Sport Maska Inc. v. Zittrer

Supreme Court of Canada

1988: March 24.

Present: Beetz, Lamer, Wilson, Le Dain and L'Heureux-Dubé JJ.

English version of the reasons delivered by

1 **BEETZ J.**:— I would allow the appeal for the reasons given by Justice L'Heureux-Dubé. Considering the origin of the provisions of the Code of Civil Procedure with regard to arbitration, I do not consider it necessary to rule on the possible similarity between common law and Quebec law in this respect. Such similarity, if any, cannot have any relevance in positive law.

English version of the judgment of Lamer, Wilson, Le Dain and L'Heureux-Dubé JJ. delivered by

2 L'HEUREUX-DUBÉ:-- Did the parties to an agreement for the sale of assets agree to submit a dispute to arbitration by a third party? If so, do such arbitrators enjoy immunity from prosecution? These are the issues raised by this appeal.

3 The Quebec Superior Court, district of Montreal (Yves Forest J., judgment of April 13, 1984), answered the first question in the negative, thus making it unnecessary to answer the second.

4 The Quebec Court of Appeal, district of Montreal (McCarthy and LeBel JJ.A., and Chevalier J. (ad hoc), [1985] C.A. 386), reversed this judgment and answered both questions in the affirmative.

5 By leave of this Court, appellant is asking it to restore the Superior Court judgment.

I -- Facts

6 The parties related the facts differently in their respective factums; respondents argued that appellant went beyond the facts alleged.

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7 For the purposes of the discussion, it will only be necessary to reproduce the facts as stated by Chevalier J. at pp. 387-88:

[TRANSLATION] On December 8, 1982, a receiver chosen by the secured creditors of the insolvent company CCM Inc. accepted an offer from R.A.D. Inc. to buy a large part of CCM's assets, including in particular a stock of goods identified as the "Winter Goods Division".

The agreement in question contained the following clause (P-2):

> 2.01 Vendor and Purchaser hereby agree that the inventory described in Section 1.01(a) above will be counted or verified by representatives of the Vendor in the presence of representatives of the Purchaser and shall be valued by the Vendor on a going concern basis at the lower of cost and net realizable value on a basis consistent with prior years, such count and valuation of the inventory described in Section 1.01(a) to be reviewed by Vendor's auditors, Messrs. Zittrer, Siblin, Stein & Levine, Chartered Accountants, who will deliver a written opinion to the Vendor and Purchaser to the effect that such inventory count and valuation is fairly presented, the whole at Vendor's sole cost. Upon delivery of such opinion, the inventory count and valuation shall be deemed to be definitively determined for all purposes in connection with this offer.
>
> The physical counting on the inventory shall commence at 5:01 p.m. on December 17, 1982 (the "Date of Possession") and the valuation of the inventory described in Section 1.01(a) shall be completed prior to January 21, 1983 (the "Closing Date").

On December 17, 1982, R.A.D. Inc. in turn resold the aforesaid winter stock to respondent Sport Maska Inc. This second agreement contained the following wording (P-1).

> 2.01 Vendor and Purchaser hereby agree that the inventory described in Section 1.01(a) above will be counted or verified by representatives of CCM Inc. the Vendor and the Purchaser and shall be valued by CCM Inc., the Vendor and the Purchaser on a going concern basis at the lower of cost or net realizable value and on a basis consistent with prior years, such

> count and valuation of the inventory described in Section 1.01(a) to be reviewed by CCM Inc.'s auditors, Messrs. Zittrer, Siblin, Stein & Levine, Chartered Accountants, who shall take into consideration the representations of Sport Maska Inc. as to the valuation of the inventory, and the said accountants shall deliver a written opinion to CCM Inc., to the [page572] Vendor and the Purchaser to the effect that such inventory count and valuation is fairly presented (marginal notation unclear), the whole at the cost of CCM Inc. Upon delivery of such opinion, the inventory count and valuation shall be deemed to be definitively determined for all purposes in connection with this Offer.
>
> The physical counting on the inventory shall commence at 5:01 p.m. on December 17, 1982 (the "Date of Possession") and the valuation of the inventory described in Section 1.01(a) shall be completed prior to January 21, 1983.

Also on December 17, 1982, CCM sent R.A.D. and Sport Maska a letter reading as follows (DP-1):

> We understand that Gestion R.A.D. Inc. has today entered into an agreement to sell the winter goods division of CCM Inc. to Sport Maska Inc. CCM Inc. hereby agrees that Sport Maska Inc. shall be entitled to attend the valuation of the winter goods inventory as contemplated in the accepted Offer of Purchase between Gestion R.A.D. Inc. and CCM Inc. and shall further be entitled to make any representations to CCM Inc. and Messrs. Zittrer, Siblin, Stein & Levine in connection with the valuation of the said winter goods inventory. However, in determining the final valuation of the winter goods inventory between CCM Inc. and Gestion R.A.D. Inc., the opinion of Messrs. Zittrer, Siblin, Stein & Levine shall be final and binding.

. . .

According to the allegations of the statement of claim, the inventory was taken and the inventoried stock valued by

CCM, which on January 20, 1983 sent appellants the following letter (P-4):

Gentlemen:

> Pursuant to Paragraph 2.01 of the Offer by Gestion R.A.D. Inc. to purchase certain assets of CCM Inc. (dated December 6, 1982; accepted December 8, 1982), we hereby inform you that we have counted the inventory described in Section 1.01(a) of the said Offer and valued the same at $3,798,000.00 as at December 17, 1982. Such inventory has been valued by us on a going concern basis at the lower of cost and net realizable value on a basis consistent with prior years.

On the same day appellants sent R.A.D. and CCM a letter reading as follows (P-3):

> Pursuant to Section 2.01 of an Offer by Gestion R.A.D. Inc. to CCM Inc. signed on December 6th, 1982 (the "Offer"), we have reviewed the count and [page573] valuation by CCM Inc. of the inventory of CCM Inc. described in Section 1.01(a) of the Offer. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests and other procedures as we considered necessary in the circumstances.
>
> In our opinion the count by CCM Inc. of such inventory as at December 17th 1982 and the valuation thereof by CCM Inc. in the amount of $3,798,000 present fairly such inventory as at such date on a going concern basis at the lower of cost and net realizable value on a basis consistent with prior years.

The following day, January 21, 1983, the date on which both transactions were to be completed, respondent paid R.A.D. the amount determined by CCM and confirmed by appellants.

Finally, on February 22, 1984, it brought against them an action the conclusions of which claimed damages in the amount of $1,306,263, representing the difference between the price it had paid for the stock purchased and the price which, it maintained, it would have had to pay if appellants

had performed their obligation as they ought to have done.

II -- Judgments

8 The Superior Court judge stated his reasons as follows:

> [TRANSLATION] WHEREAS it appears from the record that this is not a "judicial case", or a case involving an arbitrator or arbitration presented pursuant to arts. 940 et seq. of the Code of Civil Procedure;
>
> WHEREAS an arbitral award is not in question and the authorities cited do not apply either in the case at bar;
>
> WHEREAS it appears from reading the said relevant paragraph that an opinion was requested from accountants, and when that opinion is delivered there is a presumption that it is finally determined;
>
> WHEREAS the Court has before it an action for damages against defendants for the reasons alleged in the declaration;
>
> WHEREAS the Court considers that the arguments of the motion presented pursuant to arts. 163 and 165 C.C.P. appear to be ill-founded; and
>
> WHEREAS the Court considers that the motion for a declinatory exception is ill-founded, it is dismissed with costs.

9 Reversing this judgment, two judges of the Court of Appeal, LeBel J.A. and Chevalier J. (ad [page574] hoc), filed joint reasons in which McCarthy J.A. concurred.

10 At the outset the Court of Appeal eliminated the remedy based on fraud and bad faith on the part of respondents, and allowed only the action for damages which was based on respondents' professional status, given the allegations of the action as brought.

11 Chevalier J. stated the following in this regard, at p. 389:

> [TRANSLATION] The action brought is for damages. Nowhere in the declaration is there any allegation of fraud, corruption or any kind of delict affecting the personal integrity of appellants. All the allegations made against them by respondent have to do with the negligent and unprofessional manner in which they allegedly performed the

task entrusted to them.

. . .

> I therefore rule out any possibility that this is an action for damages based on a delict which has no connection with the professional status of appellants, in the precise meaning of that adjective. I consider that this first point needs to be clarified forthwith for, had appellants committed a delict of a personal nature, I would have expressed myself differently from what follows.

12 LeBel J.A. added at p. 394:

> [TRANSLATION] In order to rule the action admissible, something would have to be found suggesting more than negligence or professional misconduct. Even in paragraph 15 of the declaration, referred to above, and notwithstanding its ambiguous wording, I find no allegation to support a conclusion that appellants are personally liable.

13 On the nature of respondents' function under the terms of the foregoing agreements, Chevalier J. said the following at p. 389:

> [TRANSLATION] Having said that, I am satisfied after examining the wording of clause 2.01 of the agreement of December 17, 1982, together with the wording of the letter from CCM to R.A.D. and to Maska dated that same day, that the parties intended to submit the valuation of the goods to arbitration pursuant to arts. 940 et seq. of the Code of Civil Procedure.

14 Chevalier J. drew the criteria pointing to arbitration from the wording of the agreements in question and concluded at p. 391:

[page575]

> [TRANSLATION] In my view, it is impossible to give the last part of clause 2.01 or the wording of the letter from CCM to Maska and R.A.D. any meaning other than that of an intention to submit to the arbitration of a third party, in this case appellants, any issue that might arise between on the one hand, the direct seller R.A.D. and the original seller CCM,

which were both interested in setting as high a price as possible, and Maska on the other hand, which undoubtedly wanted to get the lowest possible price.

