



**Pathological
Arbitration Clauses
& Humpty Dumpty**

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Pathological Arbitration Clauses & Humpty Dumpty: Can “neither more nor less” mean so many different things?

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In Lewis Carroll's *Through the Looking Glass*, in rather a bitter tone, the anthropomorphized egg, Humpty Dumpty, says to Alice: “When I use a word...it means just what I choose it to mean – neither more nor less.” Should this aphorism not hold true when the highest court in this country speaks?

In July 2005, a unanimous decision of the Supreme Court of Canada¹ held:

“Whether the jurisdiction of [...] Quebec authorities is ousted in a specific case will be decided on the basis of the *wording of the jurisdiction clause* adopted by the parties [...] The clause must be *mandatory* and *must clearly and precisely confer exclusive jurisdiction* on the foreign authority [...] There must also be a *meeting of minds* between the parties; otherwise the clause is invalid [...]” [Emphasis added]

In *GreCon*, a German manufacturer's failure to deliver certain equipment to a Quebec supplier caused the partial non-performance of the supplier's obligations to a customer operating a business in Quebec. The customer initiated an action in damages against the supplier in the Quebec Superior Court. The supplier based its claim in warranty. The German manufacturer moved to dismiss the action on the basis of a choice of forum clause in the contract according to which the German court had jurisdiction. The Supreme Court allowed the appeal of the German manufacturer and dismissed the action in warranty of the supplier based principally on “the recognition of the primacy of the autonomy of the parties.”

GreCon did not reach the Supreme Court as an international arbitration case, the dispute rather concerned a forum selection clause. Given the opportunity, however, the Supreme Court decided to turn it into an arbitration case and interpret Article 940.1 of the Quebec *Code of Civil Procedure* (“C.C.P.”) (which is the equivalent of Article 8(1) of the *UNCITRAL Model Law on International Commercial Arbitration [Model Law]* or Article II (3) of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards [New York Convention]*², even though it was never asked by the parties to do so. Article 940.1 C.C.P. states:

“Where an action is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the court shall refer them to arbitration on the application of either of them unless the case has been inscribed on the roll or it finds the agreement null. The arbitration proceedings may nevertheless be commenced or pursued and an award made at any time while the case is pending before the court.”

In *GreCon*, the Supreme Court after meticulously examining the meaning and scope of the autonomy principle discussed by it, identified certain limits concerning its application.³ Among the limits articulated is the wording of the arbitration or choice of forum clause. In order to oust the jurisdiction of Quebec authorities the Court stated, the arbitration or choice of forum clause must be mandatory, it must clearly and precisely confer *exclusive* jurisdiction on the foreign authority and there must be a meeting of minds. A natural question for a reader perusing the Supreme Court's dictum is: A meeting of minds on exactly what, the exclusive jurisdiction of the foreign authority? And what if the attribution of the exclusive jurisdiction is somewhat qualified like in almost all sensible modern arbitration clauses or agreements?

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1 *GreCon Dimter Inc. v. J.R. Normand Inc.*, [2005] 2 S.C.R. 401 at 417 [*GreCon*].

2 Note that the author has intentionally decided not to refer to the recent Supreme Court of Canada decision *Dell Computer Corporation v. Union des consommateurs*, 2007 SCC 34. That decision will be the subject of Issue 2 of the BCF Arbitration Reporter.

3 *GreCon*, *supra* note 1 at 416-417.

The fact that the criterion set out by the Supreme Court is cumulative is undeniable. What is debatable is the mandatory nature of the arbitration clause, its clear and precise conferring of exclusive jurisdiction to a foreign authority and whether or not in fact there was a true meeting of minds (regarding exclusive jurisdiction and its limits and perhaps other things) between the parties. Of the three criteria mentioned, the one that will no doubt give rise to most controversy will be the last. It is also this last criterion that demonstrates why international arbitration ought to be considered as a speciality and not just another form of civil litigation.

