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Whether the issue of arbitrability arises as a threshold issue at the beginning of the proceedings or in a challenge to an award or its enforcement, the arbitral tribunal or State court before which the issue is invoked must decide how to determine the issue. State courts, in particular, are required to draw the line between arbitrable and non-arbitrable disputes on the basis of two distinct policy objectives: ensuring that sensitive matters of public interest are debated and resolved before national courts, and promoting arbitration as a vibrant system of dispute resolution for parties who freely chose to arbitrate rather than litigate their differences. The decisions of State courts in Canada, among others, are converging steadfastly in favour of arbitrability.

Global Reflections on
**International Law,
Commerce and
Dispute Resolution**

Liber Amicorum in honour of Robert Briner

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Arbitrability of Disputes

L. Yves Fortier *

1. Introduction

The extraordinary range of Robert Briner's career in international commercial arbitration is a testament to the dynamism of the man and the adaptability of this unique system of dispute resolution. The system thrives not only because individuals such as Dr Briner have dedicated their professional lives to its growth and development. It thrives also because of the expanding notion of arbitrability: legislatures and courts in societies around the world continue to entrust to international commercial arbitration—to jurists such as Dr Briner and to the institutions they have fostered (in Dr Briner's case, most notably the ICC International Court of Arbitration)—the resolution of disputes concerning an ever-growing diversity of important and interesting issues.

A decade ago, in a comparative study on the arbitrability of intellectual property disputes, Dr Briner documented the 'general tendency of the States to reduce, or even abolish, public policy limits to arbitrability in international arbitration'.¹ In the present paper, I describe several recent arbitrability cases from Canada that illustrate and indeed strengthen this 'general tendency'. I begin with a brief primer on the principle of arbitrability, inspired by Dr Briner's writings on the subject.

2. The principle of arbitrability

In formal treatments of the subject, arbitrability is typically divided into 'subjective arbitrability' and 'objective arbitrability'.²

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¹ R. Briner, 'The Arbitrability of Intellectual Property Disputes with Particular Emphasis on the Situation in Switzerland', Worldwide Forum on the Arbitration of Intellectual Property Disputes, 3-4 March 2002, Geneva, WIPO Publication No. 728 (available at <<http://arbitrator.wipo.int/events/conferences/1994/briner.html>>) at para. 3.7.

² See e.g. B. Hanotiau, 'L'arbitrabilité' (2002) 296 *Collected Courses of the Hague Academy of International Law* 25, c. I & II; E. Gaillard & J. Savage, eds., *Fouchard, Gaillard, Goldman On International Commercial Arbitration* (The Hague: Kluwer Law International, 1999) [hereinafter *Fouchard Gaillard Goldman*] part II, c. II, sect. III.

Whether, under an applicable law, a particular entity—typically a State or other public body—may be a party to an arbitration agreement and thus whether a dispute to which such entity is a party may be submitted to arbitration is referred to by commentators as ‘subjective arbitrability’ (or arbitrability *ratione personae*).³ While many national laws contain limitations on the ability of the State or public entities to settle disputes to which they are a party by means of arbitration,⁴ generally such limitations do not apply in international arbitration. It is now widely accepted that a State cannot, in an attempt to avoid arbitration pursuant to an arbitration agreement to which it is a party, invoke a provision of its own law that purports to prohibit arbitration with that State.⁵ With characteristic authority, Dr Briner summarized the prevailing view succinctly when, in his presentation to the 2001 Workshop of the Institute for Transnational Arbitration on disputes involving sovereigns, he said: ‘It would seem that the issue of the arbitrability of a dispute, when a State has signed an arbitration clause, is no longer a real issue.’⁶

Whether, under an applicable law, the particular subject matter of a dispute is capable of resolution by arbitration, in the light of relevant public policy considerations, is referred to by commentators as ‘objective arbitrability’ (or arbitrability *ratione materiae*). Article II(1) of the New York Convention addresses ‘objective arbitrability’ as follows (emphasis added):

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Although, as declared in the New York Convention, the freedom of parties to choose arbitration as the means of resolving disputes extends broadly to ‘any differences . . . in respect of a defined legal relationship, whether contractual

³ See *Fouchard Gaillard Goldman*, *supra* note 2 at para. 534.

