Unofficial English Translation

COURT OF APPEAL

2008 QCCA 444 (CanLII)

CANADA
PROVINCE OF QUEBEC
MONTREAL REGISTRY

No.: 500-09-016097-057
(500-11-023188-044)

DATE : MARCH 11, 2008

CORAM: THE HONOURABLE MARC BEAUREGARD, J.A.
ANDRÉ FORGET, J.A.
FRANÇOIS PELLETIER, J.A.

SMART SYSTEMS TECHNOLOGIES INC.
APPELLANT – Defendant – plaintiff by counterclaim
v.

DOMOTIQUE SECANT INC.
RESPONDENT – Plaintiff – defendant by counterclaim
and
DOMINIQUE ZAURRINI
and
W. C. (WOODY) SMITH
and
WILLIAM J. COOKSEY
Mis en cause

JUDGMENT

---

[1] **THE COURT; -** On the appeal from a judgment of the Superior Court (Montreal, October 5, 2005, Daniel H. Tingley, J.) which refused to recognize and declare enforceable an award of a tribunal in New Mexico, U.S.A.;

[2] After having examined the file, heard the parties, and on the whole deliberated;

[3] For the reasons of Beauregard, J.A., with which Forget and Pelletier, JJ.A. agree, **DISMISSES** the original appeal with costs, and **REJECTS** without costs the new conclusions in the amended notice of appeal.

2008 QCCA 444 (CanLII)

MARC BEAUREGARD, J.A.

ANDRÉ FORGET, J.A.

FRANÇOIS PELLETIER, J.A.

Mtre Azim Hussain and
Mtre François Fontaine
(OGILVY, RENAULT)
For the appellant

Mtre Yves Robillard
(BÉLANGER, SAUVÉ)
For the respondent

Date of hearing: December 11, 2007

REASONS OF JUSTICE BEAUREGARD

2008 QCCA 444 (CanLII)

[4] The appellant, a distributor in the United States of the products manufactured by the respondent in Quebec, claimed that a certain number of articles supplied to him by the respondent were defective or did not have the characteristics they were supposed to have had, and refused to pay the respondent for them ($US191,000).

[5] Pursuant to an arbitration clause, the parties submitted their dispute to three arbitrators in New Mexico, U.S.A. The arbitrator chosen by the appellant and the chair ruled in the appellant's favour, cancelled the distribution contract, rejected the respondent's price for the articles and ordered it to pay the appellant $US525,000. The arbitrator chosen by the respondent, however, would have ordered it to pay only $US300,000. The respondent was also ordered to pay over $US80,000 in costs.

[6] In a default judgment against the respondent, who deliberately chose not to dispute a motion for homologation submitted to a court in New Mexico, the award was approved by that court.

- 0 -

[7] The respondent submitted to the Superior Court an application for annulment of the award. Initially, the appellant responded with two motions: 1) pursuant to article 949 *C.C.P.*, it sought recognition of the award, and 2) pursuant to article 785 *C.C.P.*, it also sought recognition of the judgment of the New Mexico court that had approved the award.

[8] Later, the appellant discontinued its motion seeking homologation of the award, retaining only that seeking recognition of the judgment of the New Mexico court.

[9] The Superior Court refused to annul the award and also refused to recognize the judgment of the New Mexico court on the grounds that the application of that judgment would be manifestly inconsistent with public order as understood in international relations, due to the fact that no reasons were given for either the award or the judgment:

> While it is true that "courts should exercise restraint in reviewing arbitration awards in the international arena", this is not to suggest that courts should turn a blind eye to clear violations of public order, particularly as that term is "understood in international relations". Article 31(2) of the UNCITRAL Model Law provides that "the award shall state the reasons upon which it is based ...". This is a mandatory requirement the breach of which violates as well our notion of public order and natural justice as it applies to procedural fairness and gives rise

> to a possible refusal to recognize an award pursuant to article 36 (1)(b)(ii) of the said Model Law.
>
> (The many quotations in support of this conclusion are omitted here).

