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**Testing the Model: Expanding Arbitration to the Public Domain**

# Arbitrability: Are there Limits?

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## I- Introduction

When I received the invitation from Yves Fortier and Pierre Bienvenu to participate in this panel, I was, at first, somewhat puzzled. In their characteristically gracious fashion, they had said that they thought my background would qualify me to speak on one of three topics, which they then listed. As I ran my eyes down the list, I wondered if the letter had been addressed to me in error. The topic that has just been expertly addressed by Lucy Reed was the "Policitization of Arbitration in Investment Disputes." Knowing that there were bound to be a number of participants in the Symposium who were actively engaged in the current challenges facing investment disputes, I knew that Maître Fortier would not expect me to be in a position to enlighten this audience. And then there was a topic entitled "A View from the Judiciary." Well, that was clearly not intended for me either.

That left only one topic: "Arbitrability: Are there Limits?" It was not obvious, at first, that it had been intended for me because I have not previously written on the subject. But the more I thought about it, the more I realized that I could not be more delighted. Not only because the question of arbitrability is one of those classic questions that encourages us to think about the principles informing the kind of dispute resolution that is our collective passion. But also because Maître Fortier posed the question in such a wonderfully provocative way: "Arbitrability: *Are* there Limits?" This suggested that I would be free to depart from the rigorous analysis of recent doctrinal developments and pursue a more fundamental reflection on the topic—and all this in light of the current expansion of arbitration into the public domain, which is, as we have seen, is very much testing the model. And so I invite you to join me in taking a fresh look at the age-old question of arbitrability.

First, it is important to clarify what we are not talking about. We are not talking about the kinds of challenges to arbitrability that arise in the course of interpreting the

parties' agreement. Historically, a range of challenges to the arbitrability of disputes have arisen in connection with questions about whether the parties have, in their arbitration agreement, submitted the instant dispute to arbitration – that is, about whether the agreement *covers* the dispute. Issues of "arbitrability" in these circumstances can relate either to the subject matter of the agreement and or to the parties *to* the agreement. These kinds of challenges to arbitrability are best left for another day. Interesting though they may be, they can generally be understood through the same kind of analysis of arbitration agreements that forms the mainstay of so much of the law of arbitration.

What we *are* talking about are the limits to arbitrability that cannot be altered by the parties' agreement. Some disputes are not arbitrable because the parties *cannot* agree to submit them to arbitration; they are described as "not capable of being arbitrated." In this regard, arbitrability is a bit like justiciability. It refers to the kind of externally imposed limits on the adjudicative process that are not derived from the principles that inform the process, that is, principles such as fairness to the parties in presenting their respective claims and defences, and adjudicative efficiency. And because these externally imposed limits seem arbitrary in terms of these principles of fairness, we feel that we are obliged to accept them. We can only catalogue them and describe the occasions on which they arise. We cannot question the underlying principles that explain their application or that permit us to anticipate how they might prevent the arbitration of any given dispute. It is almost like being asked to admire the Emperor's new fall wardrobe. It doesn't occur to us to take a good look. We expect to see what we are expected to see.

## II- A Canadian Perspective: Justiciability and Arbitrability

On this point, and on the question of arbitrability in general, I would like to offer a Canadian perspective—and that is because Canadians do not take kindly to externally imposed limits on the kinds of issues that can be presented for adjudication. They like reasoned decisions in matters of controversy. The more controversial the matter, the more important it is to have a reasoned decision. As Maître Fortier and his colleagues know from having recently played an important role in the process,[1] Canada has a proud

[1] That is, in the Reference re Secession of Quebec [1998] 2 SCR 217.

tradition of seeking advisory opinions from the Supreme Court on matters of political controversy.[2] This is a tradition that can seem puzzling to constitutional lawyers from other countries that have stronger commitments to the separation of powers. Indeed, some 20 years ago, the Supreme Court of Canada questioned the very existence of a "separation of powers" in Canada in the *Operation Dismantle* case.[3] The Court rejected the proposition that there were "political questions", that is, questions that should not be submitted to courts of law because they were reserved for determination by other branches of government.[4]

