

Expert Determination

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Expert determination means what it says: determination by an expert. The apparent simplicity of this definition, however, masks something more controversial and consequential. What is it that the expert determiner is actually determining? Is it a “dispute”? One would think that the matter determined by an expert determiner could not be a “dispute” in any traditional sense, because a “dispute” can arise only after there is a fact brought into existence over which there is a difference of opinion. In other words, until a term is supplied to a contract by valuation (how much is the business worth?), or quantification (how much ore is left in the mine?) or determination of status (is there “environmental contamination” as defined by a commercial lease?), the contract is incomplete and cannot generate a legitimate difference of opinion sufficient to give rise to a true “dispute”. Expert determination is therefore not in any strict or technical sense a form of dispute resolution, but rather the contractually mandated determination of a previously indeterminate term in a prior agreement. Correctly understood, expert determination is more about contract performance than contractual dispute resolution.

Expert determination distinguished from arbitration

Expert determination is about contract performance; arbitration is about contractual dispute resolution. This principle was established authoritatively in Canada in 1988 by the Supreme Court of Canada decision in *Zittrer v. Sport Maska Inc.*¹ The case arose as a preliminary motion based upon alleged arbitral immunity. The court concluded that an expert determiner did not enjoy immunity from suit as would an arbitrator. Although *Sport Maska* arose under the *Quebec Civil Code*, its principles have general application.

In *Sport Maska* the expert determiner was the auditor for CCM, a bankrupt sporting goods manufacturer. A company called R.A.D. entered into an agreement with CCM’s receiver to purchase CCM’s Winter Goods Division and then flipped the same goods on the same terms and at the same time to Sport Maska. An inventory and valuation was required to complete both transactions. The par-

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¹[1988] 1 S.C.R. 564.

ties agreed that CCM's receiver would do an inventory in the presence of both R.A.D. and Sport Maska, which inventory would then be reviewed by CCM's auditors, the defendant Zittler, and Zittler's opinion on inventory count and valuation would be "final and binding".

The inventory was completed, Zittler opined, the deals both closed, and to its dismay Sports Maska concluded that Zittler's evaluation was off by about 30%. Sports Maska sued Zittler in negligence. Zittler moved for summary judgment on the basis of arbitral immunity. This motion went all the way to the Supreme Court of Canada before being ultimately dismissed.

The court's decision in *Sport Maska* turned on whether the provision for Zittler's determinations constituted an "undertaking to arbitrate" under the *Quebec Civil Code*.² Like the common law and Ontario *Arbitration Act, 1991*³ definitions, the relevant provisions of the *Quebec Civil Code* incorporate the concept of a "dispute" into the definition of "undertaking to arbitrate". Thus, to claim the benefit of arbitral immunity as an arbitrator at common law, or under the Ontario *Arbitration Act, 1991*, or under the *Quebec Civil Code*, it is essential to first determine whether or not the agreement to resolve issues involves a "dispute".

In considering this issue, Justice L'Heureux-Dubé (whose decision was concurred in by Justices Lamer, Wilson and Le Dain, and was adopted in part by Beetz J.) traced with painstaking care the evolution of the *Quebec Civil Code* provisions, the comparable French law on the subject, the history of comparable U.S. provisions, and the common law development of the distinction between expert determination and arbitration.

Summarizing Madam Justice L'Heureux-Dubé's helpful and clear-minded exposition of this long line of authority:

1. Common law, Canadian and English Law

Common law traditionally required two elements to constitute a submission to arbitration: a) a "dispute" and b) a manifest intent to submit that dispute to arbitration. In making a valuation, the expert determiner creates a situation in which a dispute may arise, but that alone is insufficient to constitute a "dispute". Until the valuation is made neither party knows

²Article 1926.1 of the 1988 Code: "An arbitration agreement is a contract by which the parties undertake to submit a present or future dispute to decision by one or more arbitrators to the exclusion of the courts." The corresponding current provision is article 2638.

³*Arbitration Act, 1991*, S.O. 1991, c. 17, s. 1: "'arbitration agreement' means an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them."

whether they will dispute it or not. The construction industry gave rise to this law. In a series of old cases, architect's certificates of valuation were held to be a special category of valuation entitled to arbitral immunity.⁴ Architects, brokers, insurance adjusters, and in one case an accountant valuing shares⁵ were eventually swept into this category. Then, in 1974, the House of Lords and Court of Appeal revisited the issue⁶ and reinstated the requirement of an existing "dispute" and this has become entrenched as one of the basic requirements at common law of a submission of arbitration.⁷ The court said that this common law had come down to us here in Canada unchanged, citing two Canadian cases, an Ontario High Court case, *Krofchick v. Provincial Insurance Co.* (1978), 21 O.R. (2d) 805 and a Saskatchewan Court of Appeal case, *Pfeil v. Simcoe & Erie General Insurance Co.* (1986), 19 C.C.L.I. 91.

