

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No. : 500-09-009391-004
(500-05-043881-984)

DATE : MARCH 31, 2003

**CORAM: THE HONOURABLE MELVIN L. ROTHMAN, J.A.
LOUISE MAILHOT, J.A.
JACQUES CHAMBERLAND, J.A.**

LA COMPAGNIE NATIONALE AIR FRANCE
APPELANT - plaintiff / applicant
v.

**HIS EXCELLENCY JUSTICE KÉBA MBAYE
PROFESSOR MOHAMED BENNOUNA
JUSTICE GILBERT GUILLAUME
OUSMANE DIALLO, in his capacity as clerk of the arbitral tribunal composed of
the three above-named respondents
LIBYAN ARAB AIRLINES**
RESPONDENTS – defendants / respondents
and
**THE ATTORNEY GENERAL OF CANADA
THE INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA)**
MIS EN CAUSE – mis en cause

JUDGMENT

[1] **THE COURT;** - On the appeal of a judgment rendered on February 15, 2000 by the Superior Court, District of Montreal (the Honourable Pierrette Sévigny), which dismissed with costs the applicant's motion for a declaratory judgment, judicial review, a

declaration of permanent injunction and of nullity (arts. 2, 20, 33, 46, 751, and 940 C.C.P. and following);

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

[3] For the reasons of Mailhot, J.A., with which Rothman and Chamberland, JJ.A. concur;

[4] **DISMISSES** the appeal, with costs.

MELVIN L. ROTHMAN, J.A.

LOUISE MAILHOT, J.A.

JACQUES CHAMBERLAND, J.A.

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Counsel for the mis en cause IATA

Date of hearing: November 18, 2002

DECISION OF MAILHOT, J.A.

[5] In matters of international commercial arbitration, can one appeal to the superintending and reforming powers or to the inherent powers of the State's ordinary courts of law, in this instance those of the Quebec Superior Court, before a final judgment on the merits of the case is rendered by an arbitral tribunal? If so, is it appropriate to do so in this instance? These are the questions raised by this appeal.

Summary of the facts

[6] On February 2, 1972, Compagnie Nationale Air France ("Air France") and Libyan Arab Airlines ("LAA") reached an agreement¹ by which Air France undertook to maintain the aircraft of LAA and to supply flying personnel and specialized air transportation services. In the event of a dispute, the agreement included an arbitration clause (art. 23) referring to the arbitration regulations of the International Air Transport Association ("IATA").

[7] In December 1988, Pan American Airlines flight 103 exploded over the town of Lockerbie in Scotland, resulting in 280 deaths. On September 19, 1989, 250 passengers were killed when flight 772 of the French airline company U.T.A. suffered the same fate over the Tenere desert in Nigeria.

[8] After a lengthy investigation, the authorities concluded that Libya and certain of its citizens were directly responsible. Since the Libyan State refused to cooperate in the investigation, the United Nations Organization (UNO) announced a series of resolutions aimed at creating an embargo against Libya and LAA. Consequently, on March 31, 1992, the United Nations (UN) Security Council adopted *Resolution 748*,² which stipulated in particular:

4. Decides also that all States shall:

a) Deny permission to any aircraft to take off from, land in or overfly their territory if it is destined to land in or has taken off from the territory of Libya. ...

¹ Exhibit **R-9**, F.A., 612

² Exhibit **R-2**, F.A., 528.

b) Prohibit, by their nationals or from their territory, the supply of any aircraft or aircraft components to Libya, the provision of engineering and maintenance servicing of Libyan aircraft or aircraft components ...

7. Calls upon all States, including States not members of the United Nations, and all international organizations, to act strictly in accordance with the provisions of the present resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any licence or permit granted prior to 15 April 1992;

(Emphasis added)

[9] On April 14, 1992, the Council of the European Union issued *Regulation 945/92*,³ ratifying the UN ban on supplying goods and services to a Libyan airline company, notwithstanding any agreement signed before April 1992 (arts. 2, 3).

[10] On April 15, 1992, Canada integrated the UN commercial and aerial embargo into Canadian law by passing the *United Nations Libya Regulations*.⁴

[11] The next day, Air France informed LAA that it was terminating its contract due to the embargo.

[12] On November 11, 1993, the UNO hardened its position against Libya by adopting *Resolution 883*.⁵ The embargo was then extended to all financial and commercial relations with Libya and its nationals and decreed the freezing of all Libyan assets in all countries. Henceforth, it was forbidden to accept any Libyan claim as stated in Article 8:

Decides that all States, and the Government of Libya, shall take the necessary measures to ensure that no claim shall lie at the instance of the Government or public authorities of Libya, or of any Libyan national, or of any Libyan undertaking as defined in paragraph 3 of this resolution, or of any person claiming through or for the benefit of any such person or undertaking, in connection with any contract or other transaction or commercial operation where its performance was affected by reason of the measures imposed by or pursuant to this resolution or related resolutions.

³ Exhibit **R-3**, F.A. at 533.

⁴ SOR / 92-222.

⁵ **R-4** part, F.A. at 534.

[13] On November 30, 1993, Canada amended its *United Nations Libya Regulations*⁶ to include the new UN measures. Article 14 states:

No claim in respect of any contract or transaction the performance of which has been affected by the measures imposed by these Regulations shall lie against Her Majesty in right of Canada or of a province or against any person in Canada

(a) at the instance of the Government of Libya;

(b) at the instance of any Libyan national or Libyan undertaking; or

(c) at the instance of any person claiming through or for the benefit of the Government of Libya or of any person referred to in paragraph (b).