⁴ See B. Hanotiau, *supra* note 2 at para. 18.

⁵ See B. Hanotiau, *supra* note 2 at paras. 20–49, discussing recognition of this principle in the case law of national courts, in arbitral awards and in legislation.

⁶ R. Briner, ‘Dallas Workshop 2001: The Iran-United States Claims Tribunal and Disputes Involving Sovereigns’ (2002) 18 *Arbitration International* 299 at 302. See also *Fouchard Gaillard Goldman*, *supra* note 2 at para. 72 (‘As international arbitration agreements entered into by public entities are now universally considered to be valid, the specific impact of the involvement of a public entity will be primarily in the determination of the rules governing the merits of the dispute and in the enforcement of the award, rather than in the arbitral proceedings.’).

or not', that freedom is nevertheless limited to differences engaging subject matters 'capable of settlement by arbitration'. In this connection, Professor Böckstiegel has written:

If . . . the jurisdiction of the arbitrators can only go as far as the parties by agreement have authorized them, one has to add immediately, that this jurisdiction can also go only as far as the parties can authorize them. Limits of party autonomy thereby become limits for the jurisdiction of the arbitrators. The lack of arbitrability is such a limit, and public policy is a specific qualification of that limit.⁷

3. Raising the issues of arbitrability

An inquiry into the arbitrability of the subject matter of a dispute can arise at different stages of the arbitral process, both before the arbitral tribunal and in State courts in the context of post-award enforcement or setting-aside proceedings. In his incisive survey of arbitrability across several national jurisdictions, Dr. Briner made the following observations:

A challenge to the validity of the arbitration agreement should be raised at the beginning of the arbitration. It is closely linked at that stage to the jurisdiction of the arbitral tribunal. In many national laws, any objection to the jurisdiction must be raised prior to any defence on the merits. . . .

A challenge to the validity of the arbitration agreement on the ground that the dispute is not arbitrable sometimes also occurs at the time of the enforcement of the award, as many countries allow the State courts to refuse enforcement on the ground that the award violates public policy, e.g., for the reason that the dispute was not arbitrable. . . .

The issue of arbitrability may therefore arise at least at four stages:

- normally the issue of arbitrability is invoked by a party at the beginning of the arbitration, before the arbitral tribunal, which will have to decide whether it has jurisdiction or not;
- the issue of arbitrability may be also referred by a party to a State court which will be requested to determine whether the arbitration agreement relates to a subject matter which is arbitrable;

⁷ K.-H. Böckstiegel, 'Public Policy and Arbitrability' in *Comparative Arbitration Practice and Public Policy in Arbitration*, ICCA Congress Series No. 3 (Deventer: Kluwer Law & Taxation, 1987) 177 at 178.

- the issue of non-arbitrability can be raised in setting aside proceedings before the State court, usually at the place where the arbitral tribunal has its seat;
- non-arbitrability may also be invoked by the defendant before the court deciding on the recognition and enforcement of the award.⁸

A motion before a court of competent jurisdiction to set aside an arbitral award on the basis of non-arbitrability is specifically authorized by Article 34(2)(b)(i) of the UNCITRAL Model Law, which provides, in relevant part:

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

.....

(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; . . .

Non-arbitrability is similarly recognized as a ground for a State court to refuse recognition or enforcement of an award by Article 36(1)(b)(i) of the Model Law, which adopts the standard set out in Article V(2)(a) of the New York Convention:

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
 - (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; . . .

If the issue of arbitrability is raised at the end of the arbitral process, in setting-aside or enforcement proceedings, it is clearly the relevant State court that will decide the matter. However, where the issue is invoked at the beginning of or during the arbitral process, a question may arise as to which forum—the court or the arbitral tribunal—has the power to determine whether the subject matter of the dispute is arbitrable.

According to the *Kompetenz-Kompetenz* principle—which is now recognized by the main international conventions on arbitration, by most modern arbitration statutes and by the majority of institutional arbitration rules⁹—an arbitral tribunal

⁸ R. Briner, *supra* note 1 at paras. 1.7.1–1.7.3.

⁹ See *Fouchard Gaillard Goldman*, *supra* note 2 at paras. 653–56, where detailed references are provided.

