SUPERIOR COURT

2008 QCCS 5904 (CanLII)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No. 500-05-017680-966

DATE : December 8, 2008

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

HOLDING TUSCULUM B.V.

Petitioner

v.

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

Respondent

-and-

ROBERT B. VON MEHREN
CAREY RAMOS
JOHN M. DOWD

Mis-en-cause

-and-

RONALD W. DE RUUK
BULK OIL GROUP LIMITED

Petitioners in Continuance of Suit

2008 QCCS 5904 (CanLII)

500-05-035275-971

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JUDGMENT

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I. INTRODUCTION

[1] This judgment will addresses the issues raised for determination in two proceedings instituted on behalf of Holding Tusculum B.V. (**"Tusculum"**) and heard in common:

(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 an "Order" issued by an Arbitration Tribunal (hereinafter defined) on March 21, 1996, agreeing to reconsider elements of its previous "Partial Award" rendered on January 31, 1996 (**"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 a "Final Award" of an Arbitration Tribunal" rendered on May 29, 1997 (**"Arbitration Award # 2"**)(S.C.M. No. 500-05-035275-971).

(both *Motions* sometimes referred to collectively as the **"*Tusculum Motions*"**).

[2] The *Tusculum Motions* were heard together with a *Motion* in a related proceeding instituted on behalf of Louis Dreyfus S.A.S. (**"Dreyfus"**), the *Amended Motion for the Partial Annulment of an Arbitration Award*, (the **"*Dreyfus Motion for the Partial Annulment of Arbitration Award #1*"** or the **"*Dreyfus Motion*"**), wherein Dreyfus seeks the partial annulment of Arbitration Award # 1(S.C.M. No. 500-05-015828-963).

[3] In a judgment being released concurrently with the present judgment (the **"Dreyfus judgment"**), the Court maintained the *Dreyfus Motion*.

[4] Accordingly, the Court will address in this judgment, the issues raised for determination in each of the *Tusculum Motions*, under reserve of its conclusions in the *Dreyfus judgment* and solely for the benefit of the appellate courts, should the need arise.

[5] 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 *Tusculum Motions.*

[6] For ease of reading and comprehension in this judgment, the Court will replicate substantial portions of the Dreyfus judgment, dealing with the factual background, the expert evidence and the juridical sources relevant to a determination of the issues raised for determination in each of the two *Tusculum* Motions, with such modifications or additions as may be appropriate in the circumstances.

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II. BACKGROUND

[7] 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.

[8] 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.

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

[10] 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.

[11] 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.

[12] 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)

[13] 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).

[14] The Agreement is governed by, and construed in accordance with, New York law. It 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"**).

[15] 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 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]

[16] 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]

[17] 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.

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

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[18] 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 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]

[19] 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].*

[20] 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.

[21] 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].

[22] 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.

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[3] JS-8, p. 2.
[4] JS-10, para. 63(iv).
[5] JS-18, p. 1.

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

[24] 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].

[25] 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 shareholder relationship in Beta.

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

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

[28] 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

[6] JS-21.
[7] The *ICC Rules* were subsequently amended as and from January 1, 1998.
[8] JS-23.
[9] JS-46.

> 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)

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[29] 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].

[30] 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.

[31] 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

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

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 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**

[12] *Ibid,* p.144.
[13] JS-48, p. 236.
[14] *Ibid,* p. 252.
[15] JS-50, p. 168.

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> **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 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)

[32] 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.

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

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> 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.
>
> Questions 8 and 9: See Section C below.

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)

[33] 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.

[34] 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.

[35] 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.

[36] 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*"**). Dreyfus contended that the Tribunal: (i) improperly considered matters not submitted by either of the parties, (ii) created a remedy that neither party had requested, (iii) acted without prior notice to the parties and without giving them an opportunity to be heard and (iv) improperly and without consent of the parties assumed the role of *amiable compositeur.*

[37] Tusculum filed its *Memorial in Opposition to Dreyfus' Motion for Reconsideration* on March 8, 1996. It contended that Arbitration Award #1 was final and binding as to its decisional content and that as regards Sections VI and VII.B thereof, the Tribunal was *functus officio* to review, alter and reconsider these matters.

[38] During the March 15, 1996 hearing, John M. Dowd, one of the members of the Tribunal, acknowledged that the Tribunal never held a hearing on the application of the doctrine of frustration, on the possible remedy that might flow from the application of this doctrine, or on whether it should order a forced buyout and the formula it would apply in such event. Although, Mr. Dowd was a partially dissenting member of the Tribunal on Arbitration Award #1, nonetheless, his comments are not contradicted by the other members of the panel. Moreover, Mr. Katsky, one of Tusculum's counsel, acknowledged, in an exchange with Mr. Down during the March 15, 1996, hearing, that he was not given any notice that the Tribunal might apply the doctrine of frustration and fashion a remedy in the manner which it did.

[39] On March 21, 1996, by majority decision, Carey R. Ramos dissenting, the Tribunal granted, in part, the *Motion for Reconsideration* and issued an Order (the **"Order"**[18]) declaring, *inter alia*, that as regards Sections VI and VII.B of Arbitration Award #1 (the **"Valuation and Buyout remedy"**), these matters …*were not finally determined*.

[40] The Tribunal held:

> 4. The Tribunal has not been discharged and is has not determined finally the matters dealt with in Sections VI and VII (B) and (C) of the Partial Award. Subject to the challenge to its jurisdiction asserted by Dreyfus in the Canadian litigation, it has the power to review and, if appropriate, to alter, the matters dealt with in Section VI and VII(B) and (C).
>
> Therefore, the Tribunal rules as follows:

[18] J-17 **[**the **"Order"]**.

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> First, it has no jurisdiction to reconsider the jurisdictional questions raised by Dreyfus.
>
> Second, it has jurisdiction to reconsider the terms and conditions of the resolution of the relationship, unless and until the Canadian courts hold that the relationship of the parties fell outside of the jurisdiction conferred by the parties on the Tribunal.
>
> […]

[41] In a letter dated March 27, 1996, the Tribunal advised the parties that additional evidentiary hearing dates would be scheduled, during which witnesses could be called by each of the parties.

[42] In a letter dated March 31, 1996, Tusculum objected to the convening of additional evidentiary hearings for several reasons. It reiterated that the *Dreyfus Motion for the Partial Annulment* of *Arbitration Award #1* was still pending before this Court and should be first disposed of. Moreover, Tusculum argued that it intended to file its *Motion to Annul the Order* on the grounds that it was illegal and exceeded the jurisdiction of the Tribunal.

[43] On April 3, 1996, while still a fifty percent shareholder of Beta, Tusculum's German lawyer wrote to the attorney representing Hans van Weelden, Beta's neutral managing director, demanding payment by April 12, 1996, of DM 1.5 million in costs and legal fees awarded against Beta in favour of Tusculum in other legal proceedings initiated and, at the time, outstanding in Germany.

[44] Tusculum's German lawyer advised Beta's neutral managing director that he was obliged, by German law, to file for bankruptcy on grounds of insolvency, should Beta be unable to pay the amounts claimed by the April 12, 1996, deadline. Tusculum's lawyer specifically called Mr. van Weelden's attention to the section of the relevant German *Act on German Companies with Limited Liability*, under which a managing director is required to have a company file for bankruptcy in the event of insolvency, failing which the managing director himself becomes subject to personal criminal and civil liability.

[45] Following receipt of the April 3, 1996, demand letter from Tusculum's lawyer, on April 10, 1996, Mr. van Weelden petitioned the District Court of Wilhelmshaven to commence bankruptcy proceedings on behalf of Beta. He cited, as the basis for Beta's insolvency, its inability to reimburse Tusculum, the costs and legal fees demanded. The same day, the Court granted a preliminary bankruptcy order and appointed Edgar Grönda as Beta's interim receiver (the **"Receiver"**).

[46] The *Tusculum Motion for the Annulment of the Order* was filed in this Court on April 10, 1996. The following day, the Tribunal wrote to the parties stating that it would *…take no further steps in the Arbitration proceeding, pending a decision by the Canadian*

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courts… and that *… [t]he Tribunal would reconsider this position upon application by either party for good cause shown*.

[47] On April 30, 1996, the Wilhelmshaven District Court issued a definitive Order declaring Beta bankrupt and appointing Edgar Grönda as Beta's permanent Receiver.

[48] On June 3, 1996, Dreyfus filed a *Memorandum in Support of Dismissal of the Arbitration on the Grounds of Mootness*. Dreyfus argued, in particular, seeing the bankruptcy of Beta:

> The Tribunal's work is complete. The parties' claims have been decided. The divorce that the Tribunal recognized as salutary will be effected by German Law. The Tribunal should thus issue its final award (1) adopting the final portions of the January 31, 1998 Partial Award relating to the parties' claims; and (2) declaring that the non-final portions of the Partial Award, Sections VI, VII(B) and (C) are now moot.

[49] Tusculum opposed the Dreyfus request for dismissal. In a letter, dated June 3, 1996, Tusculum argued:

> …the bankruptcy filing by Beta, a non-party to this arbitration, will not eliminate the need for further proceedings by the Tribunal to discharge its responsibilities and to resolve the disputes between the parties to this arbitration.

[50] Tusculum reiterated its opposition to the Dreyfus request for dismissal in a subsequent letter, dated June 25, 1996, wherein they argued:

> …the Tribunal should not disband because it has continuing and significant obligations with respect to its mission.

[51] By letter dated June 26, 1996, the Chairman of the Tribunal advised that the Tribunal *…has decided to take no action at this time.*

[52] On January 23, 1997, following an auction process authorized by the German Court in which both Tusculum and Dreyfus participated, on the recommendation of Beta's Receiver in bankruptcy, the Creditors' Committee voted unanimously in favour of a bid made by Dreyfus to acquire the assets of Beta and instructed the Receiver to conclude an agreement with Dreyfus by February 7, 1997, for the acquisition.

[53] On February 7, 1997, Dreyfus filed its *Memorial Regarding Termination of the Arbitral Proceedings* with the Tribunal. It asked the Tribunal to consider the effect of the German bankruptcy proceedings on the Valuation and Buyout Remedy contained in Arbitration Award #1. It argued, in particular, that because of the German Bankruptcy proceedings:

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- Sections VI and VII.B and VII.C of Arbitration Award #1 had been rendered moot;

- the judgment of the Wilhelmshaven District Court would effect the valuation and disposition of all of Beta's assets; and that consequently

- it would result in the termination of Beta as a legal entity and the termination of the parties' relationship as shareholders of Beta.