2008 QCCA 444 (CanLII)

[10] The Superior Court added than the absence of reasons made it very difficult, if not impossible, to consider the respondent's other arguments that the award was tainted with procedural defects under art. 950(4) and (5) *C.C.P.*:

> The absence of reasons to support the "determinations" in the award makes it very difficult if not impossible to assess or even reject any or all of the other grounds raised by Secant to prevent its recognition. At first blush, the award appears to have determined things entirely beyond the scope of both the Distribution Agreement and the demand for arbitration, as for example the annulment of the agreement itself and the award of "consequential" or "exemplary" damages despite the provisions of paragraph 18. of that agreement, given that these "determinations" are nowhere contemplated in the four "disputes" first sought to be arbitrated by Smart Systems. Worse, the award makes no determination in respect of these four disputes. On the face of it, the Arbitrator Panel appears to have pronounced on matters not submitted to it and to have failed to pronounce on the disputes that were submitted it.

[11] Even if it has been confirmed by a foreign court, an award rendered outside Quebec has no legal significance here unless it has been recognized and declared enforceable by a Quebec court. See articles 948 *C.C.P.* and following. The court will refuse homologation if it can be shown to be contrary to public order or if the party against whom the award is invoked can demonstrate one of the causes for annulment set forth in art. 950 *C.C.P.*

[12] Probably because it could be argued that the award would remain unenforceable in Quebec even if this Court were to overturn the judgment of the Superior Court and recognize the judgment of the New Mexico court, the appellant obtained leave to amend its notice of appeal from the judge sitting alone in order to seek homologation of the award by this Court, unlike what it did the Superior Court.

- 0 -

[13] Before the appellant discontinued its motion for homologation of the award, the respondent opposed the appellant's proceeding with the following arguments:

> 1) by stipulating that the arbitration would be governed by the *Model Law on International Commercial Arbitration* adopted by the United Nations Commission on International Trade Law, the parties had agreed that the award would be reasoned. However, the respondent not only had its claim of $US191,000

dismissed, but in addition was ordered to pay $US600,000 without the arbitrators explaining why;

2) since their mandate was to determine whether certain goods sold to the appellant by the respondent under a general distribution contract were as they should have been, the arbitrators exceeded their jurisdiction by annulling the distribution contract *ab initio*;

3) the arbitrators ordered the respondent to pay punitive damages, which was outside their jurisdiction;

4) one of the three arbitrators, the one chosen by the appellant, communicated with the appellant on five occasions, including once while the arbitrators were deliberating;

5) in arriving at its conclusion, the arbitration tribunal applied two different legal systems, namely, those of New Mexico and of Quebec, with no explanation given as to how it could do so;

6) the arbitration award is vague to the point of being unenforceable;

7) the arbitration tribunal was not competent to order the respondent to pay the legal costs stipulated in a tariff when it had already ordered the respondent to pay $US75,000 in costs.

[14] The respondent thus argued that recognizing the award and the homologation judgment would be contrary to public order (art. 949 *C.C.P.* and art. 3155(5) *C.C.Q.*) and that in any event, under art. 950(4) and (5) *C.C.P.* and art. 3155(3) *C.C.Q.*, neither the award nor the judgment could be recognized by a Quebec court because of an excess of jurisdiction by the arbitration tribunal and because the arbitration procedure was not conducted in compliance with the agreement of the parties and violated some essential principles.

- 0 -

[15] In spite of the party's discontinuance of the appellant's motion for recognition of the arbitration award, I will consider whether this award could be recognized in Quebec.

[16] Article 949 *C.C.P.* states:

> **949.** An arbitration award shall be recognized and executed if the matter in dispute is one that may be settled by arbitration in Québec and if its recognition and execution are not contrary to public order.

2008 QCCA 444 (CanLII)

2008 QCCA 444 (CanLII)

[17] Article 3155 *C.C.Q.,* however, states:

> A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases:
>
> 1) …
>
> 2) …
>
> 3) …
>
> 4) …
>
> 5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations.

[18] The appellant submits that the words “public order” in article 949 *C.C.P.* must be interpreted as “public order as understood in international relations”.

[19] I agree. The Quebec court cannot refuse to recognize and declare enforceable a foreign award based on a foreign statute because this statute contains a provision that is contrary to a mandatory provision of a Quebec statute. For example, a Quebec court will not refuse to recognize and declare enforceable a foreign award that applies a statute that does not contain a provision similar to art. 2414 *C.C.Q.*

[20] However keenly aware I am of the need to support the recognition of foreign awards, I cannot accept the appellant’s submission that recognizing the award in question and declaring it enforceable would not constitute a breach of public order as understood in international relations.