15 LeBel J.A. said the following on this point at pp. 392-93:

> [TRANSLATION] The wording of the contracts and the documents alleged in support of the proceedings contain obscurities which make it difficult to categorize appellants' function in legal terms. However, Chevalier J.' s analysis indicates that this was not a mandate given to an expert to provide a simple valuation.
>
> . . .
>
> There was the possibility of a dispute. A procedure for avoiding litigation was agreed on and it was binding on the parties. The contracts -- in particular Exhibit P-1, the contract concluded between Sport Maska Inc. and Gestion R.A.D. Inc. -- do not support the contention that appellants were simply asked for a technical opinion on the methods of valuing inventories. According to the argument put forward by respondent, in the event that appellants disagreed with the valuation this would not be fixed but would result in another negotiation between the parties. However, I conclude from the handwritten notes attached to clause 2.01 and incorporated in it that Zittrer could either confirm the valuation or suggest an alteration or adjustment. In that case, when the opinion was issued the value of the inventory was regarded as having been finally determined for all practical purposes, either in the amount paid by CCM Inc. or in the amount resulting from the adjustments determined by Zittrer. Moreover, the pleadings of respondent confirm the way in which it regarded the functions of appellants. This view can be found in paragraph 15 of the declaration, where respondent charged that appellants had broken certain obligations although they had "agreed to be arbitrators". See A.F., p. 36.
>
> Appellants resolved the issue before them and the record contains the essential components of a valid undertaking to arbitrate, an undertaking which does not [page576] have to be formulated or stated in ritual language (6). Though privately appointed, appellants as arbitrators were still judges

and not simply mandataries of the parties (7).

(6) Zodiac International Productions Inc. c. Polish People's Republic, [1983] R.D.J. 277, p. at 287, Chouinard J., Supreme Court of Canada.

(7) Henri Vizioz and Pierre Raynaud. "Jurisprudence française en matière de procédure civile", (1947) 45 Rev. trim. dr. civ. 220 and E. Glasson, Albert Tissier and Rene Morel, Traité théorique et pratique d'organisation judiciaire de compétence et de procédure civile, 3e éd., Tome 5, Paris, Librairie du Recueil Sirey, 1936, pp. 352-54, No. 1821.

16 Finally, as the Court found that respondents were acting as arbitrators, the question of their immunity was raised and was developed further by LeBel J.A. at p. 393:

> [TRANSLATION] As such an arbitrator, who is called on to settle or prevent a dispute, is given certain immunities. These are governed by the rules of public and not private law because of the similarity of arbitration to the judicial function, even when the conclusion of a submission to arbitration is contained in a private contract, when the law does not require recourse to this method of settling disputes. In the absence of fraud or bad faith, an arbitrator enjoys the immunity from civil liability suggested for him by counsel. A majority of the House of Lords again recently came to this conclusion in Arenson, cited above. Lord Morris of Borth-y-Gest had stated the same opinion some years earlier in Sutcliffe v. Thackrah, [1974] A.C. 727, at p. 744:
>
> > I think it must now be accepted that an action will not lie against an arbitrator for want of skill or negligence in making his award.
>
> Discussing the liability of a lower court, the Supreme Court made the same distinction between the jurisdiction and the immunity of the members of a disciplinary board. It held that the members of a disciplinary board could arrive at an unlawful decision which was incorrect in law, without it giving rise in itself to an action for damages against the Alberta Bar or its directors.

III -- Procedure

17 It is important to note that the Superior Court judge was dealing here with a declinatory exception [page577] brought by respondents against the appellant's action. As LeBel J.A. pointed out, this motion [TRANSLATION] "is equally an exception to dismiss" covered by art. 165(4) C.C.P.:

> 165. The defendant may ask for the dismissal of the action if:
>
> . . .
>
> 4. The suit is unfounded in law, even if the facts alleged are true.

18 At this stage in limine litis the facts alleged must be taken as proven.

19 As appears from the motion this exception is based solely on respondents' argument that they were acting in this matter as arbitrators and, as such, in view of the nature of the action brought by appellant, they were covered by immunity while in the course of their duties. Accordingly, the decision as to the nature of respondents' function must, I think, be dealt with at the outset. If respondents were not acting as arbitrators, they cannot enjoy any immunity and a decision as to the nature of the action brought by appellant would at this stage become moot.

IV -- Arbitration

1 -- Applicable Legislation

20 The agreements underlying this matter are dated December 17, 1982 and respondents' "valuation letter" January 20, 1983. At that time Book VII of the 1965 Code of Civil Procedure, R.S.Q. 1977, c. C-25 (formerly S.Q. 1965, c. 80), contained provisions on arbitration (arts. 940 to 951). These provisions have since then been extensively revised: An Act to amend the Civil Code and the Code of Civil Procedure in respect of arbitration, S.Q. 1986, c. 73, arts. 1 and 2. Provisions on arbitration have been inserted in the Civil Code on arbitration (arts. 1926.1 to 1926.6 C.C.L.C.) and the Code of Civil Procedure has been substantially amended in this regard (arts. 940 to 951.2 C.C.P.) For an analysis of these amendments see Brierley, "Une loi nouvelle pour le Québec en matière d'arbitrage" (1987), 47 R. du B. 259.

21 Before these amendments and at the time in question, Book VII of the Code of Civil Procedure, [page578] entitled "Arbitration", provided that anyone could submit to an arbitration "respecting any rights of which he has the free exercise" (art. 940 C.C.P.) The submission had to be in writing, contain the names and capacities of the parties, appoint one or three arbitrators and state the objects in dispute (art. 941 C.C.P.) The arbitrators could require the parties to provide them with a statement of their arguments but nevertheless were required to hear the parties and receive their evidence in accordance with the procedure determined by themselves. Witnesses were summoned pursuant to arts. 280 to 284 and sworn (art. 943 C.C.P.) The rules for withdrawal applicable to arbitrators were the same as those applicable to judges (art. 946 C.C.P.) Arbitrators arrived at their decisions according to the rules of law, unless exempted from so doing in the submission to arbitration or unless empowered to act as mediators; the award had to be made by a majority had to give the reasons for the decision in all cases and had to be signed by all the arbitrators (art. 948 C.C.P.) Every award could be homologated by the court with the reservation that the court could not enquire into the merits of the contestation (art. 950 C.C.P.) Article 951 dealt with the undertaking to arbitrate: the only requirements mentioned in this case were that the arbitration had to be in writing and that the parties had to execute a submission once the dispute had arisen.

2 -- Sources

22 The first Code of Civil Procedure of Quebec was adopted on June 28, 1867 (An Act respecting the Code of Civil Procedure of Lower Canada, S. Prov. C. 1866, 29 & 30 Vict., c. 25), and Title Eight dealt with arbitration (arts. 1341 to 1354). When the Code was first revised in 1897 (An Act respecting the Code of Civil Procedure of the Province of Quebec, S.Q. 1897, c. 48), these provisions were simply renumbered (arts. 1431 to 1444) without any other amendment than a clarification in art. 1436 regarding mediators.

23 The chapter on arbitration in the 1965 revision of the Code of Civil Procedure (Book VII) which I have just noted, adopts essentially the same provisions. The only changes of importance are the omission of art. 1431, dealing with submissions, which was replaced by art. 940, and the insertion [page579] of an article dealing with the undertaking to arbitrate (art. 951).

24 The codifiers of 1867 were sparing in their comments: they said, regarding arbitration:

> The articles concerning arbitrations reproduce the rules of our existing law, and only the last one requires to be

noticed.

25 The codifiers are here referring to art. 1354, which permitted an appeal from an arbitral award only where a penalty was stipulated in the submission.

26 However, the draft Code of Civil Procedure and the version reproduced in Doutre, Les lois de la procédure civile (1867), refer to the sources relied on by the codifiers, who referred to them under each article. Articles 1341 to 1354 of the 1867 Code refer to French sources, namely Pothier, Couchot, Bonnin, Bonnier and in particular the French Code de procédure civile of 1806. The substance of arts. 1003 to 1028 of the 1806 Code was reproduced in our 1867 Code, some articles even being reproduced word for word. The 1806 French Code is itself derived from old French law. In his Traité de la procédure civile (Oeuvres de Pothier, vol. 9, 1824), at pp. 122-23, Pothier refers to the Edict of August 1560 and the Ordinance of 1667.

27 Brierley writes that [TRANSLATION] "... from a historical standpoint, the source of arbitration law in Quebec is old French law as adopted in Quebec before the codification of the laws relating to civil procédure in 1867...." (Brierley, loc. cit., at p. 263; see also: Ferland, L'arbitrage conventionnel, (1983), at p. 28; Johnson, The Clause Compromissoire: Its Validity in Quebec (1945), at p. 82).

28 The Quebec Court of Appeal approved this opinion when it referred to old French law in interpreting art. 950 of the 1965 Code in a question involving the homologation of an arbitration award, in Corporation municipale du Village de St-Bernard c. Trottoirs et chaînes Pilotte Inc., [1983] R.D.J. 583, at pp. 590-92.

3 -- Definitions

29 Neither in French law, in the 1806 Code de procédure civile or earlier, nor in the 1867 Quebec Code of Civil Procedure or in its subsequent revisions, is there a definition of the word "arbitration", except for the 1986 amendments made to the Civil Code of Lower Canada. However, the 1867 Quebec Code of Civil Procedure, which differs in this respect from the French Code de procédure civile of 1806, contains a definition of submission:

> 1341. Le compromis est un acte par lequel les parties pour éviter un litige ou y mettre fin, promettent de s'en rapporter à la décision d'un ou de plusiers arbitres dont elles

conviennent.

1341. Submission is an act by which persons, in order to prevent or put an end to a lawsuit, agree to abide by the decision of one or more arbitrators whom they agree upon.

30 This article, renumbered 1431, was reproduced without any change in the 1897 revision. The commissioners explained why this definition was omitted in the subsequent 1965 revision:

> The definition of the submission given by article 1431 of the present Code is useless; moreover, if it were considered necessary, it should be found in the Civil Code. It is, however, necessary to set out in the Code of Civil Procedure the case where the submission is possible as it is there a question of means of resolving a dispute without having recourse to the Courts. Article 940 is, in this sense, new law.

31 This comment is self-explanatory and also explains the absence of a definition of the various procedures for settling disputes in the Civil Code or the Code of Civil Procedure. In our civil law system, the parties' agreement is law provided they have the capacity to contract and are not acting contrary to good morals and public order. In solving a difficulty, difference or dispute the parties have a choice of means: an expert opinion, an appraisal, conciliation, mediation, transaction, arbitration or any other form of intervention designed to resolve or to try to resolve the problem confronting them. In each case the parties have probably tried to find a final solution. The legislator has recognized this contractual freedom, subject to the reservation that as is true throughout our law the parties in either case remain free to [page581] seek or not to seek a final settlement of the matter in the courts. Our system of law has only very reluctantly allowed the parties to agree to rule out such recourse to the courts. The decision of this Court in ZodiaK International Productions Inc. v. Polish People's Republic, [1983] 1 S.C.R. 529, was necessary to give this status to the "complete" undertaking to arbitrate. It is in this context that provisions on arbitration must be seen. As the legislator had no reason to define the various procedures for settling disputes between litigants, he also had no clear interest in regulating the process for resolving such conflicts, and this gave the system chosen great flexibility. The legislator left these various procedures for settling disputes to be resolved freely by litigants when recourse to the courts was still possible. If judicial intervention was ruled out, however, the legislator had to ensure that the process would guarantee litigants the same measure of justice as that provided by the courts, and for this reason, rules of procedure were developed to ensure that the arbitrator is

impartial and that the rules of fundamental justice, such as the audi alteram partem rule, are observed. The arbitrator will make an award which becomes executory by homologation. This indicates the similarity between the arbitrator's real function and that of a judge who has to decide a case. This judge, freely chosen by the parties, is subject to procedural constraints that cannot be applied to other forms of intervention, such as an expert who does not have to settle an issue as a judge would or render a decision as the courts generally do. Once the expert's opinion has been given, the parties can still go to court unless they have clearly otherwise agreed.