In fact, this extraordinary confidence in the capacity of the courts and of the adjudication of disputes to play a central role in the governance of the country is not a recent development. It is embedded in the very fabric of Canada. Our first two important constitutional documents reflect the strength of this commitment to adjudication. Of course, the first document I am referring to is the one in 1760, infelicitously entitled the "Articles of Capitulation"[5] in which the Canadiens agreed to the terms on which they were prepared to let the British govern Canada.[6] And the second document is the British statute called the Quebec Act, which in 1774 elaborated on these terms.[7] During that formative period, between 1760 and 1774 it was resolved that Canada could best be governed by two branches of government, not three. There was an Executive, comprised of the local governor advised by representatives of the Church, and a Judiciary composed of British courts applying local law in matters of private law. There was no legislature. The recommendation made by the Boston merchants who had migrated north to establish

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[2] *AG Ontario v AG Canada* (Reference Appeal) [1912] AC 571.

[3] *Operation Dismantle Inc. v Canada* [1985] 1 SCR 441.

[4] *Marbury v Madison*, 5 U.C. (1 Cranch) 137 (1803).

[5] Despite the impression given by the title of this instrument, Lord Mansfield confirmed in *Campbell v Hall,* (1774) 1 Cowp 204, 98 ER 1045 (QB) that "Articles of capitulation, upon which the country is surrendered, and treaties of peace by which it is ceded, are sacred and inviolate, according to their true intent and meaning."

[6] Article XXXVII of the Articles of Capitulation provided that "The Lords of the Manors, the Military and Civil officers, the Canadians, as well in the Towns as in the country, the French settled, or trading, in the whole extent of the colony of Canada, and all other persons whatsoever, shall preserve the entire peaceable property and possession of the goods…[lands], merchandizes, furs, and…even their ships…—"Granted as in the XXVIth article." A Shortt and AG Doughty *Documents Relating to the Constitutional History of Canada 1759-1791* v 1 (SE Dawson Ottawa 1907) 25.

[7] H Neatby *The Quebec Act: Protest and Policy* (Prentice-Hall Scarborough, Ontario 1972).

a local legislature was rejected. It was rejected because it would necessarily have been based on a narrow franchise that excluded the francophone majority.

Since that time, the unparalleled trust placed by Canadians in the integrity of their justice system and its capacity to play an important role in government has distinguished Canada even from countries with otherwise very similar approaches to government.[8] But what does this unparalleled trust in the Courts say about the confidence that Canadians might have in arbitration? Surely the reasons for minimizing the restrictions on court jurisdiction that exist to permit the Executive to operate freely have little in common with the reasons for restricting the freedom of parties to agree that certain disputes will not be heard in the courts, but rather determined by way of arbitration. To be sure justiciability and arbitrability are very different concepts. Both kinds of externally imposed limits prevent the adjudication of disputes in their respective fora, but one might suppose that an expansive approach to justiciability that ensured that more matters would be dealt with in the courts would imply a narrow approach to arbitrability lest a broader approach draw more matters out of the courts.

I think that this is not the case in Canada. Canadian legal traditions promote a broad view both of justiciability and of arbitrability. But before we consider why that might be so, and what the future might hold, it is worth considering what the current state of the law is on arbitrability. And we can do so quite briefly, because like the history of thinking on many legal issues, the history of thinking on arbitrability in Canada, particularly as it might apply to international commercial disputes, is quite brief.

