# SUPERIOR COURT

2008 QCCS 5903 (CanLII)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No. 500-05-015828-963

DATE : December 8, 2008

---

**IN THE PRESENCE OF : THE HONOURABLE JOEL A. SILCOFF, J.S.C.**

---

**LOUIS DREYFUS S.A.S. (**formerly known as
S.A. LOUIS DREYFUS & CIE **)**

Petitioner

v.

**HOLDING TUSCULUM B.V.**

Respondent

-and-

**ROBERT B. VON MEHREN**
**CAREY RAMOS**
**JOHN M. DOWD**

Mis-en-cause

-and-

**RONALD W. DE RUUK**
**BULK OIL GROUP LIMITED**

Respondents in Continuance of Suit

2008 QCCS 5903 (CanLII)

**JUDGMENT**

## I. INTRODUCTION

[1] This judgment will addresses the issues raised for determination in the *Amended Motion for the Partial Annulment of an Arbitration Award*, filed on behalf of Louis Dreyfus S.A.S. (**"Dreyfus"**) (the **"*Dreyfus Motion for the Partial Annulment of Arbitration Award #1*"** or the **"*Dreyfus Motion*"**), wherein Dreyfus seeks the partial annulment of a "Partial Award" rendered by an Arbitration Tribunal (hereinafter defined) on January 31, 1996 (**"Arbitration Award # 1"**).

[2] The *Dreyfus Motion* was heard together with those in two other related proceedings filed on behalf of Holding Tusculum B.V. (**"Tusculum"**):

(i) *Amended Motion to Declare Unlawful, Null and Vacated an Order by an Arbitration Tribunal to Reconsider its Award and to Reopen Proof and Hearing* (the **"*Tusculum Motion for the Annulment of the Order*"**), wherein Tusculum seeks to set aside the "Second", "Third" and "Fourth" rulings contained in the March 21, 1996, "Order" of an Arbitration Tribunal agreeing to reconsider elements of Arbitration Award # 1(S.C.M. No. 500-05-017680-966); and

(ii) *Amended Motion for the Partial Annulment of an Arbitration Award* (the **"*Tusculum Motion for the Partial Annulment of Arbitration Award # 2)*"**), wherein Tusculum seeks the partial annulment of the May 29, 1997, "Final Award" of an Arbitration Tribunal (S.C.M. No. 500-05-035275-971).

(collectively the **"*Tusculum Motions*"**)

[3] The historical background giving rise to the issuance of Arbitration Award # 1, the Order and Arbitration Award # 2 and the procedural history of all three proceedings are interrelated and are not severable. However, for ease of comprehension, the *Dreyfus Motion* and the *Tusculum Motions* are being dealt with in two separate but interrelated judgments. The Court will address in this judgment, only the issues raised for determination in the *Dreyfus Motion.*

[4] In a judgment being released concurrently with the present judgment (the **"Tusculum judgment"**), the Court dismissed both of the *Tusculum Motions*.

2008 QCCS 5903 (CanLII)

## II. BACKGROUND

[5] By agreement dated November 7, 1990 (the **"Agreement"**), Tusculum and Dreyfus, the latter initially through a Swiss subsidiary, from which it subsequently acquired all of its rights and obligations, each became fifty percent shareholders in Beta Raffineriegesellschaft Wilhelmshaven mbH (**"Beta"**), a German company which owned an oil refinery (the **"Refinery"**) in Wilhelmshaven, Germany.

[6] The Agreement reflected several undertakings agreed to by the parties. In addition to providing for the acquisition of their respective 50% equity interest in Beta, the Agreement formalized and reflected:

(i) the relationship and various shareholder rights and obligations of the parties *inter se* in Beta; and

(ii) the intention of the parties to subsequently reorganize the corporate and commercial structure of the joint business venture referred to therein, as specified in the following extract of the Preliminary Statement to the Agreement:

> It is intended further that Beta shall become a wholly-owned direct or indirect subsidiary of a non-German holding company ("Parent") to be jointly owned by B.V. and by Dreyfus. The precise details of the reorganization pursuant to which Beta will become a subsidiary of Parent have not yet been, determined, but it is anticipated that B.V. and Dreyfus may each contribute their Beta shares in exchange for fifty percent of the shares of Parent.
>
> The parties intend to enter into more formal and complete agreements incorporating the general provisions of this Agreement and such other provisions as they may agree. Nevertheless it is the intention of the parties that this Agreement shall constitute a binding agreement of each of them until they otherwise agree in writing.

[7] Following execution of the Agreement, the requisite formalities under German Law for the consummation of the share acquisition component contemplated therein were complied with.

[8] However, the parties failed to effect the corporate and commercial reorganization contemplated and referred to in the extract of the Preliminary Statement to the Agreement referred to above. The reasons and the responsibility for the failure are not relevant to the present proceedings.

[9] Amongst the provisions governing the relationship between the parties *inter se,* the Agreement provided for a remedy in the event of the occurrence of a *bona fide* impasse, as defined therein.

[10] Under Section 4(d) of the Agreement:

> In the event that at any time after the first anniversary of Recommissioning **a bona fide impasse develops** between B.V. and Dreyfus as shareholders of Beta, Parent or the "Operating Companies" (as defined in Section 6 (a)) or between representatives of B.V. and Dreyfus as directors of Beta, Parent or the Operating Companies which prevents the shareholders or the directors from acting with respect to a matter of material significance affecting Beta, Parent and the Operating Companies taken as a whole and required to be submitted to a vote of their shareholders or directors in accordance with the terms of this Agreement or applicable law, the provisions contained in this paragraph (d) may be invoked by either party. (This paragraph (d) shall not apply to impasses created by B.V. or Dreyfus for the specific purpose of availing themselves of its provisions).
>
> (our emphasis)

[11] If either party invoked Section 4(d) and the parties did not resolve the alleged *bona fide* impasse within a specified period, Dreyfus would be obliged to purchase Tusculum's interest in Beta at the "Put Price" (if Tusculum were the invoking party) or the "Call Price" (if Dreyfus were the invoking party). The "Put Price" and "Call Price" provided for Dreyfus to pay the greater of a specified minimum price or the "Appraised Value" (which would be determined according to a formula and by the opinions of various appraisers, therein more fully defined).

[12] The Agreement is governed by, and construed in accordance with, New York law and specifies that any disputes with respect to its interpretation or claims for any breach thereof, will be resolved by arbitration in accordance with the rules of the International Chamber of Commerce (the **"ICC"**).

[13] On November 10, 1993, alleging a *bona fide* impasse within the meaning of Section 4(d) of the Agreement, Tusculum invoked the arbitration clause contained in Section 13 (the **"Arbitration Clause"**) and commenced arbitration proceedings against Dreyfus by filing a *Request for Arbitration* with the ICC International Court of Arbitration (Case No. 8082/HV). In its *Request for Arbitration,* Tusculum initially sought:

> (1) a declaration by the arbitrators that there exist between the parties impasses within the meaning of paragraph 4(d) of the Shareholders' Agreement and that, accordingly, Dreyfus is required to buy out Tusculum's interest in Beta at a value to be determined by appraisal under paragraph 4(d).
>
> (2) declarations and/or determinations by the arbitrators that (i) Dreyfus engaged in a course of conduct by which it repeatedly breached the

2008 QCCS 5903 (CanLII)

> Shareholders' Agreement and thereby damaged the value of Beta and the Refinery, or (ii) the appraisers should take such course of conduct and the economic consequences thereof into account in appraising Beta for purposes of the buy-out of Tusculum's interest in Beta.[1]

[14] On December 23, 1993, Dreyfus served its *Answer to Tusculum's Request for Arbitration* as well as its own *Request for Arbitration (Counterclaim),* wherein it sought:

> (i) A declaration that Tusculum wrongfully breached and repudiated the Joint Venture Agreement and violated its fiduciary duty and that Louis Dreyfus properly terminated the Agreement as a consequence:
>
> (ii) An award against Tusculum in an amount representing its fifty (50%) share of the losses from the joint venture operations, plus accrued interest.
>
> (iii) An award against Tusculum in the amount of the "expense" reimbursements that Tusculum wrongfully obtained from Louis Dreyfus, plus accrued interest.
>
> (jv) An award dissolving Beta in view of Tusculum's violations of fiduciary duty and illegal, fraudulent and oppressive actions toward Louis Dreyfus.
>
> (v) An award of damages satisfactory to remedy any and all breaches of contract and any and all breaches of fiduciary obligations;
>
> (vi) Reimbursement of all costs and expenses incurred by Louis Dreyfus in connection with the preparation for, and conduct of, these arbitration proceedings, including, but not limited to, the fees and/or expenses of the International Court of Arbitration, the arbitrators, legal counsel, experts, consultants and witness, together with interest thereon.[2]

[15] An Arbitration Tribunal, consisting of Mis-en-cause Robert B. Von Mehren, Carey Ramos and John M. Dowd (the **"Tribunal"**), was subsequently constituted pursuant to the Rules of Arbitration of the ICC.

[16] On March 7, 1994, Tusculum filed a *Reply* to Dreyfus' *Request for Arbitration (Counterclaim)* wherein, with respect to Dreyfus' request for an award dissolving Beta, it asserted:

> […]
>
> (iv) Dreyfus is not entitled to and cannot obtain an award dissolving Beta. Tusculum engaged in no conduct in violation of Dreyfus's or Beta's rights or interests, as alleged by Dreyfus. Rather, the opposite is true, as set forth in Tusculum's Request for Arbitration. Thus, as a factual matter, there is no basis

[1] JS-2, p.11-20.
[2] JS-4, p. 91-92.

