

DELIMITING THE SPHERES OF JUDICIAL AND ARBITRAL POWER: "BEWARE, MY LORD, OF JEALOUSY"*

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I. Introduction

In the last twenty years, international commercial arbitration has emerged as the preferred means of resolving disputes involving transnational interests. This has been due, in large measure, to the fact that markets, business, and finance have become borderless. It has also been made possible by the increasing willingness of local courts and judges to forego what has been described as "the ancient judicial hostility to arbitration" and to enforce the *will of the parties* as expressed in arbitration agreements and, ultimately, in the awards rendered as a consequence of such agreements.

This change — from doubt to deference in the attitude of courts toward arbitration — is at least as evident in Canada as in other arbitration-friendly jurisdictions around the world. As with most however, it behoves us to recall the road taken so far, to assess the wisdom of our current actions and continually to inquire as to the direction of our next steps.

II. The Legal Framework

In 1986, Canada became the first country in the world to enact the Model Law on International Commercial Arbitration as proposed in June 1985 by the United Nations Commission on International Trade Law ("UNCITRAL").

* (...) "it is the green-ey'd monster which doth mock *the meat it feeds on*;" From: Othello, III, iii, 165.

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Very shortly thereafter, each of the provinces and territories followed suit by enacting legislation that either adopted the Model Law by reference or incorporated its basic provisions.

The Model Law and its domestic offspring were intended to clarify, standardise, and facilitate the law and practice of international commercial arbitration, as regards such matters as the enforcement of agreements to arbitrate, the conduct of arbitrations and the recognition and enforcement of foreign arbitral awards. Assisted by Canada's contemporaneous, though belated, adhesion to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, better known as the New York Convention, these goals have largely been attained.

The fundamental objectives of both the New York Convention and the Model Law are to foster predictability in the resolution of international commercial disputes and to ensure consistency between jurisdictions in this regard; to encourage thereby the use of international commercial arbitration as an effective dispute resolution mechanism; and to facilitate and promote international trade and commerce. The adoption or incorporation of these principles in Canadian law, as described, reflects a very clear and strong statement of public policy.

Needless to say, the creation and preservation of a sphere within which arbitrators rather than judges are paramount, involves a delicate balancing of the right of parties to determine freely the means by which their private disputes are resolved, and the interests of the national legal systems that are expected to recognise and enforce the product of such private dispute resolution. Such balancing involves, above all, a demarcation of the scope of possible intervention by the courts. If the task is delicate, the language by which this is accomplished in the Model Law is direct. Article 5 of the Model Law — entitled “Extent of Court Intervention” — states simply: “*no court shall intervene except where so provided*” in this Law. By this language, article 5 is intended to exclude any so-called general, supervisory or residual powers of intervention of national courts. There are now several Canadian cases confirming that the federal and provincial equivalents of art. 5 have precisely that effect.¹

When seized with a dispute in a matter which one party claims is the subject of an arbitration agreement, the role of the court, as provided in the Model Law and the New York Convention, is confined to determining whether the arbitration agreement is null and void, inoperative, or incapable of being performed. Faced with a valid arbitration agreement, the court is *required* to send the parties to arbitration.²

¹ The fundamental principle embodied in article 5 has been explicitly considered and applied in: *Quintette Coal Ltd. v. Nippon Steel Corp* (1990), B.C.J. No. 2241 (C.A.); and in *Compagnie Nationale Air France c. Mbaye*, [2000] R.J.Q. 717.

² This obligation was reaffirmed in *Rio Algom v. Sammi Steel* (1991), 47 C.P.C. (2d) 251 (Ont. Gen. Div.).

The Model Law also provides that questions pertaining to the arbitrator's jurisdiction and scope of authority are for the *arbitrator* to determine in the first instance. This fundamental principle — that the arbitral tribunal is empowered to determine the existence and scope of its own jurisdiction — is well established in the theory and practice of international commercial arbitration where it is known as "*kompetenz-kompetenz*".

The Model Law also sets out the related (and equally well accepted) principle of "severability" or "autonomy" of the arbitration agreement, whereby an arbitration agreement is deemed to have a life of its own, separate and apart from the broader contract in which it may be contained. As a result, the principle operates so as to shield an arbitration agreement from any finding of invalidity concerning the principal contract.