Consider, by way of example, the following pathological⁴ arbitration clause which became the focus of a recent Quebec Superior Court decision.⁵

ARBITRATION:

All disputes arising in connection with this contract *shall exclusively* be settled by arbitration in Zurich in accordance with the arbitration rules applicable.

The arbitration tribunal shall consist of three arbitrators. The proceedings to be held in English and shall be governed by the laws of Switzerland.

The party demanding arbitration shall notify the other party by registered letter. Both parties shall within 30 days following receipt of such notice, appoint their arbitrator and notify the other party of such appointment by registered letter. Within further 30 days, the two arbitrators shall appoint a third arbitrator who shall act as chairman.

Any arbitrator not appointed as above shall be appointed on request of either party by the *Zurich Cantonal Arbitration Association* in Zurich/Switzerland. [Emphasis added]

The clause was agreed to as part of a Supply Agreement concluded on 25 January 2007 between a Turkish steel company, Ekinciler Demir Ve Celik San, a.s. [**Demir**] and a Connecticut based company, U.S. Ferrous Trading Division – Tube Division – Tube City IMS [**Tube**]. Neither *Demir* nor *Tube* had a place of business in Quebec. The only connection to Quebec and Canada was that delivery of part of the goods was to take place in the ports of Quebec and St. John, New Brunswick.

On or about 27 March 2007, a “conformity of goods delivered” dispute arose between the parties (*Demir* discovered that a portion of the goods, as indicated in the Supply Agreement and then located in the port of Quebec City, did not correspond to the requirements and specifications set out in the Agreement) and in the context of that dispute, *Demir* applied to the Quebec Superior Court for provisional measures – an order of interlocutory injunction – against *Tube* and the Bank of New York, which had confirmed the irrevocable letter of credit issued by the Economy Bank of N.V. of The Netherlands to satisfy the balance of purchase price due on delivery. The Superior Court then asked itself the following question: “Does the Court, in the face of an arbitration clause that requires the place (or seat) of the arbitration to be in Zurich, Switzerland, have the competence to issue the requested injunction?”

4 The term pathological is often used to describe an arbitration agreement which is difficult to give effect to by the parties, arbitral tribunals and/or state courts.

5 *Ekinciler Demir Ve Celik San a.s. v. Bank of New York* (4 April 2007), Quebec 200-17-008113-078, J.E. 2007-1037 (C.S.) [**Ekinciler**]. The decision was not appealed to the Quebec Court of Appeal.

After examining in detail the arbitration clause, the Notice of Arbitration issued by *Demir* in March of 2007 and the *ratio decidendi* of Lebel J.'s decision in *GreCon*, the Honorable Justice Catherine La Rosa concluded:

The clause does not contain any limitation. *Demir*, a Turkish company, and *Tube*, an American company, which do not have connecting factors with Quebec, have decided that if a litigation concerning the execution of the contract was to come about, they would exclusively resort to arbitration [...] in neutral grounds in Zurich, Switzerland. In this way, they have renounced to resort to Quebec authorities with respect to the execution of the contract including situations where provisional or conservatory measures may be needed [...] [*internal translation*]

For many, there may be nothing surprising about the statements made by the Superior Court in *Ekinciler*. After all, the arbitration clause between *Demir* and *Tube* is quite explicit (as italicized, bolded, and underlined by the Court in its decision) about what *Demir* and *Tube* [the Parties] intended if there was to be a dispute between them in connection with the Supply Agreement: “***All disputes arising in connection with this contract shall exclusively be settled by arbitration in Zurich in accordance with the arbitration rules applicable.***”

The Superior Court's decision also seems to, at first blush, respect the principle of the primacy of the autonomy of the parties set out in *GreCon* and it avoids the thorny issue as to whether on the basis of Article 940.4 and other provisions of the *C.C.P.* (Article 751, for example), only judges in Quebec can grant interim relief or provisional measures. The reader may find it of interest that in a recent decision, a single judge of the Quebec Court of Appeal refused to grant *Bennett Fleet* leave to appeal to that Court on an opaque issue which has long required clarification under Quebec law.⁶