2008 QCCS 5903 (CanLII)

> for the relief sought by Dreyfus. Separately, the arbitral panel is without power or jurisdiction under the parties' November 7, 1990 agreement or otherwise to dissolve Beta.[3]

[17] On April 14, 1994, Tusculum submitted an *Amended Reply to Dreyfus' Counterclaim*, again contending that no joint venture existed and that, because various impasses existed, Dreyfus should be ordered to buy out Tusculum's interest in Beta pursuant to Section 4(d) of the Agreement. It reiterated its assertion that *…the arbitral panel is without power or jurisdiction under the parties' November 7, 1990 agreement or otherwise to dissolve Beta*[4]*.*

[18] On June 3, 1994, seeing that in unrelated proceedings Tusculum's shares in Beta had been attached by one of its creditors, Dreyfus filed an *Amended Counterclaim and Amended Answer.* Dreyfus asserted that on April 28, 1994, in conformity with its Articles of Association, Beta had adopted a shareholders' resolution assigning Tusculum's Beta shares to Dreyfus, with the proviso that Beta's managing director would determine the compensation due to Tusculum in accordance with applicable law. The Articles of Association provided for such compulsory assignment if either shareholder's shares were attached by a creditor and such attachment had not been lifted within 90 days.

[19] In its June 3, 1994, *Amended Counterclaim and Amended Answer*and prior to the execution of the July 15, 1994, Terms of Reference, Dreyfus withdrew its request for the dissolution of Beta[5].

[20] As a result of subsequent events, involving third parties unrelated to the present proceedings, the matters raised in Dreyfus' *Amended Counterclaim and Amended Answer* became academic and the position previously taken by Dreyfus regarding the assignment of the Tusculum shares in Beta was abandoned for the purposes of these proceedings.

[21] On June 20, 1994, Tusculum filed *Claimant's Reply to Defendant's Amended Answer and Counterclaim, and Claimant's Supplemental Claims*[6]*.*

[22] On July 15, 1994, in accordance with, and as required by, Article 13 of the *Rules of Conciliation and Arbitration of the International Chamber of Commerce,* then in force (the **"*ICC Rules*"**)[7], the parties and the Tribunal concluded the Terms of Reference governing the scope and conduct of the arbitration proceedings (the **"Terms of Reference"**) [8].

---

[3] JS-8, p. 2.
[4] JS-10, para. 63(iv).
[5] JS-18, p. 1.
[6] JS-21.
[7] The *ICC Rules* were subsequently amended as and from January 1, 1998.
[8] JS-23.

2008 QCCS 5903 (CanLII)

[23] The claims and counter claims of the parties submitted to the Tribunal for determination are defined in Section VI of the Terms of Reference. In their respective initial submissions, neither party invoked the doctrine of "frustration of purpose", nor did either of them request the Tribunal to fashion a remedy which would terminate their entire relationship in Beta.

[24] Pursuant to Section IX of the Terms of Reference, the Arbitration was seated in Montreal.

[25] Evidentiary hearings were held in New York City, London, England, and Hamburg, Germany, from March 6, 1995 until June 26, 1995.

[26] Notwithstanding the scope of the Terms of Reference, in a letter dated May 24, 1995, addressed by the Chairman of the Tribunal to counsel for each of the parties[9], he wrote:

> Gentlemen;
>
> After consultation, the Tribunal has decided to put to the parties for consideration in the preparation of their legal arguments the questions stated in the attachment to this letter. **In putting these questions, the Tribunal does not suggest that these are more important than other legal issues which will be discussed by the parties or, indeed that any of the questions are of controlling importance. Moreover, the Tribunal does not intend that the parties draw any inferences from the questions posed.** They are put forth only because the Tribunal believes that their consideration may be helpful to the parties in the shaping of their arguments.
>
> […]
>
> [Attachment]
>
> C. The Conduct of the Parties
>
> 1. What effect, if any, did the conduct of the parties have on their rights and obligations?
>
> 2. Do **doctrines such as reliance, frustration,** change of circumstances, or failure of essential purpose **have an impact** on the rights and obligations of the parties to the Agreement? If so, what is the effect of the application of such doctrine or doctrines?
>
> 3. Does the principle of mitigation of damages apply and, if so, how?
>
> (our emphasis)

[9] JS-46.

2008 QCCS 5903 (CanLII)

2008 QCCS 5903 (CanLII)

[27] Closing arguments were held in Montreal on July 11 and 12, 1995. The questions raised in the May 24, 1995, letter, in particular the application of the doctrine of frustration, were not raised by any member of the Tribunal, nor were they argued by counsel for either party. Although Tusculum asserted that, in light of the *bona fide* impasse which, they allege, exists between the parties, Dreyfus was obliged to purchase Tusculum's equity interest in Beta, neither party asserted that the parties' entire relationship should be terminated under the doctrine of frustration[10].

[28] Although not raised by either party in its closing argument, the applicability of the doctrine of frustration was, however, referred to in the Post-hearing Memorials filed on behalf of each of the parties between June 21, 1995, and August 1, 1995. Dreyfus contended that the doctrine could be applied in the present circumstances as a basis for granting relief sought by Dreyfus in its *Counterclaim*. Tusculum contended that the doctrine was not applicable in the context of the dispute referred to the Tribunal for determination.

[29] The following extracts of the Post-hearing Memorials on this subject are of particular relevance in defining the scope and extend of the relief sought by each of them from the Tribunal and their respective expectations regarding the scope of its mandate:

**(i) Tusculum, June 21, 1995:**

> A resolution in accordance with the impasse and buy-out provisions of the November 7 Agreement would be fair and equitable and what the parties bargained for[11].
>
> […]
>
> "Frustration of purpose" and the related doctrines do not apply in a situation where, as here, the parties simply were unable to agree on how to implement an agreement. […] Under the doctrine of frustration, one party is discharged from performing the contract because the consideration it would receive from the other has been rendered valueless to it. Such a doctrine cannot be invoked here since Dreyfus has already received its benefit of the bargain - one-half of the shares of Beta and control (more than it bargained for) of the Refinery[12].

**(ii) Dreyfus, June 21, 1995**:

> The Tribunal should declare the joint venture and the November 7 Agreement terminated as of October 14, 1993, and order Tusculum to

[10] See transcripts of Closing Arguments, July 11 & 12, 1995, JS-53, JS-54.
[11] JS-47, p. 17.
[12] *Ibid,* p.144.

pay its half of the losses, with pre-judgment and postjudgment interest as provided under New York law[13].

[…]

[W]hen 'frustration' in the legal sense occurs, it does not merely provide one party with a defence in an action brought by the other. It kills the contract itself and discharges both parties automatically." (internal citations omitted). Where a court finds frustration of purpose, an "implied condition will be read into the contract that it shall be abrogated on the nonhappening of [the assumed] event[14].

**(iii) Tusculum, July 5, 1995**:

In the final section of its post-hearing memorial, Dreyfus contends, for the first time, that if the Tribunal rejects its claim that the November 7 Agreement created a joint venture, Dreyfus should nevertheless be able to recover on theories of frustration, *quantum merit*, unjust enrichment, quasi-contract or mistake (the "new claims"). **These new claims should be rejected in their entirety because, as they are beyond the scope of the parties' agreement to arbitrate and are not encompassed in the Terms of Reference, this Tribunal lacks jurisdiction to decide them.** The Tribunal therefore need not even consider the merits of these claims[15].

**(iv) Dreyfus, July 6, 1995**:

Tusculum also argues that "the time has come for the parties to be separated once and for all" […] and that, not so coincidentally, the only vehicle for achieving that result and avoiding additional proceedings requires that Louis Dreyfus give Tusculum a $65 million going-away party. **Of course, this is not divorce court. Nor is this a court of general jurisdiction faced with a petition for dissolution. It is not the Tribunal's fault that these parties went into business together, and it is not the Tribunal's responsibility to find a way to end that relationship.**

[…]

**We respectfully submit that, once the Tribunal makes clear that there was no bona fide impasse and that there will be no above-market payout for Tusculum's Beta shares, the parties will be well positioned to disentangle their affairs.** In any event, that is the

[13] JS-48, p. 236.
[14] *Ibid,* p. 252.
[15] JS-50, p. 168.

2008 QCCS 5903 (CanLII)

> responsibility of the parties, once the Tribunal has discharged its duty of applying the parties' contract and the governing law to the facts[16].
>
> (our emphasis)

2008 QCCS 5903 (CanLII)

[30] On January 31, 1996, by majority decision, John M. Dowd dissenting, the Tribunal rendered Arbitration Award # 1[17]. Referring to the questions posed in Section VII of the Terms of Reference (Statement of Issues to be Determined), it concluded:

> **VII. THE AWARD**
>
> On the basis of the foregoing, the Tribunal renders the following Partial Award:
>
> **A. Answers to Section VII Questions**
>
> The Tribunal answers the question posed in Section VII of the Terms of Reference as follows:
>
> Question 1: It finds that no joint venture was established.
>
> Question 2: It finds that the Agreement of November 7, 1990 was never amended or modified.
>
> Question 3: **It finds that the relation established by the Agreement of November 7, 1990, insofar as that Agreement relates to Beta, has not been terminated.** If further finds that the Agreement imposed upon the parties an obligation to negotiate in good faith with respect to the corporate holding company structure envisioned by the Agreement. Such negotiations have ceased and the Tribunal holds that neither party has asserted or proved any claim with respect to failure to negotiate in good faith.
>
> Question 4: It finds that neither party has properly invoked the provisions of Section 4(d) of the November 7, 1990 Agreement and that Claimant is not entitled to any monetary damages.
>
> Question 5: If finds that neither party has breached any commitments, duties or obligations to the other which entitle either party to any monetary of other relief. It reserves decision, however, as to what relief should be afforded to Dreyfus if and to the extent that any liens or encumbrances remain on Tusculum's interest in Beta after completion by the parties of the procedures set forth in Section B of this Partial Award. See p. 42-43 supra.
>
> Question 6: It finds that neither party's ability to maintain an arbitral claim or defence has been barred, diminished or otherwise affected.
>
> Question 7: See Section B below.