Finally, it is significant to recall that, in addition to Art. 5, other provisions of the Model Law explicitly address the delineation of the abutting spheres of judicial and arbitral competence, by incorporating elements of the New York Convention under which arbitral awards must be recognised and enforced by national courts, and cannot be stayed or set aside, save in extremely limited circumstances.³

III. *The Attitude and Role of the Judiciary*

Words such as "jealousy" and "hostility" have been proffered as descriptions of the traditional attitude of the judiciary toward arbitration. It is not difficult to imagine that judges may once have been extremely suspicious of private agreements that have, as their primary objective, to remove disputes from the purview of the courts and to establish, in effect, a parallel system of dispute resolution. Common law courts, which are central to the development of the law in the Anglo-American tradition, were arguably more wary of arbitration agreements than their civil law cousins, given that such agreements can be viewed as ousting considerable aspects of the court's "inherent" jurisdiction.

However, according to some authors, the notion of an age-old hostility on the part of the courts is nothing more than historical *hokum* — a myth that has affected the work of legal scholars and practitioners for the past century. For example, one writer has argued that there is actually no evidence of ancient judicial hostility towards arbitration; on the contrary, from the earliest times the courts traditionally worked in harmony with arbitration.⁴ The author points out that in Ancient Greece there was an established system of arbitration, separate from litigation, designed to ease the burden on the courts, that was not only accepted but greatly appreciated by the judiciary. In Rome as well, the practice

³ These primarily have to do with serious procedural irregularities amounting to violations of the principle of natural justice or due process.

⁴ See in particular, Derek Roebuck, «The Myth of Judicial Jealousy», 10 *Arbitration International* 1994, 395.

of arbitration was well known at least as far back as the promulgation of the Twelve Tables in the 5th century BCE.

Malgré l'impact des réformes législatives de 1986 sur le développement de l'arbitrage au Canada, on peut certes recenser dans la jurisprudence canadienne quelques exemples où s'exprime encore une certaine réticence judiciaire à accorder une «place au soleil» à l'arbitrage, parallèle à celle du juge étatique, dans la résolution des différends de nature commerciale.⁵ Cependant, la jurisprudence majoritaire, et elle dénote sans conteste une tendance très lourde, est respectueuse des principes directeurs de la Loi-type. Il faut désormais certainement ranger le Canada parmi les pays hospitaliers à l'arbitrage.

Les tribunaux sont appelés à intervenir dans le processus arbitral principalement à deux étapes. D'abord pour déterminer si un différend doit être renvoyé à l'arbitrage; et ensuite lorsqu'on cherche à faire exécuter ou à faire annuler une sentence arbitrale.

IV. Lors d'une demande de renvoi à l'arbitrage

En plus des motifs de refus de renvoi à l'arbitrage prévus expressément à la Loi-type, le juge saisi d'une demande de renvoi doit, de façon préliminaire, vérifier si le différend est ou non visé par la convention d'arbitrage. Cette étape préliminaire est particulièrement importante puisqu'elle fournit l'occasion à un juge étatique qui serait par ailleurs réfractaire à l'arbitrage de définir l'objet du «différend» de façon à restreindre, sinon à écarter la juridiction de l'arbitre. Si cet examen préliminaire dépasse une appréciation *prima facie* de l'application de la clause d'arbitrage, l'effectivité de la convention d'arbitrage peut s'en trouver sérieusement compromise. Cette appréciation judiciaire doit être respectueuse de la compétence du tribunal arbitral de statuer sur sa propre compétence.

À cet égard, il est intéressant de noter que la jurisprudence française apprécie différemment «l'objet du litige» selon qu'il s'agit de fixer les limites de la compétence du tribunal arbitral lors d'une demande de renvoi, plutôt que de contrôler si le tribunal arbitral a outrepassé cette compétence au stade de la reconnaissance de la sentence. Dans le premier cas, la jurisprudence française a retenu une approche extrêmement déférente afin de donner un maximum d'effectivité à la convention d'arbitrage⁶.

⁵ Mentionnons, par exemple: *Jaffasweet Juices Ltd. v. Michael J. Firestone & Associates* (1996), 45 C.P.C. (3d) 350 (Ont. (Gen. Div.)); *Ontario Federation of Labour v. Ontario (Minister of Economic Development, Trade & Tourism)* (1996), 31 O.R. (3d) 302 (Gen. Div.); *C.C.I.C. Consultech International c. Howard R. Silverman* (24 mai 1991), Montréal 500-09-00147-901, J.E. 91-987 (C.A.); *ODC Exhibit Systems Ltd. (Canada) v. Expand International Ltd.*, (1988), 41 B.C.L.R. 286 (S.C.); *Injector Wrap Corp. v. Agrico Canada Ltd.* (1990), 67 Man.R. (2d) 158 (CA).

