JUDICIAL REVIEW OF INTERNATIONAL ARBITRATIONS IN CANADA: NOTES ON *MEXICO V CARGILL*

Marc Gold*

What is the standard by which courts should review the decisions of international arbitral tribunals, and how much deference, if any, should reviewing courts pay to the reasoning of the tribunal under review?

In Canada the issue seems to have been settled by the recent decision of the Ontario Court of Appeal in *Mexico v Cargill Inc*, holding that the correct standard of review is correctness and that no deference *per se* is owed to the tribunal under review.[1] This appears to put to rest an issue that has remained open and somewhat confused in the case-law.[2]

Clear answers to these questions are welcome, but there is a world of difference between knowing what the standard of review is and knowing how that standard will be applied in any given case. It is therefore important to "unpack" the correctness standard to provide guidance to lawyers, arbitrators and judges when they are called upon to apply it in practice.

* Mediator and arbitrator; Adjunct Professor of Law, McGill University.

1 2011 ONCA 622, (2011), 107 OR (3d) 528, leave to appeal refused [2011] SCCA No 528 (QL) [*Cargill*]. Although the refusal to grant leave does not mean that the Supreme Court of Canada necessarily endorsed the reasoning of the Court of Appeal on the issue of the standard of review, it was the central issue in the case. Accordingly this paper proceeds on the basis that the issue has been settled in Canada, at least for the time being.

2 For a review of the Canadian case-law, see Henri C Alvarez, "Judicial Review of NAFTA Chapter 11 Arbitral Awards," in Emmanuel Gaillard and Frédéric Bachand, eds, *Fifteen Years of NAFTA Chapter 11 Arbitration* (New York: Juris Publishing, 2011) at 103. The issue remains unsettled in the United States. Notwithstanding the Supreme Court's holding in *Hall Street Associates v Mattel Inc*, 552 US 576 (2008) to the effect that the *Federal Arbitration Act*, 9 USC § 10(a) sets out the exclusive grounds for vacating an arbitral award, lower courts remain divided as to whether an award may also be vacated where the arbitral award exhibits a "manifest disregard" for the law. For an interesting analysis of the issue based on agency theory, see Tom Ginsburg, "The Arbitrator as Agent: Why Deferential Review Is Not Always Pro-arbitration" (2010) 77 U Chicago L Rev 1013.

In this respect, *Cargill* provides a good case study of the factors that inform judicial review of arbitral awards. As will be argued below, the determining factor is the way in which the court views its role *vis-à-vis* the arbitration process. This will influence how it characterizes the legal and factual issues under review, and accordingly whether it will or will not intervene to set aside an arbitral award. Otherwise put, it is the general orientation of the court and the way it characterizes the legal and factual issues under review and not the standard of review as such, that will determine the outcome in any given case.

1. The Case

The case arose out of Mexico's efforts to protect its sugar industry from the importation of high-fructose corn syrup (HFCS). Cargill was a producer of HFCS who, in anticipation of the coming into force of the *North American Free Trade Agreement*,[3] established a number of production and distribution facilities in the United States to sell HFCS to its wholly-owned Mexican subsidiary, which in turn sold the product throughout Mexico. Mexico enacted a series of trade barriers which ultimately were found to constitute breaches of NAFTA.

As a result of these barriers, Cargill was forced to shut down a number of its production facilities and a distribution centre, while its Mexican subsidiary had to close its US distribution centre. The parties agreed to arbitration under Chapter 11 of NAFTA, Cargill seeking damages for its lost profits as a result of Mexico's breaches. The arbitration was heard by an expert panel who awarded damages to Cargill and its subsidiary in the amount of $77,329,240. This sum represented the direct lost sales and associated costs suffered by the subsidiary in Mexico ("down-stream" losses), and the lost sales of Cargill to its subsidiary of the HFCS produced in the United States ("up-stream" losses). Mexico challenged that portion of the decision awarding up-stream damages to Cargill, on grounds that the tribunal had no jurisdiction to award damages for losses suffered outside Mexico.

The parties having designated Toronto as the place of arbitration, the Ontario Superior Court of Justice had jurisdiction to review the arbitral award under the *International Commercial Arbitration Act,*[4] which enacted the *UNCITRAL Model Law on International Commercial Arbitration* (Model Law) as a Schedule to the Act.

---

3 *North American Free Trade Agreement between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289 (entered into force 1 January 1994) [NAFTA].

4 RSO 1990, c I.9.

The award of up-stream damages was challenged under Article 34(2)(a)(iii) of the Model Law which allows the court to review an award on grounds that:

> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration … .

The Superior Court judge dismissed Mexico's challenge and upheld the arbitration award of upstream damages, applying a "reasonableness" standard of review. The case was appealed to the Ontario Court of Appeal.

