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The Expert Is Right – Even When Wrong

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Parties to commercial contracts would usually agree on the procedures to be carried out in the event a dispute arises between them. One of the most important yet often overlooked procedures is the appointment of an independent auditor to assess the damages payable to the winning party in a legal suit.

What happens then when one party disagrees with the finding of an independent auditor? This question was considered in the recent Federal Court case of *Integrated Training and Services Sdn Bhd v Kerajaan Malaysia & Ors* [2022] 3 MLJ 77.

Background Facts

The appellant (Integrated Training and Services Sdn Bhd) and the first respondent (Kerajaan Malaysia) entered into an agreement (the Contract) where the appellant was to provide and carry out flight training courses for the respondent's trainees. The respondents were to send a certain number of trainees to attend the appellant's training courses by batches. The respondents failed to fulfil their obligations under the Contract. The appellant then sued the respondents for breach of contract at the High Court, which ruled in favour of the appellant.

The Court of Appeal upheld the High Court's decision and remitted the case back to the High Court for assessment of damages. Pursuant to the Contract between the parties, a chartered accountant was mutually appointed by the parties as an independent auditor (the Expert) and an assessment was made by the Expert (the Expert Report). Upon assessment, the Expert evaluated the damages in the sum of RM 21,735,613.50 to be paid to the appellant. The respondent did not agree with the Expert Report and appealed against the assessment. The court allowed the respondent's appeal and then directed the parties to appoint a new auditor to assess the damages. The appellant appealed against this direction to appoint a new auditor which went all the way to the Federal Court.

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The Decision Of The Federal Court

The Federal Court applied the rule adopted by the English Court in *Campbell v Edwards* [1976] 1 All ER 785 which states that where two parties have agreed that the price of a property was to be fixed by an agreed Expert, the valuation cannot be set aside by either party on the ground that the valuer had made a mistake. This rule in *Campbell v Edwards* was also adopted by the Singapore High Court in *Geowin Construction Pte Ltd (in liquidation) & Ors v Management Corporation Strata Title No 1256* [2007] 1 SLR 1004 where the Singapore High Court held, if parties agreed for a valuation to be made by an Expert, parties were bound by the decision of the Expert even if he/she made a mistake as long as it was given honestly and in good faith. The assessment of the Expert could only be set aside on the basis of fraud or partiality.

Essentially, once parties have agreed to the mutually appointed Expert, they were bound by the Expert's determination. The court would generally not intervene in a matter within the Expert's jurisdiction unless vitiating factors such as fraud, collusion or partiality/bias could be shown.

Analysis Of The Decision

In this case, the respondents had:

1. Alleged that the Expert had taken into consideration irrelevant documents in preparing the Expert Report.
2. Disagreed with the methodology adopted by the Expert in assessing the damages that have been suffered by the appellant.

The Federal Court held that even if the allegation was true that the Expert had taken into consideration irrelevant documents, this would not be sufficient to set aside the Expert Report. Interestingly, the court opined that errors of fact or law by the Expert would not vitiate the Expert Report so long as he acted within his contractual obligation.

On the point of the methodology adopted by the Expert, the Federal Court firmly decided that the mere fact that the respondents were not happy with the methodology used by

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the Expert was not a valid reason or justification to set aside the Expert Report. Given the fact that the Contract did not specifically provide the procedures to be followed by the Expert, the Expert was free to determine the methodology to be used in his assessment.

Conclusion

In a nutshell, parties entering into a contract are encouraged to put specific procedures in writing to be followed when certain circumstances arise. This may prevent confusion and/or any unnecessary costs due to lengthy litigation when a dispute arises. For instance, a clause on the appointment of an independent expert to assess damages must cover, among others, the specific terms of references/areas that need to be considered and/or to be excluded by the auditor in his/her assessment. Such terms of references/areas should be worded clearly and unequivocally without room for any ambiguity.

Authored by Jonathan Ho, a Pupil with the firm's dispute resolution practice.

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