### III- A Brief History

Not much more than 10 years ago, the Ontario Court of Appeal decided a case that considered the effect of the then relatively new International Commercial Arbitration Act. The Ontario courts were asked to stay a proceeding in favour of arbitration in one of the southern states, and one of the parties objected that, because the dispute involved a construction lien and this could affect title to real property in Ontario, the proceeding

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[8] On this extraordinary asymmetrical approach to the branches of government, see J Walker, *The Constitution of Canada and the Conflict of Laws* (DPhil Thesis, Oxford University: 2001).

should not be stayed because the matter was not arbitrable; it had to be decided in an Ontario court. That decision was in the *Automatic Systems v Bracknell* case[9] and the Court of Appeal stayed the litigation finding no compelling reason in the circumstances to restrict the scope of operation of international commercial arbitration. I recall at the time being fascinated by the effect that was occurring as the immovable objects of the supposedly self-evident limits of arbitrability were met by the irresistible force of the parties' agreement to arbitrate backed by the New York Convention and the International Commercial Arbitration Act.[10] Despite the apparent challenge of reconciling this clash of fundamental principles there seemed not to be any good reason to restrain the parties from arbitrating their dispute in the forum of their choosing.

That was just ten years ago. There have been a few other cases along the way,[11] but the next big milestone came with the 2003 decision of the Supreme Court of Canada in *Desputeax and Éditions Choette,* that is, the *Caillou* case.[12] We are all very grateful to those here who participated in producing such a clear and helpful articulation of the strong support of international commercial arbitration that is consistent with Canadian legal traditions. Indeed, the measure of their success is that the reasoning in the judgment, including its statements about the scope of arbitrability, reads so naturally that one wonders what the controversy might have been.

The case involved a challenge to the arbitrability of questions of ownership of copyright, and the Supreme Court seemed to have no difficulty in deciding that the assignment in the *Copyright Act* of these issues to the concurrent jurisdiction of the Federal Court and the provincial superior courts included "arbitration procedures created by a provincial statute"—any exception to arbitrability would need to be provided for expressly.[13] The court noted the exceptions that were provided in the Civil Code of Quebec for certain questions of ordre public and certain questions of the status of persons, or what are called "extra-patrimonial" matters in the Civil Code, but it

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[9] *Automatic Systems Inc v Bracknell Corp* (1994) 18 OR (3d) 257 (CA).

[10] International Commercial Arbitration Act, RSO 1990, c I.9.

[11] And more recently, *Cooper v Deggan* (2003) 16 BCLR (4th) 248 (CA).

[12] *Desputeaux v Éditions Chouette (1987) inc* [2003] 1 SCR 178.

[13] *Ibid.* ¶ 46.

emphasized that apart from these, the Civil Code gives parties the freedom to submit any matter to arbitration.[14]

Having noted these two exceptions, the Court went on to describe the narrow approach that should be taken to them. First, with respect to matters of ordre public, the Court noted the "variable, shifting or developing nature of the concept"[15] and said how this can make "it extremely difficult to arrive at a precise or exhaustive definition of what it covers."[16] As a result, an "arbitrator is not compelled to stay his or her proceedings the moment a matter that might be characterized as a rule or principle of public order arises in the course of arbitration."[17] Rather "public order arises primarily when the validity of an arbitration award must be determined."[18] And when that happens, "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."[19] Second, with respect to the extent to which the arbitrability of copyright disputes should be restricted by reason of the extra-patrimonial nature of moral rights, the Court observed that "the *Copyright Act* deals with copyright primarily as a system designed to organize the economic management of intellectual property"[20] and that although a copyrighted "work is a 'manifestation of the personality of the author', this issue is very far removed from questions relating to the status and capacity of persons and to family matters."[21]

To those familiar with the far more extensive American jurisprudence on these issues, the suggestion that "public order arises primarily when the validity of an arbitration award must be determined" might seem to echo the "second look doctrine" of introduced in the *Mitsubishi* decision.[22] In that decision the United States Supreme Court suggested that some objections to arbitrability might best be addressed at the enforcement stage under Article V(2)(b) of the New York Convention. At the time, this generated a