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itself is empowered to determine the existence and scope of its own jurisdiction. It therefore has the primary power to rule on the issue of arbitrability.¹⁰ However, the courts will often have an opportunity to review the tribunal's decision, including as regards arbitrability, by virtue of the jurisdictional compromise struck in Article 16 of the Model Law and thus in the many national laws that are based on the Model Law.

Article 16(3) of the Model Law provides that where an arbitral tribunal rules as a preliminary matter that it has jurisdiction (i.e. that the dispute is arbitrable), that decision may be challenged by a party within thirty days before a national court. At least one learned commentator has questioned how much of a compromise the Model Law really represents, inasmuch as arbitrators may choose to delay their decision on jurisdictional issues until their final award.¹¹

It is important to note that the *Kompetenz-Kompetenz* principle is significantly attenuated in the United States, where the Federal Arbitration Act, which predates the Model Law, has generated its own unique jurisprudence. In *First Options v. Kaplan*,¹² in an opinion delivered by Justice Breyer, the United States Supreme Court held that "[j]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute . . . so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about *that* matter":

Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision, only in certain narrow circumstances. If, on the other hand, the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely

¹⁰ See B. Hanotiau, *supra* note 2 at para. 56. The fact that the arbitral tribunal has primary power to rule on the issue does not mean that such jurisdiction is in all circumstances exclusive. In the Canadian context, see e.g. *Unifund Assurance Co. v. Insurance Corp of British Columbia*, [2003] 2 S.C.R. 63 at paras. 35-49 (holding that the courts should determine, in the first instance, the constitutional applicability of a provincial statutory regime instead of appointing an arbitrator pursuant to a provision of that regime and allowing the arbitrator to make his own determination of the constitutional question).

¹¹ See W.W. Park, 'The Arbitrability Dicta in *First Options v. Kaplan*: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?' (1996) 12 *Arbitration International* 137 at 152.

¹² 514 U.S. 938 (1995).

independently. These two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration.¹³

At issue in *First Options* was not ‘objective arbitrability’ *per se* but rather ‘arbitrability’ in the sense of whether the subject matter in question fell within the scope of the parties’ agreement to arbitrate. However, the Court’s reasoning could apply equally to the issue of ‘objective arbitrability’, in which case the relevant question would be: did the parties agree to submit the issue of ‘objective arbitrability’ itself to arbitration?¹⁴

4. Determining arbitrability

Whether the issue of arbitrability arises as a threshold issue at the beginning of the proceedings or in a challenge to an award or its enforcement, at the end of the arbitration, the arbitral tribunal or court before which the issue is invoked must decide (and do so either expressly or implicitly) how to determine the issue. In particular, it must first determine the law applicable to the enquiry. Leading treatises put forward different approaches to the determination of the law or rule applicable to the arbitrability question.

On the one hand, a relatively straightforward rule has been advocated:

When examining the objective arbitrability of an international dispute, a court must apply its conception of international public policy. As they are not the organs of a particular legal order, arbitrators dealing with the same issue will generally apply the requirements of genuinely international public policy, subject to considerations regarding the enforceability of their award.¹⁵

This approach, perhaps because of its apparent simplicity, often finds favour with practitioners. For example, in a recent arbitration in which I served as

¹³ *First Options*, *supra* note 12 at 943 (internal citations omitted); cf. *Apollo Computer Inc. v. Berg*, 866 F.2d 469 (1st Cir. 1989) (holding that the arbitrability issue should be decided by the arbitrators where the parties’ arbitration agreement incorporates institutional arbitration rules which themselves recognize the *Kompetenz-Kompetenz* principle).

¹⁴ In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), the United States Supreme Court distinguished among various ‘substantive’ and ‘procedural’ arbitrability questions for purposes of applying the *First Options* rule. While the Court observed that ‘a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court’ (*ibid.* at sect. II), it did not address directly the question of ‘objective’ arbitrability.

¹⁵ *Fouchard Gaillard Goldman*, *supra* note 2 at para. 559.

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arbitrator, the tribunal received submissions on arbitrability emphasizing that 'the question of arbitrability is ultimately one of international public policy'.