32 From this standpoint a definition of the submission is not absolutely necessary, since it is virtually axiomatic that an arbitrator cannot settle a dispute, which is his function, if no dispute exists: the arbitration would then be pointless.

33 The purpose of the articles regarding the submission was therefore really to identify the dispute, the subject of the arbitration, and to indicate the function of the arbitrator or arbitrators regarding this dispute.

34 The adoption of an amendment to the Civil Code in 1986, inserting art. 1926.1, accompanied by amendments to the Code of Civil Procedure at the same time under the heading of arbitration (arts. 940 to 951.2) did not, in my opinion, alter the state of the law on the matter, but rather merely added to the rules of procedure by clarifying them and included the undertaking to arbitrate and the submission in a single definition of the "arbitration agreement":

> 1926.1 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.

35 It might be thought that, in so doing, the legislator intended to merge the "submission" and the "undertaking to arbitrate" into a single concept. That is not the case. In my opinion, the distinction remains: the existing dispute refers to the submission and the potential dispute to the undertaking to arbitrate, both of which were and remain the components of the arbitration agreement. The only change I can see is to the mechanism for setting the arbitration in motion, that is the notice mentioned in art. 944 C.C.P., which was also adopted at the time of the 1986 amendments:

> 944. A party intending to submit a dispute to arbitration must notify the other party of his intention, specifying the matter in dispute.

> The arbitration proceedings commence on the date of service of the notice.

36 If the obligation to make a submission under the undertaking to arbitrate is thereby reduced, the notice contained in art. 944 C.C.P. performs the function of the submission as defined in art. 1341 of the 1867 Code of Civil Procedure: the notice must describe the dispute, which at this point is necessarily an existing dispute, and set out the parameters of the dispute for arbitration. As these amendments were not in effect when the dispute at bar arose, I do not think any further analysis is necessary.

37 It must be assumed here that at the time of the 1965 revision the legislator did not abandon the legislative policy underlying both the definition of the submission and the rules on arbitration at the time the Code was enacted in 1867, as is indeed indicated by the adoption, almost without change, of the provisions on arbitration in that 1867 Code.

38 Article 940 of the 1965 Code simply indicates where the submission is possible:

> 940. Any person may enter into a submission to arbitration respecting any rights of which he has the free exercise.
>
> However, no one may enter into a submission respecting alimentary gifts or legacies, separations between consorts or questions which concern either public order or the status or capacity of persons.

39 Article 951, also added in the 1965 revision, mentions the undertaking to arbitrate for the first time:

> 951. An undertaking to arbitrate must be set out in writing.
>
> When the dispute contemplated has arisen, the parties must execute a submission. If one of them refuses, and does not appoint an arbitrator, a judge of the court having jurisdiction makes such appointment and states the objects in dispute, unless the agreement itself otherwise provides.

40 I wish to embark on a short but relevant digression to note that the French version of this new article introduces the term "différend". The 1986 amendments to the Civil Code (art. 1926.1) and Code of Civil Procedure (arts. 940 to 951.2) also use the term "différend" instead of "litige".

41 In the context of arbitration, two meanings can be given to the term "litige". In its first sense, "litige" means "lawsuit" (poursuite civile). Article 1341 of the 1867 Code states that "Submission is an act by which persons, in order to prevent or put an end to a lawsuit, agree to abide by the decision of one or more arbitrators whom they agree upon". In its second sense, the term "litige" refers more generally to any dispute. Considering art. 951 C.C.P. and the 1986 amendments consistent therewith, I think it is preferable to use in the French version the term "différend" instead of "litige" when necessary to differentiate arbitration [page584] from expertise in order to avoid any ambiguity.

42 Though article 951 was the subject of academic and judicial dispute for many years, the commissioners only commented on it briefly:

> Articles 945, 947 and 951 contain provisions that one does not find in the present Code but which are self-explanatory.

43 Though the French Code de procédure civile of 1806 and our 1867 Code of Civil Procedure do not mention the undertaking to arbitrate, that does not mean it was unknown to our law before the 1965 revision any more than to French law. It was in fact regarded as a natural extension of the submission, though the validity of the complete undertaking to arbitrate was not recognized at that time. The addition of art. 951 C.C.P. thus only filled this gap and officially recognized the existence of the undertaking to arbitrate in Quebec law, without thereby altering the rules applicable at the time to the submission and to arbitration.

44 Before proceeding further, it is perhaps best to explain the concepts of submission and of undertaking to arbitrate.

45 Based on the definition of the submission in the 1867 Code of Civil Procedure, applicable to the 1965 revision and so in effect at the time the agreement was concluded between the parties, and in light of art. 951 C.C.P., introduced in the 1965 revision, it can be said that the undertaking to arbitrate applies to a potential dispute which, if it occurs, will require a submission. When the submission has been made, we can speak of arbitration. There is thus no arbitration without an existing dispute. This is what Chouinard J. said in Zodiak, supra, at p. 534:

> A submission applies only to existing disputes, while an undertaking to arbitrate also extends to future disputes.

46 I will return to this aspect of the matter in considering one of respondents' arguments about the undertaking to arbitrate. For the moment, I must look instead at the criteria for distinguishing [page585] between arbitration and the collateral or related concept of the expert opinion. A review of the state of the law on this point in other jurisdictions can often clarify the fine points of either system. In view of the sources of our law on arbitration, which comes to us from old French law, such an exercise can only serve as a point of comparison. The parties themselves asked the Court to undertake it and referred it to an imposing list of academic and judicial common law authorities, from which, in their submission, the applicable distinguishing criteria may be derived.

4 -- Common Law, Canadian and English Law

47 The common law has in fact developed two concepts which it regards as characteristic of arbitration: the existence of a dispute and the duty or intent of the parties, as the case may be, to submit that dispute to arbitration.

48 The very earliest authorities on the point required a dispute to exist if there was to be an arbitration. In Collins v. Collins (1858), 26 Beav. 306, 53 E.R. 916, the parties concluded a contract to sell a brewery and plant, the price to be set by valuation. The valuation clause provided that each party would appoint a representative, and that these representatives might in turn appoint a third person to make a valuation. As each party's representatives could not agree on the choice of a third party as an appraiser, one of the parties brought an action to have the Chancery Court appoint the third party. This procedure was authorized under s. 12 of the Common Law Procedure Act, 1854 (U.K.), 17 & 18 Vict., c. 125, provided it was a case of arbitration. The Court accordingly had to determine whether the valuation clause created an arbitration, thereby allowing it to appoint a third party arbitrator.

49 Sir John Romilly, M.R., held that an arbitration required an existing dispute. He explained, at p. 918:

> An arbitration is a reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties. It is very true that in one sense it must be implied that although there is no existing difference still that a difference may arise between the parties; yet I think the [page586] distinction between an existing difference and one which may arise is a material one and one which has been properly relied upon in the case. If nothing has been said respecting the price by the vendor and

> purchaser between themselves, it can hardly be said that there is any difference between them. It might be that if the purchaser knew the price required by the seller, there would be no difference, and that he would be willing to give it. It may well be that if the vendor knew the price which the purchaser would give, there would be no difference, and that he would accept it. It may well be that the decision of a particular valuer appointed might fix the price and might be equally satisfactory to both; so that it can hardly be said that there is a difference between them. [Emphasis added.]

50 This criterion was also used in the following cases: Scott v. Corporation of Liverpool (1858), 3 De. G. & J. 334, 44 E.R. 1297 (Chelmsford L.C., at p. 1310); Bos v. Helsham (1866), L.R. 2 Ex. 72 (Kelly C.B., at pp. 78-79); Re Hopper (1867), L.R. 2 Q.B. 367 (Cockburn C.J., at pp. 372-73, and Blackburn J., at pp. 376-77); Re Carus-Wilson and Greene (1886), 18 Q.B.D. 7 (C.A.) (Lord Esher, M.R., at p. 9).

51 The Court of Appeal appears to have abandoned this criterion in Chambers v. Goldthorpe, [1901] 1 Q.B. 624. In that case, an architect had to produce interim certificates indicating the progress of work done on the building of a house so that the owner could make partial payments to the builder as work progressed. The owner sued the architect for negligence in performing his function. The issue turned on whether the architect was acting as an arbitrator, in which case he would benefit from immunity against civil suit.

52 In upholding the architect's immunity Smith, M.R., for the majority, said the following at p. 635:

> It was argued that there was no dispute between the parties prior to the plaintiff giving his certificate, and that, unless there was a dispute, the plaintiff could not be in the position of an arbitrator. I do not see why there should not be an arbitration to settle matters, as to [page587] which, even if there was no actual dispute, there would probably be a dispute unless they were so settled.

53 The Master of the Rolls relied on a trilogy of cases, 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. This line of authority had reversed earlier decisions on the arbitration/expert opinion distinction by widening the scope of arbitral status to apply to

appraisers. The following experts were classified as arbitrators: a broker, an insurance adjuster and an architect.

54 The Court of Appeal applied the same principle in Finnegan v. Allen, 43] 1 K.B. 425, in deciding the status of an accountant who was required to set the value of certain shares. Despite the absence of a dispute prior to the valuation, the Court granted the accountant immunity in the absence of fraud or bad faith.