2. The Standard of Review

Various submissions were made on the issue of the appropriate standard of review. Mexico and Canada argued that the standard ought to be correctness, while Cargill argued that the appropriate standard was that of reasonableness.[5] In this respect, the submissions track the framework for judicial review articulated by the Supreme Court of Canada *in Dunsmuir v New Brunswick*.[6] A different approach was offered by ADR Chambers, an intervener in the case, who submitted that it was inappropriate to apply the domestic administrative law tests to the review of an international arbitration panel, and that the appropriate standard to be applied is that of deference.[7]

---

[5] The United States made no submissions on the standard of review, but did support Mexico's position in the case.

[6] 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]. In *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, [2011] 1 SCR 160 at para 26 [*Alliance Pipeline*], Fish J summarized *Dunsmuir* as follows:

> Under *Dunsmuir*, the identified categories are subject to review for either correctness or reasonableness. The standard of correctness governs: (1) a constitutional issue; (2) a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'" (*Dunsmuir* at para 60, citing *Toronto (City) v CUPE, Local 79*, 2003 SCC 63, [2003] 3 SCR 77, at para 62); (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or *vires*" (paras 58-61). On the other hand, reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" (para 54); (2) raises issues of fact, discretion or policy; or (3) involves inextricably intertwined legal and factual issues (paras 51 and 53-54).

[7] ADR Chambers correctly argued that the list of grounds in the Model Law was exhaustive, but went on to submit that this called for the "highest degree of deference." Respectfully, this seems to be a *non sequitur*. If the terms of the Model Law truly are exhaustive and jurisdictional in nature, there is no reason to show any deference to the arbitration panel's assumption of jurisdiction *per se*. Rather the inquiry should be *de novo*.

The Court viewed the issue as one of the jurisdiction of the tribunal to render the decision it made. The Court accepted the argument that the Model Law sets out a limited and exhaustive list of grounds for judicial review, and that it would be unhelpful, if not indeed inappropriate, to import standards of review taken from administrative law or the domestic review by appeal courts of trial decisions.[8]

That said, the Court relied upon both Canadian and English case law[9] to conclude that the proper standard of review is correctness "in the sense that the tribunal had to be correct in its determination that it had the ability to make the decision it made."[10] Taking a relatively narrow view of what amounts to questions of jurisdiction, the Court held that the award fell within the terms of the submission to arbitration and therefore rejected the challenge to the award.

How did the Court get there, and what does it tell us about what lies behind the Court's application of the standard of review?

The principle that informs the Court's reasoning at every juncture in the decision is that courts should not review decisions of international arbitration tribunals on their merits, but should only intervene in exceptional cases where there is a true question of jurisdiction.[11] This general orientation towards their role underpinned the Court's choice of the correctness standard, shaped how it defined the scope of the jurisdictional issue, and influenced how it characterized the legal and factual questions at issue in the case.

The Court took pains to distinguish review on jurisdiction from review of the merits of the case. In the context of domestic law issues, the courts are "warned to ensure that they take a narrow view of what constitutes a question of jurisdiction and to resist broadening the scope of the issue to effectively decide the merits of the case."[12] This is especially so in the

---

This in fact appears to be the position taken by courts in Quebec under the relevant provisions of the *Code of Civil Procedure*, RSQ, c C-25; see e.g. *The Gazette c Blondin*, [2003] RJQ 2090 (QCCA); *Coderre v. Coderre*, 2008 QCCA 888, [2008] RJQ 1245.

8 *Cargill*, *supra* note 1 at paras 29 and 30.

9 *United Mexican States v Metalclad Corp*, 2001 BCSC 664, (2001), 89 BCLR (3d) 359; *Canada (Attorney General) v SD Myers, Inc,* 2004 FC 38, [2004] 3 FCR 368; *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan,* [2011] 1 AC 763 (UKSC). The Court also cited LeBel J in *Dunsmuir* for the proposition that, in the context of administrative tribunals, a tribunal must be correct in its determination of the scope of its authority.

10 *Cargill*, *supra* note 1 at para 42.

11 *Ibid* at paras 33 and 44.

12 *Ibid* at para 45.

context of international arbitration, states the Court, where "[c]ourts are warned to limit themselves in the strictest terms to intervene only rarely in decisions made by consensual, expert, international arbitration tribunals, including on issues of jurisdiction."[13] And when a court does identify an issue of jurisdiction, "they are to carefully limit the issue they address to ensure that they do not, advertently or inadvertently, stray into the merits of the question that was decided by the tribunal."[14]

This general orientation was reinforced by the way in which the Court described the two challenges faced by a reviewing court. The first is "to navigate the tension between the discouragement to courts to intervene on the one hand, and on the other, the court's statutory mandate to review for jurisdictional excess…"[15]; and the second is to limit its review to jurisdiction "and not to review the merits of the decision itself."[16]

As if to further underline the point, the Court invoked the importance of avoiding review on the merits to justify rejecting the reasonableness standard of review in the case. For the Court, the reasonableness standard inevitably involves the court reviewing the merits of the decision:

> Once a court enters into a reasonableness review, it is effectively considering the merits of the tribunal's decision and deciding whether that decision is acceptable because it is reasonable, not because it was made within the jurisdiction of the tribunal.[17]

In this respect the Court offered the correctness test as more protective of the integrity of the arbitral process than the reasonableness test, despite the conventional view that "reasonableness" is a more deferential test than correctness.