[21] I accept that an arbitration award rendered without reasons is not inconsistent with public order as understood in international relations when the parties do not require that reasons be given for the award. But what happens in the case of an award rendered without reasons when both parties wanted there to be? Where two traders have agreed to submit a dispute involving several hundreds of thousands of dollars to arbitration and agreed that reasons will be given for the award, I find it hard to believe that a court somewhere can recognize this award and declare it enforceable when it was rendered by arbitrators who, in violation of their mandate, exceeded their jurisdiction.

[22] In theory, when the parties agree that an award will be reasoned, it must be so. I could accept that the absence of reasons is not in every case grounds for annulling an arbitration award, even if the parties required that reasons be given. This might be so in a case where everything is clearly black or white, and where it depends primarily on the

credibility of two witnesses and the unreasoned award tacitly states that the court believes one witness rather than the other. But this is not at all the case in the present instance.

[23] In fact, in the present case, the fact that the award was rendered without reasons prevents us from knowing why the arbitrators annulled the distribution contract, from understanding how they could order the respondent to pay exemplary damages in spite of their being prohibited from doing so, and from being aware of the details of the $US525,000 judgment.

[24] It should be said in passing that art. 949 *C.C.P.* does not state that the award shall be recognized if the award itself is not contrary to public order. Rather, the award is recognized if its recognition would not be contrary to public order. In this instance, the disposition of the award is not contrary to public order, but the recognition of it would be against public order because, contrary to the express wishes of the parties, it was rendered without reasons.

[25] The appellant argues that, since the parties to an arbitration can waive the requirement that the award be reasoned, the existence of the requirement is not a rule of public order. I do not accept this argument. What most offends the sense of fairness, order as between the litigants, and consequently public order, is not that an award is rendered without reasons, but that it is rendered without reasons contrary to the wishes of the parties.

[26] To recognize the award in question would plainly constitute a flagrant injustice against the respondent.

[27] And that is not all. In the context of globalization of trade, the legislator encourages all parties to regulate their disputes though arbitration in accordance with certain rules. The courts would be acting counter to the wishes of the legislator if they approved awards rendered contrary to these rules. A trader who agrees to subject a dispute to arbitration must be able count on the fact that these rules will be respected. If they are not and the court closes its eyes, traders will turn their backs on arbitration. This reason in particular persuades me that the recognition of the award in this instance would be contrary to public order.

[28] It obviously must also be considered that in a democratic country one cannot imagine a judicial power rendering justice without any possibility of verifying whether its decisions are based on anything other than arbitrary reasons. Moreover, anyone charged with an adjudicative function knows very well that the attempt to justify a decision based on a first impression often leads to the discovery that the decision is not the right one.

2008 QCCA 444 (CanLII)

2008 QCCA 444 (CanLII)

[29] The appellant refers us to decisions by foreign courts and commentary[1] in support of its submission that an unreasoned award does not violate public order as understood in international relations. After studying these texts, I am not persuaded, in the present case, that the authors would arrive at a different conclusion from that of the Superior Court and my own. In any event, these texts are not binding and were unable to convince me that the recognition of the award in question would not constitute a violation of public order as understood in international relations.

[30] If I am wrong in finding that the recognition of the award would violate public order, I will say that the respondent may oppose recognition of the award by invoking the situations set out in art. 950(4) and (5) *C.C.P*

[31] In addition to rendering an unreasoned award – against the express wishes of the parties – the arbitrators cancelled *ab initio* the distribution contract when this was not required of them. In addition, they appear to have ordered the respondent to pay punitive damages, which exceeded their jurisdiction. Finally, the arbitrator chosen by the appellant communicated with the appellant while the arbitrators were deliberating. Therefore, even if the recognition of the award is not against public order, it seems clear that homologation of the award could be refused on the basis of art. 950(4) and (5) *C.C.P.*

[32] In this last respect, I do not accept the appellant's submission that the respondent cannot oppose recognition or enforcement of the award on the basis of art. 950 *C.C.P.* because, in deciding not to oppose the homologation of the award in New Mexico, the respondent waived its right to invoke a violation of the procedure on which the parties had agreed.