[54] Dreyfus concluded that, for these reasons, the Tribunal was without jurisdiction to review or revise the judgments of the German Court.

[55] As previously authorized by the Creditors' Committee of Beta and the German Court, on February 20, 1997, Beta's Receiver accepted the bid of EFS Raffineriegesellschaft Wilhelmshaven mbH, a subsidiary of Dreyfus, and entered into an agreement selling all of Beta's assets to it.

[56] Thereafter, all proceeds from the sale and subsequent liquidation of Beta's estate were distributed in accordance with the list of allowed claims prepared by the Receiver. No assets or proceeds remained available for distribution to either shareholder of Beta. Beta thus became defunct and was subsequently struck from the commercial register, ending its existence as a legal entity.

[57] On February 21, 1997, the Tribunal issued *Procedural Order No. 5,* in which it convened the parties to a hearing to be held on April 2, 1997, to consider questions of its ongoing jurisdiction. It requested memorials from each of the parties dealing with the questions raised.

[58] Memorials were filed on behalf of each of the parties on March 21, 1997. Dreyfus argued, seeing the bankruptcy of Beta and the subsequent sale of all of its assets:

> For all practical purposes, there are no assets for the Tribunal to distribute or award that could be the subject of any "relief" by the Tribunal.
>
> […]
>
> The Tribunal does not have jurisdiction to consider "claims" arising in 1996 and it lacks the power to distribute Beta's assets. Its mission is now at an end. The Tribunal should dismiss all remaining issues as moot and enter a final award terminating this arbitration.

[59] Tusculum argued,*:*

(i) *…[T]he Tribunal has jurisdiction to consider the conduct of the parties subsequent to the issuance of the Partial Award*; and

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(ii) *…[T]he very language of the stay shows that the Tribunal considers its jurisdiction to cover post-Partial Award conduct of the parties.*

[60] On May 29, 1997, by majority decision, Carey R. Ramos dissenting, the Tribunal issued a second award, which it referred to as a "Final Award" (**"Arbitration Award #2"**[19]). It determined that Sections VI and VII.B and VII.C of Arbitration Award #1 were non-final and further that the effect of the German bankruptcy proceeding was as follows:

> Since all of Beta's assets have been sold and the proceeds will be completely distributed to creditors, it has become a mere shell without any assets. Therefore, "Beta after the forthcoming final distribution, will … no longer have any assets and will in due course be struck from the commercial register, and, thus, end its corporate life as a legal entity". Exhibit D to Dreyfus 21 March 1997 Memorial, Memorandum of Dr. Manfred Balz, p. 1
>
> […]
>
> The German bankruptcy proceeding has achieved the objective of the non-final portion of the Partial Award—termination of the relationship between the parties. To do so, a value was established pursuant to German law for Beta's assets. Because the allowed claims against Beta exceed the proceeds from the sale of its assets, Dreyfus and Tusculum will receive a distribution only as creditors and will receive nothing as shareholders. However, their relationship as shareholders will terminate by operation of German law after the bankruptcy proceeding has been concluded. [20]
>
> (internal citations omitted)

[61] In Section IV (The Award), the Tribunal concluded:

> 1. The German bankruptcy system has accomplished what the non-final portion of the Partial Award was designed to do; it has set in motion a train of events that, under German law, will terminate the relationship of the parties. Thus, the action of the courts of a sovereign government has done what the Tribunal would have done in the absence of the events subsequent to 31 January 1996 outlined in Part I above. These governmental acts have in effect mooted the relief that the non-final portion of the Partial Award provided. The Tribunal does not have any jurisdiction to review the actions of the German courts.
>
> […]

[19] J-56 **["Arbitration Award #2"]**.
[20] *Ibid,* p. 14.

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> 3. It is, therefore, the decision of the Tribunal that it cannot and will not implement the valuation procedure as requested by Tusculum.[21]
>
> (internal citations omitted)

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[62] The *Tusculum Motion for the Partial Annulment of Arbitration Award #2* was filed with this Court on September 8, 1997.

[63] Tusculum was declared bankrupt on October 23, 1997. Ronald W. de Ruuk (**"Mr. de Ruuk"**), one of the Petitioners in Continuation of Suit, was appointed sole administrator and representative of the bankrupt estate of Tusculum, seized with the capacity and interest to exercise all of its rights of action before the courts on behalf of the estate.

[64] On February 13, 1998, Mr. de Ruuk signed, on behalf of Tusculum, a document entitled Transfer of Benefit of Claims (**"Transfer of Benefit"**), effective as of October 21, 1997.

[65] On April 21, 1998, following the Transfer of Benefit, Mr. de Ruuk and Bulk Oil Group Limited (**"Bulk Oil Group"**), the other Petitioner in Continuance of Suit, filed a joint *Appearance in Continuance of Suit*.

[66] Dreyfus contends that Bulk Oil Group has neither the requisite standing nor sufficient personal and direct interest to become a party to the present proceedings. It argues that the *Appearance in Continuance of Suit,* filed on behalf of Bulk Oil Group, should be struck from the record and that only Mr. de Ruuk, in his capacity as sole administrator and representative of Tusculum, be allowed to continue suit.

[67] However, under reserve of its objections and for the purposes of these proceedings only, as mentioned in a letter dated February 13, 2008, referred to in Section V (C) of this judgment, Dreyfus waives any arguments which it may have with respect to the standing of Bulk Oil Group.

III. ISSUES

[68] The principal issues raised for determination in the *Tusculum Motions* are described below. For reasons which will be explained in Section VIII (Analysis) of this judgment, a coherent analysis and determination of these issues requires their consideration in the following order:

(A) With Respect to the *Tusculum Motion for the Partial Annulment of Arbitration Award #2:*

  (i) Did the Tribunal have jurisdiction to render Arbitration Award #2?

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[21] *Ibid,* p. 15 & 16.

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(ii) Referring to the Terms of Reference, what is the significance of the wording and what was the intention of the parties in providing *"…the Tribunal shall decide all issues of jurisdiction…"* (Section VII, p. 51) ?

(iii) Did the Bankruptcy Order regarding Beta render moot the Valuation and Buyout Remedy contained in Sections VI and VII.B of Arbitration Award #1, thus justifying the issuance of Arbitration Award #2 by the Tribunal?

(iv) Was the determination, in Arbitration Award #2, that it was no longer appropriate to implement the Valuation and Buyout Remedy described in Arbitration Award #1, a determination involving the merits of the dispute and, accordingly, one into which this Court cannot enquire?

(v) Has Tusculum discharged its burden of proving appropriate grounds for the annulment of Arbitration Award #2? and

(vi) Under reserve of the foregoing, do Tusculum's actions subsequent to the issuance of the Order constitute an express or implied authority to the Tribunal to address the new circumstances arising from the bankruptcy of Beta, thereby precluded it from seeking the annulment of Arbitration Award #2?

(B) With Respect to the *Tusculum Motion for the Annulment of the Order:*

(i) Assuming the Tribunal had jurisdiction to fashion the Valuation and Buyout Remedy and thereby issue the conclusions found in Sections VI and VII.B of Arbitration Award #1, was it, to the extent of such conclusions, a "final award" within the meaning of Article 32(2) of the *UNCITRAL Model Law on International Commercial Arbitration*[22]?

(ii) Accordingly, did the Tribunal become *functus officio* upon rendering Arbitration Award #1, save for the matters expressly reserved therein?

(iii) Do the determinations and the decisions contained in Sections VI and VII.B of Arbitration Award #1 have the authority of *res judicata*?

(iv) Or, alternatively, did the Tribunal reserve jurisdiction with respect to the conclusions dealt with in Sections VI and VII.B of Arbitration Award #1, thereby allowing it to issue the Order?

(v) Was the Tribunal competent to decide issues of jurisdiction? In so doing, did it err in determining, in the Order, that it had jurisdiction to re-consider

[22] U.N. Doc. A/40/17 (1985), **[**the **"*UNCITRAL Model Law*"]**.

such conclusions in the same proceedings? Does this error give rise to judicial intervention?

(vi) Referring to the Terms of Reference, what is the significance of the wording and what was the intention of the parties in providing *"…the Tribunal shall decide all issues of jurisdiction…"* (Section VII, p. 51)? and

(vii) Has Tusculum discharged its burden of proving appropriate grounds for the annulment of the Order?

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IV. POSITIONS OF THE PARTIES

(A) Tusculum

(i) With Respect to the *Tusculum Motion for the Partial Annulment of Arbitration Award #2*

[69] Tusculum, asserts in its *Motion*:

> 36. Notwithstanding that in sections VI and Vllb) of Award #1 the Tribunal had established and ordered implemented a specific valuation procedure for the transfer price of Petitioner's interest in Beta as part of the Valuation and Buyout Remedy, described in paragraphs 6 and 7 hereof, the Tribunal subsequently refused to apply the Valuation and Buyout Remedy, […]
>
> 37. Thus, the Tribunal erred regarding its jurisdiction in two separate respects: (1) the Tribunal acted "*functus officio*" when it abrogated and refused to implement the Valuation and Buyout Remedy contained in Award #1 and (2) the Tribunal misconstrued its own jurisdiction when it held in Award #2 that it "cannot . . . implement the valuation procedure as requested by Tusculum";
>
> 38. In this regard and in the context of Beta's bankruptcy proceedings in Germany, a subsidiary of Respondent purchased Beta's assets through the bankruptcy for a price of approximately US $60 million, as is evidenced in Award #2 and as previously explained above in paragraph 29;
>
> 39. The said amount of US $60 million was far below the expert evidence submitted to the Tribunal by both Petitioner and Respondent hereto, the Respondent itself having valued the Refinery at US $ 160 million and the other valuations of the Refinery referred to in Award #1 being for approximately US $ 300 million or in excess thereof;

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40. Moreover, Award #1 stipulated that the fair market value was to be estimated as between a willing buyer and a willing seller, neither being under any compulsion to act, such criteria being non existent in the bankruptcy sale to Respondent's subsidiary which purchased Beta's assets;

41. And yet, notwithstanding the foregoing, the Tribunal in its Award #2 considered the effects and potential effects of the subsequent German bankruptcy so as to conclude that it would not implement the Valuation and Buyout Remedy in sections VI and VIIb) of Award #1;

42. However, after having established and ordered implemented, in sections VI and VIIb) of Award #1, the Valuation and Buyout Remedy, the Tribunal was "*functus officio*" and had no jurisdiction to nullify and to refuse to implement, as it did, the Award #1 Valuation and Buyout Remedy;