[16] JS-51, p. 8-9, 13.
[17] J-4 **["Arbitration Award #1"]**.

Questions 8 and 9: See Section C below.

2008 QCCS 5903 (CanLII)

### B. Finding of Frustration of Purpose and Transfer of Interest in Beta

> **The Tribunal finds that the purpose of the November 7, 1990 Agreement has been frustrated. It decides that the remaining relationship between the parties should be terminated** with the interest held by Tusculum in Beta being transferred to Dreyfus. Accordingly, the Tribunal directs as follows:
>
> Dreyfus shall purchase from Tusculum, and Tusculum shall transfer to Dreyfus, Tusculum's one-half ownership interest (Geschaeftsantei) in Beta for a transfer price that shall be one-half of the transfer value determined in accordance with the formula TV = V - $111,248,000.
>
> (our emphasis)

[31] Having determined that Dreyfus shall purchase from Tusculum its *one-half ownership interest in […] Beta,* the Tribunal then proceeded to define the procedure to be followed for determining fair market value of the Beta shares and the corresponding purchase price. It expressly retained jurisdiction to supervise the valuation process. To this end, Arbitration Award # 1 provided:

> 3. Supervision of valuation program: The parties and/or the experts may seek the views of the Tribunal with respect to any questions which arise in connection with the valuation process and the Tribunal may, at its sole discretion, modify the time periods set forth in this Partial Award.

[32] In conformity with the *ICC Rules*, prior to its release to the parties, the International Court of Arbitration reviewed and approved Arbitration Award #1. It was thereafter transmitted to the parties on February 6, 1996.

[33] The *Dreyfus Motion for the Partial Annulment of Arbitration Award #1* was filed with this Court in the weeks following the issuance of the *Arbitration Award #1* and was subsequently amended. Although filed in 1996, the *Dreyfus Motion* was only argued before this Court, some twelve years later, in the spring and fall of 2008.

[34] In addition to filing the *Dreyfus Motion for the Partial Annulment of Arbitration Award #1*, on February 26, 1996, Dreyfus filed with the Tribunal, a *Motion for Reconsideration, Reopening of the Proceedings and Stay of the Partial Award* (the **"*Motion for Reconsideration*"**). Tusculum's *Memorial in Opposition to Dreyfus' Motion for Reconsideration* was filed on March 8, 1996.

[35] The relevant facts occurring subsequent to the filing of the *Motion for Reconsideration* and the proceedings filed in connection therewith are addressed in the Tusculum judgment.

## III. ISSUES

[36] The principal issues raised for determination in the *Dreyfus Motion* are the following:

*(i) What were the issues raised for determination before the Tribunal?*

*(ii) Having concluded that Tusculum failed to prove a claim that falls within the impasse provisions of Section 4 (d) of the Agreement and having dismissed Dreyfus' Counterclaim, was the Tribunal nonetheless authorized to assert jurisdiction over the entire relationship between the parties, thereby permitting it to fashion and impose the Valuation and Buyout Remedy?*

*(iii) In the affirmative, assuming it had jurisdiction to fashion and impose the Valuation and Buyout Remedy, a remedy entirely of its own making founded on what it referred to by reference as being …on the ad hoc application of broad principles of justice and fairness...*[18]*, seeing that the possibility of imposing such remedy was neither raised nor pleaded during the hearings before the Tribunal, by so doing:*

*(a) Did the Tribunal act in violation of the principles of ultra petita* and *audi alteram partem, thereby violating principles of public order and denying the parties' fundamental rights to due process and natural justice? and*

*(b) Had the Tribunal transformed itself from being arbitrators to being amiable compositeur, without the express consent of the parties?*

## IV. POSITIONS OF THE PARTIES

### *(A) Dreyfus*

[37] The principal grounds asserted for the partial annulment of Arbitration Award # 1, are set out in paragraph 2.A. of the *Dreyfus Motion*:

> When the Tribunal decided:
>
> > that Respondent had not proved a claim under the bona fide impasse (buy-out) provisions of Section 4 (d) of the Agreement […] between the parties and that it was not entitled to any relief thereunder; and,
> >
> > that Petitioner committed no actionable wrong against Respondent; and,

[18] *In re SCM Corporation* v. *Fisher Park Lane Co.;* 40 N.Y.2d 788, 793 (N.Y. 1976); see also *Cook* v. *Mishkin*, 95 A.D.2d 760, 464 N.Y.S. 2d 761, 763 (1st Dept 1983).

2008 QCCS 5903 (CanLII)

> that there was no joint venture agreement between the parties and that Petitioner's counterclaims should therefore be rejected;

it decided the only matters that were submitted to it for decision and of which it was lawfully seized by the parties, with the result that, in doing so, its authority and jurisdiction to act further was exhausted, the Tribunal being *functus officio* for all legal purposes.

The Tribunal then ruled, without giving notice to the parties or giving them the opportunity to submit any evidence or arguments on the issue that, notwithstanding its dismissal of the respective claims of the parties, as set forth in the Terms of Reference […], it nevertheless had jurisdiction to deal with all other matters and differences which remained outstanding between the parties and arising from their relationship because it claimed to have authority from the parties to deal with what it called (at page 22 of the Partial Award, […] the "Entire Relationship" between the parties (the "**Entire Relationship**"). Petitioner submits that the Tribunal had no jurisdiction to deal with the Entire Relationship after having disposed of the specific claims and disputes mentioned in the Terms of Reference […].

The Tribunal then, without giving notice to the parties or affording them the opportunity to submit any evidence or arguments on the issue of the resolution of the Entire Relationship, and in spite of the absence of any finding of breach of the Agreement by the Petitioner, **"fashioned"** a remedy whereby Petitioner was ordered to buy Respondent's shares in the company jointly owned by them (Beta).

In assuming jurisdiction over the Entire Relationship […] and in purporting to fashion a remedy […], the alleged purpose of which (according to the Tribunal) was to resolve the Entire Relationship by **"divorcing"** the parties, the Tribunal dealt with a dispute not contemplated by and not falling within the agreement to arbitrate […] and decided matters and issues beyond the scope of the said agreement;

**The Terms of Reference […] signed by the parties in connection with the arbitration proceedings and the conduct of the parties during the arbitration process did not directly or indirectly confer upon the Tribunal jurisdiction over the Entire Relationship or jurisdiction to "divorce" the parties by fashioning a remedy for that purpose and, in purporting to do so, the Tribunal rendered a decision without jurisdiction and which, in any event, is manifestly and patently unreasonable.**

Furthermore, in adopting this **"fashioned remedy"**, the Tribunal acted as an **"amiable compositeur"**, although it had no such authority from the parties.

In thus acting, the Tribunal exceeded its power under the Agreement […] and Terms of Reference […] because the Tribunal was limited to application of New York law and the Tribunal's remedy did not follow New York law or indeed any law.

2008 QCCS 5903 (CanLII)

**Subsidiarily - assuming that the Tribunal had jurisdiction to deal with the Entire Relationship and fashion such a remedy, which is denied - the manner in which it proceeded and the way in which it chose to do so was a denial of natural justice, due process and of Petitioner's fundamental rights, since at no time during the hearing or the argument was the notion of the Tribunal's jurisdiction over the Entire Relationship or the possibility of a forced buy-out remedy ever raised (outside the context of the above-mentioned bona fide impasse provision in Section 4(d) of the Agreement), thereby depriving Petitioner of the opportunity to argue that the Tribunal had no jurisdiction to so act, and, in any event, Petitioner was not given the opportunity to argue against the very nature of the solution proposed by the Tribunal, the whole contrary to Petitioner's right to a fair and just hearing (*audi alteram partem*).**

(our emphasis)

[38] As summarized by Dreyfus' counsel in his oral argument:

Dreyfus seeks annulment of Sections VI and VII.B of the Tribunal's Partial Award for three reasons:

1) The Tribunal decided issues regarding the termination of the parties' entire relationship and the doctrine of frustration:

    a) that were not before the Tribunal,

    b) that were not raised by the parties with the Tribunal, and

    c) that were not discussed by the Tribunal with the parties.

2) The Tribunal ordered an ad hoc remedy:

    a) that was of the Tribunal's own making,

    b) that was not sought by the parties, and

    c) that was not raised by the Tribunal with the parties.

    Dreyfus had no notice that the Tribunal would decide these matters and no opportunity to be heard on any of these matters.

    The decisions were a product of the violation of the principles of *ultra petita* and *audi alteram partem*.

    The Tribunal's actions constituted a denial of Dreyfus's fundamental rights to due process and natural justice.

3) The Tribunal assumed the role of amiable compositeur without the parties' consent:

2008 QCCS 5903 (CanLII)

a) The Tribunal expressly ignored the applicable law, stating that it had the right to make "determinations based on *ad hoc* application of broad principles of justice and fairness."

b) In so doing, the Tribunal assumed the role of amiable compositeur.

c) Article 13(4) of the 1988 ICC Rules provided that: "The arbitrator shall assume the powers of an amiable compositeur if the parties are agreed to give him such powers."

d) No such consent was given by the parties.