---

13 *Ibid* at para 46.

14 *Ibid* at para 47.

15 *Ibid* at para 48.

16 *Ibid* at para 50.

17 *Ibid* at para 51. It is beyond the scope of this paper to consider whether the Court was correct in rejecting the reasonableness test. One can certainly make the argument that the *Dunsmuir* framework makes it plausible to conclude that reasonableness is the right standard at least for arbitrations under NAFTA, given that a tribunal will be interpreting its enabling statute, where issues of state investor treaty policy are raised, and where the factual and legal issues are necessarily intertwined; see *Alliance Pipeline*, *supra* note 4. One might ask, however, whether the Court correctly characterized the nature of the reasonableness standard as applied to the jurisdictional issue. As one commentator observed, one might apply the reasonableness standard to inquire whether it was reasonable for the tribunal to conclude that it had the authority to render its decision, and not to enter into a review of the decision on the merits; see Marina Chernenko, "The Upshot of Up-Stream Losses in Mexico v. Cargill: Judicial Deference to International Arbitration Tribunals," online: http://www.osgoode.yorku.ca/node/3612.

At first blush this might strike one as counter-intuitive, as it is generally believed that the correctness standard entails a greater degree of judicial scrutiny than does the reasonableness standard. But that is to look at the standard of review in the abstract. The fact is that courts have a fair degree of choice in how they apply the different standards of review, and much will turn on how they characterize the facts and the legal issues in the case, including what does or does not go to jurisdiction. To the extent that courts define jurisdiction in narrow terms, they can apply the correctness standard without second-guessing the merits of the arbitral decision under review.

The Court also had to address the argument that the appropriate standard of review is one of deference. Here again, it is the Court's focus on jurisdiction that drove its reasoning on this point. Although the case-law is replete with references to the "powerful presumption" that an international arbitral tribunal acted within its authority,[18] the Court rejected the idea that this calls for deference. To presume that the tribunal was correct in determining the scope of its jurisdiction or to otherwise defer to its reasoning, "would effectively nullify the purpose and intent of the review authority of the court."[19] Instead, the language of "powerful presumption" was reinterpreted to point to the general orientation that a court should take in the face of a challenge to an international arbitral award. "[T]he principle underlying the concept of a 'powerful presumption' is that courts will intervene rarely because their intervention is limited to true jurisdictional errors"[20] and not to a review on the merits.

What then does the Court understand by jurisdiction? As noted earlier, jurisdiction is defined in narrow terms. Citing LeBel in *Dunsmuir*, the Court wrote:

> "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction.[21]

The Court offered two examples of clear jurisdictional errors that would justify setting aside an arbitral award. The first would be an award based on acts outside the dates covered by the submission to arbitrate, and the

---

18 See cases cited in *Cargill*, *supra* note 1 at para 33.

19 *Ibid* at para 47.

20 *Ibid* at para 46.

21 *Ibid* at para 40, citing *Dunsmuir, supra* note 4 at para 59.

other an award based on an investment in a territory other than one covered by the authorizing statute. Beyond these clear examples, however, we need to examine how the Court addressed the facts in *Cargill* to gain a better understanding of how the correctness standard may be applied in the future. What appears clear is that the Court's reluctance to enter into a review on the merits shaped the ways in which it characterized the legal and factual issues in the case, allowing them to uphold the arbitral award while applying the correctness standard of review.

3. Applying the Test

Mexico argued that the tribunal did not have jurisdiction to award damages to Cargill for its up-stream losses. It argued that Chapter 11 of NAFTA, which speaks of "investments in the territory of the Party," constitutes a territorial limitation on the scope of damages that can be awarded, and that accordingly, the arbitrator was without jurisdiction to award damages for the lost profits suffered by the plant in the United States. It was supported in this argument by both Canada and the United States, who argued that all three NAFTA parties had taken the common position, in accordance with Article 31 of the *Vienna Convention on the Law of Treaties*,[22] recognizing this territorial limitation on the scope of damages. Mexico further argued that the tribunal had erred in compensating Cargill in its capacity as a producer rather than as an investor.