Despite an arbitration clause which read: “The shareholders agree that any disagreement or dispute shall be submitted to an arbitrator pursuant to the provisions of the *Code of Civil Procedure*, at the exclusion of the courts” [*internal translation*], *Acolam* lodged a Motion for interlocutory and permanent injunction before the Quebec Superior Court to enforce a non-competition clause in a unanimous shareholders agreement. *Bennett Fleet* responded by filing a Notice of Arbitration over that very same dispute and a sole arbitrator was chosen by the parties. The arbitrator ready to hear the dispute, *Bennett Fleet* moved to dismiss *Acolam's* Motion for injunction. Relying on Article 940.4 *C.C.P.*, the Quebec Superior Court dismissed *Bennett Fleet's* motion. Shortly thereafter, in a rather terse decision the Quebec Court of Appeal denied *Bennett Fleet* leave to appeal because:

The *Code of Civil Procedure*, to which [...] the arbitration clause refers, states that the Superior Court can, before or during the arbitration proceedings, grant provisional measures. Pursuant to the *Code of Civil Procedure*, and the will of the parties expressed in the arbitration agreement, therefore, the Superior Court has the competence to order an interlocutory injunction which is, without a doubt, a provisional measure.

In these circumstances, and pursuant to the Court of Appeal's decision in *La Coopérative forestière Laferrrière et al c. Les Placements Raoul Grenier Inc. et al.*, AZ-03019195, I conclude that the Superior Court had to dismiss, as it did, the motion to dismiss, and in any event the petitioner did not submit any argument supporting the intervention of the Court. [*internal translation*]

⁶ *Bennett Fleet (Québec) Inc. v. Acolam Inc.* (4 December 2006), Montreal 500-09-017181-066 (C.A.).

With respect, in my view, both the Quebec Superior Court and the Quebec Court of Appeal erred in their decisions. In the face of a valid arbitration clause and the Supreme Court of Canada's recent decisions in *Desputeaux v. Éditions Chouette (1987) Inc.*⁷ and *GreCon*, the Quebec Superior Court should have referred the matter to the arbitrator pursuant to Article 940.1 *C.C.P.* The requirements of Article 940.1 *C.C.P.* having been met, the presence of the word "may" in Article 940.4 *C.C.P.* (versus the mandatory "shall" in Article 940.1 *C.C.P.*) should have encouraged the Quebec Superior Court to leave the matter in the hands of the arbitrator unless there was a matter of urgency.

Regrettably, the Superior Court did not do so and a single judge of the Quebec Court of Appeal decided to go along with it⁸, leaving Article 940.4 *C.C.P.* again, deprived of an in-depth legal analysis. This is particularly disappointing because while the law of arbitration as it relates to interim and provisional measures continues to rapidly evolve in other parts of world, the law in Quebec with respect to that important issue remains controversial and contrary to international trend.

Take for example the new Article 37 of the *International Arbitration Rules of the International Centre for Dispute Resolution [ICDR]* dealing with emergency measures of protection to be granted by a sole and emergency arbitrator where appropriate.⁹ Article 37 of the *ICDR International Arbitration Rules* states that unless otherwise agreed to by the parties, "the provisions of [that] Article shall apply to arbitrations conducted under arbitration clauses or agreements (requiring the application of the ICDR International Arbitration Rules) entered into on or after May 1, 2006."

Subparagraph 4 of Article 37 also states that the "emergency arbitrator shall have the power to order or award any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property. Any such measure may take the form of an award or of an order. The emergency arbitrator shall give reasons in either case. The emergency arbitrator may modify or vacate the interim award or order for good cause shown."