2008 QCCS 5903 (CanLII)

***(B) Tusculum***

[39] The principal grounds raised by Tusculum in opposition to the *Dreyfus Motion* are set out in paragraphs 33 and following of the *Amended Defence to the Amended Motion*:

> 33. The Arbitration Clause on which was founded Respondents' claim as well as the Terms of Reference agreed upon by the parties were broad and clearly encompassed the power and the jurisdiction to pronounce an award such as the one pronounce in the present instance, […];
>
> 34. Petitioner itself have taken the position, on numerous occasions, that the Arbitration Clause is broad and should be interpreted broadly and, in that context, has successfully sought the dismissal of legal proceedings filed by Respondents in Germany against Petitioner on the basis that the dispute should be rather arbitrated, […];
>
> 35. The Tribunal had the power and the obligation to determine the scope of its jurisdiction, based on the Agreement, the Terms of Reference and the representations made by the parties, and no excess of jurisdiction giving rise to an intervention of this Honourable Court has been committed in that respect;
>
> 36. The Tribunal had the authority to determine the rules of procedure as well as the rules of evidence that were to be followed and, in that respect, has respected the parties' rights in the present instance;

[40] In the *Plan d'Argumentation des Intimés en Reprise d'Instance,* applying the principles of law which it asserts are universally applicable in matters of international commercial arbitration and codified in the *Code of Civil Procedure*, it seek the dismissal of the *Amended Motion,* in particular, for the following reasons:

> 4. Le tribunal n'a aucunement excédé sa compétence;
>
> 5. Le tribunal a respecté l'équité procédurale et la procédure arbitrale applicable en ayant recours à la doctrine du *frustration;*

6. Les arbitres n'ont pas agi comme « amiables compositeurs »;

7. Dreyfus demande essentiellement à la Cour d'examiner le fond du litige, ce qui est expressément interdit par l'article 946.2 C.p.c.;

8. Une fin de non-recevoir interdit à Dreyfus de contester la sentence des arbitres.

2008 QCCS 5903 (CanLII)

## V. ADMISSIONS AND STIPULATIONS

### *(A) Exhibits*

[41] *Joint Books of Exhibits* and *Joint Books of Supplemental Exhibits* were produced by consent. They form part of the Court Record.

[42] Certain additional exhibits were also produced by consent during the hearings. They are described in the *Procès Verbal* prepared for each of the respective dates hearing.

### *(B) Sources*

[43] *Joint Books of Sources* were also produced by consent. They form part of the Court Record.

### *(C) Continuation of Suit filed by Bulk Oil Group Limited and the trustee of the bankruptcy of Tusculum, Ronald W. De Ruuk*

[44] In a letter dated February 13, 2008 the parties, through their respective counsel confirmed:

> Further to our meeting of December 17, 2007 and our recent written and telephone exchanges, we hereby confirm the understanding reached between us with respect to the continuances of suit filed in the above-captioned court file numbers by Bulk Oil Group Ltd. ("Bulk Oil") and the trustee of bankruptcy of Holding Tusculum B.V. ("Tusculum"), Mr. Ronald W. de Ruuk ("de Ruuk").
>
> We confirm that the parties will not, in the context of the above-captioned court files coming up for hearing before the Quebec Superior Court, raise the issue of standing or legal interest of Bulk Oil or de Ruuk. These and any other connected issues are simply matters that the Quebec Superior Court need not address at this time. We also confirm that agreement of S.A. Louis Dreyfus & Cie ("Dreyfus") to proceed in this manner is without prejudice to any of its rights to raise the above and other related issues in the future and it does not constitute an admission by Dreyfus that Tusculum's interests, if any, were validly transferred to de Ruuk or Bulk Oil. Finally, it is agreed and understood that the parties authorize Justice Silcoff to incorporate the terms of this agreement in his judgment.

[45] In a subsequent letter dated September 4, 2008, the parties further confirmed that the undertakings made in the February 13, 2008, letter, shall apply to the present proceedings.

[46] At the request of the parties, the full text of the February 13, 2008, letter has been incorporated in the present judgment.

2008 QCCS 5903 (CanLII)

## VI. EXPERT EVIDENCE

[47] The Court was privileged to receive expert evidence on matters of international commercial arbitration from some of the foremost authorities on the subject in the western world. Their respective opinions are frequently cited in precedent setting judgments rendered by Courts of competent final jurisdiction elsewhere in North America, in Western Europe and in Australia.

[48] These experts' *viva voce* evidence, received in support of the opinions expressed in their respective reports, occupied the substantial portion of the Court's hearings. As one might expect, the opinions are divergent on several fundamental issues.

[49] Specific reference will be made to their opinions, where appropriate, in Section VIII (Analysis) of this judgment.

### *(A) Dreyfus*

[50] The following experts were heard on behalf of Dreyfus. Written reports and, in some cases, reply reports were produced by each of them:

| | **Expert** | **Date of Report** |
|---|---|---|
| (i) | Emmanuel Gaillard (**"Gaillard"**); | Nov. 22, 2005 (the **"Gaillard Report"**)<br>Feb. 16, 2007 (the **"Gaillard Report #2"**) |
| (ii) | Eric Schwartz (**"Schwartz"**); | Nov. 22, 2005 (the **"Schwartz Report"**)<br>Feb. 16, 2007 (the **"Schwartz Report #2"**) |
| (iii) | William Lawrence Craig (**"Craig"**) | Nov. 23, 2005 (the **"Craig Report"**)<br>Feb. 16, 2007 (the **"Craig Report #2"**) |

2008 QCCS 5903 (CanLII)

### *(B) Tusculum*

[51] The following experts were heard on behalf of Tusculum. Written reports and, in some cases, reply reports were produced by each of them:

| | Expert | Date of Report |
|---|---|---|
| (i) | Fabien Gélinas (**"Gélinas"**); | October 27, 2005 (the **"Gélinas Report"**)<br>August 22, 2006 (the **"Gélinas Report #2"**) |
| (ii) | Lord Mustill (**"Mustill"**); | August 22, 2006 (the **"Mustill Report"**) |
| (iii) | Philippe Leboulanger (**"Leboulanger"**); | August 23, 2006 (the **"Leboulanger Report"**) |

## VII. DETERMINATIVE SOURCES: RELEVANT CONTRACTUAL, STATUTORY AND REGULATORY DISPOSITIONS OF ADMINISTRATIVE BODIES

[52] The rights and obligations of the parties and the relief sought must be examined in light of the relevant provisions of following determinative sources: (A) the Arbitration Agreement; (B) the Terms of Reference; (C) the (1988) *I.C.C. Rules*; (D) the *Code of Civil Procedure of Québec*[19]; (E) the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*[20] and (F) the *UNCITRAL Model Law* and other sources referred to in Article 940.6 *C.C.P*.

### *(A) The Arbitration Agreement*

[53] Section 13 of the Agreement provides for the resolution, by way of arbitration, of all disputes with respect to the interpretation of the Agreement or claims for damages for the breach thereof.

> This Agreement shall be governed by, and construed in accordance with the laws of the State of New York (regardless of the laws that might otherwise govern under applicable New York principles of conflict of laws). **Any disputes with respect to the interpretation of this Agreement or claims for damages for breach of this Agreement shall be resolved by arbitration in the English language by one or more arbitrators chosen in accordance with the rules of the International Chamber of Commerce.**
>
> (our emphasis)

---

[19] **[**"***C.C.P.***"]**.
[20] 330 U.N.T.S. 3, **[**the **"*New York Convention*"]**.

[54] Although the Arbitration Clause did not specify a place of arbitration, by letter dated February 24th, 1994, the ICC Court seated the arbitration in Montreal.

## ***(B) The Terms of Reference***

[55] Pursuant to Article 13 of the 1988 *ICC Rules* in force at the time, the parties and the Tribunal executed the Terms of Reference dated July 15th, 1996. Section VII of the Terms of Reference defined the issues to be determined by the Tribunal.

> **VII. Statement of the issues to be Determined**
>
> The Arbitral Tribunal shall decide all issues of jurisdiction, if any, and all issues of merits arising from the Terms of Reference herein and from the pleadings properly filed by the parties under the directions of the Tribunal, in one or more awards, in particular the following:
>
> 1. Did the Agreement of November 7, 1990, considered alone or in the context of the conduct of the parties, establish a joint venture? If it did, what was the scope thereof and the obligations of the parties thereunder?
>
> […]
>
> 2. Was the Agreement of November *7,* 1990 amended or modified at any time?
>
> 3. Has the relationship, if any, between the parties established by the Agreement of November 7, 1990 (referred to in paragraphs 1 and 2 above) and their conduct thereunder been terminated? If so, by what communications and/or conduct, and when was the termination effective?
>
> > a. In particular, did Defendant's letter of October 14, 1993 operate to terminate the relationship and, if so, what are the consequences of the termination;
> >
> > b. Was either party entitled to terminate the relationship as a result of breaches, repudiation or other wrongful conduct by the other; and
> >
> > c. Have any events taken place such as positions taken in court - proceedings or transfer of stock interests in Beta which had the effect of repudiating or terminating the relationship?
>
> 4. Has an "impasse" within the meaning of Section 4(d) of the November 7, 1990 Agreement occurred and, if so, has either party properly invoked the provisions of Section 4(d)?
>
> > a. In particular, if one party has properly invoked an impasse, what are the legal consequences thereof and what action should the Arbitral Tribunal take with respect thereto?

2008 QCCS 5903 (CanLII)

b. Is the Claimant entitled to the "call price" or the "put price" and/or to the right of appraisal provided under the November 7, 1990 Agreement?

c. If the remedies provided in subparagraph (b) are inapplicable, is the Claimant entitled to any monetary damages?

d. Should any recovery by the Claimant be offset by the amount of its liability, if any, for any joint venture losses?