55 However, this line of authority was reversed by the House of Lords in the leading cases of Sutcliffe v. Thackrah, [1974] 1 All E.R. 859, and Arenson v. Casson Beckman Rutley & Co., [1975] 3 All E.R. 901. In Sutcliffe the facts were practically identical to those in Chambers, supra. An architect who had to issue interim certificates indicating the progress of construction work on a building was sued for liability. The Court specifically reintroduced the requirement of a present dispute as a criterion for distinguishing between arbitration and a simple expert opinion. I quote Lord Morris of Borth-Y-Gest at p. 870:

> One of the features of an arbitration is that there is a dispute between two or more persons who agree that they will refer their dispute to the adjudication of some selected person whose decision on the matter they agree to accept.

56 See also Lord Morris of Borth-Y-Gest at p. 874 and Viscount Dilhorne at p. 880. Lord Reid and Lord Salmon expressly reversed Chambers at pp. 864 and 887 respectively, and therefore by implication the line of authority which had followed it (McLaren and Palmer, The Law and Practice of Commercial Arbitration (1982), at p. 6.)

57 In Arenson, supra, the purchase price of shares in a company was to be set by its accountant. The appellant sued the accounting expert for damages, alleging negligence in his valuation. As in Sutcliffe the Court of Appeal characterized the accountant as an arbitrator, thereby granting him immunity from an action based on his negligence. The House of Lords reversed the Court of Appeal and repeated the requirement of a present dispute as an essential condition for the existence of arbitration. Lord Simon said in the clearest possible terms (at p. 912):

> There may well be other indicia that a valuer is acting in a judicial role, such as the reception of rival contentions or of evidence, or the giving of a reasoned judgment. But in my view the essential prerequisite for him to claim immunity as an arbitrator is that by the time the matter is submitted for

> him for decision there should be a formulated dispute between at least two parties which his decision is required to resolve. It is not enough that parties who may be affected by the decision have opposed interests -- still less that the decision is on a matter which is not agreed between them. [Emphasis added.]

58 See also Lord Wheatley at p. 915 and Lord Salmon at p. 924; Walton, Russell on the Law of Arbitration (19th ed. 1979), at p. 59; Hogg, The Law of Arbitration (1936), at p. 8.

59 This criterion is also accepted in Canada (Re Krofchick and Provincial Insurance Co. (1978), 21 O.R. (2d) 805 (H.C.), at p. 810; Pfeil v. Simcoe & Erie General Insurance Co. (1986), 19 C.C.L.I. 91 (Sask. C.A.), it p. 98; McLaren and Palmer, op. cit., at p. 1).

60 The parties must be under an obligation to submit their dispute to arbitration. This requirement may result either from legislation or from the intention of the parties. No difficulty arise from a statutory obligation. When the arbitration procedure results from a contractual clause, however, the situation must be examined more closely. It then becomes necessary to draw the parties' intent from the relevant documents (Sutcliffe v. Thackrah, supra, at p. 867, per Lord Morris of Borth-Y-Gest; Preload Co. of Canada Ltd. v. Regina (City of) (1953), 10 W.W.R. (N.S.) 241 (Sask. C.A.), at p. 265 (Procter J.A., dissenting); [page589] Pfeil v. Simcoe & Erie General Insurance Co., supra, at p. 97; McLaren and Palmer, op. cit., at p. 4; Campbellford, Lake Ontario and Western Railway Co. v. Massie (1914), 50 S.C.R. 409, at p. 421 (Duff J.)) This intent can be demonstrated in various ways. The courts and academic analysts have looked at certain indicia in this connection, such as the terminology used by the parties (Re Premier Trust Co. and Hoyt and Jackman (1969), 3 D.L.R. (3d) 417 (Ont. C.A.), at p. 419), the fact that a decision is final and binding (Sutcliffe v. Thackrah, supra, at p. 877), the judicial nature of the proceedings (Re Carus-Wilson and Greene, supra, at p. 9) and the professional status of the third party (Pfeil v. Simcoe & Erie General Insurance Co., supra, at p. 97).

61 Lord Wheatley gives a brilliant summary of the state of the common law in this area in Arenson, supra, at pp. 914, 915-16:

> (1) It is clear from the speeches of Lord Reid, Lord Morris of Borth-Y-Gest and my noble and learned friend, Lord Salmon, in Sutcliffe v. Thackrah that while a valuer may by the terms of his appointment be constituted an abritrator [sic] (or quasi-arbitrator) and be clothed with the

> immunity, a valuer simply as such does not enjoy that benefit.
>
> (2) It accordingly follows that when a valuer is claiming that immunity he must be able to establish from the circumstances and purpose of his appointment that he has been vested with the clothing which gives him that immunity.
>
> (3) In view of the different circumstances which can surround individual cases, and since each case has to be decided on its own facts, it is not possible to enunciate an all-embracing formula which is habile to decide every case. What can be done is to set out certain indicia which can serve as guidelines in deciding whether a person is so clothed. The indicia which follow are in my view the most important, though not necessarily exhaustive.

. . .

> The indicia are as follows: (a) there is a dispute or a difference between the parties which has been formulated in some way or another; (b) the dispute or difference has been remitted by the parties to the person to resolve in such a manner that he is called on to exercise a judicial function; (c) where appropriate, the parties must have been provided with an opportunity to present [page590] evidence and/or submissions in support of their respective claims in the dispute; and (d) the parties have agreed to accept his decision.

5 -- U.S. Law

62 Certain points of comparison may be derived from a brief review of U.S. law.

63 The approach taken by the U.S. courts is similar to that adopted by the courts in England and in the Canadian common law provinces.

64 The existence of a present dispute remains one of the principal criteria of distinction. Similarity to the judicial process is also an important aspect. Thus, in Hartford Fire Insurance Co. v. Jones, 108 So.2d 571 (1959), the Supreme Court of Mississippi had to determine whether a valuation clause contained in an insurance policy was an arbitration or a request for an expert opinion. Hall J., for the Court, said at p. 572:

> Appraisement, in particular, is perhaps most often confused with arbitration. While some of the rules of law that apply to arbitration apply in the same manner to appraisement, and the terms have at times been used interchangeably, there is a plain distinction between them. In the proper sense of the term arbitration presupposes the existence of a dispute or controversy to be tried and determined in a quasi judicial manner whereas appraisement is an agreed method of ascertaining value or amount of damage stipulated in advance generally as a mere auxiliary or incident feature of a contract with the object of preventing future disputes rather than of settling present ones. [Emphasis added.]

65 See also Sanitary Farm Dairies v. Gammel, 195 F. 2d 106 (8th Cir. 1952), at p. 113.

66 The fact that the third party makes a decision based on his personal expertise rather than on an adversarial procedure requiring the admission of evidence and argument by the parties suggests the existence of an expert opinion (In re Waters, 93 F.2d 196 (5th Cir. 1937), at p. 200; Bewick v. Mecham, 156 P.2d 757 (Cal. 1945), at p. 760; Sanitary Farm Dairies v. Gammel, supra, at p. 113; Preferred Insurance Co. v. Richard Parks Trucking Co., 158 So.2d 817 (Fla. Dist. Ct. App. 1963), at p. 820).

67 The U.S. courts have developed a criterion which does not appear to have attracted the attention of the English and Canadian courts. It suggests 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:

> An agreement for arbitration ordinarily encompasses the disposition of the entire controversy between the parties upon which award a judgment may be entered, whereas an agreement for appraisal extends merely to the resolution of the specific issues of actual cash value and the amount of loss, all other issues being reserved for determination in a plenary action before the court.

(Preferred Insurance Co., supra, at p. 820.)

68 In In re Delmar Box Co., 127 N.E. 2d 808 (1955), the New York Court of Appeals, per Fuld J., made the following comments on the arbitration/expert opinion distinction at pp. 810-11:

A number of basic distinctions have long prevailed between an appraisement under the standard fire policy and a statutory arbitration. An agreement for arbitration ordinarily encompasses the disposition of the entire controversy between the parties, upon which judgment may be entered after judicial confirmation of the arbitration award. Civ.Prac.Act, para. 1464, while the agreement for appraisal extends merely to the resolution of the specific issues of actual cash value and the amount of loss, all other issues being reserved for determination in a plenary action. See Matter of American Ins. Co., 208 App.Div. 168, 170-171, 203 N.Y.S. 206, 207-208. Appraisal proceedings are, moreover, attended by a larger measure of informality, see Strome v. London Assur. Corp., 20 App.Div. 571, 573, 47 N.Y.S. 481, 483, affirmed 162 N.Y. 627, 57 N.E. 1125, and appraisers are "not bound to the strict judicial investigation of an arbitration." See Matter of American Ins. Co., supra, 208 App.Div. 168, 171, 203 N.Y.S. 206, 208. Arbitrators are required to take a formal oath, Civ.Prac.Act, para. 1455, and may act only upon proof adduced at a hearing of which due notice has been given to each of the parties, Civ.Prac.Act, para. 1454. They may not predicate their award upon evidence garnered through an ex parte investigation of their own, at least unless so authorized by the parties. See Stefano Berizzi Co. v. Krausz, 239 N.Y. 315, 146 N.E. 436. Appraisers, on the [page592] other hand, are not required to take an oath. See Syracuse Savings Bank v. Yorkshire Ins. Co., 301 N.Y. 403, 411, 94 N.E.2d 73, 78; Wurster v. Armfield, 175 N.Y. 256, 264, 67 N.E. 584, 586; Williams v. Hamilton Fire Ins. Co., 118 Misc. 799, 194 N.Y.S. 798. They are likewise "not obliged to give the claimant any formal notice or to hear evidence"; and they may apparently proceed by ex parte investigation, so long as the parties are given an opportunity to make statements and explanations to the appraisers with regard to the matters in issue. See Kaiser v. Hamburg-Bremen Fire Ins. Co., 59 App. Div. 525, 530, 69 N.Y.S. 344, 347, affirmed 172 N.Y. 663, 65 N.E. 1118; Townsend v. Greenwich Ins. Co., 86 App.Div. 323, 326-327, 83 N.Y.S. 909, 911-912, affirmed 178 N.Y. 634, 71 N.E. 1140; Matter of American Ins. Co., supra, 208 App.Div. 168, 171, 203 N.Y.S. 206, 208.

Furthermore, in an arbitration, all the arbitrators, if there be more than one, "must meet together and hear all the allegations and proofs of the parties", Civ.Prac.Act, para.

> 1456. The standard appraisal clause, in contrast, specifically recites that the umpire is not to participate in the appraisal in all cases, but is only to pass on such differences as there may be between the appraisers designated by the respective parties. In addition, the vacatur of an arbitration award invariably results in a new arbitration, Civ.Prac.Act, para. 1462; see Matter of Fletcher, 237 N.Y. 440, 449, 143 N.E. 248, 251, whereas after an appraisal award has been set aside without any fault on the part of the insured, he is not required to submit to any further appraisement but is free to litigate the issues in an action at law on the policy. See Gervant v. New England Fire Ins. Co., 306 N.Y. 393, 400, 118 N.E.2d 574, 577.