43. Indeed, notwithstanding that it was entitled a Partial Award, Award #1 rendered by the Tribunal on January 31, 1996 […], was final and binding as to its decisional content, inclusive of Sections VI and VII(B), wherein the Tribunal established and ordered implemented the Valuation and Buyout Remedy;

44. In accordance with the ICC Rules of Arbitration, Award #1 […] was submitted to the International Court of Arbitration of the ICC, which approved Award #1 at its session of January 25, 1996 […];

45. The fact that the Tribunal reserved unto itself a supervisory role as to the application of the valuation procedure set forth in Award #1, did not render any less final Award #1 as to all matters decided therein, …;

[…]

46. As a consequence, by deciding in Award #2 not to implement the Valuation and Buyout Remedy it had established and ordered implemented in Award #1, the Tribunal both disregarded the applicable arbitration procedure, according to which Award #1 was final as to all matters decided therein, and, further, exceeded its jurisdiction, being "*functus officio*" to render null and of no effect a remedy which was final and binding as set forth in Award #1;

47. It is further evident from Award #2 […] that the Tribunal did not simply attempt to complete, its mission of finalizing the evaluation of quantum in accordance with the determined method but, rather, considered itself empowered to refuse to implement the method which it had established in Award #1, whereas it was "*functus officio*" to do so. Moreover, contrary to its conclusion in Award #2, the Tribunal had jurisdiction to implement the Valuation and Buyout Remedy but failed to exercise that jurisdiction;

48. The Tribunal's Award #2 […] is not only contrary to generally recognized principles of international commercial arbitration, as established in the Quebec Code of Civil Procedure and in the ICC Rules of Arbitration, but Award #2 is tantamount to the Tribunal sitting in Appeal of Award #1, which it is "*functus officio*" and without jurisdiction to do;

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(ii) With Respect to the *Tusculum Motion for the Annulment of the Order*

[70] Tusculum asserts in its *Motion*:

19. The Award rendered by the Tribunal on January 31, 1996 […] is final and binding as to its decisional content, inclusive of Sections VI and VII(B), notwithstanding that it is a partial award.

20. The Tribunal was authorized not only by customary practice in international commercial arbitration but also specifically by the parties at Section XI of the Terms of Reference […], to issue partial awards for the purposes of concluding substantive issues between the parties, which it accordingly decided to do.

21. In accordance with the ICC Rules of Arbitration, the Award […] was submitted to the International Court of Arbitration of the ICC, which approved same at its session of January 25, 1996, […]

22. The fact that the Tribunal reserved unto itself a supervisory role as to the valuation program for damages, which would give rise to a final determination of the fair market value of Beta through a procedure established in the Award, does not render any less final the Award as to all matters decided therein, […].

23. The Order of the Tribunal […] as regards Sections VI and VII(B) extends beyond the jurisdiction of the Tribunal, the latter being "*functus officio*" to review, alter and reconsider matters which are final and binding as set forth in the Award […].

24. It is evident from the Order […] and the subsequent correspondence from the Chairman of the Tribunal […] that the Tribunal intends to go beyond the express provisions of the Award, which it is "*functus officio*" to do; in addition, even if it could make simple corrections in clerical errors, interpretations of ambiguous wording or decisions on issues omitted in the Award, it is clear that the Tribunal does not intend to restrict itself to such simple gestures in this case.

25. It is further evident from the Order […] and the subsequent correspondence […] that the Tribunal is not simply attempting to

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complete its mission of finalizing the evaluation of quantum in accordance with the determined method but, in addition, considers itself empowered to even reconsider, alter and modify the method which it established, whereas it is "*functus officio*" to do so.

26. The Tribunal, in its majority decision supporting the Order, has erred as to its jurisdiction by concluding, for all intents and purposes, that a "Partial Award" is not final and binding so long as a "Final Award" is contemplated, the whole contrary to the intentions of the parties as expressed in the Terms of Reference and, as well, to recognized principles of international commercial arbitration, including those expressed in the UNCITRAL Rules of Arbitration.

27. The said Order of the Tribunal […] is not only contrary to generally recognized principles of international commercial arbitration as established in the Quebec Code of Civil Procedure, in the ICC Rules of Arbitration and in the UNCITRAL Rules of Arbitration, but it is tantamount to the Tribunal sitting in Appeal of its own award, which it is "*functus officio*" to do.

(B) Dreyfus

(i) With Respect to the *Tusculum Motion for the Partial Annulment of Arbitration Award #2*

[71] Dreyfus, asserts in its *Amended Plea*:

147. In its Motion for Annulment of Final Award filed on 8 September 1997, Tusculum seeks the annulment of the Final Award dated 29 May 1997 on the grounds that the Tribunal was *functus officio* once the Partial Award had been rendered and that it thereby exceeded its jurisdiction and disregarded the applicable procedure by issuing the Final Award.

148. Tusculum's said Motion must be dismissed because it constitutes an impermissible attempt to enquire into the merits of the dispute before the Tribunal. Article 946.2 CCP, together with Article 947.2 CCP, provide that the Court may not enquire into the merits of the dispute when examining a matter for homologation or annulment. Because it seeks review of the merits of the dispute, Tusculum's said Motion improperly invades the exclusive province of the Tribunal and must be dismissed by this Honourable Court.

149. The burden of proving that the award as a whole, in its disposition of the case, violates enumerated and explicit grounds contemplated under Article 946.4 CCP, rests entirely with Tusculum.

150. Except for the allegation that "the applicable arbitration procedure was not observed", none of the grounds enumerated and relied upon by Tusculum

to request annulment of the Final Award fall within the specific and narrow grounds which the legislature has identified for annulment of arbitral awards.

151. Contrary to Tusculum's allegations, the Tribunal followed the "applicable arbitration procedure" in rendering the Final Award. It fully observed the ICC Rules, the Terms of Reference, and any mandatory provisions of any applicable law.

152. The form, content and delivery of the Final Award were consistent with the applicable arbitration procedure, including international commercial arbitration practice, principles and usage, particularly those relating to the ICC arbitration proceedings. The Final Award was submitted in draft form to the ICC Court for scrutiny. In approving the Final Award, the ICC Court plainly viewed it as consistent with the ICC Rules, the Terms of Reference, and any mandatory provisions of any applicable law.

153. In the Final Award, the Tribunal determined that Sections VI and VII(B) and (C) of the Partial Award were non-final. The Tribunal's decisions in the Final Award relating to its own Partial Award is a question pertaining to the merits of the dispute before the Tribunal and cannot be subject to annulment under the CCP. ICC arbitration procedure leaves it to the Tribunal to determine the questions concerning whether, or which parts of, a partial award are final or non-final. Under New York and other applicable law, the finality of an award relates to the merits of the dispute.

154. Although unreviewable by this Honourable Court, the Tribunal's determination that portions of the Partial Award dealing with the valuation and buy-out procedure were non-final was correct. These matters of procedure, as set forth in Sections VI and VII (B) and (C) of the Partial Award, were directions and not binding decisions. There was no final determination in respect of these issues.

155. Under the ICC Rules, a tribunal is free to revisit or reconsider any of its procedural or other directions, and indeed, it must do so if there are new circumstances or developments including new pleadings of the parties.

156. […]

157. […]

158. Moreover, in the Final Award, the Tribunal did not re-determine any issue already finally decided by the Partial Award. Instead, it addressed new and different issues that had arisen after issuance of the Partial Award, notably the effect of the German bankruptcy proceedings and decisions of the German bankruptcy court on Sections VI and VII(B) and (C) of the Partial Award.

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159. In considering the effect of these subsequent events, the Tribunal determined that the German bankruptcy proceedings … achieved the objective of the non-final portion of the Partial Award—termination of the relationship between the parties. Further, it determined that "the action of the courts of a sovereign government has done what the Tribunal would have done in the absence of the events subsequent to 31 January 1996…". The Tribunal also determined that "these governmental acts have in effect mooted the relief that the non-final portions of the Partial Award provided." Finally, it determined that "the Tribunal does not have jurisdiction to review the actions of the German courts." […]

160. […]

161. Contrary to Tusculum's allegations, the Tribunal was not precluded by the doctrine of *functus officio* from issuing the Final Award. Under New York and other applicable law, the doctrine of *functus officio* is of doubtful, or at least reduced, applicability when the issue is the proper scope of the future decision-making of a properly constituted and continuously functioning arbitral tribunal following up on its rendering of a Partial Award. […]

162. […]

163. […]

164. As already discussed, even where it applies, the doctrine of *functus officio* does not prevent an arbitrator from issuing necessary clarifications or addressing, *inter alia*, contingencies that later arise. The doctrine is customarily applied with flexibility in international arbitrations. The bankruptcy was a supervening event that had not been foreseen, and the Tribunal was required to consider its effect on the valuation and buy-out procedure and the fulfillment of the objective underlying the non-final portions of the Partial Award.

165. Moreover, Tusculum consented to the Tribunal determining the impact of the bankruptcy and post-Partial Award conduct on the relevant portions of the Partial Award. […]

166. By its conduct, Tusculum waived any objection to the Final Award and is estopped under New York and other applicable law from seeking to annul it.

167. […]

168. Furthermore, the Tribunal's determination that the valuation and buy-out procedure of the Partial Award had been rendered moot by the actions of the German bankruptcy law was clearly correct. […]

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169. The result was that Beta had no assets to appraise, sell or transfer. Furthermore, Beta's shares had no value, and Beta itself did not exist. The parties' relationship as shareholders in Beta was terminated by operation of law. Any decision of the Tribunal relating to the liquidation and/or winding up of Beta could simply not be enforced or carried out, given that Beta had no assets and was no longer in existence.

170. Indeed, in the Final Award, the Tribunal determined that the relationship between the parties "will terminate by operation of German law after the bankruptcy proceedings have been concluded" and, furthermore, "the Tribunal does not have any jurisdiction to review the actions of the German courts" […]

171. […]

172. Although the foregoing reasons are sufficient to require dismissal or denial of Tusculum's Motion for Annulment of the Final Award, Tusculum's other conduct would require the same result.

173. Tusculum was a full participant in the bankruptcy auction. It availed itself of a fair opportunity to obtain value for its interest in the Refinery by submitting a bid through its affiliate. In so doing, Tusculum renounced its rights with regard to its proceedings instituted before this Honourable Court relating to the annulment of the Order and the Final Award.

