators and Mediators Australia, its directors and officers will not be liable to a party upon any cause of action whatsoever for any act or omission by the Expert in the performance or purported performance of the Process. The parties jointly and severally hereby indemnify and shall keep indemnified the Expert, The Institute of Arbitrators and Mediators Australia, its directors and officers against all claims, actions, suits, proceedings, disputes, differences, demands, costs, expenses and damages arising out of or in any way referable to any act or omission by the Expert in the performance or purported performance of the Expert's role in the Process.*

21. *11.* *Where the dispute arises out of or in connection with a contract between the parties, the parties shall continue to perform their contractual obligations notwithstanding the existence of the process.*

22. 4(b) Id.

23. 4(b) Id.

24. *4(d)* *The Expert must make the determination on the basis of information received from the parties and the Expert's own expertise. The Expert is not bound by the rules of evidence and may receive any information in such manner as the Expert thinks fit.*

25. *4(h)* *At any conference with the Expert a party may have legal or other representation. The conference must be held in private, but may include authorised representatives or experts for the parties. If required by the Expert, a transcript of the conference may be taken and made available to the Expert and the parties.*

26. *4(j)* *Any dispute arising between the parties in respect of any matter concerning these Rules or the Process, (including the Expert's jurisdiction) shall be submitted to and determined by the Expert.*

27. *5.* *Unless otherwise agreed by the parties at a preliminary conference held under Rule 4(g), the following procedures shall apply -*

(a) *Within fourteen (14) days of the date of the commencement of the Process, the Claimant in the dispute must provide to the Respondent and to the Expert a statement in writing detailing the nature of the dispute, any agreed statement of facts and a written submission on the dispute in support of the Claimant's contentions of fact and law.*

(b) *Within fourteen (14) days after the provision of the above submission, the Respondent must provide to the Expert and to the Claimant a written response to the Claimant's submission.*

(c) *Within seven (7) days after the provision of the respondent's response under Rule 5(b), the Claimant may provide a written response to the Expert and to the Respondent.*

28. *3(b)* *The Expert is not an arbitrator of the matters in dispute and shall not be deemed to be acting in an arbitral capacity. The Process or any process conducted under or in any connection with these rules is not an arbitration within the meaning of any legislation or rules dealing with commercial, industrial, court-annexed or any other form of arbitration. Any conference conducted under these Rules is not a hearing conducted under any legislation or rules dealing with commercial, industrial, court-annexed or any other form of arbitration.*

29. For example, *Australian Uniform Arbitration Act's* s.28:

"*Awards to be final*

Unless a contrary intention is expressed in the arbitration agreement, the award made by the arbitrator or umpire shall, subject to this Act, be final and binding on the parties to the agreement."

30. The Court has also established rules for Commercial Arbitration and for Conciliation. ❑