[14] LAA notified Air France that a request for arbitration was filed with IATA on October 23, 1995,⁷ alleging that Air France had ceased to perform the contract on two occasions, first in a partial breach on November 1, 1985 and then a total breach on April 16, 1992. Consequently, LAA claimed excess charges paid for the maintenance of Boeing 707 aircraft since November 1, 1985, and for the purchase of spare parts for Boeing 727 aircraft since April 16, 1992. It then appointed its arbitrator.

[15] On November 23, 1995, after serving notice to the French Minister for Foreign Affairs,⁸ Air France notified LAA that it could not appoint an arbitrator owing to the various UN resolutions, which in its opinion prevented it from doing so.⁹ LAA informed IATA of Air France's failure to appoint an arbitrator and requested IATA to do so in its stead in accordance with paragraph (2) of Article 2 of the *IATA Arbitration Rules*.¹⁰

...

(2) if they do not agree to the appointment of a single arbitrator, the arbitral tribunal shall consist of three arbitrators appointed as follows:

if only two parties are involved in the dispute each party shall appoint one of the three arbitrators. Should either party fail to appoint his arbitrator such appointment shall be made by the Director General of IATA.

[16] On June 13, 1996, IATA acceded to the LAA request and appointed Mr. Gilbert Guillaume,¹¹ respondent in the present proceedings. Subsequently, Mr. Guillaume and the arbitrator designated by the LAA appointed the respondent, Mr. Kéba Mbaye,¹² Chair of the arbitral tribunal.

[17] On February 4, 1997, Air France sent a letter to the Chair of the arbitral tribunal, confirming that it would soon be attending the hearing, but explained that it intended to

⁶ SOR/93-521.

⁷ Exhibit **R-8**, F.A. at 562

⁸ Exhibit **R-11**, F.A. at 634

⁹ Exhibit **R-10**, F.A. at 632

¹⁰ Exhibit **C-5**, F.A. at 1105.

¹¹ A judge at the International Court of Justice.

¹² A former judge at the International Court of Justice.

raise, as a preliminary argument, the non-arbitrability of the dispute.¹³ On June 26, 1997, the parties, with the cooperation of the arbitral tribunal, prepared a Mission Statement.¹⁴ The forum for the arbitration proceedings was to be Montreal, the governing law French law, and the procedure governed by the *Arbitration Rules of the UN Commission for International Commercial Law* (“UNCITRAL Rules”).¹⁵

[18] The Mission Statement explains the exception of non-arbitrability of the dispute presented by Air France as follows:

[TRANSLATION]

(1)

Air France intends, as a first step, to raise the non-arbitrability of the dispute between itself and Libyan Arab Airlines, primarily in reason of:

- the existence of international standards decreed by the United Nations Security Council, in particular Resolution No 883 of November 11, 1993, and the Community Rules thereunder, which prevent Air France from taking part in any procedure related to a request formulated by a Libyan company in connection with a contract whose performance has been affected, directly or indirectly, by the aforementioned international rules.
- the provisions of the contract of February 2, 1972, in particular Article 19 relating to force majeure, and,
- the irregularity of the constitution of the arbitral tribunal in light of the aforesaid international standards.

For the above reasons, it will be incumbent on the arbitral tribunal to answer the following questions:

(i)

Do United Nations Security Council Resolution 731 of January 21, 1992, 748 of March 31, 1992, and 883 of November 11, 1993, as well as EC Community Rules 945/92, 3274/93, and 3275/93 constitute an obstacle to the progress of arbitral proceedings whose aim is to consider claims by Libyan Arab Airlines against Air France under a contract whose performance was affected by the aforesaid texts?

(ii)

Do the above-mentioned international standards constitute a case of force majeure that poses an obstacle to the consideration of the merits of the dispute by the arbitral tribunal?

(iii)

¹³ Exhibit **R-15**, F.A. at 652.

¹⁴ Exhibit **R-16**, F.A. at 653

¹⁵ F.A. at 413.

Was the arbitral tribunal properly constituted?

(2)

Basically, and in the eventuality that the arbitral tribunal should dismiss the exception of the non-arbitrability of the dispute raised by Air France, Air France will principally dispute all of the requests in the Libyan Arab Airlines arbitration request, showing that they are unfounded.

...

[19] The Mission Statement also includes a calendar announcing an arbitrability award after the exchange of briefs by the parties. A hearing was held on May 15, 1998.

[20] On July 10, 1998, the arbitral tribunal issued partial award No. 1 in which the exception of non-arbitrability was dismissed.¹⁶ The arbitrators were of the opinion that the dispute is arbitrable under French law, Canadian law, and transnational public order. Consequently, the arbitral tribunal declared itself competent to hear the dispute but did not pronounce upon questions to be decided later with respect to the consequences of the embargo:

[TRANSLATION]

...

4. States that there is no non-arbitrability of the dispute whatever resulting either from transnational public order, from French law (law of the merits), or from Canadian law (law of seat), and consequently, dismisses Air France's exception of non-arbitrability, without pronouncing on what it will decide in a later phase of the proceedings with regard to the consequences for Libyan Arab Airlines' requests concerning Security Council Resolution 883(93) and the decisions taken for its application.

...

[21] On August 12, 1998, Air France filed proceedings with the Quebec Superior Court asking the Court to declare that the appointment of the arbitrator by IATA was invalid and unlawful, to declare the dispute non-arbitrable, to quash the partial award rendered by the arbitral tribunal, and to order the arbitrators to put an end to their work, at least for as long as the international embargo against Libya remained in force. LAA filed a motion to dismiss this proceeding, which the trial judge treated as a contestation of Air France's motion.