69 I note that the final and binding nature of the decision made by third parties does not appear to have been adopted by the U.S. courts. On the contrary, in Sanitary Farm Dairies v. Gammel, supra, the Federal Court of Appeals, Eighth Circuit, held that a valuation could also be final and conclusive if that was the intent of the parties without making it an arbitration. Johnsen J. explained, at p. 113:

> In general, where parties to a contract, before a dispute and in order to avoid one, provide for a method of ascertaining the value of something related to their dealings, the provision is one for an appraisement and [page593] not for an arbitration. 3 Am.Jur., Arbitration and Award, para. 3, pp. 830, 831. But, under Minnesota law, as well as generally, the result of an appraisal which the parties have thus contracted to have made is just as conclusive upon them as would be an arbitration award -- even though from the contract and the nature of the situation there may be involved no right to a hearing before the appraiser -- if they have expressly stipulated that it shall be so conclusive, or if the intention to be so bound is fairly inferable from the language which they have used. State v. Equitable Ins. Co., 140 Minn. 48, 167 N.W. 292, 293; Nelson v. Charles Betcher Lbr. Co., 88 Minn. 517 93 N.W. 661, 662.

6 -- French Law

70 Turning now to France, we find that in the absence of an express provision, to distinguish arbitration from an expert opinion the French courts have developed two criteria, one objective and the other subjective, according to the terminology used by commentators. The first involves

ascertaining whether a dispute exists and the second involves analyzing the intent of the parties to submit to arbitration.

a) Objective criterion

71 In a judgment dated November 7, 1974, Di Trento c. Pinatel, Rev. arb., 1975.302, the Court of Cassation held, based on the fact that a dispute existed between the parties, that intervention by a third party was an arbitration rather than an expert opinion as the result of certain indicia, which it listed at p. 303:

> [TRANSLATION] But whereas the judgment, after analysing the contract, states that it provides that the parties undertake to give effect to the decision as a judgment without any right of appeal; that the arbitrators are exempt from procedural formalities, and may make their decision as mediators; that the parties were assisted by their counsel; that from these facts, the judgment could conclude that a dispute existed between the parties concerned, if not as to the inventory of the property at least as to its value, and that the aforesaid agreement accordingly was an agreement to arbitrate;

72 This decision appears to be consistent with earlier decisions and has also been approved by commentators (Cass. civ., June 9, 1961, Rev. arb., 1961.186 (Soc. Distilleries réunies de Bretagne et [page594] de Normandie c. Sofridex); Cass. com., May 8, 1961, Bull. civ., III, No. 192, p. 169 (Société Idéal Coiffeur c. Société Raimon); Paris, 1re Ch. supp., February 5, 1976, Rev. arb., 1976.255 (S.C.I. Résidence Les Tilleuls c. S.A. Promeric); Trib. civ. Seine, 1re Ch., February 8, 1956, Rev. arb., 1957.25 (Distilleries de Bretagne et de Normandie c. Société privée d'exploitation immobilière); de Boisséson, Le droit français de l'arbitrage (1983), at p. 193; Motulsky, Écrits: études et notes sur l'arbitrage (1974), at p. 41; Rubellin-Devichi, Rev. arb., 1980.87, note; Ravon, Traité de l'arbitrage et de l'expertise (1905), at p. 91; Rocher, De l'arbitrage en matière civile (1907), at p. 8).

b) Subjective criterion

73 Commentators consider that while use of the term "dispute" requires more than the mere existence of an issue, the court must determine whether the parties intended to submit their respective arguments in this connection to a decision-making body to be reviewed and decided upon. The search for this intent was the subject of a decision by the Court of Cassation on May 25, 1962, Société Romand c. de Montmort, Rev. arb., 1962.103. In that case

a commercial lease contained a rent adjustment clause under which the rent was to be set by agreement between the parties, and failing such agreement, by arbitrators designated by each of them, who if they disagreed could appoint a third party arbitrator.

74 The rent was set by the arbitrators and de Montmort attempted to homologate the decision by an application in exequatur, to which the Société Romand objected. The lower courts dismissed the objection because the decision was not in the nature of an arbitration award. The Court of Cassation affirmed these judgments on the ground that the parties had not agreed to submit the dispute to the jurisdiction of the third parties, though they had appointed them as arbitrators. The Court held at p. 104:

> [TRANSLATION] But whereas the judgment observes that although a dispute could be found to exist due to the disagreement of both parties as to the amount of the rental it must be shown that they intended to give the third parties whom they appointed arbitrators a decision-making authority; that under the agreement of [page595] October 30, 1954 the latter were to determine the amount of the rental and incidentals; that the decision characterized as an "arbitration award" was simply the performance of the mandate so given by the parties; that the third party arbitrator, in the "award", stated that under the agreement between the parties the decision on the price constituted a rider to the lease; that accordingly this decision, which was intended to be incorporated in the contract, clearly became a constituent element of the agreement between the parties.... [Emphasis added.]

75 Motulski, op. cit., made the following observations in his text on arbitration, at p. 42:

> [TRANSLATION] In the final analysis, therefore, it all depends on what the parties intended; and in order to know what they intended we should not be concerned essentially, or even primarily, with the name they gave, often without thinking about the consequences, to the third parties whom they called in; rather, we should ask which of the possible actions by a third party the one actually intended corresponds to. This truth was expressed in a judgment of a much earlier date (Req., March 31, 1862, S., 1862.I.362, D.P. 1862.1.242); and nearly a century later the Tribunal civil de la Seine, in the judgment to which I referred at the start of

> my remarks, Feb. 8, 1956, Gaz. Pal., 1957.1.30, restated the concept: "even if", it said, "in the contract the parties used the word 'arbitrator' to describe the third party, the extent of his powers cannot depend on the formal designation so given but on the nature of the task entrusted to him". [Emphasis added.]

76 The following decisions and academic articles are to the same effect: Cass. civ., 1re Ch., October 26, 1976, Rev. arb., 1977.336 (Cayrol c. Cayrol); Cass civ. 2e Ch., June 7 and November 30, 1978, Rev. arb., 1979.343, (Pentecost c. Pantaloni; Société Creaciones Reval c. Société Cerruti 1881), note Roland-Levy; Paris, 1re Ch. C., January 12, 1979, Rev. arb., 1980.83, (Belon c. Maurey), note Rubellin-Devichi; Nancy, 1re Ch., December 12, 1985, Rev. arb., 1986.255 (Langlais c. Bruneau); de Boisséson, op. cit., 1983, at p. 193; Loquin, L'amiable composition en droit comparé et international (1980), at pp. 10-11.

77 In a recent judgment on October 9, 1984, Société S.E.C.A.R. c. Société Shopping Decor, Rev. arb., 1986.263, the Court of Cassation had to decide on the validity of a decision made by a third party referred to by the parties as an "arbitrator". [page596] The parties had included in a commercial lease an indexing clause using an index published by a government body. In the event that index ceased to be published, and in the absence of agreement, the parties undertook to refer the matter to an arbitrator. As publication ceased and the parties did not agree, an arbitrator was appointed and he chose another index. One of the parties challenged this decision. In upholding the third party's decision, the Court implicitly treated the latter as an expert despite the fact that the parties had referred to him as an "arbitrator". Mayer, Rev. arb., 1986.267, explains the reasons underlying the Court's decision at pp. 269-70:

> [TRANSLATION] Disagreement did not suffice in that case to create an issue because, though it was certainly the cause of the "arbitrator's" intervention, it was not the subject of the latter: once it was established that the parties had not reached agreement, and he therefore had to step into their shoes, the third party "chose" (this is the word used by the parties) at his own discretion what he thought was the most suitable index. He did not have to decide between opposing positions which might have been argued before him, and to rule that one or the other was correct.
>
> It is unnecessary, within the limits of this note, to suggest any definition of a dispute; it will be sufficient to

> ascertain whether the rules governing the document creating jurisdiction are consistent with the situation in the S.E.C.A.R. case. Clearly, at least three fundamental aspects of those rules are inapplicable. First, and most importantly, the requirement of an adversarial procedure does not have to be raised: the third party was to determine the new index by himself, and was not required to hear the parties (unless they had expressly contemplated his doing so). Secondly, the dispositive rule is inapplicable: the third party's choice was not limited by fixed options determined by the opposing arguments of the parties. Third, reasons did not have to be given for the decision. All of this results from the fact that there was no dispute, and also establishes that there was none.

78 It is interesting to note that the French Nouveau Code de procédure civile provides in art. 1451 that only a natural person fully able to exercise his civil rights may act as an arbitrator. If the agreement names a legal entity, the latter has only the power to organize the arbitration, nothing more.

79 This brief review of the state of modern French law, which is derived like our own from old French law, indicates that there is no fundamental difference between the various approaches taken by the common law and that taken by French case law and academic analysis to the concept of arbitration.

7 -- Quebec Law

80 In Quebec, in view of the legislator's silence both as to the definition of arbitration and its distinguishing features, academic analysis and case law are generally an invaluable source.

81 Quebec courts, however, have not had many opportunities to rule on the point. In Corporation de la Ville de Beauharnois v. Liverpool & London & Globe Ins. Co. (1906), 15 K.B. 235, the Court of King's Bench vacated an arbitration award on the ground that the arbitrators had failed to inform one of the parties of the date and place of the hearing. However, the Court had first to decide as to the nature of a clause contained in the insurance contract which provided for the appointment by each party of an appraiser to fix the loss suffered by the insured. In the event of disagreement, each appraiser was to select a third party (an umpire) to whom their respective arguments would be submitted. The decision rendered would be final and binding on the parties. They undertook to submit all relevant documents to both the appraisers and the umpire who had the right to call witnesses under

oath. The Court characterized this agreement as arbitration, relying primarily on the fact that the parties used the word "arbitration", even though the agreement was entitled "appraisement bond".

82 Home Insurance Co. de New York v. Capuano (1926), 41 K.B. 85 and Ouellette v. Cie d'assurance mutuelle de commerce contre l'incendie, [1949] R.L. 163 (Supp. Ct.) are to the same effect: the clause requiring interpretation was identical to that in Ville de Beauharnois, supra.