On the other hand, there exists an approach which requires that various national laws be considered:

If the issue of arbitrability arises, it is necessary to have regard to the relevant laws of the different states that are or may be concerned. These are likely to include the law governing the party concerned, where the agreement is with a state or state entity; the law governing the arbitration agreement; the law of the seat of arbitration; and the law of the place of enforcement of the award.¹⁶

I do not propose in the present paper to take a position as to the 'correct' approach to this complex question. In any event, I defer to Dr Briner who, in his characteristic style, reduces the matter to its essential principles:

The Law Applicable to the Issue of Whether a Settlement by Arbitration is Admissible

The question arises under which law the arbitrator will decide whether settlement by arbitration is admissible and, as a consequence, whether the arbitration agreement is valid. In this context, basically three laws can enter into consideration:

- the law governing the substantive contract;
- the law governing the agreement to arbitrate;
- the law governing the conduct of the arbitration (referred to as "*lex arbitri*").

The law governing the agreement to arbitrate is in practice often the same as the law governing the substantive contract.

It is well established in both the theory and practice of international arbitration that the arbitration process is governed by the law of the place in which it has its seat. This law is referred to as the *lex arbitri*.

Some national systems leave the determination of the arbitrability to the law governing the agreement to arbitrate.

To conclude this point, the *lex arbitri*, i.e., the law applicable at the seat of the arbitral tribunal, is the law which, in general, determines whether the subject matter of the agreement is arbitrable or not. We will deal later in this paper with the question of the influence of the law in force at the place of execution.

¹⁶ A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration*, 3d ed. (London: Sweet & Maxwell, 1999) at 148-49. See also the detailed exposition of the subject in B. Hanotiau, *supra* note 2 at paras. 55-110.

Scope of Application of the "lex arbitri"

The *lex arbitri* does not necessarily govern the whole of the arbitral tribunal's work and procedure as it usually allows much room for the application of the rules of other legal systems. The scope of their application is basically determined by the *lex arbitri*. The existence and the measure of the freedom of the parties in respect of the regulation of the arbitration proceedings are determined by the *lex arbitri* which should be taken as the starting point.

Nature of the Rules Designated by the "lex arbitri" to Govern the Question of Arbitrability

The *lex arbitri* resolves the issue of the arbitrability either by a rule of conflicts or by a substantive rule of private international law. A rule of conflict states which law is applicable to a particular subject matter and in the present case to the issue of arbitrability. A substantive rule of private international law addresses the issue by determining itself the criteria according to which a particular matter, in the present case arbitrability, is to be considered.

.....
Where the *lex arbitri* addresses the determination of the arbitrability by a rule of conflicts of law, objective arbitrability has to be determined pursuant to the solution offered by the rule of conflicts of law which may refer to the law found applicable either to the arbitration agreement, or to the main contract, or to both or to the procedure of arbitration, or to the subject matter in question.¹⁷

Having completed a review of the 'mechanics' of arbitrability—when it is raised, who decides the issue, and how it is resolved—I now address the substantive question: which subject matters are capable of resolution by arbitration and which are reserved exclusively to the courts?

Drawing the line between arbitrable and non-arbitrable disputes involves a consideration of two distinct policy objectives: ensuring that sensitive matters of public interest are debated and resolved before national courts; and promoting arbitration as a vibrant system of dispute resolution for parties who freely choose to arbitrate rather than litigate their differences.¹⁸ Although these two objectives, each valid in its own right, are sometimes portrayed as competing, they are not in practice wholly irreconcilable. Different methods have developed which are well explained in the following extract (emphasis added):

¹⁷ R. Briner, *supra* note 1 at paras. 1.4–1.6 (footnotes omitted).

¹⁸ See A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration*, 2d ed. (London: Sweet & Maxwell, 1991) at 137.

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The first [method] simply consists in excluding from resolution by arbitration disputes which are perceived as involving questions of public policy. . . .

The second method, which is a wholly unsatisfactory hybrid, entails excluding from resolution by arbitration all disputes where one of the parties has violated a rule of public policy. . . .