(iii) With Respect to the *Tusculum Motion for the Annulment of the Order*

[72] Dreyfus asserts in its *Amended Plea*:

127. As a preliminary matter, Tusculum's Motion for Annulment of Order must be dismissed because it improperly seeks the annulment of a procedural order. Articles 947 to 947.4 of the Quebec *Code of Civil Procedure* (the "**CCP**"), which Tusculum alleges is the statutory basis for its said Motion, allow only motions to annul arbitration awards. A procedural order, on the other hand, cannot be the subject of either homologation or annulment proceedings under the CCP. Respondent therefore reserves the right to have Tusculum's Motion for Annulment of Order dismissed on preliminary grounds.

128. The Order is clearly a procedural order, not an arbitration award….

[…]

130. An arbitrator's expression of views concerning the arbitrator's own prior interim ruling, when such views are expressed in the context of providing directions to the parties in a procedural order that will lead to a final award, is in accord with custom and practice in international arbitration

and is not understood as constituting an award and a final determination of the merits of the dispute.

131. Furthermore, the Order was not treated as an award under the ICC Rules. […] Because it was a procedural order, the Order was not submitted to the ICC Court for scrutiny, and the ICC Secretariat did not notify the parties of the Order.

132. […]

133. In sum, because the Order is a procedural order, and not an arbitration award, this Court cannot review the Tribunal's actions in issuing the Order, and Tusculum may not make the Order the subject of a motion for annulment under Articles 947 to 947.4 of the CCP.

134. Even if the CCP permitted a motion to annul a procedural order, Tusculum's said Motion must be denied.

135. Contrary to Tusculum's contention, the Tribunal was not precluded by the doctrine of *functus officio* from issuing the Order. As of 21 March 1996, the Tribunal had not fulfilled its function and had not been discharged. Rather, it remained in existence, having issued only a Partial Award. […]

136. In addition, the Tribunal expressly reserved its jurisdiction with respect to Sections VI and VII (B) and (C) of the Partial Award, as it was entitled to do. Both "the parties and/or the experts" could, under Section VII (B) (3) of the Partial Award, seek the views of the Tribunal with respect to "any questions which arise in connection with" the valuation and buy-out procedure […].

137. Even if the doctrine of *functus officio* were relevant here, under New York and other applicable law, the doctrine contains several exceptions, including the right of an arbitrator to clarify an award that fails to address,

inter alia, a contingency that later arises. This is consistent with custom and practice in international arbitration.

138. In all events, the doctrine of *functus officio* must be applied with flexibility in the context of international arbitration proceedings, and the Tribunal was entirely justified and empowered to act as it did.

139. The Tribunal's authority to issue the Order is further supported by the broad powers regarding matters of procedure that the parties conferred on it in the Terms of Reference. […]

140. As stated above, the Terms of Reference provided that "[t]he Arbitral Tribunal shall determine the procedure to be followed in this arbitration, subject to mandatory provisions of any applicable law and of January 1,

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1988 ICC Rules of Conciliation and Arbitration." Granting such broad powers to arbitrators to determine matters of procedure is customary in international arbitration, and particularly in ICC arbitrations.

141. In issuing the Order, the Tribunal did not contravene the ICC Rules, the Terms of Reference or any mandatory provisions of any applicable law but, on the contrary, acted within the spirit of those rules and in accordance with general international arbitration custom and practice.

142. In any event, by its conduct, Tusculum waived its challenge to the Order when it failed to diligently pursue its Motion for Annulment of Order. […]

143. Accordingly, […], on 25 June 1996, Tusculum again wrote to the Tribunal […] asking it not dissolve itself before a ruling from the Canadian court because termination of the arbitration proceedings "would deny Tusculum the chance to meaningful relief in the Canadian courts".

144. Again, rather than prosecuting its Motion for Annulment of Order promptly in this Court, Tusculum attempted instead to obtain Beta's Refinery for itself by placing a bid in the bankruptcy auction (*see* paragraph 112 above). By its failure promptly to pursue its objection to the Order with this Court and by its election to seek alternative relief in the German bankruptcy process, Tusculum has waived its challenge to the Order.

145. The Order was, moreover, superseded by and merged into the Final Award and, even if the CCP permitted the annulment of a procedural order, which it does not, the Order would no longer be the proper subject of annulment proceedings.

V. ADMISSIONS AND STIPULATIONS

(A) Exhibits

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

[74] 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 of hearing.

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(B) Sources

[75] *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

[76] 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.

[77] At the request of the parties, the full text of the letter has been incorporated in the present judgment.

VI. EXPERT EVIDENCE

[78] 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.

[79] 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.

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

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(A) Tusculum

[81] 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"**) 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"**)

(B) Dreyfus

[82] 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"**) Feb. 16, 2007 (the **"Gaillard Report #2"**)
(ii)	Eric Schwartz (**"Schwartz"**);	Nov. 22, 2005 (the **"Schwartz Report"**) Feb. 16, 2007 (the **"Schwartz Report #2"**)
(iii)	William Lawrence Craig (**"Craig"**)	Nov. 23, 2005 (the **"Craig Report"**) Feb. 16, 2007 (the **"Craig Report #2"**)

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

[83] 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*[23]; (E) the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*[24] and (F) the *UNCITRAL Model Law* and other sources referred to in Article 940.6 *C.C.P*.

(A) The Arbitration Agreement

[84] 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)

[85] 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

[86] 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 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:

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[23] [***"C.C.P."***].
[24] 330 U.N.T.S. 3, [the **"*New York Convention*"**].

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?
>
> 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

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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;

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?

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?

(C) The (1988) ICC Rules

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

Article 11 – Rules Governing the Proceedings

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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.

(D) Code of Civil Procedure of Québec

[88] 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

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(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.

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.

[…]

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> **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.

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(E) The New York Convention

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

[90] 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*[25], 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[26] 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 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,

[25] [2007] S.C.C. 34, para. 38ff. **["Dell"]**.
[26] Lord Mustill was qualified and heard as an expert witness on behalf of Tusculum in these proceedings.

"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 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

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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.

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(F) <u>The UNCITRAL Model Law and other sources referred to in Article 940.6 C.C.P.</u>

[91] The following provisions of the *UNCITRAL Model Law* should be given …*considerable interpretive weight…*[27] 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.
>
> (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:

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

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(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.

VIII. ANALYSIS

[92] Seeing the Court's rulings in the Dreyfus judgment, effecting the partial annulment of Arbitration Award #1 and, in particular, considering the Court's annulment of the Valuation and Buyout Remedy imposed therein, both the Order and Arbitration Award #2 become moot. Accordingly, both the *Tusculum Motion for the Annulment of the Order* and the *Tusculum Motion for the Partial Annulment of Arbitration Award #2* must be dismissed for lack of object. However, as previously mentioned, the Court will nonetheless address the issues raised for determination in each of the two *Tusculum Motions* under reserve of the foregoing and solely for the benefit of the appellate courts, should the need arise.

[93] Also, as previously mentioned, a coherent analysis and disposition of the various issues raised for determination in each of the two *Tusculum Motions,* requires their consideration in the following order:

(i) the *Tusculum Motion for the Partial Annulment of Arbitration Award #2*; and

(ii) the *Tusculum Motion for the Annulment of the Order.*

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(A) Tusculum Motion for the Partial Annulment of Arbitration Award #2

1. Certain Fundamental Principles

[94] The competence of the Tribunal, the scope of its mandate and the extent to which the Court may intervene in annulling Arbitration Award # 2 must be analyzed in light of certain fundamental principles retained by the jurisprudence and by other recognized authorities.

[95] In a seminal decision of the Supreme Court of Canada rendered in *Desputeaux* v. *Éditions Chouette*[28], regarding these and other related issues, Lebel J. addressed the subject in the following manner:

> 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.

[96] 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 Pre and Post hearing memoranda filed on behalf each of them.

[97] 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.

[98] In *Desputeaux*[29], the Lebel, J. wrote:

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[28] [2003] 1 S.C.R. 178, para. 22 **["*Desputeaux*"]**.
[29] *Desputeaux, supra*, para. 67 & 69.

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> 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 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)

[99] Although in some earlier decisions rendered prior to *Desputeaux,* there have been conflicting views expressed regarding the limits of judicial intervention in cases 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 contested arbitration award is 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*[30]*.* These grounds must be narrowly construed[31] and cannot be assimilated with those available on an application for judicial review of an administrative tribunal pursuant to articles 33 and 846 *C.C.P.*

[100] Moreover, it is not disputed that decisions of international arbitral tribunals are presumed valid. They must be accorded a high degree of deference[32]. The onus of proving that they should be annulled rests on the party seeking annulment.

[101] 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*[33], 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 pro**vided" in this Law. By this language, article 5 is intended to exclude any so called general, supervisory or residual powers of intervention of national courts. There are now several Canadian cases confirming that the federal and provincial equivalents of art. 5 have precisely that effect[1].
>
> (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.

[102] Finally, it is now settled law that on applications for homologation or annulment of arbitral awards, the Court cannot enquire into the merits of the dispute[34].

[103] The Court must now determine whether, in the context of these fundamental principles, the grounds alleged by Tusculum for the partial annulment of Arbitration Award #2 are sufficient to warrant its intervention.

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[30] Gaillard Report, para. 48ff; Craig Report #2, para. 36.
[31] *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.), **["*Corporacion 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.).
[32] *Corporacion Transnacional de Inversiones*, *supra*, p. 6.
[33] (2001) 80 Can. Bar Rev., 143, 144.
[34] Art. 946.2 *C.C.P.*

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2. Application of Fundamental Principles

[104] What then are the grounds identified in the *Tusculum Motion for the Partial Annulment of Arbitration Award #2* and upon which it relies in seeking the annulment of Arbitration Award # 2?

[105] Tusculum relies upon the grounds included in three of the exceptions to the general rule prohibiting the Court from refusing homologation, enunciated in Articles 946.4 (4) & (5) and 946.5 *C.C.P.* and made applicable to an application for annulment by operation of the provisions of Article 947.2 *C.C.P.* The Court will examine, in sequence, each of the three exceptions as they apply to the present proceedings.

(i) Article 946.4 (4) *C.C.P.*

> 946.4 The court cannot refuse homologation except on proof that:
>
> […]
>
> (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;**
>
> (our emphasis)

[106] In the present proceedings, as in *Desputeaux,* the terms of reference were not defined solely by a single document or agreement. Rather, the primary source of its competence is found in the Arbitration Clause forming part of the Agreement (Section 13), as delineated and defined by the content of the Terms of Reference and any other matters agreed to by the parties and communicated to the Tribunal.

