Kluwer Arbitration Blog

When an Unplanned Flight to Canada Lands You in the Paris International Court of Arbitration

Dina Prokic (Senior Assistant Editor) (Woods LLP) · Wednesday, May 4th, 2022

Aircraft seizures tend to come up at the enforcement stage, oftentimes in relation to investment arbitration awards (see, e.g., proceedings against Tanzania or Equatorial Guinea). In *Specter Aviation v. Laprade*, however, the seizure of the Beechcraft Super King Air 300 (the "Aircraft") is what triggered proceedings before the courts of the Canadian province of Québec, the US State of Oklahoma and Guinea, as well as an arbitration tribunal under the auspices of the Paris International Court of Arbitration (the "CAIP"). The main point of contention is the ownership of the Aircraft. In late 2020 the Superior Court of Québec (the "SC") ruled that this issue belonged in court (2020 QCCS 4392), however a year later the Québec Court of Appeal (the "CA") referred the parties to arbitration (2021 QCCA 1811). Such disparate conclusions stemmed from, among other things, different takes on separability and arbitrability. In addition to clarifying the interplay between the various provisions of the Civil Code of Québec (the "CCQ") which regulate the international jurisdiction of Québec authorities, and shining the light on the enforceability of multi-tiered dispute resolution clauses (of which there were two in this case), the CA's judgment reaffirms the province's pro-arbitration stance.

How it started

The Parties' 2012 joint venture aimed to develop air transportation services in Africa and came to an end when in 2019 they decided to part ways, formalizing the terms of their break-up in an Addendum to the original Agreement. The Addendum regulated the division of property, including the Aircraft in dispute. In the summer of 2019, the Aircraft left Guinea to undergo maintenance in France. Thereafter, instead of returning to Guinea, one of the Defendants illegally flew the Aircraft to Canada. Upon landing in Canada, the Plaintiffs seized it and requested the SC to: (i) recognize such seizure as valid; (ii) order the Defendants to pay legal costs related to the seizure in the amount of $100K; (iii) acknowledge that one of the Plaintiffs was the registered owner of the Aircraft; and (iv) acknowledge the Plaintiffs' right to take immediate possession of the Aircraft. After the Defendants filed their defense and counterclaim asking the SC to declare them as Aircraft's owners, Plaintiffs filed a motion to dismiss or, alternatively, to suspend on grounds of international *lis pendens*. By this point, Plaintiffs had sought to have their ownership recognized in Guinea (where the court ultimately referred the Parties to arbitration at the Defendants' request) and Oklahoma. While the status of the latter proceeding is omitted from the CA's judgment, in the judgment granting leave to appeal (paras. 2, 27-28), the CA had refused to issue an anti-suit

injunction to prevent Plaintiffs from taking further steps before the Oklahoma court.

How it evolved in the Québec courts

The SC refused to refer the Parties to arbitration because the Plaintiffs had attorned to the jurisdiction of Québec authorities, the dispute was not arbitrable and neither of the two dispute resolution clauses was applicable. The CA reversed all these findings, referring the Parties to arbitration pursuant to the 2019 dispute resolution clause.

Tacit renunciation to arbitrate

The SC briefly concluded that Plaintiffs' numerous procedural steps and failure to request referral to arbitration for 10 months demonstrated its attornment to Québec jurisdiction. The CA, conversely, considered Plaintiffs' actions more closely, noting the distinction between steps related to the Aircraft's seizure (for which Québec authorities undisputedly have jurisdiction under Art. 623 of the Code of Civil Procedure, "CCP") and submissions on the merits (i.e. the Aircraft's ownership). According to the CA, Plaintiffs' early actions did not concern the merits of the dispute, but only the seizure's validity (paras. 38, 40). It was only after the Defendants filed their written defense and counterclaim, i.e. the first submission on the merits, that the 90-day deadline for requesting referral to arbitration under Art. 622 CCP was triggered. As the Plaintiffs made their request within this timeframe, they could not be considered to have waived their right to arbitration (paras. 42, 44).

Arbitrability and international jurisdiction of Québec courts

The parties' dispute does not fall into any of the non-arbitrable categories listed in Art. 2639 CCQ: disputes over the status and capacity of persons, family matters or other matters of public order. Nonetheless, according to the SC, the parties' dispute could not be resolved through arbitration because of the interplay of three provisions of the CCQ: (i) 3139 which provides that a court's jurisdiction over the principal demand entitles it to rule on an incidental or cross demand; (ii) 3148(2) which provides that in personal actions of patrimonial nature courts have no jurisdiction if the parties have agreed to arbitrate their differences; (iii) 3152 which grants Québec authorities jurisdiction over real actions if the disputed property is located in the province.

While acknowledging the Supreme Court of Canada's judgment in *GreCon Dimter Inc. v. J.R. Normand Inc.* (previously discussed here) which held that Art. 3148(2) trumped Art. 3139 CCQ, the SC found it had jurisdiction under Art. 3152 CCQ because this was a real action and the Aircraft was in the province (paras. 38-42).

The CA opposed this view, noting that Art. 3152 CCQ merely defined the limits of international jurisdiction of Québec authorities and could not be used to bring real actions within the realm of non-arbitrable matters which are clearly identified in the CCQ and must be interpreted narrowly (paras. 14, 22, 48-51). In his concurring reasons Justice Frédéric Bachand emphasized that arbitrability was the rule and, relying on Gary Born's treatise, pointed to the prevailing view that

disputes related to real rights are arbitrable.