For these reasons, a third method of ensuring that the interests of society are protected in sensitive areas has developed. It consists of *allowing the arbitrators to hear disputes relating to matters of public policy*, whether or not the main contract containing the arbitration agreement actually contravenes public policy. *The courts will then be able to review the public policy issue* if an action is subsequently brought to enforce or set aside the resulting award. This approach shows far more respect for international arbitration than the first two methods, as there is no basis for the presumption that arbitrators will not consider it essential to uphold the requirements of international public policy.¹⁹

As judges have come to realize and understand that arbitral awards dealing with public policy issues remain subject to their supervision at the enforcement stage, it has become easier, indeed logical, for them to accept that such issues need not be reserved for exclusive consideration by the courts. The result has been that arbitration has vastly expanded. This 'second-look doctrine' was famously articulated by the United States Supreme Court in the Mitsubishi decision, which held that claims under US antitrust laws were arbitrable in international commercial arbitration:

Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed.²⁰

As Dr Briner and others have observed, with the growing acceptance of arbitration, at least in the international sphere, public policy limits to arbitrability are gradually disappearing.²¹ Arbitrators now adjudicate disputes involving such public matters as intellectual property rights, antitrust and competition, securities laws, bankruptcy, corporate law, taxation, and allegations of fraud, corruption or bribery.²² As one authority has aptly and amusingly observed:

¹⁹ See *Fouchard Gaillard Goldman*, *supra* note 2 at 332-33

²⁰ *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) at 638.

²¹ See R. Briner, *supra* note 1 at para. 1.11.2.4; A. Redfern & M. Hunter, *supra* note 16 at 154.

²² See *Fouchard Gaillard Goldman*, *supra* note 2 at 339-59; A. Redfern & M. Hunter, *supra* note 16 at 148-54.

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 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.²³

5. Arbitrability in Canada

Courts in Canada have followed the international trend of doing away with limits to the arbitrability of disputes.²⁴ Three recent Canadian cases should be seen as solidifying Canada's reputation as an arbitration-friendly jurisdiction.

In 2003, the Supreme Court of Canada issued a landmark decision in *Desputeaux v. Éditions Chouette Inc.*,²⁵ in which it considered the arbitrability of a dispute involving the ownership of copyright as between the illustrator, the author and the publisher of a children's literary series based on the well-known French character 'Caillou'. The publishing company had applied to the Superior Court of Québec for recognition of its alleged entitlement to exploit the reproduction rights to the series. The illustrator opposed the publisher's interpretation of the licence. More significantly, however, the illustrator opposed the publisher's recourse to the courts, and it succeeded in having the case dismissed by the Superior Court and referred to arbitration pursuant to an arbitration agreement contained in an exchange of letters between the parties.

The sole arbitrator eventually decided in favour of the publisher. As part of his decision, he ruled that the involvement of the author and the illustrator in the development of the Caillou character was indivisible, and that the character

²³ J. Walker, 'Arbitrability: Are There Limits?' (paper presented at LCIA Symposium in Montreal, 4 October 2004).

²⁴ In 2000, on the occasion of the 125th anniversary of the Supreme Court of Canada, I noted that '[the] change from doubt to deference in the attitude of courts toward arbitration is at least as evident in Canada as in other arbitration-friendly jurisdictions around the world'. L. Yves Fortier, 'Delimiting the Spheres of Judicial and Arbitral Power: "Beware, My Lord, of Jealousy"' (2001) 80 *The Canadian Bar Review* 143 at 143.

²⁵ [2003] 1 S.C.R. 178.

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was therefore a work of 'joint authorship' within the meaning of the Canadian Copyright Act.²⁶ The illustrator, unhappy with this result, challenged the award in the courts on various grounds, including the non-arbitrability of the authorship issue. The challenge was founded on section 37 of the Copyright Act and article 2639 of the Civil Code of Quebec, which, respectively, read as follows:

37. The Federal Court has concurrent jurisdiction with provincial courts to hear and determine all proceedings . . . for the enforcement of a provision of this Act or of the civil remedies provided by this Act.

* * *

2639. Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration.

An arbitration agreement may not be opposed on the ground that the rules applicable to settlement of the dispute are in the nature of rules of public order.