[107] Section 13 of the Agreement stipulates:

> …**Any dispute 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)

[108] Section 13 reflects the intention of the parties and their broad consent to submit to arbitration the resolution of *…(a)ny dispute with respect to the interpretation of this Agreement or claims for damages for breach of this Agreement.*

[109] In Section VII of the Terms of Reference, the parties substantially expanded the scope of the matters which they agreed to arbitrate. There can be no doubt as to their

intentions with respect to the far reaching scope of the mandate given by the parties to the Tribunal.

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VII. Statement of the issues to be Determined

The Arbitral shall decide all issues of jurisdiction, if any, and all issues of merits arising from the Terms of Reference herein and from the pleadings property 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?

    a. In particular, did the parties ever enter into any unincorporated joint venture to process oil at the Beta Refinery; and

    b. Did Claimant and Defendant participate in a joint venture to purchase crude oil, process it at the Beta Refinery, market the refined products, and trade and hedge crude and products positions?

    c. If a joint venture existed between the parties and was terminated, to what relief, if any, is either party entitled arising out of or relating to such termination?

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 paragraph 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 beaches, 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?

    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 subparagraph 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 defence 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;

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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 subparagraph 4(b) and 4(c), is Claimant entitled to any other relief or is Defendant entitled to dismissal of Claimant's claims?

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 favour?

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?

[110] Although the parties could have chosen to limit the scope of the mandate granted to the Tribunal, they chose not to. In *Desputeaux,* Lebel, J. noted:

> The parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of an arbitration proceeding[35].

[111] Moreover, again in *Desputeaux,* Lebel, J. noted:

> The arbitrator's mandate must not be interpreted restrictively by limiting it to what is expressly set out in the arbitration agreement. The mandate also includes everything that is closely connected with that agreement, or, in other words, questions that have [TRANSLATION] "a connection with the question to be disposed of by the arbitrators with the dispute submitted to them" (S. Thuilleaux, *L'arbitrage commercial au Québec: droit interne — droit international privé* (1991), at p. 115). Since the 1986 arbitration reforms, the scope of arbitration agreements has been interpreted liberally (N. N. Antaki, *Le règlement amiable des litiges* (1998), at p. 103; *Guns N'Roses Missouri Storm Inc. v. Productions Musicales Donald K. Donald Inc.*, [1994] R.J.Q. 1183 (C.A.), at pp. 1185-86, *per* Rothman J.A.)[36].

[112] With respect to the scope of the Tribunal's mandate, the Court agrees with, and adopts by reference the views expressed in *Respondent's (Dreyfus) Post-Hearing Plan of Argument* at page 44 and following:

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[35] *Desputeaux*, s*upra,* para.22.
[36] *Ibid*, para.35.

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115. The Terms of Reference expressly confer authority to decide "all issues of jurisdiction" and "all issues of merits" arising from the Terms themselves, as well as from the "pleadings properly filed by the parties under the directions [sic] of the Tribunal…" (*Id.*) As Professor Gaillard noted, the parties' consent to arbitrate was extremely broad. (*See, e.g.*, April 9 Tr. 52 (Testimony of E. Gaillard) (characterizing the Terms of Reference as the parties basically telling the Tribunal, "You decide anything which comes before you.").)

116. The arbitration agreement, read in conjunction with the Terms of Reference, requires the dismissal of Tusculum's motion under Article 946.4(4). The effect of the German bankruptcy proceedings on the valuation and share transfer program of the Partial Award, and the related application of the doctrine of *res judicata*, were "issues of merits" within the meaning of Section VII of the Terms of Reference. Furthermore, they were issues "arising from the Terms of Reference," certainly to no lesser extent than was the question of frustration of the Shareholders' Agreement and the remedial procedure crafted by the Arbitral Tribunal to separate the parties in Section VI and VII(B).[37]

117. Indeed, in the Partial Award the Arbitral Tribunal held that the parties had consented to submit to the Tribunal their entire relationship and every associated dispute. In the Arbitral Tribunal's words, "The Tribunal concludes that 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 the remedy requested fell within the ambit of Section 13 of the Agreement." (J-4, pp. 20-21, JBE I, pp. 115-16.) (…)

[…]

118. Tusculum has not challenged these findings of the parties' consent to arbitral jurisdiction over their entire relationship or the Tribunal's authority to award whatever relief, if any, it might deem appropriate. *See* note 37, *supra*.

119. Moreover, the question of the effect of the German bankruptcy proceedings on the valuation and transfer procedure was an issue of merits arising "from pleadings properly filed by the parties under the directions [sic] of the Tribunal," as provided in the Terms of Reference. (J-2, p. 33, JBE I, p. 51.) In January 1997 Tusculum moved the Tribunal to modify and then implement the valuation and share transfer procedure of the Partial Award as so modified. (*Compare* J-44, JBE V, pp. 905-21; J-50, JBE V, pp. 1007-40; J-54, p. 5, JBE VI, p. 1173 ("The *measurement* of the value of these shares can still be made by conducting an appraisal of the assets Beta had at all times from the commencement of this arbitration through the issuance of the Partial Award—which included the refinery assets." (emphasis in original) *with* Partial Award, J-

[37] [Internal footnote quoted] For the purpose of Tusculum's present motions, it must be assumed that the Arbitral Tribunal had the authority to decide the matters in Sections VI and VII (B) of the Partial Award, notwithstanding Dreyfus's Motion for the Partial Annulment of the Partial Award. *See* para. 8, *supra*. Dreyfus's arguments are subject to that motion.

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> 4, p. 46, JBE I, p. 141 ("the *current* fair market value of Beta" (emphasis supplied); *id.* at 47, JBE I, p. 142 (same, two references); *id.* at 49, JBE I, p. 144 (same).) The modifications requested by Tusculum were designed to take into account the bankruptcy proceedings and the sale of the Refinery. As previously explained, Tusculum asked the Arbitral Tribunal to change the date on which the value assets would be measured from the "current" fair market value at the time of the appraisal to, instead, the value in November 1993 or, alternatively, January 1996. (J-55, pp. 11462-63, JBE VI, p. 1226 (Argument of Tusculum's counsel).) It also asked that the identity of the assets to be valued be changed from the Refinery to, instead, potential claims that Tusculum contended Beta had against Dreyfus. (*Compare* J-50, pp. 2-3, JBE V, pp. 1010-11 *with* Partial Award, J-4, pp. 65-69, JBE I, pp. 160-64.) These were "all issues of merits" that the Arbitral Tribunal was entitled to decide.
>
> 120. Similarly, in February 1997 Dreyfus moved to dismiss the arbitration as moot in light of the German bankruptcy proceedings and the impossibility of implementing the valuation and share transfer program. (J-47, pp. 29-34, JBE V, pp. 965-70.) Again, Dreyfus's pleading raised issues of merits that the Terms of Reference authorized the Tribunal to decide. (*See, e.g.*, *id.* at 32, JBE V, p. 968 ("All of Beta's assets are in the hands of the Receiver and will be liquidated and distributed in accordance with German law.").)
>
> 121. Given that an arbitration agreement (including the Terms of Reference that expand that agreement) is to be construed liberally, *Desputeaux*, p. 204, para. 35 (R.A. Tab 1), and that a "powerful presumption" that the Arbitral Tribunal acted within its powers must be applied, *Quintette Coal*, p. 10 (R.A. Tab 9), *Corporacion Transnacional*, p. 7 (R.A. Tab 10), it is difficult to perceive how Tusculum can meet its burden of establishing that the Final Award "contains decisions beyond the scope of the [arbitration] agreement." Article 946.4(4) C.C.P. Again, the Arbitral Tribunal held that the parties had consented to have their "entire relationship" resolved by the Arbitral Tribunal and that the Tribunal could order any relief it thought appropriate. (J-4, p. 22, JBE I, p. 117.) Tusculum has not challenged that finding of broad consent to arbitral jurisdiction.

[113] On the matter of the effect of the German bankruptcy proceedings on the propriety of the Tribunal's fashioning the Valuation and Buyout Remedy contained in Arbitration Award # 1 and the implementation thereof, Dreyfus argues that regardless of whether the mechanism should be viewed as having been finally determined in Arbitration Award # 1 (as Tusculum asserts) or not, the rulings by the German Courts and the subsequent sale of the Beta assets rendered the issue irrelevant. The Valuation and Buyout Remedy became impossible to implement. As a result of these events, the key elements of such Remedy could no longer be performed.

[114] In its *Plan d'argumentation des requérantes en reprise d'instance*, counsel for Tusculum disputes Dreyfus' arguments regarding the effect of the bankruptcy of Beta and the resulting impossibility of implementing the Valuation and Buyout Remedy. They argue at page 49:

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> 142. D'ailleurs, ce n'est pas aux arbitres qu'il revient de déterminer ce qu'il convient de faire si leur sentence n'est pas (ou n'est plus) susceptible d'exécution. Si les arbitres doivent tenter de s'assurer que la sentence qu'ils s'apprêtent à rendre sera susceptible d'exécution, il ne leur revient pas de la mettre en application. C'est aux tribunaux nationaux que cette tâche revient, les arbitres n'ayant d'ailleurs aucun pouvoir de contrainte sur les parties :
>
> > B. Moreau, « Le prononcé de la sentence entraîne-t-il le dessaisissement des arbitres? », *Études de procédure et d'arbitrage en l'honneur de Jean-François Poudret*, Berne (Suisse), Stampfli Verlag, 1999 **[Onglet 68]** :
> >
> > > « Si l'exécution amiable de la sentence se révèle impossible, il ne reste plus qu'à poursuivre l'exécution forcée de la sentence, et à cet égard, seule la juridiction étatique compétente en matière d'exécution des décisions juridictionnelles peut en connaître ».

[115] With respect, the Court does not share counsel's views. Moreover, the extract of the authority cited by counsel can be distinguished on the facts in the two proceedings and, accordingly, has no application in the present circumstances.

[116] On this issue, the Court once again agrees with, and adopts by reference, the views expressed in *Respondent's Post-Hearing Plan of Argument* at page 28 and following:

> 77. As Lord Mustill candidly acknowledged, the situation confronting the Arbitral Tribunal and the parties at the time of the Final Award was "ridiculous." (April 3 Tr. 57, 74.) The valuation and transfer procedure in the Partial Award had been "falsified by events." (*Id.* at 70.)
>
> 78. Article 26 of the 1988 ICC Rules, which governed these arbitral proceedings, provides that "in all matters not expressly provided for in these Rules, the International Court of Arbitration and the arbitrator shall act in the spirit of these Rules and shall make every effort to make sure that the award is enforceable at law." (S-3, p. 14, JLS I, p. 31.) As Mr. Craig points out in his second report, for the Arbitral Tribunal to have forced Dreyfus to pay anything for worthless shares in a non-existent Beta would have been a violation of natural justice, and thus a violation of art. 26. (Craig 2d Rep., p. 7, para. 23, JER X, p. 1310.)
>
> 79. The Arbitral Tribunal's Final Award was fully consistent with article 32(2)(c) of the Model Law and thus consistent with the C.C.P. That provision states:
>
> > (2) **The arbitral tribunal shall issue an order for the termination** of the arbitral proceedings **when**:
> >
> > [. . .]