⁶ Au Québec, l'arrêt *Condominiums Mont St-Sauveur c. Constructions Serge Sauvé Ltée* (1990), R.J.Q. 2783 (C.A.) propose une interprétation large du champ d'application de la convention d'arbitrage et de la cause d'action, laissant ainsi aux arbitres le soin de statuer sur leur compétence.

L'effectivité des conventions d'arbitrage commande que ce soit l'arbitre qui détermine en premier lieu si le différend est couvert par la clause compromissoire. Si l'arbitre s'octroie une compétence que l'entente ne lui confère pas, les parties auront la faculté de tenter d'écarter la sentence, la Convention de New York autorisant expressément le juge étatique à refuser la reconnaissance à une sentence qui porte sur un différend non visé par la convention d'arbitrage. Le respect du principe «*kompetenzkompetenz*» permet non seulement d'assurer la crédibilité des arbitres à titre d'adjudicateurs privés, mais aussi de préserver l'efficacité du processus arbitral.

V. Lors de l'exécution de la sentence arbitrale

Tant la Convention de New York que la Loi-type envisagent un contrôle judiciaire de la mission de l'arbitre après que la sentence arbitrale ait été rendue, dans le cadre de procédures d'homologation ou d'annulation de la sentence. Se soulève à cette étape la question du rôle du juge étatique, non plus à l'égard de la convention d'arbitrage, mais à l'égard de la sentence arbitrale elle-même.

Les valeurs en jeu sont d'une part la finalité du processus arbitral (laquelle est évidemment compromise si la cause doit être réinstruite devant les tribunaux étatiques) et d'autre part la confiance de la collectivité dans l'institution arbitrale, confiance qui s'effritera rapidement si l'on y dispense une justice imprévisible ou si l'on y tolère une procédure entachée d'irrégularités. Le contrôle judiciaire de ce produit de l'instance arbitrale qu'est la sentence *doit* rester strictement limité.

Commercial arbitration, as contemplated by both international instruments and domestic legislation, is not a preliminary step in judicial proceedings. Rather, it is a private system of adjudication intended to provide, ideally, a substitute for the judicial resolution of an ever expanding category of disputes. That said, judicial review of arbitral awards, limited in scope, is arguably one of the essential conditions for the development of an effective system of arbitral justice. It is the availability of subsequent court control which makes it acceptable for arbitrators to rule on their own jurisdiction, for example, or for national laws to admit the arbitrability of disputes involving issues of public policy, such as anti-trust or securities claims.⁷ Similarly, it is *because* the courts have a role to play in enforcing arbitral awards that judges can, and do, refrain from interfering in arbitral proceedings during the conduct of the arbitration.

⁷ For example: in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the United States Supreme Court held that U.S. courts cannot take jurisdiction over disputes governed by a valid arbitration agreement even if the dispute raises issues under the *Sherman Act* (the principal US antitrust law); in a landmark 1974 decision, *Scherk v. Alberton-Culver Co.*, 417 U.S. 506, the same court held that arbitration in the domain of US securities law is not prohibited in the context of an international contract, and extended this holding to the context of domestic arbitration in *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989).

Viewed in this manner, the availability of judicial recourse in limited circumstances is far from antithetical, but is, rather, essential to the well-being of what is otherwise a purely private process.

VI. *The Basis of Judicial Deference*

The arguments in favour of limited judicial supervision of the arbitral process by national courts are multifaceted. The first, and most important, is that parties should be held to their bargain. It is this value, rather than the abstract notion of "arbitral jurisdiction" *per se* that is worthy of respect by judges, arbitrators and legislators alike.

When opting for arbitration, parties are taken to have agreed to trade some of the procedural certainty available to them in litigation, as well as the opportunity for an appeal of an unfavourable judgement, for what they have determined are the advantages of arbitration — above all, the ability to play an enhanced role in shaping the dispute resolution process. That role encompasses virtually all aspects of an arbitration, from the selection of arbitrators whom they consider most able to understand and decide the dispute at issue, to the determination of rules governing the conduct of arbitral proceedings. The task of ensuring that arbitration proceedings produce appropriate outcomes thus resides, to a considerable degree, with the parties. Clearly, there is no guarantee that this bargain will always yield the correct decision. Yet, the question must be asked: what court system can offer such a guarantee?