[22] On April 5, 1999, Libya surrendered the two Libyan nationals accused of perpetrating the attack against Pam Am flight 103 to the Dutch authorities so that they could be brought to justice on Scottish territory.¹⁷ Under the terms of Article 8 of UN *Resolution 1192*,¹⁸ the embargo against Libya was then suspended until further notice.

¹⁶ Exhibit R-18, F.A. at 794.

¹⁷ They were subsequently found guilty.

¹⁸ Exhibit L, F.A. at 1387.

The Council of the European Union upheld the application of Article 8 of Resolution 883, however, thereby prolonging the prohibition on legal claims.¹⁹ On March 14, 2002,²⁰ the Government of Canada repealed its *United Nations Libya Regulations*.

Trial judgment

[23] The trial before the Superior Court of Quebec took place over eight days in October and November 1999. On February 15, 2000, Justice Pierrette Sévigny ruled in favour of LAA.

[24] The judge recalled that the *UNCITRAL Model Law on International Commercial Arbitration (Model Law)*²¹ is founded on two major principles: the autonomy of the parties and the autonomy and effectiveness of the arbitration process. A State court, such as the Superior Court, has no jurisdiction in the presence of an arbitration clause (art. 8, *Model Law*). Only the arbitrator is qualified to rule on his or her own jurisdiction (art. 16, *Model Law*). The State court cannot take part in the dispute before a final award is made and the only power vested in it is the power to set aside the award (art. 34, *Model Law*).

[25] In the present case, the parties have waived Quebec law by applying the *UNCITRAL Rules* with regard to the arbitration procedure. This rule stipulates that the State court cannot be involved in the arbitration process except for requests for interim measures (art. 26, par. 3).

[26] Consequently, the trial judge concluded that Air France's action was premature. The issue of the unlawful constitution of the arbitral tribunal cannot be addressed except in the context of a motion to homologate an award or a motion to set aside an award (art. 946.4 (5), *C.C.P.*), since the arbitral tribunal had given Air France leave to base its arguments on the allegedly irregular composition of the arbitral tribunal. The trial judge asserted that she agreed with the expert witnesses that the dispute was arbitrable and [TRANSLATION] "that the question really raised by Air France concerns the inadmissibility of LAA's requests and not the non-arbitrability of the dispute". Since the issue of the admissibility of LAA's requests was rejected by the arbitral tribunal in the hearing on the merits, Air France's motion was dismissed with costs.

* * *

[27] Before considering the applicant's arguments, it is appropriate to provide a brief overview of the relevant legislation.

[28] First of all, Art. 3133 of the *Civil Code of Québec* states:

¹⁹ Joint position, April 16, 1999, Exhibit **W**, F.A. at 1411.

²⁰ SOR / 2002-118.

²¹ Exhibit **R-19**, F.A. at 861.

Arbitration proceedings are governed by the law of the country where arbitration takes place unless either the law of another country or an institutional or special arbitration procedure has been designated by the parties.

[29] In this instance, the Mission Statement agreed to by the parties stipulates that, with regard to procedure, the *UNCITRAL Rules* apply.

[30] The *Code of Civil Procedure* contains a book on arbitration (Book VII). The first general provision specifies its application:

Art. 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.

[31] Here again, it should be noted that the parties made stipulations with regard to procedure since they chose the *UNCITRAL Rules* and that, except for the above-mentioned provisions in art. 940, the parties were able to derogate from Title I of Book VII of the *Code of Civil Procedure* on arbitration.

Analysis of the appellant's arguments

[32] The applicant Air France faults the arbitral tribunal for breaching the jurisdictional contract by failing to rule on the issues raised by Air France with regard to its exception of non-arbitrability, as stated above.

[33] The trial judge could not accept this argument, for several reasons.

[34] The court ruled on the first two issues, finding that it had jurisdiction to hear the dispute and that the dispute was arbitrable. In addition, the arbitral tribunal was of the opinion that the major thrust of the UN resolutions entailed determining the admissibility of LAA's requests during their subsequent consideration.

[35] One may agree or disagree with the answers in this interim award, but it is a decision that answers the two questions posed, and the arbitral tribunal was the appropriate forum to rule on these questions since they fell within its jurisdiction (art. 943 C.C.P.):

The arbitrators may decide the matter of their own competence.

[36] As for the question about the regularity or the irregularity of the constitution of the arbitral tribunal, the trial judge was right in saying that the tribunal dealt with that issue:

[TRANSLATION]

Moreover, it is important to point out that the arbitral tribunal specifically dealt with the constitution of the arbitral tribunal in its conclusions of partial award No.

1. The arbitral tribunal gives AF leave to base its arguments on an alleged irregularity in the composition of the arbitral tribunal.

[37] What the trial judgment does not cite is the precise reason that the arbitral tribunal gave for not dealing with the question:

[TRANSLATION]

The Chair told the parties that the tribunal wanted them to explain their positions regarding the objection raised by Air France over the issue of the irregularity of the composition of the tribunal, and invited them to do so.

After long debate, Air France specified that “ultimately” it was simply asking the court to take note of the fact that it had not given up on its argument and that it reserved the right, when the time came, to avail itself of the argument of the irregularity of the composition of the tribunal.

...

In short, it was agreed that the partial award to be delivered should be limited to the question of non-arbitrability.

...

On the alleged irregular constitution of the arbitral tribunal

In its brief on the arbitrability of the dispute, Air France had raised as an alternative argument [TRANSLATION] “the irregularity of the constitution of the arbitral tribunal”.

Libyan Arab Airlines answered that on the one hand, in accordance with the Mission Statement signed by the arbitrators on June 25, 1997, the parties’ briefs at this phase of the proceedings were to be confined to the question of the arbitrability of the dispute, and on the other, that Air France’s request was inadmissible because it was not up to the arbitral tribunal to determine this.