> (c) **the arbitral tribunal finds that the continuation of the proceedings have for any reason become unnecessary or impossible**.
>
> (our emphasis)
>
> […] Having made its determination concerning the effect of the supervening German bankruptcy proceedings on the valuation and share transfer program of the Partial Award, the Arbitral Tribunal was thus empowered to terminate the arbitration.

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[117] The Court finds that the Tribunal was justified, in Arbitration Award # 2, in considering the effect of the mandatory German Bankruptcy Court decision, rendered after Arbitration Award # 1, regarding the disposition of the assets of Beta, which decision rendered impossible the implementation of the Valuation and Buyout Remedy contained therein.

[118] Accordingly, and in light of the foregoing, the simple question to be addressed regarding the merits of the *Tusculum Motion for Partial Annulment of Arbitration Award #2* based upon the exception provided in Article 946.4(4) *C.C.P.* is:

> Has Tusculum satisfied the Court that Arbitration Award # 2 …*deals with a dispute not contemplated by or not failing within the terms of the arbitration agreement, or […] contains decisions on matters beyond the scope of the agreement*[38]*?*

[119] The Court would respond that Tusculum has failed to discharge this burden.

(ii) Article 946.4(5) *C.C.P.*

> **946.4** The court cannot refuse homologation except on proof that:
>
> […]
>
> (5) the mode of appointment of arbitrators **or the applicable arbitration procedure** was not observed.
>
> (our emphasis)

[120] The *…applicable arbitration procedure* referred to in article 946.4(5) *C.C.P*. is determined by reference to Article 11 of the *ICC Rules,* Article 19 of the *UNCITRAL Model Law,* Article 944.1 *C.C.P.,* as well as by reference to Section 13 of the Agreement and to Section X of Terms of Reference.

[121] Article 11 of the *ICC Rules* states:

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[38] Art. 946.4(4) *C.C.P.*

> The rules governing 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.

[122] Referring to Article 19 of the *UNCITRAL Model Law,* the Secretariat of UNCITRAL in its *Analytical Commentary* on the *UNCITRAL Model Law*[39]*,* addresses the issue of procedural autonomy of the parties involved international arbitration proceedings. In particular, referring to what it calls the *"Magna Carta of Arbitral Procedure"*, the Secretariat writes:

> 1. Article 19 may be regarded as the most important provision of the model law. It goes a long way towards establishing procedural autonomy by recognizing the parties' freedom to lay down the rules of procedure (paragraph (1)) and by granting the arbitral tribunal, failing agreement of the parties, wide discretion as to how to conduct the proceedings (paragraph (2)), both subject to fundamental principles of fairness (paragraph (3)). Taken together with the other provisions on arbitral procedure, a liberal framework is provided to suit the great variety of needs and circumstances of international cases, unimpeded by local peculiarities and traditional standards which may be found in the existing domestic law of the place.

[123] Referring to the procedural flexibility granted to arbitrators under Article 944.1 *C.C.P.,* which embodies the same principles as those enunciated in Article 19 of the *UNCITRAL Model Law,* Lebel, J., writing in *Desputeaux,* emphasized:

> 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 (*Entreprises H.L.P. inc. v. Logisco inc.*, J.E. 93-1707 (C.A.); *Moscow Institute of Biotechnology v. Associés de recherche médicale canadienne (A.R.M.C.)*, J.E. 94-1591 (Sup. Ct.), at pp. 12-14 of the full text)[40].

[124] Section 13 (the Arbitration Clause) contained in the Agreement provides that any arbitration pursued under the Agreement is to be governed by the *ICC Rules*.

[125] Section X of Terms of Reference empowers the Tribunal to:

> …determine the procedure to be followed in this arbitration, subject to the mandatory provisions of any applicable law and of the…ICC Rules, and shall not have to follow any particular municipal system of procedure…

[39] Referred to in article 940.6 (3) *C.C.P.*
[40] Desputeaux, s*upra,* para. 70.

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[126] In order to succeed in the *Tusculum Motion for the Partial Annulment of Arbitration Award* #2, it must prove *…that the arbitration tribunal did not observe the applicable arbitration procedure where the disregard constitutes* ***a flagrant breach of procedural fairness.***[41]

(our emphasis)

[127] See also in this regard Gélinas Report #2, filed by Tusculum's expert:

> In practice, very few awards are annulled or refused enforcement under the international instruments on the ground that there was a violation of the applicable arbitration procedure. This is likely due in part to the generality of the terms of arbitral rules of procedure, which give a broad discretion to arbitrators…[…][42]

(internal citations omitted)

[128] Gélinas, however, goes on to qualify these views and to take exception with the views expressed by Dreyfus' experts, particularly those expressed by Gaillard, regarding the consequences of a failure to comply with procedural rules adopted by the parties. He cites several instances where the Courts have refused to annul awards for a mere violation of applicable procedure, in the absence of other serious grounds.

[129] He acknowledges that:

> 62. The standard of a "material breach of procedure" or a breach that "presumably affected the award" and the requirement of a prejudice, *simpliciter*, sufficient or substantial, have one thing in common: they all operate to avoid the trivialization of judicial review in cases of minor violation of the procedure while at the same time avoiding the risk of subsuming this separate ground of review under other grounds referring to due process or public order.
>
> 63. Having somewhat clarified what might be called an emerging international standard with respect to annulment or refusal of enforcement under this ground, one can easily grasp that it was met in the present case. First, the violation was of a fundamental principle of procedure: the doctrine of *functus officio* and the attendant finality of awards. Second, the violation obviously had an impact on the final award which caused a substantial prejudice to Tusculum. The parties find themselves in situations that are drastically different from that in which they would have found themselves had the tribunal implemented Award #1. While Award #1 ordered Dreyfus

[41] Gaillard Report, para. 51.
[42] *Ibid*, para. 50.

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> to purchase the shares of Tusculum and to pay for them, Tusculum finds itself with nothing at the end of the process[43].

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[130] Arguing that the principle of *functus officio* and the *…rule against revisiting issues that have already been decided…*(*res judicata),* were a *implied term[s]* of the applicable arbitration procedure in this case, seeing the non-respect thereof, Gélinas concludes:

> 69. I take the view in this report that Award # 1… I take the view in this report that Award #1 was final in respect of the principle of the remedy. In violation of the applicable procedure, which reflects fundamental procedural principles, the tribunal reconsidered a final determination made in Award #1, which reconsideration had a significant impact on the outcome and caused a substantial prejudice; it follows that Award #2 may be annulled on the ground that it was not made in accordance with the applicable procedure[44].

[131] Dreyfus' experts, Gaillard, Craig and Schwartz, do not share Gélinas' views on the interpretation to be given to the concept of "applicable arbitration procedure" referred to in article 946.4 (5) and the relevant provisions of the *ICC Rules* and the *UNCITRAL Model Law*. In particular, they dispute his views regarding the implied inclusion of the doctrine of *functus officio* and *res judicata,* as rules of procedure governing the Arbitration.

[132] Gaillard describes what he believes has to be understood by the concept of "applicable arbitration procedure" in the present context:

> You have where, …which is jurisdiction, where do you resolve the dispute, before a court or before a tribunal. Then you have a question of process, which is how you resolve it. Do you want . . . will you have witnesses, discoveries, what is the process? How will it be, the conduct of the arbitration, is another phrase to describe that.[45]

[133] Then he asserts that Tusculum's approach to the issue is inappropriate:

> But the fact that the rule or a question which arises can be characterized as procedural in any given legal system or in all actually, doesn't mean that it pertains to the applicable arbitrable procedure.
>
> There may be procedural rules or substance, but it's merit, if you will. And the merits are not limited to contractual issues or the substance. It can be substantive issues or it can be procedural issues, but it may be still merits if it

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[43] Gélinas Report, para. 62-63.
[44] *Ibid*, para. 69.
[45] April 9, 2008, Tr. 61.

> doesn't pertain to the applicable arbitral procedure. […] Because it has nothing to do with how we get there… [46]

[134] Craig and Schwartz, each of whom in the opinion of the Court have significant credibility, Craig having served on the committee that analyzed and revised the *ICC Rules* and Schwartz, being former Secretary General of the ICC Court, take the view that the *ICC Rules* intended to give wide discretion to the Tribunal. In the Craig Report # 2, he elaborates on this view:

> 67. The 1988 ICC Rules give wide discretion to the Arbitral Tribunal both to adopt procedural rules it considers appropriate and to conduct the arbitral proceeding in any manner the Arbitral Tribunal deems appropriate. The Arbitral Tribunal duly followed the procedures called for by the ICC Rules and in the Terms of Reference. Furthermore, in light of the above and of the fact that the German bankruptcy proceeding has undeniably a mandatory nature in respect to the liquidation of Beta, the Arbitral Tribunal has, by respecting such a proceeding, acted in accordance with Article 11 of the 1988 ICC Rules. Moreover, if Tusculum intends to argue that the Arbitral Tribunal had allegedly violated "the applicable arbitration procedure" by not implementing the valuation process, it would indirectly acknowledge the procedural nature of such process (See Motion for Partial Annulment, §46) and therefore the powers of the arbitrators to modify it at any time during the course of the arbitration.
>
> 68. Judicial review of procedural issues in international arbitration practice is narrowly defined and is intended to permit intervention in extreme cases only to prevent flagrant denial of due process to an arbitrating party. This is typified by provisions V(1)(b) and V(1)(d) of the New York Convention pursuant to which a recognition court may (it is not mandatory) decline to recognize and enforce a foreign award where:
>
> > *"(b) 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;"*
> >
> > *…*
> >
> > *(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."*
>
> Substantially the same standards are applied in the UNCITRAL Model Law for an application for setting aside under Article 34:

[46] April 9, 2008, Tr. 73–74.