Two other important facts are worthy of mention about Article 37 of the *ICDR International Arbitration Rules*. First, the "emergency arbitrator shall have no further power to act after the tribunal is constituted and he or she "may not serve as a member of the tribunal unless the parties agree otherwise". Second, once the tribunal has been constituted, "the tribunal may reconsider, modify or vacate the interim award or order of emergency relief issued by the emergency arbitrator". Whether or not the ability to seek emergency measures of protection in any given situation is good, bad or warranted is beyond the call of this paper. There are obviously many pros and cons that have to be carefully evaluated before parties agree to such measures in their arbitration clause or agreements. Each case will have to be examined on the basis of its own unique facts.

⁷ *Desputeaux v. Éditions Chouette (1987) Inc.*, [2003] 1 S.C.R. 178.

⁸ For a more detailed commentary on the above subject in general and an analysis of the Quebec Court of Appeal's decision in *Placements Raoul Grenier Inc. v. La Coopérative forestière Laferrière* (13 November 2003), Quebec 200-09-004100-027, J.E. 2003-2275 (C.A.), see Babak Barin, "Provisional Remedies in domestic arbitrations: Time perhaps for a fresh look in Quebec?", (2004) 64 R. du B. 137

⁹ For a more complete picture of the issues surrounding this type of measure, see the debate of the United Nations Commission on International Trade Law [*UNCITRAL*] at www.uncitral.org.

This said, there is, however, a certain persuadable beauty that in almost all arbitration-friendly jurisdictions around the world a provision such as the one found in Article 37 of the *ICDR International Arbitration Rules* will be enforceable. In all of those jurisdictions, including in Switzerland, unless otherwise agreed to by the parties, an arbitral tribunal may, “on the motion of one party, order provisional or conservatory measures”.¹⁰ The same unfortunately cannot be said with any conviction at this time about an arbitration seated in Quebec.¹¹

On the basis of the preceding point and, in particular, in light of Article 183 of the *Swiss PIL Act*, which Act applies “if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile or its habitual residence in Switzerland”¹², the soundness of the Superior Court’s conclusion in *Ekinciler* some may argue becomes even more apparent. As the arbitration clause between the Parties states, all disputes in connection with the Supply Agreement shall be exclusively settled by arbitration in Zurich *in accordance with the arbitration rules applicable*.

The problem for the experienced arbitration practitioner, however, is that the words “in Zurich in accordance with the arbitration rules applicable” can, as Alice cleverly replied to Humpty Dumpty “mean so many different things”. This is even more so when the arbitration clause agreed to by the Parties explicates that any “arbitrator not appointed [as specifically agreed to by the Parties in the arbitration clause] shall be appointed on request of either party by the *Zurich Cantonal Arbitration Association* in Zurich/Switzerland”. As the reader will note below, the consequences of these “different things” can be drastic.

To begin with, it is unclear from the arbitration clause entered into between *Demir* and *Tube* whether the Parties intended to opt for institutional or *ad hoc* arbitration. This is not the place to get into a debate about the advantages and disadvantages of institutional versus *ad hoc* arbitration. Much ink has been spilled over that issue and with a bit of effort, the reader can get to the bottom of any question he or she may have in that regard.¹³ The combination of a grain of cynicism and poor drafting on the other hand lead one to think that the Parties could *not* have considered much less intended that their arbitration be governed by Chapter 12 of the *Swiss PIL Act*. Otherwise they would have explicitly said so. On the other hand, the combination of the words “in accordance with the arbitration rules applicable” and the submitting of their entire relationship to Swiss law in Switzerland militate for a contrary position – the application of Chapter 12 of the *Swiss PIL Act* which forms a part of that law.

¹⁰ See Article 183 of the Swiss *Federal Statute on Private International Law of December 18, 1987*, RS 291 [**Swiss PIL Act**]. See generally Chapter 12 of said *Swiss PIL Act* which concerns International Arbitration.