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[14] *Ibid.* ¶ 48
[15] *Ibid.* ¶ 52
[16] *Ibid.*
[17] *Ibid.* ¶ 53
[18] *Ibid.* ¶ 54
[19] *Ibid.*
[20] *Ibid.* ¶ 57.
[21] *Ibid.* ¶ 58.
[22] *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc,* 473 US 614 (1985).

concern that the finality of arbitral awards might be subject to the *in terrorem* requirement to meet the standards for the appropriate application of mandatory laws. I do not propose in this short paper to evaluate the validity of that concern or to elaborate on the recent jurisprudence in the United States, or for that matter, in Europe. I propose only to suggest that there is no indication that Canadian courts are likely to understand the Supreme Court as recommending that they ease up on the restrictions on matters that may be submitted to arbitration only in order to adopt a heavy handed approach at the enforcement stage. As the Supreme Court said, "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."[23]

That Canadian courts are amenable to accepting the encouragement given in the *Caillou* case to take a more generous approach to the range of matters that may be arbitrated is evident in the *Acier Leroux* case[24] in which the Quebec Court of Appeal decided that "despite doctrinal support for the notion that the oppression remedy under the CBCA is one of public order since it invokes concepts of fraud and bad faith,"[25] the Court relied on the view expressed in the *Caillou* case that there should be "virtually unfettered autonomy of parties in deciding what they may submit to arbitration."[26] The Court of Appeal had "no difficulty in concluding that a shareholder's oppression remedy is not one that it is necessary to have adjudicated by a court...in order 'to preserve certain values that are fundamental in a legal system'."[27] It is also evident in the dismissal of the application for judicial review in the NAFTA Chapter 11 dispute in *SD Meyers*[28] in which the Federal Court of Canada referred to the *Caillou* case in articulating the appropriate standard of review.[29]

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[23] *Desputeaux v Éditions Chouette (1987) inc, supra,* ¶ 54.
[24] *Acier Leroux Inc c Tremblay* [2004] QJ No 2206.
[25] *Ibid.* ¶ 30.
[26] *Ibid.*
[27] *Ibid.* ¶ 35.
[28] *Canada (Attorney General) v SD Myers, Inc* [2004] FCJ No 29.
[29] *Ibid.* ¶ 40.

## IV- *Erga omnes* and *Jus cogens* concerns

Now that we have taken a brief look at the current state of the law on arbitrability, we might want to consider why a more expansive approach to arbitrability is emerging; for, although Canadian legal traditions may provide a strong impetus to such an approach, a similar trend has been evident in recent years in the law elsewhere. In analyzing the differences between arbitration and litigation in the context of the concerns that are said to support restrictions on the kinds of matters that are capable of being submitted to arbitration, we find that these concerns are, for the most part, more illusory than real. As a preliminary matter, the greater flexibility in arbitration to tailor procedures to the needs of the parties and to the dispute so as to minimize unnecessary expense and delay is less and less a distinct aspiration of arbitration. Civil justice reform has been a major goal of most civil justice systems in recent years. Consider, for example, the sweeping reforms introduced in the English civil justice system as a result of the Woolf Report, in which it was recommended that the extent of the procedure should be proportionate to the size and complexity of the claim. There is less and less difference between aspirations of arbitration and litigation in this regard.[30]

That leaves two main differences between arbitration and litigation. The first main difference is that arbitral proceedings are generally private affairs—participation in arbitration is ordinarily limited to those who are parties to the agreement, and the proceedings and the results are generally held in confidence. This is in contrast to the public nature of state courts and the judgments that result and the ability of other members of the public to apply to participate as interveners or as parties. The second main difference is that arbitrations are adjudicated by persons selected on an *ad hoc* basis. This is in contrast to the members of the judiciary in national courts, many of whom are full-time judges with career-long tenure. I think these two differences between arbitration and litigation give rise to concerns about arbitrability that can be described in two terms borrowed from public international law: *erga omnes* and *jus cogens*.

The *erga omnes* concern, which was discussed in the *Caillou* case,[31] arises because the outcome of some disputes can affect persons who are not parties to the

[30] H Woolf, *Access to Justice: Final Report* (1996).