During oral argument, Air France asked simply that the court be satisfied to take note of the fact that it reserved the right to avail itself of this argument at an opportune moment.

The court took due note.²²

[38] The award and the reasons set out above echo the report of the hearing of May 15, 1998, which in part reads as follows:²³

[TRANSLATION]

The Chair then asked whether in Air France’s opinion, the arbitral tribunal was competent to verify the regularity of its own constitution.

...

²² F.A., 822, 824.

²³ F.A., 1112-1113.

Maître Borde for Air France finally said that, under the circumstances, he was abandoning this argument prior to arbitrability, acknowledging that it was another jurisdiction that was competent to rule on the regularity of the composition of the tribunal, and adding that he had to raise the question to ensure that no one would fault him later for not having done so.

...

Maître Border then said that Air France was not asking the court to rule on its own composition.

The Chair then said that the tribunal took note of Air France's position.

[39] Accordingly, the arbitral tribunal cannot be faulted for not ruling *in limine* on the regularity of its own constitution and for simply acknowledging Air France's position in its disposition:

[TRANSLATION]

2. Takes note of the position of Air France, which reserves the right to avail itself at its pleasure of its argument based on the alleged irregularity of the composition of the arbitral tribunal.

[40] So the question posed at the beginning arises once more: Can Air France, at this stage of proceedings, appeal to the powers of the state's ordinary courts of law to question the composition and constitution of the arbitral tribunal and have them declared irregular?

[41] The concepts "arbitrability" and "justiciability" were addressed before the Superior Court, after the experts' reports were filed before the Court.

[42] The two concepts have much in common. A dispute's justiciability is dependent on the nature of the dispute and the jurisdiction of the forum before which one attempts to introduce it:

[TRANSLATION]

- it will be ruled that a dispute cannot be tried before an ordinary court of law when the parties have formally agreed that it be subjected to arbitration. Conventional arbitration is available for disputes related to matters that are not reserved exclusively for the ordinary courts of law, such as bankruptcy, divorce, or expropriation.²⁴
- It will also be ruled that a dispute cannot be heard before an arbitral tribunal when it relates to a matter reserved exclusively for the ordinary courts, such as divorce.

[43] In such instances the dispute would be both non-arbitrable and non-justiciable.

²⁴ Matters that come under the exclusive jurisdiction of the ordinary courts of law vary according to the laws of different countries.

[44] In general and also in the present case, an arbitral tribunal is competent to rule on the justiciability or the arbitrability of a dispute. Whether Air France claimed before the arbitral tribunal that an exception of non-arbitrability prevented the tribunal from hearing the dispute because of public order requirements related to the UN embargo, or whether it then claimed that the same dispute was non-justiciable, it was first and foremost up to the arbitral tribunal to rule, which it was able to do either in a preliminary manner or on the merits, exercising its discretion to rule in accordance with what it considered to be its mandate and the best way of fulfilling it, due regard being given to the law and the applicable legal principles.

* * *

[45] Air France claims that the dispute cannot be referred to arbitration because the arbitration agreement would be null, invalid, and unenforceable under certain mandatory public order provisions in both the UN Resolutions and the Regulations of the Council of the European Union.

[46] Here again, it was necessary for a forum to rule on this exception of arbitrability and in the present case, only an arbitral tribunal could do so, since the parties to the dispute had agreed, as of 1972, to refer any dispute to arbitration:

Art. 23. Unless otherwise agreed, any disagreement or dispute arising from the interpretation or implementation of the present agreement or relating to any rights or obligations herein contained shall be referred to arbitration in accordance with the IATA Arbitration Clause in force at the time of appeal, said clause being considered part hereof. The decision of such arbitration shall be final and enforceable on the Parties hereto.²⁵

[47] Contrary to what the applicant maintains, the UN Resolutions do not prohibit Air France from designating an arbitrator. It would be illogical to believe that the regulation respecting the embargo prevents the parties from initiating the arbitration process, if only so that the arbitral tribunal may rule on the applicability of the measures in question.

[48] In any event, the *UNCITRAL Rules* authorize the arbitral tribunal to rule on objections on jurisdictional grounds (art. 21), a principle that is also reiterated in the *Code of Civil Procedure* (art. 943) :

Art. 21. ... 3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counterclaim.

4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award

²⁵ F.A., 622. – The validity of the arbitration clause is in no way called into question.

Art. 943. The arbitrators may decide the matter of their own competence.

[49] However, the arbitral tribunal ruled that the so-called mandatory public order provisions should be considered when examining LAA's requests and not *in abstracto*, since the requests related to various time periods and various aspects of the contract between the parties, whereas the embargo was issued only in 1992.

* * *

[50] The question nonetheless remains: can an ordinary court of law intervene with regard to this decision, when can it do so, and what are the appropriate procedural means for doing so?

[51] Courts of law have jurisdiction over matters conferred by the constitutions of each country or the state legislations that institute these courts.

[52] Arbitral tribunals enjoy a degree of autonomy and rely upon arbitration agreements. Unless an arbitration agreement is deemed invalid, state courts are obliged by such agreements to decline jurisdiction.²⁶ The source of this principle of the autonomy of the arbitration process is found in various international instruments, in particular *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, (1958) to which Canada has been a signatory since 1986.²⁷

Art. II par. 3.

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration ...

[53] In the present case, the contract between Air France and LAA states that any dispute shall be referred to arbitration. This is a consensual arbitration, in accordance with the IATA arbitration clause. As LeBel, J. pointed out in the recent judgment *Éditions Chouette (1987) Inc. v. Desputeaux*,²⁸ reference to IATA regulations is possible because:

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 12-14 of the full text).