5. If one party is found to have breached any contractual commitments, fiduciary duties or other obligation to the other, to what money damages or other relief is the injured party entitled?

a. In particular, is either party entitled to recover anything from the other in respect of operating losses, profits or other assets or liabilities of any joint venture, including any joint venture described in subparagraphs 1(a), 1(b), or 1 (c) of this Section VII;

b. Is Defendant entitled to recover from Claimant 50% of losses incurred in the first instance by Defendant with respect to any claimed joint venture as described in subparagraph 1(a), 1(b), or 1(c) of this Section VII; and

c. Is either party entitled to recover from the other any money damages as a result of a wrongful breach, repudiation, or termination of the Agreement of November 7, 1990?

6. Is either party's ability to maintain an arbitral claim or defense with respect to the November 7, 1990 Agreement, its right to damages or its right to other relief barred, diminished, waived or otherwise affected by:

a. The doctrines of unclean hands, waiver and/or estoppel;

b. The statute of frauds;

c. A change in the status of the Claimant, if such has occurred, such that it ceased to remain a shareholder of Beta;

d. Contentions which any party has made in related judicial proceedings;

e. Any party's filing and/or pursuing any judicial proceedings; and

f. A party's breaches, repudiation or other wrongful conduct?

7. If Claimant is no longer a Beta shareholder due to the April 28, 1994 Beta resolution and is not entitled to the relief described in subparagraphs 4{b) and 4(c), is Claimant entitled to any other relief or is Defendant entitled to dismissal of Claimant's claims?

2008 QCCS 5903 (CanLII)

8. What interest, if any, should be awarded to a party with respect to claims where it is successful and to awards entered in its favor?

9. Taking into account the rulings of the Arbitral Tribunal on the issues set forth above in this Section VII, the conduct of the arbitration procedure and any other factors which the Tribunal may deem relevant, what costs, if any, should the Tribunal award?

2008 QCCS 5903 (CanLII)

## *(C) The (1988) ICC Rules*

[56] The following articles of the *ICC Rules* find particular application.

**Article 11 – Rules Governing the Proceedings**

The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, and whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration

**Article 13 – Terms of reference**

**[…]**

The arbitrator shall assume the powers of an *amiable compositeur* if the parties are agreed to give him such powers.

**Article 16**

The parties may make new claims or counter-claims before the arbitrator on condition that these remain within the limits fixed by the Terms of Reference provided for in Article 13 or that they are specified in a rider to that document, signed by the parties and communicated to the international Court of Arbitration.

**Article 21 – Security of Award by the Court**

Before signing an award, whether partial or definitive, the arbitrator shall submit it in draft form to the international Court of Arbitration. The Court may lay down modifications as to the form of the award and, without affecting the arbitrator's liberty of decision, may also draw his attention to points of substance. No award shall be signed until it has been approved by the Court as to its form.

**Article 24 – Finality and Enforceability of Award**

1. The arbitral award shall be final.

2. By submitting the dispute to arbitration by the international Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made.

2008 QCCS 5903 (CanLII)

## *(D) Code of Civil Procedure of Québec*

[57] The following provisions of the *Code of Civil Procedure* find particular application.

**CHAPTER I**

**GENERAL PROVISIONS**

**940**. The provisions of this Title apply to an arbitration where the parties have not made stipulations to the contrary. However, articles 940.2, 941.3, 942.7, 943.2, 945.8 and 946 to 947.4, as well as article 940.5 where the object of the service is a judicial proceeding, are peremptory.

**[…]**

**940.6** Where matters of extraprovincial or international trade are at issue in an arbitration, the interpretation of this Title, where applicable, shall take into consideration:

**(1)** the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985;

(2) the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session held in Vienna from the third to the twenty-first day of June 1985;

(3) the Analytical Commentary on the draft text of a model law on international commercial arbitration contained in the report of the Secretary-General to the eighteenth session of the United Nations Commission Trade Law.

**[…]**

**CHAPTER V**

**ORDER OF ARBITRATION PROCEEDINGS**

**944.10** The arbitrators shall settle the dispute according to the rules of law which they consider appropriate and, where applicable, determine the amount of the damages. They cannot act as amiable compositeurs (sic) except with the prior concurrence of the parties.

**CHAPTER VII**

**HOMOLOGATION OF THE ARBITRATION AWARD**

**946.** An arbitration award cannot be put into compulsory execution until it has been homologated.

**946.1** A party may, by motion, apply to the court for homologation of the arbitration award.

**946.2** The court examining a motion for homologation cannot enquire into the merits of the dispute.

**946.3** The court may postpone its decision on the homologation if an application has been made to the arbitrators by virtue of article 945.6.

If the court acts pursuant to the first paragraph, it may, on the application of the party applying for homologation, order the other party to provide security.

**946.4** The court cannot refuse homologation except on proof that

(1) one of the parties was not qualified to enter into the arbitration agreement;

(2) the arbitration agreement is invalid under the law elected by the parties or, failing any indication in that regard, under the laws of Québec;

(3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(4) the award deals with a dispute not contemplated by or not failing within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement; or

(5) the mode of appointment of arbitrators or the applicable arbitration procedure was not observed.

In the case of subparagraph (4) of the first paragraph, the only provision not homologated is the irregular provision described in that paragraph, if it can be dissociated from the rest.

**946.5** The court cannot refuse homologation of its own motion unless it finds that the matter in dispute cannot be settled by arbitration in Québec or that the award is contrary to public order.

**CHAPTER VIII**

**ANNULMENT OF THE ARBITRATION AWARD**

**947.** The only possible recourse against an arbitration award is an application for its annulment.

2008 QCCS 5903 (CanLII)

**947.1** Annulment is obtained by motion to the court or by opposition to a motion to the court or by opposition to a motion for homologation.

**947.2** Articles 946.2 to 946.5, adapted as required, apply to an application for annulment of an arbitration award.

**947.3** On the application of one party, the court, if is considers it expedient, may suspend the application for annulment for such time as it deems necessary to allow the arbitrators to take whatever measures are necessary to remove the grounds for annulment, even if the time prescribed in article 945.6 has expired.

**947.4** The application for annulment must be made within three months after reception of the arbitration award or of the decision rendered under article 945.6.

**[…]**

**948.** This title applies to an arbitration award made outside Québec whether or not it has been ratified by a competent authority.

The interpretation of this Title shall take into account, where applicable, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards as adopted by the United Nations Conference on International Commercial Arbitration at New York on 10 June 1958.

2008 QCCS 5903 (CanLII)

## *(E) The New York Convention*

[58] International commercial arbitration law applicable in Quebec is strongly influenced by the *New York Convention* and the *UNCITRAL Model Law.*

[59] In the reasons for judgment delivered on behalf of the majority in the Supreme Court of Canada decision in *Dell Computer Corp.* v. *Union des consommateurs*[21], Deschamps, J. analyzed the international sources of arbitration law in Quebec.

> 39 The New York Convention entered into force in 1959. Article II of the Convention provides that a court of a contracting state that is seized of an action in a matter covered by an arbitration clause must refer the parties to arbitration. At present, 142 countries are parties to the Convention. The accession of this many countries is evidence of a broad consensus in favour of the institution of arbitration. Lord Mustill[22] wrote the following about the Convention:
>
> > This Convention has been the most successful international instrument in the field of arbitration, and perhaps could lay claim to be the most

[21] [2007] S.C.C. 34, para. 38ff. **[“*Dell*”]**.
[22] LordMustill was qualified and heard as an expert witness on behalf of Tusculum in these proceedings.

> effective instance of international legislation in the entire history of commercial law.
>
> (M. J. Mustill, "Arbitration: History and Background" (1989), 6 *J. Int'l Arb.* 43, at p. 49)

Canada acceded to the New York Convention on May 12, 1986.

40 The Model Law is another fundamental text in the area of international commercial arbitration. It is a model for legislation that the UN recommends that states take into consideration in order to standardize the rules of international commercial arbitration. The Model Law was drafted in a manner that ensured consistency with the New York Convention: F. Bachand, "Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?" (2006), 22 *Arb. Int'l* 463, at p. 470; S. Kierstead, "Referral to Arbitration under Article 8 of the UNCITRAL Model Law: The Canadian Approach" (1999), 31 *Can. Bus. L.J.* 98, at pp. 100-101.

41 The final text of the Model Law was adopted on June 21, 1985 by the United Nations Commission on International Trade Law ("UNCITRAL"). In its explanatory note on the Model Law, the UNCITRAL Secretariat states that it:

> . . . reflects a worldwide consensus on the principles and important issues of international arbitration practice. It is acceptable to States of all regions and the different legal or economic systems of the world.
>
> (Explanatory Note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitration, at para. 2)

In 1986, Parliament enacted the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.), which was based on the Model Law. The Quebec legislature followed suit that same year and incorporated the Model Law into its legislation. Quebec's Minister of Justice at the time, Herbert Marx, reiterated the above-quoted comment by the UNCITRAL Secretariat: National Assembly, *Journal des débats*, 1st Sess., 33rd Leg., June 16, 1986, at p. 2975, and Oct. 30, 1986, at p. 3672.

4.3.2 Nature and Scope of the 1986 Amendments to the *Civil Code of Lower Canada* and the *Code of Civil Procedure*

42 In 1986, the *Act to amend the Civil Code and the Code of Civil Procedure in respect of arbitration*, S.Q. 1986, c. 73 ("Bill 91"), which established a scheme for promoting arbitration in Quebec, was tabled in the legislature. Bill 91 added a new title on arbitration agreements to the *Civil Code of Lower Canada*. This title consisted of only six provisions setting out a few general principles relating to the validity and applicability of such agreements. The legislature's decision to place arbitration agreements among the nominate contracts in the *Civil Code of Lower Canada* is significant. After that, there was no longer any reason to regard arbitration agreements as being outside the sphere of the general law; on the

2008 QCCS 5903 (CanLII)

2008 QCCS 5903 (CanLII)

contrary, they were now an integral part of it: *Condominiums Mont St-Sauveur inc. v. Constructions Serge Sauvé Ltée*, [1990] R.J.Q. 2783 (C.A.), at p. 2785; J. E. C. Brierley, "Arbitration Agreements: Articles 2638-2643", in *Reform of the Civil Code* (1993), vol. 3B, at p. 1. The provisions added by Bill 91 would be restated without any major changes in the chapter of the *Civil Code of Québec* on arbitration agreements.