¹¹ As one source remarks, the absence of an arbitral tribunal’s power to grant interim or provisional measures “is usually a result of antique domestic legislation hearkening back to a time when the power to grant such measures was considered to be a prerogative of the national courts for public policy reasons”. See Redfern & Hunter, *Law and Practice of International Commercial Arbitration*, London, 4th Edition, Thomson, 2004, at pages 333-334. In 1986, Canada was the first country in the world to enact legislation based on the *Model Law*. Very soon thereafter, in revising its *Code of Civil Procedure*, the Province of Quebec affirmed that it wished its Book VII, Title I relating to arbitrations to be inspired by that Law. This being the case, how can it be said that an arbitrator in an arbitration seated in Quebec does not have the power to grant interim or provisional measures?

¹² *Swiss PIL Act*, *supra* note 10 at art. 176.

¹³ See B. Barin et al., *The Osler Guide to Commercial Arbitration in Canada*, The Hague, Kluwer Law International, 2006, at 26 -27.

Like in Quebec, the equivalent of Article 940 *C.C.P.*, requires that the provisions of Chapter 12 of the *Swiss PIL Act* (where the seat of the arbitration is in Switzerland and at the time of the conclusion of the arbitration agreement at least one of the parties had neither its domicile or habitual residence in Switzerland) apply in an international arbitration unless the parties have agreed in writing to exclude the application of the Act and rely upon instead on the cantonal provisions on arbitration. This was obviously not done in *Ekinciler*.

What may have tipped the balance and could have assisted the party looking for court assistance outside of Switzerland to argue that there was an express agreement or *meeting of minds* between the Parties for a competent court (in this case the Quebec Superior Court which is obviously a Quebec authority) to issue an injunction is the very important reference to the Zurich Cantonal Arbitration Association in Zurich, Switzerland. This would have been strategically important for two reasons.

First, there is no Zurich Cantonal Arbitration Association in either Zurich or elsewhere in Switzerland. Until 1 January 2004, six chambers of commerce and industry in Switzerland had their own rules of arbitration for the resolution of international commercial disputes. Among them was the Zurich Chamber of Commerce which had its own unique set of arbitration rules applicable to international disputes. What was in the past known as the Zurich Chamber of Commerce is the closest organization that the Parties *may* have intended to refer to in this case. A potentially convincing argument that could have been advanced is that the reference to the Zurich Cantonal Arbitration Association was in fact now a reference to the Swiss Arbitration Association.¹⁴

As the introduction to the new *Swiss Rules of International Arbitration* [**Swiss Rules**] promulgated by the Swiss Arbitration Association indicates, “in order to promote institutional arbitration in Switzerland and to harmonize the existing rules of arbitration, the Chambers of Commerce and Industry of Basel, Bern, Geneva, Ticino, Vaud and Zurich” adopted the *Swiss Rules*. These rules, which are essentially based on the *UNCITRAL Arbitration Rules* with certain modifications to adapt them to institutional arbitration and reflect modern practice and comparative law in the field of international arbitration, state in Article 1 that they “shall govern international arbitrations, where an agreement to arbitrate refers to these Rules, or to the arbitration rules of the Chambers of Commerce and Industry of [...] Zurich and any further Chamber of Commerce and Industry that may adhere to these Rules”. Article 1(3) of these rules also confirms that they came into force on January 1st, 2004 and, unless the parties have agreed otherwise, [they] shall apply to all arbitral proceedings in which the Notice of Arbitration is submitted on or after that date.

¹⁴ Note, however, that this argument could have faced an uphill battle if the other side argued that the reference to the Zurich Cantonal Arbitration Association was solely for the purpose of the organization acting as an appointing authority and nothing else.

Most importantly, and under the heading “Interim Measures of Protection” Article 26 (3) of the *Swiss Rules* states:

INTERIM MEASURES OF PROTECTION

Article 26

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary or appropriate.
2. Such interim measures may be established in the form of an interim award.
The arbitral tribunal shall be entitled to order the provision of appropriate security.
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 agreement.
[Emphasis added]

Article 26 (3) of the *Swiss Rules*, which is identical to Article 26 (3) of the *UNCITRAL Arbitration Rules* and again very similar to Article 9 of the *Model Law*¹⁵ indicates very clearly that a party can make an application to a competent court to seek from it interim measures. The ability of a competent state court to issue interim measures even in the face of a healthy (as opposed to pathological arbitration clause referred to above) arbitration clause or agreement is trite. An arbitral tribunal, no matter how competent, can not issue an interim or provisional measure until it has itself been established.