²⁶ *International Zodiac v. Polish People's Republic*, [1986] 1 S.C.R. 529.

²⁷ R.S.C. 1985, c. 16, 2nd Supp. – Joint Authorities – Tab 3.

²⁸ (2003) SCC 17 at para. 70.

[54] These provisions of the IATA arbitration clause in force at the time (1985) of the partial termination of the contract stipulate that the arbitral tribunal shall determine its own procedure and decide on the applicable law when necessary, and that the award shall be final and binding on the parties. The only mention of courts of law is in reference to the rendering of awards:

2. ... Any dispute or claim concerning the scope, meaning, construction or effect of this agreement or arising therefrom shall be referred to and finally settled by arbitration in accordance with the procedures set forth below and if necessary, judgment on the award rendered may be entered in any court having jurisdiction thereof;²⁹

[55] Subsequent to the arbitration request, the parties agreed in the Mission Statement that the applicable law for procedural questions would be as follows: *The court will apply the UNCITRAL arbitration rules.*

[56] The UNCITRAL Rules adopted by the United Nations Commission on International Trade Law on December 15, 1976 do not grant superintending and reforming power to State judicial courts. Only one power is mentioned and it is limited to interim measures of protection:

Art. 26.

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.
2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.
3. **A request for interim measures addressed by any party to a judicial authority** shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement³⁰.

[57] The rules refer to the law of the country in which the award is made solely for purposes of filing and registering the award (art. 32 par. 7):

7. If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.³¹

²⁹ F.A., 1105.

³⁰ F.A., 421-422.

³¹ F.A. at 423.

[58] The applicant invokes various provisions of the *Code of Civil Procedure* to justify an intervention by a court of law.

[59] Article 940.3 *C.C.P.*³² restricts the Superior Court's power of intervention to the cases listed under Title 1 of Book VII of the *Code of Civil Procedure*. This article, like several provisions of Book VII (On Arbitration) which dates back to 1986, is inspired by the *Model Law on International Commercial Arbitration*, adopted by the United Nations Commission on International Trade Law on June 21, 1985. Article 5 states:

Art. 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

[60] It is interesting to note here the commentary on the draft text of the *Model Law* provided by the Secretary-General of UNCITRAL.³³

1. This article relates to the crucial and complex issue of the role of courts with regard to arbitrations. ...
2. Although the provision, due to its categorical wording, may create the impression that court intervention is something negative and to be limited to the utmost, it does not itself take a stand on what is the proper role of courts. It merely requires that any instance of court involvement be listed in the Model Law. Its effect would, thus, be to exclude any general or residual powers given to the courts in a domestic system which are not listed in the Model Law. The resulting certainty of the parties and the arbitrators about the instances in which court supervision or assistance is to be expected seems beneficial to international commercial arbitration.
3. Consequently, the desired balance between the independence of the arbitral process and the intervention by courts should be sought by expressing all instances of court involvement in the Model Law but cannot be obtained within article 5 or by its deletion. The Commission may, thus, wish to consider whether any further such instance need be included, in addition to the various instances already covered in the present text. These are not only the functions entrusted to the Court specified in article 6, i.e. the functions referred to in articles 11 (3), (4), 13 (3), 14 and 34 (2), but also those instances of court involvement envisaged in articles 9 (interim measures of protection), 27 (assistance in taking evidence), 35 and 36 (recognition and enforcement of awards).
4. Another important consideration in judging the impact of article 5 is that the above necessity to list all instances of court involvement in the Model Law applies only to the "matters governed by this Law" The scope of article 5 is, thus, narrower than the substantive scope of application of the Model Law, i.e.

³² Art. 940.3. In all matters governed by this Title, no judge or court may intervene except as provided by this Title.

³³ Commentary contained in the Report of the Secretary-General to the 18th United Nations Commission on International Trade Law, in G.C. Part I, 97-168.

“international commercial arbitration” (art. 1), in that it is limited to those issues which are in fact regulated, whether expressly or impliedly, in the Model Law.

5. Article 5 would, therefore, not exclude intervention in any matter not regulated in the Model Law. Examples of such matters include the impact of State immunity, the contractual relations between the parties and the arbitrators or arbitral institution, the fees and other costs, including security therefor, as well as other issues mentioned above in the discussion on the character of the Model Law as “lex specialis” where the same distinction has to be made.

[61] The Quebec legislature, for its part, has specified the intervention powers of the Superior Court as follows:

Art. 940.3 A judge or the court cannot intervene in any question governed by this Title except in the cases provided for therein.

(Emphasis added.)

[62] The Quebec courts are thus compelled to follow this exhaustive list. There is a strict limit on court intervention during arbitration proceedings. The powers accorded by the *Code of Civil Procedure* are as follows:

- 1) Art. 940.4. A judge or the court may grant provisional measures before or during arbitration proceedings on the motion of one of the parties

[63] *The UNCITRAL Arbitration Rule* (art. 26(3)) and the *Model Law* (art. 9) take the same position. The present affair is clearly not a case of a provisional measure. Nor does it involve an urgent issue related to the conservation of goods. The dispute is not related to the acts of the parties but to those committed by the arbitration process.

- 2) Art. 944.6 par. 2 and 944.8. Summoning a witness to appear or to produce evidence in support of his claims.

[64] Nor do these coercive measures apply to the present case.