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> *"2. An arbitral award may be set aside by the court specified in Article 6 only if:*
>
> *a. The party making application furnishes proof that:*
>
> *…*
>
> *ii) the party making 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;*
>
> *…*
>
> *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 the Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law.*
>
> 69. A similar position is reflected in Quebec law, adopting for procedural issues only the first of the two criteria referred to in the New York Convention and the Model Law. […][47]

[135] Tusculum and its experts argue that the *Arbitration Award # 2* suffers from procedural defects, more particularly that the Tribunal failed to observe the applicable arbitration procedure. Assuming, under reserve, that this premise were correct, there is, however, no evidence that as a result thereof, Tusculum was deprived of or restricted from, in any manner, the opportunity to present its arguments and representations to the Tribunal; nor was it deprived of the protection of due process. Moreover, there is in fact, no evidence that the Tribunal, in rendering the decisions complained of by Tusculum, failed in any way to observe the applicable arbitration procedure.

[136] Accordingly, the Court would reject the second of the three exceptions [Article 946.4(5)], raised by Tusculum to justify overriding the general rule prohibiting the Court from refusing homologation and thus permitting the annulment of Arbitration Award # 2.

(iii) Article 946.5 *C.C.P.*

> **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.

[137] Tusculum asserts that in rendering both the Order and Arbitration Award # 2:

[47] See arts. 946.4 (3) (5), 947.2. *C.C.P.*

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> …le tribunal, en bafouant de façon flagrante l'autorité de la chose jugée et le principe de la finalité des décisions de justice, a rendu des décisions contraires à l'ordre public québécois tel qu'entendu dans les relations internationales (art. 946.5 C.p.c.);

[138] The Court will limit its analysis, under this heading, to the issue of public order as it applies to Arbitration Award # 2. The Court will address the assertions concerning the nullity of the Order for the same reason, subsequently in sub-section VIII (B) of this judgment when addressing the *Tusculum Motion for the Annulment of the Order*.

[139] Article 946.5 *C.C.P.* and the principles contained therein substantially replicate similar provisions contained in Article V (2)(b) of the *New York Convention* and Article 34(2)(b)(ii) of the *UNCITRAL Model Law*. The Court is entitled to gain guidance from their respective dispositions[48] and from the authorities cited in connection therewith.

[140] The application of the governing principles contained in the *New York Convention* and the *UNCITRAL Model Law,* as they relate to challenges, based on public policy grounds, of arbitral awards issued in international commercial disputes, was addressed by Lax, J. in an Ontario Superior Court of Justice judgment in *Re Corporation Transnacional de Inversiones, S.A. de C.V.* v. *STET International, S.p.A*[49]*.* At pages 6 and following he wrote:

> The broad deference and respect to be accorded to decisions made by arbitral tribunals pursuant to the Model Law; has been recognized in this jurisdiction by the Ontario Court of Appeal in Automatic Systems Inc. v. Bracknell Corp. (1994), 18 O.R. (3d) 257 at p. 264, 113 D.L.R. (4th) 449 at p. 456:
>
> > The purpose of the United Nations Conventions and the legislation adopting them is to ensure that the method of resolving disputes in the forum and according to the rules chosen by the parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale: Kaverit Steel & Crane Ltd. V. Kone Corp. (1992), 87 D.L.R. (4th) 129 at p. 139, 85 Alta. L.R. (2d) 287 (C.A.)
>
> […]
>
> The grounds for challenging an award under the Model Law are derived from Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Accordingly, authorities relating to Article V of the New York Convention are applicable to the corresponding provisions in Articles 34 and 36 of the Model Law. These

[48] Art. 940.6 *C.C.P.*
[49] *Corporacion Transnacional de Inversiones, supra*, p. 6.

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authorities accept that the general rule of interpretation of Article V is that the grounds for refusal of enforcement are to be construed narrowly: A.J. Van Den Berg, New York Convention of 1958 Consolidated Commentary, cited in Yearbook Comm. Arb. XXI (1996) at pp. 477-509.

An arbitral award is not invalid because, in the opinion of the court hearing the application, the Arbitral Tribunal wrongly decided a point of fact or law: Quintette Coal, supra, at p. 277. Where a tribunal's jurisdiction is called into question as it is here, an applicant must overcome "a powerful presumption" that the Arbitral Tribunal acted within its powers: Quintette Coal, supra, per Hutcheon J.A., at p. 223, citing with approval Parsons & Whittemore Overseas Co., Inc. v. Société Générale de L'Industrie du Papier, 508 F.2d 969 (2nd Cir. 1974).

The public policy ground for resisting enforcement of an arbitral award has also been narrowly construed. In Schreter v. Gasmac Inc. (1992), 7 O.R. (3d) 608, 89 D.L.R. (4th) 365 (Gen.Div.) Feldman J., as she then was, states at p. 623:

> The concept of imposing our public policy on foreign awards is to guard against enforcement of an award which offends our local principles of justice and fairness in a fundamental way, and in a way which the parties could attribute to the fact that the award was made in another jurisdiction where the procedural or substantive rules diverge markedly from our own, or where there was ignorance or corruption on the part of the tribunal which could not be seen to be tolerated or condoned by our courts.

At p. 624 of Schreter v. Gasmac, supra, the court quotes with approval from the decision of the United States Court of Appeals Second Circuit in Waterside Ocean Navigation Co v. International Navigation Ltd., 737 F.2d 150 91984) at p. 152. It was held there that public policy grounds for the setting aside of an award should apply only where enforcement would violate our "most basic notions of morality and justice". In this jurisdiction, the Ontario Court of Appeal has emphasized the care which courts must exercise in relying upon public policy as a reason for refusing enforcement of a foreign award. In Boardwalk Regency Corp. v. Maalouf (1992), 6 O.R. (3d) 737 at p. 743, 88 D.L.R. (4th) 612 (C.A.), the court states:

> The common ground of all expressed reasons for imposing the doctrine of public policy is essential morality. This must be more than the morality of some persons and must run through the fabric of society to the extent that it is not consonant with our system of justice and general moral outlook to countenance the conduct, no matter how legal it may have been where it occurred.

> **Accordingly, to succeed on this ground the awards must fundamentally offend the most basic and explicit principles of justice and fairness in Ontario, or evidence intolerable ignorance or corruption on the part of the Arbitral Tribunal. The applicants must establish that the awards are contrary to the essential morality of Ontario.**
>
> (our emphasis)

[141] The Court agrees with and adopts by reference in the present proceedings, the views of Lax, J. in *Corporation Transnacional* regarding the applicability of the governing principles contained in the *New York Convention* and the *UNCITRAL Model Law* in interpreting the concept of "public order" referred to in article 946.5 *C.C.P.*

[142] It remains to be determined whether Tusculum has discharged its burden and satisfied the Court that Arbitration Award # 2 …*fundamentally offend(s) the most basic and explicit principles of justice and fairness* in Québec; whether it is *…contrary to the essential morality of* Québec.

[143] Tusculum asserts that Arbitration Award # 1 was final and binding as to its decisional content with respect, in particular, to the Valuation and Buyout Remedy referred to in Sections VI and VII (B). It maintains that these determinations and decisions have the authority of *res judicata*.

[144] Accordingly, it argues in its *Plan d'argumentation des requérantes en reprise d'instance*:

> 125. Or, le principe de la finalité ou de l'autorité de chose jugée des décisions définitives constitue un des fondements du système judiciaire comme de l'arbitrage, et est à ce titre clairement considéré comme un principe d'ordre public :
>
> - *Roberge* c. *Bolduc*, [1991] 1 R.C.S. 374, 402, […]
> - *Lagacé* c. *Cloutier*, J.E. 94-789 (C.S.), à la p. 20, […]
> - B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge, Grotius Publications, 1987, à la p. 338 […]
> - H. Kélada et S. Naguib, *Les moyens de se pourvoir contre les jugements,* 2e éd., Toronto, Carswell, 1997 aux pp.18-19 […]
> - J.-C. Royer, *La preuve civile,* 3e éd., Cowansville, Yvon Blais, 2003, à la p. 561 […]
> - H. Roland et L. Boyer, *Adages du droit français,* Vol. 1, 2e éd., Lyon, Éditions l'Hermès, 1986 […]

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- *Union des artistes et Productions John Baun inc.*, D.T.E. 2004T-961 (T.A.A.), M.-F. Bich (arbitre) […]

> 126. La reconnaissance du caractère d'ordre public ne s'impose pas que dans le contexte du droit interne, bien au contraire, et constitue un principe d'ordre public tel qu'entendu dans les relations internationales;
>
> 127. En effet, l'autorité de la chose jugée est si généralement reconnu qu'il constitue un principe de droit international ayant le statut de « principe général de droit » au sens de l'article 38(1)(c) du *Statut de la Cour internationale de justice*, c'est-à-dire qu'il s'agit d'une source du droit international public liant les États :
>
> - Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge, Grotius Publications, 1987, à la p. 336 […]
>
> - *Chorzow Factory Case*, Cour permanente de Justice Internationale (1927), cité par B. Hanotiau, […]
>
> - *Affaire Trail Smelter* (cité par B. Hanotiau, « L'autorité de la chose jugée des sentences arbitrales », *L'arbitrage complexe, questions et procédures, Supplément spécial 2003 Bulletin de la CCI*, Paris, ICC, 2003) […]
>
> 128. Le fait que les parties puissent renoncer au principe de la finalité des sentences n'implique pas, par ailleurs, que la violation de ce principe par le tribunal lui-même, en l'absence d'une renonciation des parties, ne soit pas contraire à l'ordre public […]
>
> (internal citations are omitted)

[145] With respect, the Court finds that the authorities cited by Tusculum do not find application in the circumstances of the present proceedings.

[146] More recently, in 2003, the Supreme Court of Canada had occasion to address this issue in *Desputeaux*. Writing for the Court, Lebel, J. noted[50]:

> [52] [. . .] In interpreting and applying this concept [of public order] in the realm of consensual arbitration, we must therefore have regard to the legislative policy that accepts this form of dispute resolution and even seeks to promote its expansion. For that reason, in order to preserve decision-making autonomy within the arbitration system, it is important that we avoid extensive application of the concept by the courts. Such wide reliance on public order in the realm of arbitration would jeopardize that autonomy, contrary to the clear legislative approach and the judicial policy based on it. [. . .]

[50] *Desputeaux, supra*, paras. 52, 54.

