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Arbitrator drawing on own knowledge and expertise

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Clause 3 (1) (b) Second Schedule, arbitrator drawing on own knowledge and expertise

Clause 3 (1) (b) permits and arbitral tribunal to

"draw on its own knowledge and expertise"

[Acknowledgment. For this section of the paper I have drawn, virtually exclusively, and with permission, from the excellent dissertation for Honours by Auckland lawyer Sarah Keene. This very brief summary does not do justice to the extensive research undertaken by her.]

The common law afforded immunity to an arbitrator acting in a predominantly judicial capacity. The common law does not afford immunity where the decision-maker (sometimes an expert) simply investigates the subject matter of the dispute and relies on his or her own knowledge and expertise. However, Section 13 of the 1996 Act expressly grants arbitrators immunity from suit in negligence for anything done in their capacity as arbitrator. The term "arbitrator" is not defined but from a combination of the meaning of "arbitration agreement" and the statutory acceptance of inquisitorial procedures (whether adopted or not), it is probably safe to conclude that from 1 July 1997, a properly appointed arbitrator acting within the terms of his or her reference should not be in danger for losing immunity from suit for negligence.

Of much greater importance, is the point that a fundamental rule of natural justice (the audi alteram partem rule) requires the arbitrator to inform the parties and give them an opportunity to comment on any matters which the

parties could not be expected to anticipate, and which may form the basis of the arbitrator's decision. Therefore, one significant restriction on the arbitrator's ability to use his or her knowledge and expertise is the application of this rule. The arbitrator may not use his or her expertise and knowledge if the result is to take the parties by surprise. **(Thomas Borthwick (Glasgow) v Faure, Fairclough & Co [1968] 1 Lloyds Rep 16,** and **Mitsubishi International GmbH v Bremer Handelsgesellschaft mbH [1981] 1 Lloyds Rep 106.)**

In the absence of express authority to "draw on its own knowledge and expertise" an arbitral tribunal is quite constrained. As a general rule the arbitrator must base his or her award only on the facts relevant to the case which are put forward by the parties **(Hamill v Wellington Diocesan [1927] GLR 197,201.)** The arbitrator must not supply facts the parties have chosen not to supply for themselves, **(Fox v Wellfair [1981] 2 Lloyds Rep 514,522.)** An arbitrator could not use specific knowledge obtained in a different capacity. Also, an arbitrator could not conduct his or her own inquiries and become a Perry Mason where he or she felt the submissions or evidence of the parties might usefully be supplemented.

In limited circumstances an arbitrator who is also an expert in the relevant area may supplement evidence of fact.

In summary, in the absence of express authority, an arbitrator may use his or her expert knowledge in the following ways:

- to supply knowledge of technical matters, but the arbitrator will generally be obliged to give the parties an opportunity to comment on that use of expert knowledge
- to supply general knowledge of his or her area of expertise to assist his or her understanding of the evidence
- to weigh the evidence and draw inferences from the evidence
- the arbitrator must not use his or her expert knowledge to answer a question that was not asked.

When an arbitrator can use his or her own knowledge and expertise, there are still a number of important rules which constrain the way in which this is done (and will probably continue to apply as rules of natural justice.) Some of them can be summarised as follows:

- the parties must not be taken by surprise; they must be given an opportunity to comment
- if the expert arbitrator forms a view of the facts different from that given in evidence, which might produce a result contrary to that which emerges from the evidence, then the arbitrator must bring that view to the attention of the parties
- the test for the circumstance in which a duty to disclose will arise is whether the arbitrator is using his or her expert knowledge in a manner which has the effect of depriving the parties of the opportunity to give substantive evidence that may reasonably be expected to effect the outcome of the arbitration - if so, the arbitrator must disclose that expert knowledge to the parties

- the parties must be reasonably able to understand and anticipate the implications of the use of that particular arbitrator's expert knowledge for the outcome of the case
- if the arbitrator intends to adopt an investigatory procedure he or she should disclose the investigations intended before they take place and ensure the parties have a full opportunity to comment on what is proposed
- if an arbitrator, as a result of an examination (such as a view,) reaches a conclusion contrary to or inconsistent with the evidence given at the hearing, then before incorporating that conclusion into the award, the arbitrator should bring it to the attention of the parties so that they may have an opportunity of dealing with it.

Clause 3 (1) (b) of the Second Schedule simply states a presumption, and stops there. The scope and conditions of permissible use of knowledge must therefore be determined by a reference to other factors. One must give full weight to Article 18 of the First Schedule (full opportunity of presenting each party's case) and Article 34 (6) (b) of the First Schedule (stipulating that public policy of New Zealand requires observance of the rules of natural justice.)

An arbitrator would be wise to assume that many of the old principles will continue to apply as examples of the rules of natural justice in action.