It should be noted that the parties are also empowered to determine the degree of judicial control over both the arbitral proceedings and the resulting award — subject, of course, to any constraints imposed by law.⁸ The oft-cited case of *Noble China Inc. v. Lei*,⁹ is illustrative. The Ontario Court in that case was seized, *inter alia*, with a motion to dismiss an application for an order setting aside an arbitral award. The grounds alleged in support of the motion to dismiss were simple : *in their arbitration agreement, the parties had contracted out of their right to apply to the courts to set aside the arbitrators' award*. The clause in question read as follows: "No matter which is to be arbitrated is to be the subject matter of any court proceeding other than a proceeding to enforce the arbitration award."

In its decision, the court focussed on articles 18 and 19 of the Model Law — the so-called *Magna Carta* of arbitral procedure — which establish that the parties are to be treated with *equality*, shall be given a *full opportunity* to present their case and are free to agree on the *procedure* to be followed by the arbitral

⁸ For example, in Québec, the provisions of the *Code of Civil Procedure*, on the basis of which parties may apply to the courts to enforce (art. 946 *et seq.*) or to annul (art. 947 *et seq.*) arbitral awards, are peremptory; they may *not* be waived by the parties.

⁹ (1998), 42 O.R. (3d) 69 (Gen. Div.).

tribunal. The court found that neither domestic law¹⁰ or public policy, nor the terms of the Model Law itself, constrain the parties' inherent right to choose, as they apparently did in this case, contractually to *waive their right* (set out in the Model Law and related legislation) to apply to the courts to set aside an arbitral award.

In the eyes of the court, the task at hand ultimately boiled down to a determination of what the parties themselves intended, reinforcing the principle that arbitration is a consensual process tailored to fit the needs of its users. The court said:

"In choosing an international commercial arbitration, they [the parties] obtained the benefit of deciding on the rules which were to govern their arbitration. (...) These intentions are expressed with clarity and without ambiguity. (...) In my opinion, the court should give effect to this. This is consistent with the philosophy and structure of the Model Law, indeed with its 'Magna Carta'. The parties make their own agreements..."¹¹

VI. Conclusion

En ce 125^e anniversaire de la Cour suprême du Canada, il aurait été opportun de commenter la jurisprudence de la cour en matière d'arbitrage commercial international. Hélas, la Cour n'a pas encore eu l'occasion de se pencher sur les législations issues de la réforme de 1986 dans une affaire mettant en cause les intérêts du commerce international. Toutefois, la Cour suprême a indirectement affirmé son appui à une approche déférente en matière d'arbitrage dans une affaire concernant un arbitrage interne.¹² La Cour y a accueilli un appel, en provenance de la Colombie-Britannique, en s'en remettant exclusivement aux motifs dissidents en Cour d'appel, dans lesquels on trouve le *dictum* bien connu du juge Campbell dans l'affaire *Boart Sweden*¹³, suivant lequel:

... the very strong public policy of this jurisdiction that where parties have agreed by contract that they will have the arbitrators decide their claims, instead of resorting to the Courts, the parties should be held to their contract.¹⁴

La décision précitée semble une indication sans équivoque que la Cour suprême du Canada est disposée à endosser une approche déférente envers la compétence du tribunal arbitral.

¹⁰ The arbitration was conducted under the Ontario *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9

¹¹ *Noble China Inc. v. Lei*, *supra*, note 9, at 88, 87, 93.

¹² *Burlington Northern Railroad Co. c. Canadian National Railway Co.* (1995) B.C.J. No. 1084 (C.A.); (1997) 1 S.C.R. 5.

¹³ *Boart Sweden AB v. NYA Stromnes A.B.* (1988), 41 B.L.R. 295 (Ont. H.C.J.)

¹⁴ *Ibid.* at 302-03.

En conclusion, observons que s'il est illusoire de croire que l'on parviendra à éliminer la jalousie, on constate, à tout le moins dans la matière qui nous intéresse, qu'il est possible de la contenir.

Indeed, the attitudes of judges and arbitrators has evolved to the point where each now understands and appreciates the other's existence. Perhaps it can even be said of the judge with regard to the arbitrator, as was said of Othello with regard to his dearest friend: [He] dotes yet doubts; suspects, yet soundly loves.