43 Bill 91 also had a considerable impact on the *Code of Civil Procedure*. Substantial additions were made to Book VII on arbitrations, which was divided into two titles. Title I is a veritable code of arbitral procedure that regulates every step of an arbitration proceeding subject to Quebec law, from the appointment of the arbitrator to the order of the proceeding to the award and homologation. Most of these rules apply only "where the parties have not made stipulations to the contrary" (art. 940 C.C.P.). Title II sets out a system of rules applicable to the recognition and execution of arbitration awards made outside Quebec.

44 Although Bill 91 was the Quebec legislature's response to Canada's accession to the New York Convention and to UNCITRAL's adoption of the Model Law, it is not identical to those two instruments. As the Quebec Minister of Justice noted, Bill 91 was [TRANSLATION] "inspired" by the Model Law and [TRANSLATION] "implement[ed]" the New York Convention: *Journal des débats*, 1st Sess., 33rd Leg., October 30, 1986, at p. 3672. For this reason, it is important to consider the interplay between Quebec's domestic law and private international law before interpreting the provisions of Bill 91.

45 This Court analysed the interplay between the New York Convention and Bill 91 in *GreCon Dimter inc. v. J.R. Normand inc.*, [2005] 2 S.C.R. 401, 2005 SCC 46, at paras. 39 *et seq*. After noting that there is a recognized presumption of conformity with international law, the Court mentioned that Bill 91 "incorporate[s] the principles of the *New York Convention*" and concluded that the Convention is a formal source for interpreting the provisions of Quebec law governing the enforcement of arbitration agreements: para. 41. This conclusion is confirmed by art. 948, para. 2 C.C.P., which provides that the interpretation of Title II on the recognition and execution of arbitration awards made outside Quebec (arts. 948 to 951.2 C.C.P.) "shall take into account, where applicable, the [New York] Convention".

46 The same is not true of the Model Law. Unlike an instrument of conventional international law, the Model Law is a non-binding document that the United National General Assembly has recommended that states take into consideration. Thus, Canada has made no commitment to the international community to implement the Model Law as it did in the case of the New York Convention. Nevertheless, art. 940.6 C.C.P. [previously reproduced] attaches considerable interpretive weight to the Model Law in international arbitration cases:

**[…]**

47 In short, to quote Professor Brierley, Bill 91 opened Quebec arbitration law to "international thinking" in this area; this international thinking "has become a formal source of Quebec positive law": J. E. C. Brierley, "Quebec's New (1986) Arbitration Law" (1987-88), 13 *Can. Bus. L.J.* 58, at pp. 63 and 68-69.

2008 QCCS 5903 (CanLII)

## ***(F) The UNCITRAL Model Law and other sources referred to in Article 940.6 C.C.P.***

[60] The following provisions of the *UNCITRAL Model Law* should be given …*considerable interpretive weight…*[23] in addressing the issues raised for determination in the present proceedings.

**Article 28. Rules applicable to substance of dispute**

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

**Article 32. Termination of proceedings**

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

**CHAPTER VII. RECOURSE AGAINST AWARD**

**Article 34. Application for setting aside as exclusive recourse against arbitral award**

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

---

[23] *Dell, supra,* para. 46.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not failing within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

2008 QCCS 5903 (CanLII)

## VIII. ANALYSIS

### *(A) Certain Fundamental Principles*

[61] The competence of the Tribunal, the scope of its mandate and the extent to which the Court may intervene in annulling Arbitration Award # 1 must be analyzed in light of certain fundamental principles retained by the jurisprudence and by other recognized authorities.

[62] In a seminal decision of the Supreme Court of Canada rendered in *Desputeaux* v. *Éditions Chouette*[24], regarding these and other related issues, Lebel, J. addressed the subject in the following manner:

[24] [2003] 1 S.C.R. 178, a para. 22 **["*Desputeaux*"]**.

> 22 The parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding. As we shall later see, that agreement comprises the arbitrator's terms of reference and delineates the task he or she is to perform, subject to the applicable statutory provisions. The primary source of an arbitrator's competence is the content of the arbitration agreement (art. 2643 *C.C.Q.*). If the arbitrator steps outside that agreement, a court may refuse to homologate, or may annul, the arbitration award (arts. 946.4, para. 4 and 947.2 *C.C.P.*). In this case, the arbitrator's terms of reference were not defined by a single document. His task was delineated, and its content determined, by a judgment of the Superior Court, and by a lengthy exchange of correspondence and pleadings between the parties and Mr. Rémillard.

2008 QCCS 5903 (CanLII)

[63] In the present proceedings, although the Terms of Reference were defined at length by the parties, they were elaborated upon and perhaps expanded in numerous exchanges of correspondence between the parties and the Tribunal as well as in the filings of Pre and Post hearing memoranda on behalf each of them.

[64] The concept of the autonomy of the parties and of the arbitral process is a fundamental tenet of arbitration law of Québec. Save as expressly otherwise provided by law, the Courts are reluctant to intervene in the process.

[65] In *Desputeaux*[25], Lebel, J. wrote:

> 67 The legislature has affirmed the autonomy of arbitration by stating, in art. 946.2 *C.C.P.*, that **"[t]he court examining a motion for homologation cannot enquire into the merits of the dispute".** (That provision is applicable to annulment of an arbitration award by the reference to it in art. 947.2 *C.C.P.*) In addition, the reasons for which a court may refuse to homologate or annul an arbitration award are exhaustively set out in arts. 946.4 and 946.5 *C.C.P.*
>
> […]
>
> 69 This latter approach has been adopted by a significant line of authority. **It recognizes that the remedies that may be sought against arbitration awards are limited to the cases set out in arts. 946 *et seq. C.C.P.* and that judicial review may not be used to challenge an arbitration decision or, most importantly, to review its merits** (*Compagnie nationale Air France*, *supra*, at pp. 724-25; *International Civil Aviation Organization v. Tripal Systems Pty. Ltd.*, [1994] R.J.Q. 2560 (Sup. Ct.), at p. 2564; *Régie intermunicipale de l'eau Tracy, St-Joseph, St-Roch v. Constructions Méridien inc.*, [1996] R.J.Q. 1236 (Sup. Ct.), at p. 1238; *Régie de l'assurance-maladie du Québec v. Fédération des médecins spécialistes du Québec*, [1987] R.D.J. 555 (C.A.), at p. 559, *per* Vallerand J.A.; *Tuyaux Atlas, une division de Atlas Turner Inc. v. Savard*, [1985] R.D.J. 556 (C.A.)). Review of the correctness of arbitration decisions jeopardizes the autonomy intended by the legislature, which cannot accommodate judicial review

[25] *Ibid,* para. 67, 69.

2008 QCCS 5903 (CanLII)

of a type that is equivalent in practice to a virtually full appeal on the law. Thibault J.A. identified this problem when she said:

> [TRANSLATION] In my view, the argument that an interpretation of the regulation that is different from, and in fact contrary to, the interpretation adopted by the ordinary courts means that the arbitration award exceeds the terms of the arbitration agreement stems from a profound misunderstanding of the system of consensual arbitration. The argument makes that separate system of justice subject to review of the correctness of its decisions, and thereby substantially reduces the latitude that the legislature and the parties intended to grant to the arbitration board.
>
> (Laurentienne-vie, compagnie d'assurance, supra, at para. 43)

(our emphasis)

[66] Although some earlier Quebec authorities prior to *Desputeaux,* reflected conflicting views regarding the limits of judicial intervention in proceedings involving applications for homologation or annulment of arbitral awards governed by the *Code of Civil Procedure*, it is now settled law that the only recourse against a disputed or contested arbitration award is by way of an application for its annulment. The grounds for seeking annulment, inspired by Article V of the *New York Conv*ention, are limited to those set out in articles 946.4 and 946.5 *C.C.P.*[26] These grounds must be narrowly construed[27] and cannot be assimilated with those on an application for judicial review of an administrative tribunal pursuant to articles 33 and 846 *C.C.P.*

[67] Moreover, it is not disputed that decisions of international arbitral tribunals, are presumed valid. They must be accorded a high degree of deference[28]. The onus of proving that they should be annulled rests on the party seeking annulment.

[68] In an analysis entitled "*Delimiting the Spheres of Judicial and Arbitral Power: Beware My Lord, of Jealousy*", calling for a demarcation of the scope of possible intervention by the courts in reviewing arbitral awards, published by L. Yves Fortier C.C., Q.C. in the *Canadian Bar Review*[29], he notes:

> 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

---

[26] Gaillard Report, at para. 48ff.; Craig Report #2, at para. 36.

[27] *Re Corporacion Transnacional de Inversiones S.A. de C.V.* v. *STET International* [1999] O.J. N$^{o}$. 3573 (Ont.S. C.) 1 at 7 (Q.L.) **["*Corporation Transnacional de Inversiones*"]**; *Adamas Management & Services Inc.* v. *Aurado Energy Inc.,* [2004] N.B.J. N$^{o}$. 523 (N.B.Q.B.) 1, at 9 (Q.L.).

[28] *Corporacion Transnacional de Inversiones, S.A. de C.V.*, *supra*, at p. 6.