2. U.S. Law

With one notable addition and one notable exception, Madam Justice L'Heureux-Dubé noted a similar trend in the U.S. Madam Justice L'Heureux-Dubé's additional observation derived from U.S. case law was that ". . . arbitration implies the submission of the entire dispute to an arbitrator, whereas an expert opinion is limited to a more specific aspect such as the valuation of damage or of some piece of property".⁸ The

⁴*Chambers v. Goldthorpe*, [1901] 1 K.B. 624, citing and approving *Pappa v. Rose* (1871), L.R. 7 C.P. 32, *Tharsis Sulphur and Copper Co. v. Loftus* (1872), L.R. 8 C.P. 1, and *Stevenson v. Watson* (1879), 4 C.P.D. 148.

⁵*Finnegan v. Allen*, [1943] 1 K.B. 425.

⁶*Sutcliffe v. Thackrah*, [1974] 1 All E.R. 859; *Arenson v. Casson Beckman Rutley & Co.*, [1975] 3 All E.R. 901.

⁷See, for example, Brown & Marriott, *ADR Principles and Practice*, 2nd ed. (London: Sweet & Maxwell, 1999) at 4-004: "Arbitration in English law may be defined as a private mechanism for the resolution of disputes which takes place in private pursuant to an agreement between two or more parties, under which the parties agree to be bound by the decision to be given by the arbitrator according to law after a fair hearing, such decision being enforceable at law"; Menkel-Meadow et al, *Dispute Resolution: Beyond the Adversarial Model* (New York: Aspen Publishers, 2005) at 448: "Arbitration is described most simply as a process in which a third party who is not acting as a judge renders a decision in a dispute"; McLaren & Sanderson, *Innovative Dispute Resolution: The Alternative* (Toronto: Carswell, 2003) at 5-1: "Arbitration is a binding process of dispute resolution in which the facts of a dispute are presented to an independent, neutral arbitrator, or panel of arbitrators, chosen by the disputants or appointed by an agency selected by them".

⁸*Sports Maska*, para. 67.

court noted that U.S. case law does not seem to emphasize the “final and binding” nature of arbitration, as do the English cases.

3. French Law

French law adopts both of the common law criteria (existence of a dispute and intent to finally determine by arbitration) but treats the first objectively and the second subjectively.

4. Quebec Law

The court noted the absence of either case law or academic commentary on this issue in Quebec.⁹ In final analysis, however, it was held that Quebec law requires an existing “dispute” as a fundamental, defining characteristic of arbitration.

5. Australian Law

Although Madame Justice L’Heureux-Dubé did not address Australian jurisprudence in her decision in *Sports Maska*, The Honourable Michael McHugh A.C. has done so in a recent article published in the May, 2008 edition of *Arbitration*, the international journal of arbitration, mediation and dispute management.¹⁰ Justice McHugh sat on the New South Wales Court of Appeal panel in the seminal decision of *Legal & General Life of Australia Ltd. v. A. H. Hudson Pty Ltd.*¹¹ which is still widely regarded as having settled the law of Australia regarding expert determination.¹² Justice McHugh has conducted a scholarly review of the sources of the English law of expert determination, pointing out that such determinations were always binding at law, as a simple matter of contract, but that it was the courts of equity that would occasionally stay enforcement in egregious circumstances of gross fraud or partiality on the part of the valuator, or expert determiner. In his article, Justice McHugh points out that simple mistake or error was never, and is not sufficient to, overturn or stay an expert determiner’s findings. Were it otherwise, every important determination would end up in court for review *de novo*. What is needed is the kind of claim that would stand as a bar to a plea in equity for specific enforcement of a contract, i.e. a bona fide mistake by the defendant as to the subject matter or terms or effect of the underlying contract. In *Legal & General Life*, the New South Wales Court of Appeal

⁹*Sports Maska*, at para. 86.

¹⁰McHugh, “Expert Determination” (2008) 74 *Arbitration* 148.

¹¹[1985] 1 N.S.W.L.R. 314.

¹²See: *Kanivah Holdings Pty Ltd. v. Holdsworth Properties Pty. Ltd.*, [2001] NSWSC 405, Palmer J.