83 In Church v. Racicot (1912), 21 K.B. 471, an agreement to purchase logs provided that the logs were to be measured by an official inspector named by the buyer. The seller sued, alleging [page598] incorrect measurements. The Court held that a clause allowing one party to select a measurer without the other party's agreement could not be regarded as an [TRANSLATION] "undertaking to arbitrate which is binding on the parties" (p. 473).

¶ 84 Most of the cases dealing with arbitration do so in a context different from that which concerns us here.

85 Academic opinion in Quebec has also displayed little interest concerning the issue at bar. The Civil Code commentators did not examine arbitration, which at the time was a procedural matter. (Mignault, Le droit civil canadien, vols. 1 to 9, 1895 à 1916; Langelier, Cours de droit civil, vols. 1 to 6, 1905 à 1911, and Traité, de Droit civil du Québec, vols. 1 to 15, 1942 à 1958.)

86 In procedural matters, the annotated codes do not deal with the issue at bar nor do modern commentators (Mignault, Code de procédure civile du Bas-Canada annoté (1891); Martineau and Delfausse, Code de procédure civile de la province de Québec annoté (1899); Beullac, Code de procédure civile de la province de Québec annoté, (1908); Gérin-Lajoie, Code de procédure civile de la province de Québec annoté (1920); Reid and Ferland, Code de procédure civile annoté, du Québec (1981), vol. 2; Anctil, Commentaires sur le Code de procédure civile avec tableaux synoptiques et formules (1983), vol. 2; and Reid, Code de procédure civile du Québec, complement jurisprudence et doctrine. (3e éd. 1987).

87 This lack of interest by our courts and academic commentators may be explained by the importance at the time of the debate on the validity of the undertaking to arbitrate, a matter settled by this Court in Zodiak, supra. This long period of legal uncertainty did nothing to encourage the use of this method of settling disputes. The fact remains however that, from the time of the definition of the submission in art. 1341 of the 1867 Code of Civil

Procedure to which I referred above, there could be no submission without a dispute. This results not only from common sense, which is that without a dispute an arbitration is pointless, but from the provision itself which shows no ambiguity, especially [page599] if we refer to its English version, and from the interpretation given to it by the courts.

88 Although the debate has centered on the validity of the undertaking to arbitrate, a good illustration is provided by Corporation du Village de Tadoussac v. Brisson, [1959] Q.B. 644. The deed of sale of a piece of land provided that the buyer would keep the seller in its employ unless three arbitrators selected by the parties dismissed him. The seller was dismissed and sued the buyer which, in turn, argued that it did not have to undertake arbitration because the agreement in this regard did not meet the requirements of the Code of Civil Procedure. In the course of his judgment for the Court, Taschereau J. said at p. 649:

> [TRANSLATION] However, as can be seen, the chapter of the Code of Civil Procedure dealing with the submission applies only where a dispute already exists between the parties or is about to occur. In the case at bar the parties agreed to submit to the jurisdiction of an arbitrator to settle a future event. This is accordingly not the submission contemplated by art. 1431 C.C.P.

89 Similar comments are to be found in McKay v. Mackedie (1897), 11 C.S. 513, at p. 515, and Chamberland v. Corporation du Village de Mont-Joli (1936), 74 C.S. 529, at p. 531, and in Johnson, op. cit., at p. 16:

> By force of art. 1431 C.P., a submission or compromis entered upon "in order to prevent or to put an end to a lawsuit".
>
> It is not necessary that a lawsuit be actually threatened or existing. Article 1434 requires that the submission must state the "object of dispute". In a word, there must be some defined and disputed or disputable différend involving adverse interests, susceptible of leading to litigation. It is said that the dispute must be né, a live and existing difference calling for adjustment. If it is not né, there is nothing to decide, no object.

90 The contracting parties may certainly make a third party responsible for arriving at a final and binding determination of one of the components of a contract. The most common example is, of course, the setting of a price in

a contract of sale. If, however, such determination does not result in [page600] a dispute and the contract does not disclose an intention of the parties to submit such dispute to the strict judicial investigation of an arbitrator, there can be no question of arbitration.

91 In Beaudoin v. Rodrigue, [1952] Q.B. 83, the Court of Queen's Bench, while finding that there was no sale because the price was not stated in the contract, nonetheless held, like Pothier, that it will suffice if the price can be determined by "an arbitrator or by experts". However, in that case the Court did not make a decision as to the status of the third party responsible for determining the selling price. The Chief Justice of the Quebec Court of Appeal came to a similar conclusion in St-Raymond Paper Ltd. c. Campeau Corp., Mtl. C.A., No. 500-09-000639-765, November 17, 1976, not reported, cited in Rindress c. Cie de Charlevoix Ltée, [1983] C.S. 897, at p. 900 (judgment appealed, No. 500-09-001019-835). Pourcelet, La vente (5e éd. 1987), at p. 80, and Rousseau-Houle, Précis de droit de la vente et du louage (2e éd. 1986), at p. 81, are of the same opinion. This mechanism, which is not expressly provided for in the Civil Code of Lower Canada, does however exist in art. 1592 of the French Code civil, which states that the price [TRANSLATION] "... may be left to the arbitration of a third party; if the third party is unwilling or unable to make an estimate, there is no sale". The interpretation of this article has caused some difficulty in France, because of the use of the word "arbitration" in a provision which is more similar to an expert opinion than a true arbitration. Commentators now consider that this procedure cannot be regarded as arbitration, since the parties have not agreed, as stated in art. 1592 of the French Code, to submit a present and existing dispute to the jurisdiction of a third party. Robert, L'arbitrage: droit interne, droit international privé (5e éd. 1983), says at p. 7:

> [TRANSLATION] It is beyond question that the cause of the two possible types of intervention is different. In the (broad) case of art. 1592, the joint action of the parties is indicated by their intent to be bound by contractual obligations. In the case of arbitration, the existence of a common intent is found only when a difference of opinion arises as to the existence of a right, [page601] which then gives rise to the intent to resolve that difference.

92 I note here that French commentators distinguish "contractual" from "jurisdictional" arbitration, the first applying to the clarification or revision of a contract and the second to arbitration as such, the purpose of which is to resolve a dispute. This terminology, which derives from art. 1592 of the French Code civil, does not apply in Quebec since the French art. 1592 has no equivalent in the Code of Civil Procedure or the Civil Code. The

question here is not whether the recourse to a third party to determine one of the components of a contract is lawful -- that is well established -- but whether the agreement of the parties in this regard results in an arbitration. Professor Brierley properly points out:

> [TRANSLATION] 15. Completion and Revision of Contracts.
>
> 40. Contracting parties may provide for the intervention of a third party, designated an "arbitrator" or otherwise, whose function is to provide a part of the contract in order to perfect or to revise it. This part may be necessary to its initial formation or to its subsequent revision, so that in the long term the contract can continue to be binding on the parties.
>
> 41. The technique is covered by the wording of art. 1592 of the French Code civil, which provides that in a contract of sale the price can be left to the "arbitration of a third party". The article also states that if the third party does not make an estimate, there will be no sale. Clearly, the reason is that no sale will exist in that case since the setting of a price is essential for it to be perfected. This technique may be extended to other areas, such as rentals, where it may be necessary to revise the amount of the rental.
>
> 42. There is no comparable provision in the Civil Code of Lower Canada, but the absence of any provision is not an obstacle to the inclusion of such a clause under the general rules of contract law. This has already been quite properly held by the Court of Appeal. The question then is not whether such a clause is lawful, but as to its legal effects. Is the arbitration of a part of a contract, such as the setting of a price, arbitration consistent with the rules of arbitration in question here?
>
> 43. The temptation at once arises to see in this not an arbitration but a request to a common mandatary of [page602] the parties for an expert opinion. This would accordingly be an expert opinion accepted in advance by the parties, which agreed that whatever conclusion the expert arrived at would be binding on them. In such a case the function of the so-called "arbitrator" would be characterized as "legislative" rather than "decisional". An arbitrator, on the other hand, who may also be an expert, performs a judicial function: he decides a dispute referred to him, after observing, as an ordinary judge would do, the requirement

> that both sides be heard, that is, after hearing evidence and argument concerning a disputed relationship.
> (Brierley, "La convention d'arbitrage en droit québécois interne", [1987] C.P. du N. 507, at pp. 535-36.)

93 If nothing prevents recourse to a third party to determine a component of the contract, as here, for that third party to be classified as an arbitrator with all the resulting legal consequences, it is essential for the agreement of the parties to contain the components of a submission, whether or not this submission is the result of an undertaking to arbitrate. The search for the components of a submission naturally does not present any difficulty when the parties have clearly indicated their intent to have the dispute between them arbitrated, and have clearly identified that dispute. The failure of the parties to express themselves clearly in this regard, as often happens, has resulted in the development, at common law as well as in French and Quebec law, of various means of determining the true nature of the "mission" they intended to give the third party, the nature and extent of whose powers will only be a corollary of that mission. It has to be recognized that, except for the observations of Brierley, neither the courts nor academic writers have drawn a very clear line of demarcation between the various possible types of intervention. This is particularly true of expert opinions as compared with arbitration. Referring nevertheless to the definition of a submission in art. 1341 of the 1867 Code of Civil Procedure and to the old French law sources on which it is based, as well as to arts. 940 and 951, introduced in the 1965 revision, it would appear that arbitration as seen by the Quebec legislator at the time, and in my opinion even since the 1986 amendments, is the end result of a process which necessarily involves [page603] the parties' making a submission, whether following an undertaking to arbitrate or not. The first condition of the submission stage is the existence of a dispute. If the parties simply intended to avoid a possible dispute, the situation is not one of submission. However, once a dispute has arisen, they may have agreed to submit to the arbitration of a third party pursuant to an undertaking to arbitrate -- the prerequisite to a submission. I will make further reference to this below. For the moment, suffice it to say that if there is no existing dispute, we cannot speak of arbitration.

94 Beyond the requirement of a clearly identified dispute which will be the subject of the arbitration, the parties must have undertaken to submit that dispute to a third party, and I think it is crucial to identify the precise function the parties intended to entrust to this third party under their agreement and in the circumstances of each case. This intent may be inferred from the rules developed by academic writers and the courts in Quebec and in France, as the sources of both systems are equally derived from old

French law and the evolution of the provisions of both systems on the matter has taken the same course.