The Quebec Court of Appeal agreed with the illustrator. It held that the issue of authorship is not arbitrable and it accordingly annulled the arbitration award. The Court found that the Copyright Act prevented the arbitrator from ruling on the question of copyright in that section 37 of the Act conferred exclusive jurisdiction on the Federal Court of Canada, concurrently with provincial superior and appellate courts, to hear and determine all proceedings relating to the Act. With respect to article 2639 of the Civil Code, the Court of Appeal held:

Le droit de se voir justement attribuer la paternité d'une œuvre tout comme le droit au respect du nom revêtent une connotation purement morale tenant à la dignité et à l'honneur du créateur de l'œuvre. Sous ces aspects, la question de la paternité du droit d'auteur ne serait pas arbitrable.²⁷

The Court of Appeal took the view that decisions concerning the ownership, scope and validity of copyright may be made only by the courts since such decisions are, as a rule, generally enforceable against the entire world. Given that such decisions may be set up against third parties, the Court of Appeal reasoned, they cannot be left to private adjudication by arbitrators but must be rendered by the public judicial system.

A unanimous Supreme Court of Canada overturned the Court of Appeal.

²⁶ R.S.C. 1985, c. C-42.

²⁷ [2001] R.J.Q. 945 at para. 49.

Firstly, the Supreme Court rejected the argument that section 37 of the Copyright Act constitutes a bar to arbitration. Its reasoning on this point is steeped in Canadian constitutional jurisprudence on federal and provincial authority over the country's court system. What is notable for the purpose of the present paper is that the Supreme Court held that reference to 'provincial courts' in section 37 of the Copyright Act is 'sufficiently general . . . to include arbitration procedures created by a provincial statute'.²⁸ The Supreme Court opined that if Parliament had intended to exclude arbitration in copyright matters, it would have done so expressly.²⁹

Secondly, the Supreme Court concluded that disputes relating to the ownership of copyright are capable of resolution through arbitration and do not fall within the range of matters that 'may not be submitted to arbitration' by virtue of article 2639 of the Civil Code of Québec. The Court noted 'the importance placed on the economic aspects of copyright in Canada'³⁰ and held that although copyrighted work is a manifestation of the personality of the author, the issue of copyright ownership is 'very far removed from questions relating to the status and capacity of persons and to family matters, within the meaning of art. 2639 [of the Civil Code of Quebec]'.³¹

Finally, the Supreme Court reasoned that the arbitral award bound only the parties to the arbitration, and it concluded that the Court of Appeal's concern that the award could be set up against third parties was misplaced.³²

Although *Desputeaux* did not involve an international arbitration, the Supreme Court's sweeping observations and conclusions on arbitration and arbitrability are clearly applicable to arbitration generally. The following passage from the judgment is particularly relevant:

In order to determine whether questions relating to ownership of copyright fall outside arbitral jurisdiction, . . . we must more clearly define the concept of public order in the context of arbitration, where it may arise in a number of forms, as it does here, for instance, in respect of circumscribing the jurisdiction *ratione materiae* of the arbitration. Thus a matter may be excluded from the field covered by arbitration because it is by nature a "matter of public order". . . . The development and application of the concept of public order allows for a considerable amount of judicial discretion in

28 *Supra* note 26 at para. 46.

29 *Ibid.*

30 *Ibid.* at para. 57.

31 *Ibid.* at para. 58.

32 *Ibid.* at paras. 61-62.

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defining the fundamental values and principles of a legal system. In interpreting and applying this concept 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.³³

One learned commentator has written that the *Desputeaux* decision is likely to have an effect in Canada similar to the effect of the *Mitsubishi* decision in the United States.³⁴ Indeed, as the US Supreme Court did in *Mitsubishi*, the Supreme Court of Canada anchored its decision in a presumption in favour of arbitration.³⁵

The immediate and far-reaching impact of *Desputeaux* is well illustrated by two cases decided by the Quebec Court of Appeal within the year following the Supreme Court's decision.

In *Acier Leroux Inc. v. Tremblay*,³⁶ at issue was the arbitrability of a shareholder's 'oppression remedy'³⁷ against the alleged wrongdoing of a company's majority shareholder and directors. Mr Tremblay, the aggrieved minority shareholder, brought his suit before the Superior Court. *Acier Leroux Inc.*, the majority shareholder, sought to have the action dismissed and referred to an arbitral tribunal based on an arbitration clause contained in the parties' shareholder agreement.

The Superior Court dismissed *Acier Leroux's* bid to refer the dispute to arbitration. Noting that Mr Tremblay's complaint alleged both contractual and extra-contractual claims, only some of which could be referred to arbitration pursuant to the arbitration clause, the judge held that it would be more practical to have all of the parties' claims heard by the Superior Court.