[29] (2001) 80 Can. Bar Rev., 143, 144.

> Canadian cases confirming that the federal and provincial equivalents of art. 5 have precisely that effect[1].
>
> (our emphasis; internal footnote included below)
>
> [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.

2008 QCCS 5903 (CanLII)

[69] Finally, it is also not disputed that on applications for homologation or annulment of arbitral awards, the Court cannot enquire into the merits of the dispute[30].

[70] The Court must now determine whether, in the context of these fundamental principles, the grounds alleged by Dreyfus for the partial annulment of Arbitration Award #1 are sufficient to warrant its intervention.

## (B) Application

[71] In seeking the partial annulment of Arbitration Award # 1, Dreyfus invokes and relies upon the limited exceptions to the general rule prohibiting the Court from refusing homologation, enunciated in articles 946.4 (3), (4) & (5) and 946.5 *C.C.P* and to the *mutatis mutandis* rule in article 944.2 *C.C.P.* Dreyfus also invokes and relies upon Articles 18 and 34(2)(a)(ii) of the *Uncitral Model Law* and Article V.1(b) of the *New York Convention.*

[72] Dreyfus contends that, by applying the doctrine of frustration in the present dispute the Tribunal, without authority either under the Terms of Reference or otherwise, expanded the scope its mandate beyond that contemplated by either party. More particularly, Dreyfus contends that the Tribunal took it upon itself to impose a form of relief which would, in effect, result in a complete “divorce” of the parties and the termination of their entire business relationship contemplated under the Agreement.

[73] It argues that, although this issue was not submitted for determination and was never raised by the parties or by the Tribunal other than obliquely in the its June 24, 1995, letter, relying upon the doctrine of frustration, the Tribunal inappropriately fashioned an *ad hoc* remedy of its own making detailed in Section VI and VII.B of Arbitration Award #1 (the **“Valuation and Buyout Remedy”**). They assert that the parties could not possibly have anticipated that the Tribunal would go beyond what had been submitted for determination and that it would, *proprio motu,* fashion the Valuation and Buyout Remedy. By so doing, Dreyfus contends that the Tribunal acted *ultra petita* by granting relief on claims that were not made by either of the parties and, accordingly, necessarily infringed the *audi alteram partem* rule.

---

[30] Art. 946.2 *C.C.P.*

[74] The Court concurs with Dreyfus' contentions in this respect. For the reasons hereinafter expressed, the Court finds that the Valuation and Buyout Remedy was improperly fashioned according to the Tribunal's own perception as to what was fair and equitable, rather than by respecting the scope of the mandate consented and agreed to by the parties.

[75] More particularly, by so doing, the Tribunal: (i) violated the *audi alteram partem* rule; (ii) dealt with a dispute which was not contemplated by the parties and decided matters beyond the scope of the Terms of Reference; (iii) failed to observe applicable arbitration procedure; (iv) rendered an award that is contrary to public order; and (v) engaged in a transformation of roles from that of arbitrators to that of *amiable compositeurs,* without the required express consent of the parties.

2008 QCCS 5903 (CanLII)

### ***(i) The audi alteram partem rule***

[76] The *audi alteram partem* rule, codified in Article 946.4(3) *C.C.P.,* is a universal principle of law recognized and applied in matters of international commercial arbitration.

[77] Article 946.4(3) *C.C.P.*, previously cited but repeated for ease of comprehension, provides:

> **946.4** The court cannot refuse homologation *except* on proof that:
>
> **[ . . . ]**
>
> **(3)** the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings **or was otherwise unable to present his case;**
>
> (our emphasis)

[78] The grounds referred to in article 946.4 (3) *C.C.P.,* adapted as required, constitutes, as well, valid grounds for the annulment of an arbitral award[31]. These provisions are peremptory[32].

[79] Article 946.4(3) *C.C.P.* is modeled on Article 34(2)(a)(ii) of the *UNCITRAL Model Law* which provides:

> An arbitral award may be set aside by the court specified in article 6 only if [ . . . ] the party making the application furnishes proof that the party making the

[31] Art. 947.2 *C.C.P*.
[32] Art. 940 *C.C.P.*

> application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings **or was otherwise unable to present his case.**
>
> (our emphasis)

[80] Article 18 of the *UNCITRAL Model Law* provides:

> The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.
>
> (our emphasis)

[81] In their commentary on Article 18 of the *UNCITRAL Model Law*, Holtzmann and Neuhaus[33] state:

> … Article 18 has been rightly described as a key element of the "Magna Carta of Arbitral Procedure." Likewise, it might well be called the "due process" clause of arbitration, akin to similar provisions in national constitutions that establish the requirement of procedural fairness as the indispensable foundation of a system of justice.

[82] Article V.1(b) of *the New York Convention* provides:

> Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: [ . . . ] the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings **or was otherwise unable to present his case.**
>
> (our emphasis)

[83] Both the *New York Convention* and the *UNCITRAL Model Law* are recognized sources to consider in interpreting Quebec domestic law provisions where extraprovincial or international trade are at issue[34].

[84] Notwithstanding the generally recognized and perceived flexibility and procedural freedom granted arbitration tribunals in the conduct of its proceedings, the Courts, both in Canada and elsewhere, have consistently applied and enforced the *audi alteram partem* rule in considering the validity of awards issued in matters involving commercial arbitration.

---

[33] *Howard M. Holtzmann & Joseph E. Neuhaus,* A Guide to the UNCITRAL Model Law on International Commercial Arbitration (Deventer: Kluwer, 1989), p. 550.

[34] *GreCon Dimter inc. v. J. R. Normand inc.*, [2005] 2 S.C.R. 401, at para. 41; Article 940.6 *C.C.P.*

2008 QCCS 5903 (CanLII)

[85] In a Québec case, Lebel, J. addressed the subject in *Desputeaux*[35] in the following manner:

> Articles 2643 *C.C.Q*. and 944.1 *C.C.P.,* as we know, affirm the principle of procedural flexibility in arbitration proceedings, by leaving it to the parties to determine the arbitration procedure or, failing that, leaving it up to the arbitrator to determine the applicable rules of procedure.
>
> [ . . . ]
>
> **Nonetheless, the arbitrator clearly does not have total freedom in respect of procedure. Under arts. 947.2 and 946.4, para. 3 C.C.P., an arbitration award may be annulled where "the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case**.
>
> (internal citations omitted; our emphasis)

[86] Similarly, by way of example, in France, in *Thyssen Stahlunion* c*. Maaden*[36], the Cour d'appel de Paris annulled that portion of an ICC arbitration award in which the tribunal awarded interest to a party without that party having sought such relief and without providing the parties an opportunity to present arguments on the issue.

In England, in *Société Franco-Tunisienne d'Armement-Tunis* v*. Government of Ceylon*[37], the Court of Appeal remitted the matter to the umpire, finding that because of his failure to provide the parties an opportunity to present their case with regard to his calculations of the damages allegedly owed *…the proceedings were unsatisfactory and contrary to natural justice*[38] (para. 788).

[87] The Court emphasized that the umpire's finding constituted a surprise to the parties, and that as such they must be given an opportunity to present arguments regarding the issue.

[88] In his reasons for judgment, Morris L.J. noted:

> I accept fully that in cases of this kind the court will lean against disturbing the decision of a tribunal selected by the parties; but I feel that the present position is not satisfactory, and that there may be a grave risk of injustice if matters are left as they are[39].

---

[35] Desputeaux, s*upra,* paras. 70, 71.
[36] C.A. Paris, 6 avril 1995.
[37] [1959] 1 W.L.R. 787.
[38] *Ibid,* para. 788.
[39] *Ibid,* para. 800.

2008 QCCS 5903 (CanLII)

***(ii) The Tribunal dealt with a dispute which was not contemplated by the parties, decided matters beyond the scope of the Terms of Reference; and***

***(iii) Failed to observe applicable arbitration procedure***

2008 QCCS 5903 (CanLII)

[89] There is no evidence that the matters complained of by Dreyfus, were ever submitted to the Tribunal for determination or that the parties were ever given the opportunity of discussing them with the Tribunal. The references in Arbitration Award #1 to certain passages from each of the parties' Post-Hearing Memorials are insufficient to support Tusculum's contentions that the Tribunal had the mandate to terminate the parties' entire relationship and to fashion and impose the Valuation and Buyout Remedy on the parties.

[90] Moreover, it is troublesome that, in response to Question 3 posed in Section VII of the Terms of Reference, the Tribunal concluded in Arbitration Award #1:

> Question 3: **It finds that the relation established by the Agreement of November 7, 1990, insofar as that Agreement relates to Beta, has not been terminated.** If further finds that the Agreement imposed upon the parties an obligation to negotiate in good faith with respect to the corporate holding company structure envisioned by the Agreement. Such negotiations have ceased and the Tribunal holds that neither party has asserted or proved any claim with respect to failure to negotiate in good faith.
>
> (our emphasis)

[91] Yet, having arrived at this conclusion, the Tribunal proceeded nonetheless and without justification, to conclude in Part B of the Award:

> The Tribunal finds that the purpose of the November 7, 1990 Agreement has been frustrated. **It decides that the remaining relationship between the parties should be terminated** …
>
> (our emphasis)

and thereupon to fashion and impose the Valuation and Buyout remedy.

[92] An examination of the record discloses that the Tribunal did not raise with, or seek the views of, the parties as to (i) whether it could terminate the parties' entire relationship notwithstanding the dismissal of all their respective claims; (ii) whether the doctrine of frustration could and should be applied as a legal rationale for "divorcing" the parties; (iii) whether it could and should fashion whatever *ad hoc* remedy it deemed appropriate in order to effect that "divorce"; and if it should (iv) what transfer valuation formula and procedure should be retained in determining the Valuation and Buyout Remedy.