95 I will review some of these criteria, which though useful are neither exhaustive nor conclusive, but may serve as a guide in determining an intent which is often far from easy to identify. The language used by the parties may indicate their intent to submit a dispute either to arbitration or to an expert opinion. For example, the title given to the contract, the fact that the same word is used uniformly in various documents or the absence of any reference to one procedure rather than another may be taken into consideration in deciding the nature of the process contemplated by the parties. However, the courts are not bound by the terms chosen deliberately or otherwise by the parties, as these terms may well not correspond to the true intent appearing from other criteria.

96 One of the principal aspects that emerges from an analysis of the Code of Civil Procedure, academic opinion and the case law is the similarity that must exist between arbitration and the judicial [page604] process. The greater the similarity, the greater the likelihood that reference to a third party will be characterized as arbitration. The facts that the parties have the right to be heard, to argue, to present testimonial or documentary evidence, that lawyers are present at the hearing and that the third party delivers an arbitration, award with reasons establish a closer likeness to the adversarial process than the expert opinion and tend to establish that the parties meant to submit to arbitration. The fact that the decision is final and binding is also indicative of an arbitration, but contrary to what was argued by respondents, that criterion is not exclusive to arbitration.

97 The function assigned to the third party is indicative of the status conferred on him by the parties. If the third party has to decide between opposing arguments presented by the parties on a given point, we are much closer to arbitration. If, however, the parties call on a third party solely to supply a necessary component of the contract, it is less certain that they intended to submit a present dispute to the third party, but rather tried to ensure that such a dispute did not arise, unless there are other criteria to the contrary. In the same vein, is the third party called on to make a decision in light of his personal knowledge or must he choose among the various positions put forward by the parties concerned? In the first case, the situation will probably be one of an expert opinion, while in the second it will probably be an arbitration.

98 Moreover, if the third party is to be an arbitrator, he cannot act as the mandatary of one of the parties. For example, the fact that he has a special connection with one of them or that he is paid by only one of them seems

inconsistent with the concept of impartiality, a fundamental characteristic of arbitration. Compliance by the parties with the mandatory provisions of the Code is an essential condition of arbitration. At the time the submission had, inter alia, to be in writing and contain the requirements set out in the old art. 941 of the Code of Civil Procedure (now art. 1926.3 C.C.L.C.); there had to be one or three arbitrators (art. 941 C.C.P.); the parties could not undertake to arbitrate the matters listed in art. 940 of the [page605] Code of Civil Procedure (now art. 1926.2 C.C.L.C.); the arbitral award had to be supported by reasons and signed (art. 948 C.C.P., now art. 945.2 C.C.P.)

99 All these criteria are means of determining the true intent of the parties. However, a caveat is necessary at this point. The foregoing criteria are not necessarily exhaustive, nor are they mutually exclusive, in the sense that they may occur together and even merge into one another. They do not all have to be existing, still less be unanimously in favour of one position or another. The criteria, as their name suggests, are in fact only tools used to determine the intention disclosed by the documents and other instruments, in order to establish the function the parties actually meant to assign to the third party chosen by them.

100 It goes without saying that I only rule on these, criteria, developed from Quebec law and French law, in the context of Quebec civil law.

8 -- Analysis

101 The foregoing must now be applied to the facts of the case at bar so as to determine whether agreement P-1, signed on December 17, 1982, and in particular clause 2.01, read together with the letter of the same date from CCM to appellant (Exhibit DP-1), the letter of January 20 from CCM to respondents (Exhibit P-4) and the letter of respondents dated the same day to CCM and Gestion R.A.D. (Exhibit P-3) contain an agreement to arbitrate or simply an agreement to obtain a professional opinion from a common mandatary.

102 As was pointed out by LeBel J.A., the wording of the agreements and the exchange of correspondence between the parties contain [TRANSLATION] "obscurities which make it difficult to categorize appellants' function in legal terms" (p. 392).

103 Did a dispute exist between the parties?

104 When the purchase offers were signed, there was no dispute yet between the parties as to the [page606] value of the stock in the Winter Goods Division. The parties had not yet done an inventory, and a fortiori,

had not valued it. The primary purpose of clause 2.01 was to establish a process allowing the parties to determine one of the essential components of the contract, namely the price.

105 Disagreement as to the value of the inventory only arose once the transaction had been completed, that is after the valuation had been checked by respondents on January 20, 1983. Until that time, no dispute could have existed between the parties since the valuation was not complete, so that neither appellant nor the other parties involved would have had the information necessary to challenge the value assigned to the inventory.

106 There was so little dispute between the parties at that date that appellant paid the agreed selling price of $3,798,000 on the basis of the certificate issued by respondents. It was not until after appellant took possession of the inventory that it allegedly found the value of the latter to be less than certified by respondents.

107 Was there before that date a potential dispute or one that was about to arise, as respondents maintained? While any agreement contains the germ of a possible dispute, that is not the criterion we must use in determining the existence of the arbitration mechanism. There must be a measure of reality to the possibility, a basis in fact. At the time the parties entered into their contract, they clearly did not have a dispute in mind: indeed, in accepting the certificate offered by the seller, appellant made certain, or thought it had made certain, there would be no dispute. It is hard to see what other reason or necessity there could have been for such a certificate, except to be a guarantee to the buyer, which did not have possession of the inventory and was not in a position to value it, of the accuracy of the amount represented by the seller, which formed the selling price.

108 If at the time appellant signed the deed of sale it had foreseen the likelihood of a dispute about the price of the inventory sold, would it have relied on the seller's auditors, paid by the seller, and given it [page607] the responsibility of resolving the dispute impartially in accordance with the rules inherent in arbitral awards? This is one of the rare cases where this intent can be verified from the clause in the contract which the parties later deleted: in the event of a dispute clearly identified the clause provided for the impartiality of an arbitrator, and the appointment of another arbitrator selected by appellant, the two arbitrators having the right in certain circumstances to appoint a third. I reproduce this clause below.

109 In my opinion it follows from this that neither at the time they signed their agreement nor when respondents intervened was there any dispute or

potential dispute between the parties that could be the subject of a submission. Accordingly, it is not possible to speak of an arbitration here.

110 Strictly speaking, this is conclusive. If however it is really necessary to determine the parties' intent, an exercise which the parties themselves asked the Court to undertake, an analysis of the agreements concluded confirms that no dispute existed between them and that, in any case, the parties did not intend to submit such a dispute to the arbitration of respondents.

111 None of the documents containing the agreement uses the words "arbitrators" or "arbitration" or refers to any other expression suggesting arbitration. On the contrary, in the agreement initialled by the parties (Exhibit P-1), the heading under which clause 2.01 occurs is entitled "Valuation of Inventory" and in it the parties state that the inventory will be "counted or verified by representatives of CCM Inc., the Vendor and the Purchaser and shall be valued by CCM Inc., the Vendor and the Purchaser... to be reviewed by CCM Inc.'s auditors. Messrs. Zittrer, Siblin, Stein & Levine, Chartered Accountants, who shall... deliver a written opinion... to the effect that such inventory count and valuation is fairly presented... the whole at the cost of CCM Inc. Upon delivery of such opinion...." (Emphasis added.)

112 The letter of December 17, 1982 (Exhibit DP-1) uses the same word "valuation" in concluding [page608] "However, in determining the final valuation of... the opinion of Messrs. Zittrer...." In their letter of January 20, 1983 (Exhibit P-3) the said respondents told the parties that "Our examination was made in accordance with generally accepted auditing standards.... In our opinion... the valuation thereof...." (Emphasis added.)

113 The language used by the parties prima facie resembles that of a request for an expert opinion.

114 It should be noted at this stage that the original agreement was modified. Certain conditions were added by hand in the margin of clause 2.01. For greater clarity, I again reproduce this clause with the handwritten notes inserted at the appropriate place, underlined and identified by square brackets.

> 2.01 Vendor and Purchaser hereby agree that the inventory described in Section 1.01 (a) above will be counted or verified by representatives of CCM Inc. the Vendor and the Purchaser and shall be valued by CCM Inc., the Vendor and the Purchaser on a going concern basis at the lower of cost or

> net realizable value and on a basis consistent with prior years, such count and valuation of the inventory described in Section 1.01 (a) to be reviewed by CCM Inc.'s auditors, Messrs. Zittrer, Siblin, Stein & Levine, Chartered Accountants, [who shall take into consideration the representations of Sport Maska Inc. as to the valuation of the inventory and the said accountants shall] deliver a written opinion to CCM Inc., to the Vendor and the Purchaser to the effect that such inventory count and valuation is fairly presented [or should be modified or adjusted], the whole at the cost of CCM Inc. Upon delivery of such opinion the inventory count and valuation shall be deemed to be definitively determined for all purposes in connection with this Offer.

115 These handwritten additions appear to result from the striking out of a paragraph which was in the original clause 2.01, and at first sight appeared to be a true undertaking to arbitrate. This paragraph read as follows:

> In the event of a dispute between the parties with respect to the valuation as aforesaid, same shall be submitted to arbitration to Messrs. Zittrer, Siblin et al and a firm of accountants appointed by Purchaser; the said firms shall then review the valuation and if the difference between them does not exceed One Hundred [page609] Thousand Dollars ($100,000.00), it shall be divided between the Vendor and the Purchaser, and, if it exceeds One Hundred Thousand Dollars ($100,000.00), the said firms shall choose a third firm of accountants whose decision shall be binding on all parties. The cost of the arbitration shall be borne equally by the parties.

116 The last part of the last sentence in clause 2.01 was also deleted. It read as follows:

> Upon delivery of such opinion, the inventory count and valuation shall be deemed to be definitively determined for all purposes in connection with this Offer, [provided same is concurred in by the Purchaser.]

117 The parties here deliberately rejected recourse to arbitration. It will be noted that the undertaking to arbitrate, which was deleted, resembled a submission, bringing an arbitration about, as it provided for the appointment

of three arbitrators, division of costs and so on. I find it hard to see how, having ruled out arbitration, the parties could at the same time have chosen to resort to it.

118 In view of the bankrupt condition of CCM, it would appear that the time factor was an essential element of the sale of the inventory for its creditors and shareholders. The speed with which the sale was concluded supports this assumption. The purchase offer was completed on December 17, 1982 and the closing date set at January 21 following, implying that the inventory was to be finalized and the valuation completed by that date.

119 From this I conclude that the parties agreed to delete what might have constituted a true arbitration agreement, possibly in order to avoid any delay in concluding the contract or for some other reason which they did not see fit to explain.