33 *Ibid.* at para. 52 (internal citations omitted). For commentary on this decision, see F. Bachand, 'Canada: Arbitrabilité d'un différend touchant au droit d'auteur et conformité d'une sentence à l'ordre public, note sous Cour suprême du Canada, 21 mars 2003' *Rev arb.* 2003.473 at 482-93; S. Guillemard, 'L'affaire *Chouette*: L'arbitre et l'interprétation d'un contrat en matière de droit d'auteur selon la Cour suprême du Canada' *Les Cahiers de droit* 2003.99.

34 See F. Bachand, *supra* note 33 at 483. The *Desputeaux* decision is arguably more significant (in the Canadian context) than was *Mitsubishi* (in the US context), in that *Desputeaux* was not limited, as was *Mitsubishi*, to international arbitration.

35 cf. F. Bachand, *supra* note 33 at 484-89.

36 [2004] R.J.Q. 839.

37 This statutory remedy is provided for in section 241 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44.

Acier Leroux appealed unsuccessfully to the Quebec Court of Appeal, which held that Mr Tremblay's suit was properly initiated in the Superior Court. That conclusion, however, was based solely on defects in the wording of the arbitration clause and *not* on the non-arbitrability of the subject matter of the dispute. On the issue of arbitrability, the Court of Appeal held unanimously that parties may, in principle, agree to have a claim based on the statutory oppression remedy adjudicated by an arbitral tribunal. The Court wrote:

In applying the analysis of LeBel, J. [of the Supreme Court of Canada] in *Desputeaux*, I have no difficulty in concluding that a shareholder's oppression remedy is not one that it is necessary to have adjudicated by a court, to use his words, in order 'to preserve certain values that are fundamental in a legal system'. The mere fact that there are allegations of fraud or bad faith in an oppression remedy is not enough to engage issues of fundamental values that are comparable to the legal status of persons.

Without diminishing the importance of this remedy to minority shareholders, it is of no greater significance in the commercial world than many other types of recourses that are submitted routinely to arbitration where questions of fraud or bad faith may be raised without any suggestion that public order is offended. Such an approach is consistent with the concept that public order should not be given a broad interpretation so as to unduly limit recourse to so potentially an effective and expeditious process as arbitration. This is especially so in circumstances where the parties are in a position to choose as an arbitrator someone with vast experience and expertise in the particular subject matter in issue, qualities that are not necessarily as readily available in the judicial system where the choice of a decision-maker may not be a function of experience or expertise but rather of unrelated factors.³⁸

In the second case that I wish to highlight, *Compagnie nationale Air France v. Mbaye*,³⁹ the Quebec Court of Appeal addressed the arbitrability of a contract dispute arising as a result of the United Nations embargo on Libya. In 1972, Air France and Libyan Arab Airlines (LAA) entered into a maintenance contract (governed by French law) that included an IATA arbitration clause. Following the tragic destruction of two airplanes that fell over Lockerbie and Ténéré (in 1988 and 1989, respectively), the United Nations Security Council imposed an embargo on Libya which, in effect, prevented Air France from providing to

³⁸ *Supra* note 36 at paras. 35–36. The Ontario Court of Appeal also recently confirmed the arbitrability of a shareholders' dispute involving an oppression remedy; see *Woolcock v. Bushert*, [2004] O.J. No. 4498.

³⁹ [2003] R.J.Q. 1040 (C.A.).

LAA the services which were the object of their contract.⁴⁰ Air France subsequently terminated its contract with LAA. The following year, the UN Security Council, with a view to intensifying pressure on Libya, adopted a second resolution prohibiting any legal claim pursuant to contracts terminated as a result of the embargo.⁴¹ The UN resolutions were duly implemented in both France and Canada.