[65] In fact, the principal ground invoked by the applicant to have partial award No 1 quashed is the irregularity in the appointment of the arbitrators. Quebec law provides reason to intervene in three situations, namely, at the time of the homologation of the award (art. 946.4(5) *C.C.P.*), at the time of the request for recognition and enforcement of the award (art. 950(5) *C.C.P.*), or at the time of annulment of the award (art. 947.2, *C.C.P.*). It is important to emphasize that the court cannot enquire into the merits of the dispute when dealing with a motion for homologation (art. 946.2, *C.C.P.*) or with an application for recognition and execution (art. 951.1, *C.C.P.*).³⁴

- 3) Art. 943.1. If the arbitrators declare themselves competent during the arbitration proceedings, a party may within 30 days of being notified thereof apply to the court for a decision on that matter.

While such a case is pending, the arbitrators may pursue the arbitration proceedings and make their award.

³⁴ *Éditions Chouette (1987) inc. v. Desputeaux*, (2003) CSC 17, par. 54.

[66] This provision is not covered by art. 940 *C.C.P.* It can be derogated from. And in fact, the parties waived this recourse by choosing the UNCITRAL Rules for arbitration procedure. However, these rules do not provide for the intervention of the state court during the arbitration process except, as already mentioned, to obtain measures.

[67] The trial judge was therefore justified in departing from art. 943.1.

[68] Air France argues, however, that public order cannot tolerate a violation of international obligations and the international prohibitions imposed by UN and European Union resolutions, and this would authorize a court of law to intervene.

[69] Here again, Air France's position is difficult to follow.

[70] The fundamental objective of the legislator is to exhaust the arbitration procedure before resorting to the courts. In other words, in every case in which a jurisdictional objection or one related to the constitution of the arbitral body is raised, the state's court may intervene only subsequent to the final award. Thus, the trial judge was right in declaring the applicant's action to be premature.

[71] Moreover, articles 34 and 36 of the *Model Law* specify that the state's courts may intervene only in response to motions for recognition and enforcement or annulment of the award (ruling on merits of the case):

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

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:

...

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;

Article 36. Grounds for refusing recognition or enforcement.

Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

...

iv) the composition of the arbitral tribunal 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;

[72] Thus, there is still the possibility of intervention by the courts at the end of the arbitration process, in spite of the fact that practices with regard to enforcement may vary from one country to another.³⁵

[73] There is no exception, not even for reasons of public order. Furthermore, all this is in accord with the current philosophy and trends in international commercial arbitration.

[74] Gaillard and Savage, in their most recent work,³⁶ describe the basic trends that developed at the time of the various recent reforms in the field of international commercial arbitration. First of all, they emphasize that the reforms are aimed at ensuring and reinforcing the effectiveness of arbitration agreements, which entails recognition of both the validity of arbitration agreements and their autonomy. The second common legislative objective is the recognition of a generalized movement towards the increased independence of international arbitration from national legal systems, provided that the parties adhere to certain fundamental legal principles. And the third basic goal or tendency is to limit legal interventions. The authors stress that the courts tend to intervene only after the end of arbitration. They add:³⁷

... the international validity of the award ultimately depends on two fundamental conditions: the validity of the arbitrators' powers and the acceptability of their decision, although control by the courts can never go as far as revising the decision as to fact or law. The available means of recourse have also been limited. The tendency is to leave just one possible action: an application to set the award aside. Even this is denied under certain circumstances in some jurisdictions. Of course, there will always remain the option of resisting enforcement of the award.

[75] It must be concluded that Book VII (Arbitration) of the *Code of Civil Procedure* and the *UNCITRAL Arbitration Rules* cannot be used in support of legal intervention at this point in the arbitration process.

4) Articles 33, 46, 846, and following: the superintending and reforming power and the inherent powers of the Superior Court.

[76] A remedy based on art. 846 C.C.P. is admissible only against a statutory tribunal: *Atlas Tuyaux v. Savard*, [1985] R.D.J. 556 (C.A.).³⁸

³⁵ Redfern & Hunter, *Law and Practice of International Commercial Arbitration*, 3d ed. (London: Sweet & Maxwell, 1999) at 469-470; by way of illustration, see *Chromalloy Aeroservices Inc. & Arab Republic of Egypt* (August 1996) II Int. Arab Report, and the comments of Emmanuel Gaillard in "L'exécution des sentences annulées dans leur pays d'origine : l'expérience française", Working Group III, I.C.C.A. (Paris, May 1998).

³⁶ Fouchard, Gaillard, Goldman, *On International Commercial Arbitration* (Kluwer Law International, 1999).

³⁷ *Supra* 103.

³⁸ Applied by the Superior Court in 1997 in *P.G.Q. v. DuMesnil & Cintec Environnement Inc.*, Montreal 500-05-032772-970, J.E. 97-2081 (Sup.Ct.), Louise Lemelin J.S.C.

[77] In *Roberval Express v. Transport Drivers Union*,³⁹ the Supreme Court of Canada held that the superintending and reforming power of the Superior Court cannot be invoked to control the legality of an arbitral tribunal, the latter not being established by statute. In that judgment, Chouinard, J. explains the criteria that define a statutory tribunal:

In addition to the obligation on the parties to resort to this tribunal, in the first passage Lord Goddard speaks of a body set up by statute, which has duties conferred on it by statute. In the second, he speaks of powers and duties conferred by statute, which when exercised may lead to the detriment of subjects who may have to submit to their jurisdiction. In the third, he speaks of bodies which have been entrusted by Parliament with duties partly of an administrative character and partly of a judicial character in some cases, the decisions of which may affect the parties.

In my view the key point to be noted is this characteristic, referred to three times by Lord Goddard, which consists of duties and powers conferred by statute and which seems to me to be as important in classifying a tribunal as the obligation to resort to that tribunal or, what would be more correct in the context, the absence of a choice whereby the parties may adopt this method or some other to resolve their differences.