[31] *Desputeaux v Éditions Chouette (1987) inc, supra,* ¶ 55.

proceeding. This suggests that those others, or their representatives, should be able to have notice of the proceedings and an opportunity to be heard in them. We can see evidence both of courts beginning to question the extent to which this concern properly limits the scope of arbitrable matters and of arbitral practice adapting to this challenge. In some instances, courts are reassuring non-parties who may be affected by the result of the arbitration that the resolution of the dispute between the parties will always be subject in its effect on third parties to the outcome of other proceedings in other fora.[32] In other instances, such as in some of the recent NAFTA proceedings, provision is being made for affected groups to have access to information about the proceedings, and an opportunity to make their views known to the tribunal.[33]

The *jus cogens* concern, which was hinted at in the discussion of the respect needed for mandatory laws in *Mitsubishi,* is a greater challenge. It represents a two-fold concern to ensure a standard of adjudication that is sufficient to command respect for the determinations made without the benefit of *de novo* review, and to ensure adherence to norms from which no derogation can be permitted. Meeting the challenges of the *jus cogens* concern requires an evolution in thought and practice on two fronts: first, it requires evolution in the nature of establishing and maintaining confidence in the "judiciary" that comprise the tribunals who preside over international arbitrations; and second, it requires an evolution in the approach that is taken to the respect for the international nature of the dispute.

With respect to the first of these concerns, particularly as the use of international commercial arbitration expands into new areas of dispute resolution in the public domain, it will become increasingly important to ensure confidence in the integrity of the adjudication by establishing means to secure and maintain the integrity of the adjudicators. This is traditionally described as maintaining the impartiality and independence of the adjudicators. If by impartiality, we mean that an adjudicator should have no connection with the parties or other reason to favour one of the parties over the

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[32] *Western Oil Sands Inc v Allianz Insurance Co. of Canada* (2004) 9 CCLI (4th) 130 (QB).

[33] *Methanex Corporation v United States of America,* Decision of the Tribunal on Petitions of Third Persons to Intervene as "Amici Curiae", 15 January 2001, available on http://www.naftalaw.org

*United Parcel Service of America Inc v Government of Canada,* Decision of the Tribunal on Petitions for Intervention and Participation as "Amici Curiae", 17 October 2001, available on http://www.naftalaw.org

other, that requirement is well understood, even though the standards for it may continue to generate some debate. But the standards for independence are a little less clear. We secure and maintain the independence of adjudicators in national courts in a variety of ways, including security of tenure and carefully considered mechanisms for the selection of judges, which, in Canada, are presently under review. This ensures that a career judiciary is independent of inappropriate influences.

Clearly, this is one area in which arbitration and litigation are inherently different. Does the lack of full-time adjudicators with security of tenure mean that the integrity of arbitral adjudication will always be impaired by a lack of independence? I think not. And this is because independence is never absolute. It is always freedom from one kind of influence in order to be subject to another. We secure the independence of our judiciary from the kinds of forces that might affect the "impartiality" of their decisions so that the members of the judiciary can be free to be influenced by a strong commitment to the rule of law that they are sworn to uphold. The independence that must be fostered to ensure the integrity of the adjudication of international commercial disputes is different. Until quite recently it has been maintained largely by market forces and the strong reputation of the few who were regularly appointed as arbitrators in international commercial disputes. But as arbitration expands into a broader range of claims and as the number of participants increases—whether parties, counsel or arbitrators—the need to find ways to secure and maintain the independence of adjudicators and the integrity on which respect for their work will rest, is presenting fresh challenges. I think we are rising to the challenge. I commend to you, in this regard, the work of Philippe Sands and the International Law Association Study Group on International Courts and Tribunals, which can be found on the ILA website.[34] And, of course, the IBA Committee D Guidelines continue to move the discussion forward.[35] But it would be wrong to omit mention also of the significant work of the major arbitral institutions and the many occasions on which their colloquia and symposia encourage the necessary discussion and debate to further the

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[34] International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, *Independence of the International Judiciary* available on http://www.ila-hq.org/html/layout_committee.htm

[35] Committee D, International Bar Association, *IBA Guidelines on Impartiality, Independence and Disclosure in International Commercial Arbitration*, available on http://www.ibanet.org/pdf/InternationalArbitrationGuidelines.pdf

thinking on this challenging subject among those interested in international commercial arbitration.