In 1995, LAA served Air France with a request for arbitration, claiming breach of contract, and proceeded to appoint its arbitrator. Air France took the position that, because of the UN embargo, it could not participate in the arbitration. At LAA's request, IATA appointed an arbitrator on behalf of Air France, as well as a chairman, and the arbitral tribunal was thus constituted. Sitting in Montreal and applying the UNCITRAL Arbitration Rules, the arbitral tribunal rejected Air France's argument of non-arbitrability. In a partial award, the tribunal held:

il ne résulte pas de l'ordre public transnational, pas plus que des droits français (droit de fond) et canadien (droit du siège), une quelconque inarbitrabilité du litige et, en conséquence, rejette l'exception d'inarbitrabilité d'Air France, sans pour autant se prononcer sur ce qu'il décidera dans une phase ultérieure de la procédure quant aux conséquences sur les demandes de Libyan Arab Airlines de la résolution 883(93) du Conseil de Sécurité et des décisions prises pour son application.⁴²

Air France challenged the award before the Quebec Superior Court. The Court dismissed the challenge. Air France then appealed to the Quebec Court of Appeal.

The Court of Appeal rejected Air France's argument of non-arbitrability and confirmed the Superior Court's decision.⁴³ The Court of Appeal held that while the UN resolutions imposing the embargo on Libya undoubtedly formed part of international public policy, which the arbitral tribunal could not ignore, they did not deprive the tribunal of its jurisdiction to consider which, if any, of LAA's claims were not barred by the embargo.⁴⁴ The Court adopted as its own the following excerpts from an opinion submitted by the legal expert who had provided evidence on behalf of LAA:

40 See UN Security Council Resolution 748 (31 March 1992).

41 See UN Security Council Resolution 883 (11 November 1993).

42 Cited in decision of the Court of Appeal, *supra* note 39 at para. 20.

43 For commentary on this case see A. Prujiner, 'Canada : Le refus des juges québécois d'intervenir dans un arbitrage international avant la sentence finale, note sous Cour d'appel du Québec, 31 mars 2003' Rev. arb. 2003.1365 at 1385-95.

44 *Supra* note 39 at paras. 89-91.

La Résolution 883 du Conseil de Sécurité et les règlements du Conseil de l'Union européenne n'instituent aucune inarbitrabilité objective, ni même subjective, en attribuant une compétence exclusive aux juridictions étatiques des pays de l'Union européenne pour connaître de litiges qui ne sont pas, comme c'est le cas du différend qui oppose LAA et Air France, la conséquence de l'embargo à l'égard de la Libye. Ces textes ne visent en effet qu'à rendre provisoirement irrecevables les seules demandes tendant à obtenir l'indemnisation des dommages qui sont la conséquence directe ou indirecte de l'embargo, ce qui est cohérent avec le but poursuivi par le Conseil de Sécurité des Nations Unies et le Conseil de l'Union européenne.⁴⁵

6. Conclusion

It is interesting to note that, in 1994, Dr Briner highlighted the arbitrability of intellectual property disputes in Switzerland and observed that the leading Swiss decision on the issue of arbitrability involved the UN embargo against Iraq.⁴⁶ His remarks were prescient indeed, insofar as Canada is concerned. As I have explained in this paper, these and other areas of 'public' law are now also an indelible feature of the jurisprudence of arbitrability in Canada.

Whether in subject matters involving intellectual property rights, international embargoes or shareholders' oppression remedies, the decisions of State courts in Switzerland, Canada and many other jurisdictions are converging steadfastly in favour of arbitrability. Indeed, in the vast majority of cases, it could be said that arbitrability has become a 'non-issue'.⁴⁷ As Dr Briner has written, one can even discern a tendency for disputes concerning certain subject matters to be decided exclusively by arbitration 'for political reasons or because of the lack of flexibility in state courts' procedures' (for example, disputes of the type at issue before the Iran-US Claims Tribunal, the UN Compensation Commission, and the Claims Resolution Tribunal for Dormant Accounts in Switzerland).⁴⁸ This tendency derives, in no small part, from Dr Briner's own contribution to both the study and the practice of international arbitration.

The international arbitration community owes a debt of deep gratitude to Robert Briner for a distinguished career marked throughout by dedication, excellence and integrity. *Ad Multos Annos*, Robert.

⁴⁵ Excerpts from the opinion of Professor P. Leboulanger, cited *ibid.* at para. 72.

⁴⁶ See R. Briner, *supra* note 1 at sect. 2.

⁴⁷ cf. A. Redfern & M. Hunter, *supra* note 16 at 154.

⁴⁸ R. Briner, 'Globalization and the Future of Courts of Arbitration' (2000) 2 *European Journal of Law Reform* 439 at 445.

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As promised, a cleaner copy of the article.
have a great evening.
Carol

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