[78] In this instance, the parties deliberately chose recourse to arbitration in their contract. This was in no way created by a statute. It therefore cannot be described as a statutory authority and its actions are not subject to the power of judicial review of the Superior Court (formerly *certiorari*).

[79] With regard to the inherent superintending and reforming powers in art. 33 C.C.P., these are exercised “in such manner and form as provided by law”, these terms referring to the provisions of Book VII of *the Code of Civil Procedure* (Arbitrations).

[80] In *Radio-Canada v. L'Union des artistes*,⁴⁰ the Court of Appeal, *per* Laurent E. Bélanger, J.A., clearly ruled:

[TRANSLATION]

The parties agree this is not a question of arbitration imposed by statute: both consider the arbitral award to be subject to homologation by the Superior Court, under art. 950 C.C.P., which grants the latter only limited right of review. The case law has clearly established that, in order to invoke the lack or excess of jurisdiction of a tribunal subject to the superintending and reforming powers of the Superior Court, one must proceed by a motion in evocation under art. 846 C.C.P. On the other hand, such a motion cannot be brought against the decision

³⁹ *Roberval Express v. Transport Drivers, Warehousemen and General Workers' Union, Local 106*, [1982] 2 S.C.R. 888 at 899.

⁴⁰ *Annotated Code of Civil Procedure of Quebec*, vol. 3, unpublished judgments, 616 (15 May 1978) Montreal 500-09-000009-779 (C.A.).

of a private arbitrator. I do not see how art. 33 C.C.P. could authorize a contestation of the same judgment by direct action.

...

From this we may conclude that, while not subject in as total a manner as set forth under art. 33 C.C.P. to the superintending and reforming powers of the Superior Court, the arbitral award is no less subject to its right to "examine into any grounds of nullity which affect the award or into any other questions of form which may prevent its being homologated". It does not, however, have the right to inquire into the merits of the dispute.

[81] As for the other inherent powers of the Superior Court, the applicant, invoking the judgment of the Supreme Court of Canada in *Canada (Human Rights Commission) v. Canadian Liberty Net*,⁴¹ invites courts of law to make an exception to art. 940.3 C.C.P. because "of the hierarchy of international legal standards". In *Canadian Liberty*, the Supreme Court considered the inherent jurisdiction of the federal Court, a concept flowing from the presumption that if a right exists, there must exist a court with the jurisdiction to enforce it, "for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the [Queen's] Courts of justice", *Board v. Board*, [1919] A.C. 956 (C.P.).

[82] In 1981, Lord Diplock of the House of Lords⁴² expressed himself as follows on the subject of these inherent powers:

I turn next to the general jurisdiction of the High Court to grant injunctions as an alternative source of its power to control the conduct in an arbitration of the parties to it or to arbitrator. As recently as 1977, this House in *Siskina (Owners of cargo lately laden on board v. Distos Compagnia Naviera S.A.)*, [1979] A.C. 210) had occasion to confirm as a matter of *ratio decidendi* the well-established law that the jurisdiction of the High Court to grant injunctions, whether interlocutory or final, was confined to injunctions granted for the enforcement or protection of some legal or equitable right. In doing so, this House expressly approved the judgement of Cotton L.J. in *North London railway Co. v. Great Northern Railway Co.* (1883) 11 Q.B.D. 30.

That was a case in which both Cotton and Brett L.JJ. discussed several pronouncements, made by Sir George Jessel M.R. in earlier cases at first instance, which to an ingenuous reader might suggest that a judge had almost unfettered discretion to grant injunctions whenever he thought it would be convenient to do so. The Court of Appeal, however, found themselves able to explain away those statements by putting on them somewhat strained gloss to the effect that they meant no more than that the court had jurisdiction to grant an

⁴¹ [1998] 1 S.C.R. 626 at para. 29.

⁴² *Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping Corporation Ltd.*, [1981] A.C. 909 at 979 (H.L.).

injunction *for the enforcement or protection of a legal or equitable right* when it was just and convenient so to do.

[83] Moreover, Lord Diplock rejected the concept of a general supervisory power with regard to conventional arbitrators.⁴³

I find myself unable to accept as well-founded the general proposition by Lord Denning M.R. that “the High Court has an inherent jurisdiction to supervise the conduct of arbitrators. It is not confined to the statutory powers.” That such a general supervisory power was vested in the High Court had never been asserted until the judgment of the Court of Appeal delivered in June 1979 in *Japan Line Ltd. v. Aggeliki Charis Compania Maritima S.A.* [1980] 1 Lloyd's Rep. 288-292, ...

... For the moment I confine myself to rejecting the notion that the High Court has a general supervisory power over the conduct of arbitrations more extensive than those that are conferred upon it by the Arbitration Acts; nor do I suppose that the assertion of such an open-ended power of intervention in the conduct of consensual private arbitration would be likely to encourage resort to London arbitration under contracts between foreigners which have no other connection with this country than the arbitration clause itself.

[84] In any event, there is a tribunal with jurisdiction to defend the rights of Air France, even though this implies that certain rights will not be considered by the State's courts until after the final award.

[85] The comment by Australian jurist Keith Mason,⁴⁴ published in 1983, a little after the House of Lords judgment in *Bremer Vulkan*, provides a good summary of the situation with regard to arbitrators:

Many of the more recent developments of administrative law can be related to the assumption by superior courts of a general inherent jurisdiction to use their process in aid of the proper administration of justice. Thus, in appropriate cases the Supreme Court will exercise an inherent power to stay proceedings in those courts or tribunals in respect of which it is empowered to exercise an appellate or supervisory jurisdiction whenever necessary to prevent injustice occurring with respect to matters which come within its cognisance. However, the House of Lords has recently asserted that the source of judicial powers over arbitrators is wholly statutory and not inherent.