With respect to the second part of the *jus cogens* concern—that of the need to adhere to mandatory norms—it is important in describing the necessary evolution of thought and practice to be mindful of the difference between local disputes and international disputes. There are bound to be a category of local disputes on extra-patrimonial matters, particularly disputes in the area of family law, for which the need to adhere to mandatory laws creates challenges for arbitration. Despite this, the desire to encourage alternative dispute resolution, even in this area, has prompted a surprising increase in the willingness to question the non-arbitrability of extra-patrimonial matters. For example, it has given rise to a significant debate in Ontario over the availability of arbitration of family disputes in tribunals committed to the application of shari'ia law. It might be thought that international disputes are less subject to these concerns in that they are more likely to be cast in and understood in purely economic or legal terms. Even if they are not, there is broad recognition of the higher threshold for public policy objections to the decisions reached in international disputes.[36]

Nevertheless, with the continued expansion of adjudication as a means of decision making in international affairs, new forms of dispute resolution are bound to provoke controversies of this sort. Lucy Reed's paper spoke to this, but examples of resistance to the resolution of controversies that reflect the traditional "political questions" concerns abound, even in government to government disputes. Just this summer the International Court of Justice considered a challenge to its jurisdiction to pronounce on the lawfulness of the construction of a wall by Israel in the occupied territories.[37] In the wake of such highly politicized matters, though, other kinds of disputes, such as those relating to antitrust and merger control, as has been written about by several including Marc Blessing,[38] and conflicts between income tax treaties, as has also been written about by

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[36] International Law Association, Committee on International Commercial Arbitration, Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, available on http://www.ila-hq.org/html/layout_committee.htm

[37] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* International Court of Justice 9 July 2004, General List 131 ¶¶ 36-38.

[38] M Blessing, *Arbitrating Antitrust and Merger Control Issues,* Swiss Commercial Law Series, vol. 14 (Basle: Helbing & Lichtenhahn, 2003).

several including Professor Park,[39] come to seem more naturally the subject of international commercial arbitration.

## V- Conclusion: The Emperor and Public Policy

The gradual elimination of arbitrary limits to the kinds of matters that can be submitted to arbitration will, no doubt, generate considerable discussion in the years to come but, all in all, I think it is time to take a fresh look at arbitrability. I am not here today to declare that the Emperor has no clothes; although, I must say that lately he seems rather scantily clad. And with each new judicial appraisal of the limits of arbitrability, he seems to be wearing less and less. But in case you are tempted in your passion for international commercial arbitration to join the chorus of those chanting "take it off", I would like to introduce a note of restraint. There will always be some arbitral awards that we might want to reserve the right to censor for public policy reasons. But beyond that, it is not clear to me what independent value there might be to the cautionary effect of a concern for arbitrability that would prevent matters from being submitted to the parties' chosen forum, where that forum is an arbitral forum. Indeed, the Emperor, at least as I see him, is clothed only in public policy.

In this regard, it may be time for us to stop speaking about the nature of the limits to international commercial arbitration that are posed by arbitrability. It may be time for us to stop asking "What are the limits?" En fin, mes collègues, je croix que le moment est arrivé pour poser la question dans la manière de Maître Fortier: "Arbitrability: *Are* there limits?" I, for one, cannot see any.

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[39] WW Park & DR Tilinghast, *Income Tax Treaty Arbitration* (Amersfoort: International Fiscal Association, 2004).