2008 QCCS 5903 (CanLII)

[93] The Court notes that, in their respective *Post-Hearing Memorials*, each party dealt with the doctrine of frustration. Dreyfus acknowledged that the doctrine could be invoked in a very limited manner in support of its *Counterclaim* seeking reliance and restitution damages and the termination of the parties' contractual relationship under the Agreement relating to the commercial activities of processing and marketing.

[94] However, there is no suggestion by Dreyfus in its *Post-Hearing Memorial* that the doctrine could or should be invoked to terminate the parties' entire relationship and justify the imposition of the Valuation and Buyout Remedy, especially when the Tribunal had: (i) denied all of the parties' claims and requests for relief properly before the Tribunal; and (ii) determined that*…the relation established by the Agreement of November 7, 1990, insofar as that Agreement relates to Beta, has not been terminated*.

[95] Although Tusculum now claims that the Tribunal had the necessary mandate to invoke the doctrine of frustration and accordingly to address the issue by fashioning and imposing the Valuation and Buyout Remedy, it argued the exact opposite in its Post-Hearing Reply Memorial. At the time Tusculum argued that the doctrine could not be applied in the circumstances; that the Tribunal lacked jurisdiction to consider the doctrine because it was *…beyond the scope of the parties' agreement to arbitrate and not encompassed in the Terms of Reference*[40] .

[96] The Court concurs with Tusculum's earlier submissions as expressed in its Post-Hearing Reply Memorial.

[97] Moreover, the application of the doctrine of frustration cannot find justification by the fact that it was referred to, among other questions raised, in the Tribunal's letter of May 24, 1995. The letter was sent **after the close of the scheduled evidentiary hearings** and did not provide any notice that the Tribunal might possibly rule on the termination of parties' entire relationship (notwithstanding the denial of all of the parties' claims and requests for relief). Although the letter referred to the doctrine of frustration in Part C, it grouped this doctrine with three other legal issues, "reliance" "change of circumstances" and "failure of essential purpose" and only asked the parties to consider whether it and the other listed doctrines *…have an impact on the rights and obligations of the parties to the Agreement.* The letter raised no question of the possibility of imposing a forced buy-out remedy due to frustration. Nor did it suggest that, relying on the doctrine of frustration, the Tribunal might fashion its own *ad hoc* remedy without first consulting the parties.

[98] More particularly, the letter did not constitute notice of the intention of the Tribunal to: (i) apply the doctrine of frustration to terminate the parties' entire relationship if it denied, as it did, both parties' claims and requests for relief, (ii) fashion an *ad hoc* remedy that neither party had requested; nor did the letter address (iii) the nature and scope of such a remedy.

---

[40] JS-50, p. 168.

[99] The letter specifically downplayed the significance of the questions or the request for replies contained therein. Accordingly, it is not surprising that during closing arguments on July 11 and 12, 2005, neither party nor any member of the Tribunal raised the issue or referred to the questions contained in its letter. Similarly, there were no further evidentiary hearings held in order to address these issues.

[100] John M. Dowd, member of the Tribunal, although dissenting from the majority Award on certain issues, referring to the Tribunal's determinations in Sections VI and VII.B of Arbitration Award #1, acknowledged that the parties had no forewarning that it would be applying the doctrine of frustration and fashioning some sort of relief as a consequence thereof. In particular he acknowledged that the Tribunal never held a hearing to seek representations from the parties as to what would be the appropriate remedy in the circumstances.

[101] During his testimony before the Court, Lord Mustill, one of Tusculum's expert witnesses, acknowledged that the Tribunal had acted inappropriately in the circumstances. His views are best described in the following extract of his testimony given on April 4, 2008:

> Q- Well, then suppose the situation where the arbitrators just issued a partial award without telling the parties it was going to issue a partial award?
>
> A- That would be very wrong.
>
> Q- In what sense?
>
> A- Because it wouldn't give the parties an opportunity to be heard, which is vital. Even more vital, I would say, in arbitration, than in a court. It's natural justice. If you're going to take a major decision, you must take the views of those who are going to be affected by it. They would have a serious grumble if they found that they were stuck with a partial award without their consent, without, at least, being asked. Now, if they didn't consent, it may be that the arbitrators could still do it, but that would call for argument. . . .[41]

[102] On this subject, Lord Mustill concluded that: *[t]he Tribunal had gone on a frolic of its own…*[42.]

[103] By so acting, not only did the Tribunal violate the *audi alteram partem* rule and deal with a dispute not contemplated by the parties but as well, it failed to observe applicable arbitration procedure.

---

[41] April 4, 2008 Tr. 21–22.

[42] April 3, 2008 Tr. 63–64.

2008 QCCS 5903 (CanLII)

2008 QCCS 5903 (CanLII)

### *(iv)* ***The Tribunal rendered an award contrary to public order***

[104] The decision by the Tribunal to terminate the parties entire relationship, to apply the doctrine of frustration and, thereby, to justify the imposition of the Valuation and Buyout Remedy without first granting to the parties the opportunity to be heard was taken in total disregard of the the *audi alteram partem* rule.

[105] The *audi alteram partem* rule is one of public order. An award which breaches public order may not be homologated or, as the case may be, may be annulled[43]. It's breach may give rise to annulment under the public order ground set out in Article 946.5 *C.C.P*, notwithstanding the fact that it also constitutes a distinct ground for annulment under provisions such as article 946.4(3) *C.C.P.* and Article V(1)(b) of the *New York Convention.* The provisions of Article 946.5 *C.C.P.* would appear to be of residual application for those cases not otherwise covered by the other provisions of law[44].

### *(v)* ***The Tribunal engaged in a transformation of roles from that of arbitrators to that of amiable compositeurs, without the required express consent of the parties.***

[106] The Tribunal concluded at page 20 and 21of Arbitration Award #1;

> …[T]hat the parties intended to submit to the Tribunal the entire dispute between them and to grant the Tribunal authority to **fashion appropriate remedies** irrespective of whether the particular dispute in question or remedy requested fell within the ambit of Section 13 of the Agreement.
>
> […]
>
> The arbitrator's charge is to "**find a just solution**" to the dispute between the panics, Lentine v. Fundaro. 29 N.Y.2d 382, 385 (1972); to that end, it is appropriate for him to "fashion the remedy appropriate to the wrong," Matter of Payer & Wildfoersier. 38 N.Y.2d 669, 677 (N.Y. 1976); "see also Cook v. Mishkin, 95 A.D.2d 760, 464 N.Y.S.2d 761, 763 (1st Dept 1983).
>
> (our emphasis)

[107] The Tribunal erred in determining that it had the power to …*fashion appropriate remedies* and …*to find a just solution* notwithstanding its dismissal of the parties' respective claims,…*irrespective of whether the particular dispute in question or remedy requested fell within the ambit of Section 13 of the Agreement*. In so determining, the

---

[43] Article 946.5 *C.C.P.*; Article 34(2)(b)(ii) *UNCITRAL Model Law*; Article V(2)(b) *New York Convention.* See also S. Thuilleaux, *L'arbitrage commercial au Québec : Droit interne – Droit international privé* (Cowansville: Yvon Blais, 1991), p. 111: "…la violation de l'ordre public dans la sentence peut résulter de la violation des règles de justice naturelle comme l'avait affirmé la jurisprudence."

[44] Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (Netherlands: Deventer: Kluwer, 1981) p. 376.

Tribunal took on the role of *amiable compositeur*, when it was never asked, mandated, or permitted to do so. It failed to observe the applicable domestic[45] and international[46] arbitration procedure by assuming this role without the requisite of the parties.

[108] For this additional reason, Sections VI and VII.B of Arbitration Award #1 must be annulled.

**FOR THESE REASONS, THE COURT:**

[109] **GRANTS** in part Dreyfus' *Re-amended Motion for the Partial Annulment of an Arbitration Award*;

[110] **DECLARES** that the Tribunal lacked jurisdiction to deal with the entire relationship existing between the parties and, moreover, that its rulings in this regard in Section III of the Arbitration Award #1 or elsewhere in the Award, including those contained in the Concurrence and Dissent of John M. Dowd, are therefore null and without effect for all intents and purposes;

[111] **ANNULS** those portions of Arbitration Award #1, including those contained in the Concurrence and Dissent of John M. Dowd, which assume such jurisdiction to deal with the entire relationship existing between the parties, including those portions of the Award specifically recited in Section B, which is found at pages 64 to 69 thereof; and

[112] **DECLARES** inoperative any references to same made elsewhere in Arbitration Award #1, including (without limitation) the responses contained in the sections entitled "Question 5" and "Question 7", reported at page 64;

[113] **THE WHOLE** with costs.

_____
JOËL A. SILCOFF, J.S.C.

[45] Article 944.10 *C.C.P.*
[46] Article 13(4) 1988 *I.C.C.* Rules; Article 28 UNCITRAL *Model Law*.

2008 QCCS 5903 (CanLII)

Me George R. Hendy
Me Anne-Marie L. Lizotte
**OSLER, HOSKIN & HARCOURT LLP**

Me Babak Barin
Me Vikki Andrighetti
**BCF LLP**

Mr. John J. Buckley Jr.
**WILLIAMS & CONNOLLY LLP**

Attorneys for Petitioner

**Me Marie-Josée Hogue**
**Me Patrick Ferland**
**Me Berly Acosta**
HEENAN BLAIKIE SRL

Attorneys for Respondent

Dates of hearing : March 31; April 1, 2, 3, 4, 7, 8, 9, 28, 29, 30; May 1, 2, & September 8, 9, 10 & 11 2008

2008 QCCS 5903 (CanLII)