[33] I accept the respondent's argument that arts. 948 *C.C.P.* and following cannot be read as containing any such ground for inadmissibility of an opposition under art. 950 *C.C.P.* On the contrary, the legislator intended for Quebec courts to exercise a certain control and not recognize foreign awards that violate the mandate of the arbitrators or significantly violate the procedure on which the parties had agreed, regardless of the fact that the award is already approved in the jurisdiction where it was it rendered. It is

---

[1] *Schreter v. Gasmac Inc.*, (1992), 7 O.R. (3d) 608 at 621 (Gen.Div.); *Food Services of America Inc. (c.o.b. Amerifresh) v. Pan Pacific Specialties Ltd.* (1997), 32 B.C.L.R. (3d) 225 (S.C.); J.B. Casey & J. Mills, *Arbitration Law of Canada: Practice and Procedure* (Huntington, N.Y.: Juris Publishing, 2005) at 348; *Soyak International Construction & Investment Inc. v. Hochtief AF*, SVEA Court of Appeal, 16 October 2007, No. T 6398-03; *Inter-Arab Investment Guarantee Corp. v. Banque Arabe et Internationale d'investissements*, (1997) XXII Y.B. Comm. Arb. 643 (Belgian C.A.); *Provenda S.A. v. Alimenta S.A.* (12 December 1975), Arrêts du tribunal federal Suisse, 101 1a 521; A. J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Traditional Interpretation* (Boston: Kluwer Law and Taxation Publishers, 1994) at 381; *Michael M. Pfeifle v. Chemoil Corporation*, 73 Fed. Appx. 720 at 722 (2003); F. Bachand, "Recent Developments on Grounds for Annulment and Non-Enforcement of International Awards in Canada" (June 2006) Report to the NAFTA 2022 Committee at para. 18, forthcoming in (2006), 3(1) Southwestern J. L. & Tr. In the Americas; *A.G. Edwards & Sons, Inc. v. McCullogh*, 967 F.2d 1401 (9th Cir. 1992), cert. denied, 113 S.C. 970 (1993).

possible that in certain countries, if a procedural defect is not initially raised in the jurisdiction where the award was delivered, the local court is not allowed to refuse to recognize a foreign award on the grounds that the procedure on which the parties agreed was not followed. But this is not the case in Quebec. While some might think that the procedure proposed by the appellant would be desirable here, it is not what the legislator intended. Since under article 948 *C.C.P.* the legislator allows the Quebec court to refuse to recognize a foreign award even if it has been approved by the court of the jurisdiction where it was delivered, the sources[2] to which the appellant refers us in support of his submission do not seem relevant or convincing to me.

[34] Since I have arrived at this conclusion, it is not necessary to consider the respondent's additional argument that the appellant cannot seek the recognition of the award in question when in first instance, after discontinuing the motion for recognition of the award, it asked only that the judgment of the New Mexico court be recognized.

[35] It goes without saying that I wholly endorse the reasons and the conclusion of the Superior Court concerning the recognition of the judgment of the New Mexico court.

[36] I would therefore dismiss the appeal with costs, and reject without costs what is sought in the amended notice of appeal.

MARC BEAUREGARD, J.A.

2008 QCCA 444 (CanLII)

[2] A. J van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Traditional Interpretation* (Boston: Kluwer Law and Taxation Publishers, 1994) at 267; F Bachand, *L'intervention du juge canadien avant et durant un arbitrage commercial international* (Cowansville, Qc.: Editions Yvon Blais, 2005) at 79-99; 217; *Minmetals v. Ferco* (1999), XXIVa Y.B. Comm. Arb.; Lord Mustill & S.C. Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition* (London: Butterworths, 2001) at 89; P. Beckers, "Untimely Challenge May Foil Defence against Recognition of Foreign Award" (19 October 2006) *Newsletter of the International Law Office*, online: www.internationallawoffice.com/newsletters; P. Aeberli, "Jurisdictional Disputes under the Arbitration Act 1996: A Procedural Route Map" (2005), 21 Arb. Int. 253 at 295-296; J.B. Casey & J Mills, *Arbitration Law of Canada: Practice and Procedure* (Huntington, N.Y.: Juris Publishing, 2005) at 353.