Separability

Plaintiffs sought to rely on the dispute resolution clause contained in the 2019 Addendum, albeit arguing that their consent to this Addendum had been vitiated by fraud. The SC held Plaintiffs could not have their cake and eat it too. While acknowledging that, in principle, this clause would be presumed valid and any decision as to its nullity would be deferred to the arbitrator (para. 55), the SC concluded that logic did not apply here because the Plaintiffs themselves denied having consented to the Addendum that contained the dispute resolution clause they themselves sought to apply. Emphasizing the separability of arbitration agreements (enshrined in Art. 2642 CCQ) and echoing the findings of the arbitral tribunal which had rendered a partial award on jurisdiction in the meantime, the CA held that Plaintiffs' reliance on the 2019 dispute resolution clause was well-founded.

A closer look at the multiple multi-tiered dispute resolution clauses

Considering the SC's dismissal of the 2019 clause, it only analyzed the one contained in the 2012 Agreement.[1)] This clause required all disputes to be resolved amicably, failing which Price Waterhouse Coopers would act as arbitrator. This clause further provided that, should the arbitrator fail to resolve the parties' dispute, the matter would be brought before the "*tribunal arbitral de Paris*". Since that clause lacked clarity and imperativeness, and Plaintiffs never felt bound by it, as manifested by their actions before the courts of Québec and Guinea, the SC concluded it was competent to decide which party owned the Aircraft (paras. 60-73).

One can hardly disagree that this clause is flawed or, at best, rather ambiguous. First, it names a legal person as an arbitrator, which is rarely seen nowadays[2)] and even excluded in some countries.[3)] Though the issue of legal persons acting as arbitrators is not expressly dealt with in Québec legislation, when commenting on the previous CCP the Supreme Court of Canada in *Sport Maska Inc. v. Zittrer* noted that its provisions "suggest that only a natural person can act as an arbitrator" (para. 127). Second, it omits to clarify at what point arbitration will be considered to have failed. Finally, "*tribunal arbitral de Paris*" could mean a multitude of things.

Without commenting on the 2012 clause and while acknowledging that the ultimate decision as to which provision applies rested with the arbitrator under the *competence-competence* principle, the CA opined that it was rather the 2019 clause that governed. In the CA's view this clause clearly and imperatively conferred exclusive jurisdiction upon an arbitrator (paras. 17-19).

Again, one cannot deny that this is a better provision. However, this is true only if one considers the clause as it was reproduced by the CA:

> *Any dispute arising in connection with this addendum and its consequences shall be subject to a prior mediation procedure conducted under the auspices of PriceWaterhouseCoopers.*

> *If the mediation fails, the dispute shall be resolved **by arbitration** under the auspices of the CHAMBRE ARBITRALE INTERNATIONALE DE PARIS, in accordance with its Rules, which the parties declare that they know and accept.*[4)]

For reasons unknown, the 2019 clause considered by the SC was slightly, yet sufficiently different to make it ambiguous. In particular, the second paragraph stated:

> *If the mediation fails, the dispute shall be resolved under the auspices of the CHAMBRE ARBITRALE INTERNATIONALE DE PARIS, in accordance with its Rules, which the parties declare that they know and accept, **without however identifying the mediator**.*[5)]

Considering that CAIP offers both mediation and arbitration services, the absence of "by arbitration" before "under the auspices" coupled with the reference to a "mediator" hardly makes this a mandatory and unambiguous arbitration clause. In the face of two rather poorly drafted dispute resolution clauses, the SC's decision is, perhaps, a tad less surprising.

Conclusion

Certain Canadian judgments may have recently raised doubts about the judiciary's support for arbitration (see, e.g., discussions about the Supreme Court of Canada's judgments here and here, as well as those of British Columbia and Ontario courts). Meanwhile, the CA's judgment in *Specter Aviation v. Laprade* unambiguously demonstrates respect for some of the most fundamental principles of arbitration: party autonomy, *competence-competence* and separability.

** The views expressed herein are those of the author and do not necessarily reflect the views of Woods LLP or its partners.*

References

?1 See para. 12: "*Toute litige sera réglé à l'amiable. À défaut de règlement à l'amiable, le cabinet d'audit PWC sera désigné comme arbitre. À défaut de résolution du litige par l'arbitre, le litige sera porté devant le tribunal arbitral de Paris.*"

?2 Gary B. Born, International Commercial Arbitration (2021), pp. 1875-1876.

?3 See, e.g. Art. 1450 of the French Code of Civil Procedure which applies to domestic matters, or Art. 19 of the Serbian Arbitration Act.

?4 See para. 17 : "*Toute contestation survenant à l'occasion du présent avenant et de ses suites fera l'objet d'une procédure de médiation préalable conduite sous l'égide de Price WaterhouseCoopers. En cas d'échec de la médiation, le différend sera résolu* ***par arbitrage*** *sous l'égide de la CHAMBRE ARBITRALE INTERNATIONALE DE PARIS, conformément à son Règlement que les parties déclarent connaître et accepter*."

?5 See para. 13 : "[…] En cas d'échec de la médiation, le différend sera résolu sous l'égide de la Chambre Arbitrale Internationale de Paris, conformément à son règlement que les parties déclarent connaître et accepter, **sans toutefois identifier le médiateur**."

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