120 The fact remains that, under the handwritten additions to clause 2.01, appellant could make representations regarding valuation of the inventory. It is paradoxical that appellant should be expressly given this right without its being extended to the other parties concerned in the transaction, namely CCM and Gestion R.A.D. Exhibit DP-1 adds to the confusion in that CCM agrees [page610] that appellant can make representations not only to respondents, but to itself as well. Does this mean that CCM was thereby acting as arbitrator? The question suggests its answer. The opportunity to make representations, though an essential component of arbitration and of any judicial process, is not exclusive to them. Nothing forbid parties to a contract from making representations to the expert they chose in order to draw to his attention certain facts which might affect the outcome of the valuation.

121 Further, it is of the essence of an arbitration award that it be final and binding, except of course for recourses that may be permitted. However, the parties may agree to be bound by an expert's decision without his necessarily being an arbitrator. Various reasons may prompt the parties to act in this way. In the case at bar, for example, the necessity for speed imposed by the situation in which CCM found itself may have forced the parties to sell the inventory quickly. This may have created a necessity to ensure that the setting of the price, which in the circumstances was a complex operation, should be done so as not to prejudice completion of the contract within the agreed time limits.

122 Although appellant had an opportunity to make representations, there is nothing in the contract to indicate that respondents' function here was to exercise a judicial authority by choosing between several opposing

positions: they were simply required to determine the accuracy of the valuation to be made by the parties, which as Chevalier J. stated (at p. 388), was in fact made by CCM. Far from settling a dispute, respondents, indirectly it is true, completed the contract of sale concluded between the parties by approving the valuation of the inventory so that the price payable could be determined.

123 Furthermore, respondents had a professional connection with one of the parties, CCM, as they acted as its auditors. Also, under clause 2.01 respondents' fees were to be paid by CCM in full. These two facts appear to me to conflict with the rules on arbitration in which, besides the absence of any connection between the parties, costs are [page611] shared, in order to ensure at least in theory that the arbitrator will be impartial, something the parties had envisaged in the undertaking to arbitrate that was later deleted.

124 The agreement names Messrs. Zittrer, Siblin, Stein, Levine, chartered accountants, to do the valuation and give their opinion. It is not clear whether the individuals or a firm are intended. If the parties meant to name the accounting firm as arbitrator, then the question arises whether a civil partnership can act as an arbitrator. Where there is no express stipulation by the parties, as here, the provisions of the Code of Civil Procedure then in effect suggest that only a natural person can act as an arbitrator. Thus, article 944 C.C.P. dealt with cases where an arbitrator died or became incapacitated; art. 946 C.C.P. dealt with cases where arbitrators withdrew; and art. 948 C.C.P. required each arbitrator to sign the award. I do not really see how death could affect a firm or how it could withdraw or physically sign an award.

125 Finally, article 948 C.C.P. required arbitrators to give reasons for their award in all cases. Respondents' letter dated January 20, 1983 (Exhibit P-3) does not have the characteristics of such an award. Thus, no reference is made anywhere to appellant. It contains no analysis of arguments and no reason explaining or justifying the conclusions arrived at by respondents. The format of the letter and the forms it contains correspond exactly to what accounting experts describe in their terminology as an accounting opinion on a particular item, namely inventories (CICA Handbook, Canadian Institute of Chartered Accountants, chap. 5805.16).

126 In the final analysis, based on the language used, the process contemplated by the parties under the rules applicable to arbitration, the fact that they deliberately deleted the paragraph providing for a possible arbitration, although they agreed to be bound by respondents' opinion, and that they provided for representations to be made by appellant, the intent that in my opinion clearly emerges from the agreement and the other documents

[page612] giving effect to it is that the parties agreed to obtain an expert opinion from an accountant and did not intend to submit the matter to arbitration by respondents in the accepted understanding of the structure and legal consequences of that process. To use the words of Mayer, loc. cit., [TRANSLATION] "All of this results from the fact that there was no dispute, and also establishes that there was none" (p. 269).

127 A digression must be made here. In his opinion LeBel J.A. notes that [TRANSLATION] "the pleadings of respondent [here the appellant] confirm the way in which it regarded the functions of appellants [here the respondents)" (p. 393). This "admission" can be found in paragraph 15 of the statement of claim, where respondent charged that appellants had broken certain obligations although they had [TRANSLATION] "agreed to be arbitrators". LeBel J.A. appears to regard this as a judicial admission.

128 At the hearing appellant explained that this word was used not in the legal sense, as it is found in the Quebec Code of Civil Procedure, but in a very broad sense as it is used in everyday language, and that, in any event, the classification of respondents' function was a question of law which could not be the subject of a judicial admission.

129 In the very recent judgment of this Court C. (G.) v. V.-F. (T.), [1987] 2 S.C.R. 244, in which a similar situation occurred though in a different context, Beetz J., delivering the unanimous judgment of the Court, held as follows at p. 257:

> At the hearing, counsel for the appellants conceded that the award of custody to a third person would amount to a declaration of partial deprivation.... This concession on a point of law is not binding on the Court.

130 A similar conclusion must be drawn here.

131 Finally, respondents argued that clause 2.01 of the agreement was an undertaking to arbitrate, or at least that respondents were acting as mediators. These arguments must be examined.

9 -- Undertaking to Arbitrate

132 As I have already mentioned, there is no longer any question since ZodiaK, supra, concerning the validity of the undertaking to arbitrate in Quebec law. The only applicable provision at the time the parties concluded their agreement was art. 951 C.C.P., which I have set out earlier. I should point out that the undertaking to arbitrate differs from the submission

essentially in that the former is an agreement in contemplation of a potential dispute while the latter relates to a dispute that has arisen.

133 The undertaking to arbitrate is in fact a contract in which the parties undertake to conclude a submission to arbitrate should a dispute arise between them. Two stages are therefore required: first, the parties promise to resort to arbitration if a dispute arises, and second, when the dispute does arise, they conclude a submission in the proper form (Ville de Granby v. Désourdy Construction Ltée, [1973] C.A. 971, cited with approval in Zodiak, supra, at pp. 540-42; Colas, "Clause compromissoire, compromis et arbitrage en droit nouveau" (1968), 28 R. du B. 129). Nothing prevents that an undertaking to arbitrate specify the arbitration procedure. Once a dispute arises, it is only necessary to implement the process provided by the undertaking to arbitrate, if any, or by the parties' agreement if the wording is not in keeping with provisions of the Code of Civil Procedure. Since 1986, this machinery has been set out in art. 944 C.C.P. At that time, the undertaking to arbitrate was not subject to any formal requirement, except that it be in writing. It must clearly indicate the parties' intent to submit any future dispute to arbitration. It cannot obviously specify the subject-matter of the dispute since that had not yet arisen.

134 Respondents argued that clause 2.01 of Exhibit P-2 and letter DP-1 constituted an undertaking to arbitrate. They relied principally on the following observations by Chouinard J. in Zodiak, supra, at p. 543:

> The Code of Civil Procedure contains no provision regarding the form of an undertaking to arbitrate. It [page614] will be sufficient if it contains the essential ingredients, namely that the parties have undertaken to execute a submission and that the arbitration award is final and binding on the parties.

135 As respondents argued that a dispute had arisen and had been submitted to them in the capacity of arbitrators, they had to establish that the parties had undertaken to execute a submission. There is no mention anywhere of such an obligation, apart from the paragraph which they later deleted. Accordingly there can be no question here of an undertaking to arbitrate, still less of a submission.

10 -- Mediation

136 Mediation was expressly covered by art. 948 C.C.P.:

> 948. The arbitrators must decide according to the rules

> of law, unless by the submission they have been exempted from doing so, or have been empowered to act as mediators.

137 The status of a mediator allows its holder to decide on the basis of equity, without being bound by substantive or procedural rules of law, except of course for rules of public order such as those of natural justice which provide for impartiality, opportunity for the parties to be heard, reasons to be given for the award, and so on.

138 Mediation is not, as such, a legal concept distinct from that of arbitration. Rather, the mediator is an arbitrator who is exempted from compliance with the rules of law as provided in art. 948 C.C.P. (Antaki, "L'Amiable composition", in Antaki and Prujiner, Actes du 1er Colloque sur l'arbitrage commercial international (1986), at p. 153). The mediator is in fact only the "bon père de famille" of the Civil Code transposed to arbitration matters.

139 Mediation is a departure from the law of arbitration. Like any exception it must, if it is not expressly provided for, at least result from a clear and unambiguous intent (Concrete Column Clamps Ltd. v. Cie de Construction de Québec Ltée (1939), 67 K.B. 536, at pp. 545-46, per Galipeault J., aff'd by [1940] S.C.R. 522).

140 This does not mean that the word "mediators" or any other hallowed expression must be contained in an agreement to arbitrate. It will suffice that the parties clearly indicate their intention to exempt the arbitrators from compliance with the rules of law (Concrete Column Clamps Ltd. v. Cie de Construction de Québec Ltée, supra, at p. 546; Antaki, loc. cit., at p. 155; Ferland, op. cit., at p. 84).

141 This approach is in accordance with that adopted in French law (Loquin, op. cit., at p. 44; Bredin, "L'amiable composition et le contrat", Rev. arb. 1984.259; Tyan, Le droit de l'arbitrage (1972), at. pp. 240-41; Robert, op. cit., at pp. 160-61).

142 Mediation is only a simplified form of arbitration, and consequently must be the subject of a clear intent by the parties giving the arbitrators the status of mediators. Clause 2.01 and letter DP-1 make no mention of respondents' being exempted from compliance with the rules of law, acting on the basis of equity or their conscience, or, more simply, being mediators. Though a mediator is not bound by the rules of law, the criteria for distinguishing between arbitration and expert opinion nonetheless apply to him mutatis mutandis, since he remains first and foremost an arbitrator.

143 I conclude from the foregoing analysis that respondents were not acting as arbitrators. It is therefore impossible to speak of mediators any more than of an undertaking to arbitrate or a submission.

V -- Conclusion

144 Overall, I conclude that there was no present or potential dispute either at the time the agreement was concluded between the parties or, when respondents performed their mandate. The parties did not intend to submit a dispute to arbitration by respondents, but simply agreed to rely on their opinion as accounting experts, making them their mandataries on one aspect of the contract, namely the value of the assets sold by CCM, which essentially represented the selling price of those assets.

145 As the question of immunity does not arise in this context, it must be concluded that the motion for a declinatory exception made by respondents is unfounded and was properly dismissed by the Superior Court.

146 For these reasons I would allow the appeal, reverse the judgment of the Court of Appeal and restore the judgment of the Superior Court, the whole with costs throughout.