The Court disagreed. Stating that "Mexico's submission seeks to expand the jurisdictional question into issues that go to the merits of the case,"[23] the Court held that Chapter 11 of NAFTA imposed only two jurisdictional limits on the award of damages. The first is that there must be an "investment" in the territory, not merely the sale of goods to buyers in the territory. Second, the damages must have been incurred by reason of, or arising out, of the breach of one Party of the provisions of Chapter 11. For the Court, the only territorial limitation related to the place of the investment, not to the place or scope of damages. The latter issue was an issue of fact that fell within the jurisdiction of the tribunal.

Regarding the argument based on the *Vienna Convention*, the Court agreed that if there were such a clear agreed-upon position, it would be a jurisdictional error for a tribunal to fail to give effect to the relevant provisions of Chapter 11.[24] Nevertheless, after reviewing the submissions on this point, the Court concluded that they fell short of establishing that

---

22 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) [*Vienna Convention*].

23 *Cargill*, *supra* note 1 at para 66.

24 *Ibid* at para 84.

there was such an agreed-upon position limiting the scope of damages. Accordingly the Court found no jurisdictional error.

As noted above, Mexico had argued that the tribunal had failed to distinguish between the losses Cargill suffered in its capacity as investor and as producer, the latter suffering its damages in the United States and not in Mexico. (The tribunal had found that Cargill had an integrated business model and had accepted an expert damages report that quantified the loss to the US plant from its lost sales to its Mexican distributor.) The Court framed the issue as "whether lost capacity in Cargill's US plants constitutes damages by reason of, or arising out of, Mexico's breaches."[25] For the Court, this was a "quintessential question for the expertise of the tribunal, rather than an issue of jurisdiction."[26] Because there was no language in Chapter 11 that explicitly prohibited awarding such damages, the Court held that the tribunal had the jurisdiction to award such damages.

But notice how the analysis would change were the issue to be characterized differently. The Court framed the issue as whether or not the lost profits were the result of Mexico's breaches. So put, it does indeed appear to be a matter of fact to be determined by the tribunal. But is it not equally plausible to frame the issue as whether the damage was sustained by an investor in relation to its investment? Framed this way, would this not be a question that goes to the heart of the jurisdiction of the tribunal to entertain the case?[27] Why is one characterization more correct than the other?

The point here is not to claim that the Court was wrong to uphold the arbitral award, or that the tribunal was wrong to award up-stream damages to the company. I simply wish to underline the critical role played by the court's choice of how it characterized the legal issue in the case so as to keep it outside the definition of jurisdiction articulated by the Court.

4. Conclusion

The decision in *Cargill* appears to settle the question of the appropriate standard of review of international arbitral tribunals, and this is itself a good thing. Despite the fact that the Court unnecessarily (but perhaps

---

25 *Ibid* at para 72.

26 *Ibid.*

27 Marc J Goldstein, "What We Learn from Canada's Cargill Case: Judicial Review and the Core Competence of Investment Tribunals", online: http://arbblog.lexmarc.us/2011/10/what-we-learn-from-canadas-cargill-case-judicial-review-and-the-core-competence-of-investment-tribunals/.

unsurprisingly) used the language of the *Dunsmuir* administrative law framework to describe the standard of review, the Court's overall approach seems well-founded.

The Court approached its task by focussing on the language of the governing statutes – in this case Chapter 11 of NAFTA and Article 34(2)(a)(iii) of the Model Law – to determine whether the tribunal's award fell within the scope of the submission to arbitration. That is the functional equivalent of treating the issue as arising *de novo*, which it is submitted is the more appropriate stance for a court to take. Moreover, by defining jurisdiction in relatively narrow terms, the Court avoided second-guessing the tribunal on the merits of the award. This is also the appropriate stance for a court to take.

Perhaps less clear is the question of how much weight a court should attach to the reasoning of the tribunal with respect to its assumption of jurisdiction in a case like *Cargill*. If deference seems inappropriate in light of the need to ensure that the tribunal had the authority to act as it did, it is nonetheless likely that the tribunal has far greater experience and expertise than does the court in the interpretation of the text of NAFTA, other relevant treaties, arbitral case-law, and so on. At least in cases of international arbitrations where state investor issues are raised, it would appear appropriate to give considerable weight to the reasoning of the tribunal on issues of jurisdiction.

Finally, *Cargill* illustrates a truism about judicial review generally that is a commonplace amongst lawyers and judges alike. Regardless of the standard of review being applied, judges have a degree of choice as to how broadly or narrowly they define jurisdictional issues. They have an even greater degree of choice regarding how to characterize the legal and factual issues in a given case, as they do with respect to the weight they attach to the reasoning of the tribunal even if they eschew the language of deference. These choices will ultimately be informed by the general orientation that the court takes *vis-à-vis* the international arbitration process generally, and the role that it sees for itself in reviewing the particular decision under review. Whether the standard of review is correctness, reasonableness or some other formulation, these are the elements that will determine the result in any given case and are the factors to which lawyers ought to be directing their attention.