As one source has quite aptly noted, “the point may seem so obvious as to be hardly worth mentioning. Yet it is important and frequently overlooked until a crisis arises. It takes time to establish an arbitral tribunal; and during that time, vital evidence or assets may disappear. National courts may be expected to deal with such urgent matters; an arbitral tribunal that is not yet in existence plainly cannot do so. Some rules have sought to address this lacuna”.¹⁶ Another factor which is critical to the understanding of why the assistance of a competent state court may be necessary is that the powers of an arbitral tribunal are generally limited to the parties involved in the arbitration itself. The *Model Law*, [...] makes it plain that an arbitral tribunal may only ‘order any party to take such interim measures of protection as the arbitral tribunal may consider necessary [...]’. A third party order, for example, addressed to a bank holding deposits of a party would not be enforceable against the bank. It also raises particular problems in multi-contract, multi-party disputes”.¹⁷

The lacuna referred to above and existing under the *Swiss PIL Act* was obviously addressed by the *Swiss Rules*. Under the *Swiss PIL Act* Article 183, unless the parties agree otherwise, a request for provisional or conservatory measures must first be addressed to the arbitral tribunal. If a party then fails to comply with the measure or measures ordered by the tribunal, the arbitral tribunal may request the assistance of a judge, who shall then apply his or her own law. There is thus a drastic difference between what a national court can do under Article 26(3) of the *Swiss Rules* and Article 183 of the *Swiss PIL Act*.

¹⁵ Article 9 of the *Model Law*, under the heading “Arbitration agreement and interim measures by court”, states that: “It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure”.

¹⁶ Redfern & Hunter, *supra* note 11 at 334.

¹⁷ *Ibid.*, at 334-335. For a review and analysis of Canadian case law relating to multi-party disputes see: B. Barin, “Non-signatories in International Arbitration: Some thoughts from Canada”, *ICCA 18th Congress*, June 2006.

Had *Demir*, as it certainly could have, taken the position in its Notice of Arbitration that the *Swiss Rules* ought to govern any arbitration proceeding between the Parties, and that by virtue of Article 26(3) of these Rules, the Quebec Superior Court was a competent judicial authority capable of providing it with the injunction it requested against *Tube* and a third party to the Supply Agreement, the Bank of New York, could the Superior Court still have concluded that the Parties had “clearly and precisely conferred exclusive jurisdiction on the foreign authority” so as to deprive *Demir* of such an important right?

In light of the imprecise use of language in the arbitration clause between the Parties, could the Quebec Superior Court conclude, when it was specifically directed to investigate by the Supreme Court of Canada, that there was indeed a *meeting of minds* between *Demir* and *Tube*? What about the relationship between *Demir* and the Bank of New York that was not governed by the arbitration clause?

The answer to the above questions at this juncture is no longer relevant, but for those who draft, litigate or enforce arbitration clauses, “it is important that the competent court should have the power to issue interim measures in support of the arbitral process. In situations of extreme urgency, where third parties need to be involved or where there is a strong possibility that a party will not voluntarily execute the tribunal’s order, there may be little option but to identify the appropriate state court and make the application there. The measure requested may include the granting of injunctions to preserve status quo or to prevent the disappearance of assets, the taking of evidence from witnesses or the preservation of property or evidence”.¹⁸ To be safe, a party or practitioner facing a delicate international arbitration question like the one in *Ekinciler* should seek appropriate advice so that “neither more nor less” and “so many different things” that Humpty Dumpty and Alice debated about can be adequately evaluated.

¹⁸ *Supra* note 16 at 336.

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