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> [54] [. . .] The court must determine whether the decision itself, in its disposition of the case, violates statutory provisions or principles that are matters of public order. **In this case, the *Code of Civil Procedure* is more concerned with whether the disposition of a case, or the solution it applies, meets the relevant criteria than with whether the specific reasons offered for the decision do so.** An error in interpreting a mandatory statutory provision would not provide a basis for annulling the award as a violation of public order, unless the outcome of the arbitration was in conflict with the relevant fundamental principles of public order. That approach, which is consistent with the language used in art. 946.5 *C.C.P.*, corresponds to the approach taken in the law of a number of states where arbitration is governed by legal rules analogous to those now found in Québec law. The courts in those countries have limited the consideration of substantive public order to reviewing the outcome of the award as it relates to public order. (See: E. Gaillard and J. Savage, eds., *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999), at pp. 955-56, No. 1649; J.-B. Racine, *L'arbitrage commercial international et l'ordre public*, vol. 309 (1999), at pp. 538-55, in particular at pp. 539 and 543; *Société Seagram France Distribution v. Société GE Massenez*, Cass. civ. 2e, May 3, 2001, *Rev. arb.* 2001.4.805, note Yves Derains.) **And lastly, in considering the validity of the award, the clear rule stated in art. 946.2 *C.C.P.*, which prohibits a court from inquiring into the merits of the dispute, must be followed. In applying a concept as flexible and changeable as public order, these fundamental principles must be adhered to in determining the validity of an arbitration award.**
>
> (our emphasis)

[147] In *Desputeaux*, Lebel, J. cites as reference extracts of one of the recognized texts on the subject, E. Gaillard and J. Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*:

> Thus, in arbitration as in ordinary private international law thinking, it is not so much the abstract rule of law applied by the arbitrators which must be measured against the requirements of international public policy, as the actual result reached by the arbitrator or the court. [51]

[148] Gaillard reiterated this view in his testimony before the Court.[52]

[149] In the present proceedings, Tusculum dismisses the importance of adhering to the principles enunciated in *Desputeaux* and supported by Dreyfus' experts in these proceedings regarding the importance of analyzing the actual result reached by the Tribunal, as opposed to considering some abstract and unsubstantiated rule of law applicable in international commercial arbitration. Rather, Tusculum asserts that Arbitration Award # 2 offends public order, in that it disregards the finality of that part of

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[51] (The Hague, Boston: Kluwer Law International, 1999), p. 955-956.
[52] April 9 2008, Tr. 35, 80-86.

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Arbitration Award # 1 relating to the Valuation and Buyout Remedy and thereby contravenes the fundamental principle of *res judicata,* recognized, according to Tusculum, as part of both domestic law and international public policy.

[150] It is far from certain whether *res judicata* is a recognized principle of international public policy that could form the basis of annulment proceedings such as the ones presently under consideration. Based upon the expert evidence heard, it would appear that there is in fact no consensus that *res judicata* is a recognized principle applicable in international commercial arbitration proceedings. Similarly, to the extent that the principle might find application in certain instances, there is no consensus among the experts heard or among the respective authorities cited by each of them, as to what specific rules of *res judicata* should be recognized and in what context.

[151] Moreover, there is serious doubt as to whether the conclusive or preclusive effects of an arbitral award pertain to public policy.

[152] In light of the foregoing, having considered the authorities cited by experts heard on behalf of each of the parties and considered their respective views, the Court is unable to conclude, even on the balance of probabilities, that *res judicata* forms part of international public policy applicable in the context of the present proceedings.

[153] Accordingly and for the reasons expressed, the Court finds that the effect of the disposition of the merits of the dispute in the manner provided for in Arbitration Award #2 is not contrary to public order as contemplated by article 946.5 *C.C.P.* More particularly, the Court finds that the Award:

(i) does not …*fundamentally offend the most basic and explicit principles of justice and fairness* in Québec; and

(ii) is not *…contrary to the essential morality of* Québec.

[154] Under reserve of the foregoing and assuming Tusculum had succeeded in satisfying the Court, which it has not, that:

(i) *res judicata* was a recognized principle of international public order, the non respect of which could be the basis of annulment; and

(ii) the portion of Arbitration Award # 1, wherein the Tribunal fashioned the Valuation and Buyout Remedy, constituted a final judgment not reviewable according to the principles of *res judicata,*

Tusculum's challenge, founded on the exception contained in article 946.5 *C.C.P.* would still fail.

[155] As the Tribunal noted in Part IV at page 15 of Arbitration Award # 2:

> The German bankruptcy system has accomplished what the non-final portion of the Partial Award was designed to do; it has set in motion a train of events that, under German Law, will terminate the relationship of the parties. […]
>
> These governmental acts have in effect mooted the relief that the non-final portion of the partial award provided. The Tribunal does not have any jurisdiction to review the actions of the German Courts.

[156] The *Tusculum Motion for the Partial Annulment of Arbitration Award # 2,* seeks to annul an award made over eleven years ago and to require the parties and the Tribunal, already disbanded, to be reconstituted, and to proceed in a futile exercise in order to apply the Valuation and Buyout Remedy fashioned in Arbitration Award # 1 involving the shares of a defunct company, Beta.

[157] The Court agrees with the Tribunal that the actions of the German Court have rendered the Valuation and Buyout Remedy moot. In the Court's opinion, it would be contrary to public order to insist now on the specific performance of the Remedy in the manner fashioned in Arbitration Award #1, notwithstanding the actions of the courts of a sovereign state and notwithstanding the fact that, as a result thereof, some of the key elements of the Remedy could no longer be performed. Effectively, this Court is being asked by Tusculum to render a judgment which is not susceptible of execution. To do so would offend the very principles of public order upon which it relies in its efforts to seek the annulment of Arbitration Award # 2.

[158] In *Respondent's Post-hearing Plan of Argument*, referring to Lord Mustill's views on the subject and to applicable 1988 *ICC Rules* and *Uncitral Model Law* provisions, Dreyfus asserts:

> 77. As Lord Mustill candidly acknowledged, the situation confronting the Arbitral Tribunal and the parties at the time of the Final Award was "ridiculous." (April 3 Tr. 57, 74.) The valuation and transfer procedure in the Partial Award had been "falsified by events." (*Id.* at 70.)
>
> 78. Article 26 of the 1988 ICC Rules, which governed these arbitral proceedings, provides that "in all matters not expressly provided for in these Rules, the International Court of Arbitration and the arbitrator shall act in the spirit of these Rules and shall make every effort to make sure that the award is enforceable at law." (S-3, p. 14, JLS I, p. 31.) As Mr. Craig points out in his second report, for the Arbitral Tribunal to have forced Dreyfus to pay anything for worthless shares in a non-existent Beta would have been a violation of natural justice, and thus a violation of art. 26. (Craig 2d Rep., p. 7, para. 23, JER X, p. 1310.)
>
> 79. The Arbitral Tribunal's Final Award was fully consistent with article 32(2)(c) of the Model Law and thus consistent with the C.C.P. That provision states:

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> (2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:
>
> [. . .]
>
> (c) the arbitral tribunal finds that the continuation of the proceedings have for any reason become unnecessary or impossible.

(S-7, p. 11, JLS I, p. 164 (emphasis supplied).) Having made its determination concerning the effect of the supervening German bankruptcy proceedings on the valuation and share transfer program of the Partial Award, the Arbitral Tribunal was thus empowered to terminate the arbitration.

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[159] The Court concurs.

[160] In view of the foregoing and for the reasons expressed, seeing the provisions of articles 946.4 and 947.2 *C.C.P.* and seeing the failure by Tusculum to discharge its burden of proof of establishing, to the satisfaction of the Court, that its challenge of Arbitration Award # 2 is well-founded, in fact and in law, upon one of the exceptions mentioned in articles 946.4 (4), 946.4(5) and 946.5 *C.C.P.*, the *Tusculum Motion for the Partial Annulment of Arbitration Award # 2*, will be dismissed.

(B) Tusculum Motion for the Annulment of the Order

1. Certain Fundamental Principles

[161] The fundamental principles referred to above in analyzing the *Tusculum Motion for the Partial Annulment of Arbitration Award #2,* apply as well to the *Tusculum Motion for the Annulment of the Order.* The competence of the Tribunal, the scope of its mandate and the extent to which the Court may intervene in annulling the Order must be analyzed in light of these same principles.

[162] The Court must now determine whether, in the context of these fundamental principles, the grounds alleged by Tusculum the annulment of the Order are sufficient to warrant its intervention.

2. Application of Fundamental Principles

[163] In the same manner and, to a large extent, for the same reasons invoked by it in its arguments regarding the merits of the *Tusculum Motion for the Partial Annulment of Arbitration Award #2,* Tusculum reiterates its position in the *Tusculum Motion for the Annulment of the Order.* It argues that Arbitration Award # 1 was final and binding as to its decisional content with respect, in particular, to the Valuation and Buyout Remedy, and that accordingly these determinations and decisions have the authority of *res judicata*.

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[164] Tusculum contends, moreover, that having rendered what was, in its opinion, a final award insofar as it relates to the Valuation and Buyout Remedy, the Tribunal became *functus officio* in relation to that part of the Award and could not revisit the issue, as it agreed to do, in the Order.

[165] Dreyfus opposes Tusculum's contentions. It asserts that only an "Award" is capable of being annulled and that the Order is not an "Award" and moreover, that the doctrine of *functus officio* was not applicable, as the Tribunal had not fulfilled its mandate and had yet to be discharged.

[166] In light of the Court's analysis and conclusions regarding the events occurring subsequent to the issuance of the Order and preceding the issuance of Arbitration Award #2, in particular in light of the Court's findings regarding the effect of the Beta bankruptcy on the enforceability of the disputed Valuation and Buyout Remedy, perhaps the most convincing argument raised by Dreyfus is that the matter of the validity of the Order became moot. By force of circumstances, it was superseded and merged into Arbitration Award #2. Thus even if the validity of the Order, viewed and analyzed in isolation, might appropriately be challenged, the facts and circumstances arising subsequently have rendered this hypothesis purely academic.

[167] The Court concurs with Dreyfus' submissions in this regard. Although the issues raised in the *Tusculum Motion for the Annulment of the Order* may be intellectually challenging and thought provoking from a jurist's perspective, a determination by the Court as to the jurisdiction of the Tribunal to issue the Order and the validity and enforceability of the operative and contested provisions thereof, are of little or no importance in determining the outcome of the dispute between the parties. The conduct of both parties, as well as the events occurring subsequent to the issuance of the Order, including the German bankruptcy proceedings involving Beta, have rendered the Order moot and the provisions thereof, no longer susceptible of execution.

FOR THESE REASONS, THE COURT:

(1) *Tusculum Motion for the Partial Annulment of Arbitration Award #2*

[168] **DISMISSES** the *Tusculum Motion for the Partial Annulment of Arbitration #2;*

(2) *Tusculum Motion for the Annulment of the Order*

[169] **DISMISSES** the *Tusculum Motion for the Annulment of the Order*;

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

_____
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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.

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