(Emphasis added.)

[86] In short, in Quebec, the superintending and reforming powers of the State's court are exercised only after final award and only for a consideration of nullities which might

⁴³ *Ibid.* at 979.

⁴⁴ Now President of the Court of Appeal of New South Wales.

affect the award or of questions of form which might prevent its homologation (art. 946.4 C.C.P.); the court cannot, however, inquire into the merits of the contestation between the parties.⁴⁵

Transnational public order

[87] The applicant also asserts that the arbitral tribunal could not be constituted owing to the UN resolutions instituting an embargo, claiming that these resolutions constitute imperative standards of international law that cannot be derogated from. According to Professor Michel Pourcelet, these international standards, which he describes as *erga omnes*, do not require ratification or integration into national law to be enforceable in all countries.⁴⁶

[TRANSLATION]

While it is true that the general, customary practice is to integrate laws and regulations on the application of an international system of law into domestic law, it has already been emphasized that *erga omnes*, the transnational public order obligation related to *Jus Cogens*, does not require translation into the national system of law nor the promulgation of any instrument, contrary to what is required in the case of international treaties, the latter not being mandatory unless ratified and integrated within national law.

[88] *The United Nations Charter* provides for the acceptance and application of Security Council Decisions by Member States (art. 25).⁴⁷ It is true that *The United Nations Charter* has precedence over all other international instruments in the event of a conflict of laws (art. 103). Nevertheless, the international public order that it is designed to protect consists in the coherent combination of the legal systems of the all of the States.⁴⁸

[89] How are these standards to be interpreted in the case of arbitration proceedings? Professor Philippe Fouchard, who testified on behalf of the applicant, supports the view that this supranational law and order must apply to the arbitrators.⁴⁹ I agree. Even though the arbitral tribunal is not itself a Member State of the United Nations, this does not mean that it can disregard international public order. The probative value of the Security Council Resolutions cannot be ignored. However, I do not believe that the facts adduced permit the conclusion that the arbitral tribunal violated international public order by declaring itself qualified to hear the dispute.

[90] Indeed, Article 8 of *Resolution 883* restricts the prohibition to claims related to:

⁴⁵ *Éditions Chouette* at para. 69.

⁴⁶ F.A. at 156, para. 3.

⁴⁷ F.A., at 889.

⁴⁸ François Côté, "Les notions d'ordre public et d'arbitrabilité dans le cadre de l'article 946.5 C.P. et leurs implications internationales", (1988) *R.J.E.L.* 31 at 36.

⁴⁹ F.A. at 1666.

... any contract or other transaction or commercial operation where its performance was affected by reason of the measures imposed by or pursuant to this resolution or related resolutions;.

[91] Professor Pourcelet considers that this provision has a retroactive effect.⁵⁰ With respect, I rather believe that the question remains unsettled and that it can be discussed before the arbitral tribunal. In my opinion, the provision seems to indicate that only claims that are a consequence of the embargo are prohibited. The claim already initiated before the April 15, 1992 deadline is not necessarily affected by this measure. The same would hold for claims presented after April 15, 1992 that are not dependent on the U.N. measures. In other words, all that would be admissible are requests for compensation for any direct and indirect damage caused by or related to the embargo. As for the effect of the European Union Council Regulations adopted on November 29, 1993, particularly Article 3 of Regulation 3275-93, this is also a matter to be decided by the arbitral tribunal.

[92] Professor Philippe Leboulanger makes the following comments on the issue of retroactivity, comments which to me seem appear convincing:

[TRANSLATION]

Security Council Resolution 883 and the European Union Council Regulations institute no objective, nor even any subjective, non-arbitrability in assigning exclusive jurisdiction to the State jurisdictions of the European Convention countries to hear disputes that are not the consequence of the embargo against Libya, unlike the dispute between LAA and Air France. These documents are intended solely to render provisionally inadmissible only those requests that are aimed at obtaining compensation for damage that is the direct or indirect consequence of the embargo, which is consistent with the objective set by the United Nations Security Council and the Council of the European Union.

To interpret the letter and the spirit of these texts otherwise would result in the institution of absolute, retroactive jurisdictional immunity to the benefit of the Libyan parties and their co-contractors, which would be contrary not only to law and to fairness, but to plain common sense.⁵¹

[93] In the present case, the respondent presented an arbitration request comprising two parts.⁵² It alleges that the contract concluded between the parties was first suspended on November 1, 1985 and then completely suspended on April 16, 1992. At first sight, therefore, the arbitrators could not completely set aside the respondent's request for arbitration on the grounds that it was prohibited by the UN measures. It will obviously be incumbent on the respondent to prove to the arbitral tribunal that part of its complaint indeed originated before the embargo came into effect.

⁵⁰ F.A., 160, 10.

⁵¹ Opinion of Philippe Leboulanger, 27 April 1999, F.A. at 255.

⁵² Exhibit **R-8**, F.A. at 568.

[94] As for the effect of the suspension of the embargo, it does not seem to me that the Court has to rule on this question, since at this stage of the proceedings – and this point needs to be made again – it falls under the jurisdiction of the arbitral tribunal.

[95] Consequently, the argument that the arbitral tribunal did not respect transnational public order is unfounded, and the Superior Court therefore cannot annul the award based on this argument.

[96] In conclusion, after an analysis of the various UN measures and the specific powers conferred on Quebec courts, I am of the opinion that the Court should not intervene with regard to the judgement under appeal. The trial judge ruled according to the rules set forth in the *Code of Civil Procedure* and, consequently, the appeal should be dismissed with costs.

LOUISE MAILHOT, J.A.