SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No. 500-05-017680-966
500-05-035275-971

DATE : May 26, 2006

IN THE PRESENCE OF : THE HONOURABLE JOEL A. SILCOFF, J.S.C.

HOLDING TUSCULUM B.V.
Petitioner

v.

S.A. LOUIS DREYFUS & CIE
Respondent
and
ROBERT B. VON MEHREN
CAREY R. RAMOS
JOHN M. DOWD
Mis en cause
and
RONALD W. DE RUUK
BULK OIL GROUP LIMITED
Petitioners in Continuance of Suit

JUDGMENT

I. INTRODUCTION By *Petitioners in Continuance of Suit's Motion to Strike Out of the Record Certain Expert Reports Filed by Respondent* (the **" *Motion to Strike* "**), Donald W. De Ruuk and Bulk Oil Group Limited (**" Petitioners "**) seek to strike from

the records three expert reports filed by Respondent, S.A. Louis Dreyfus & Cie. (**" Dreyfus "** and, collectively, the **" Dreyfus Expert Reports "**). Petitioners argue, *inter alia,* that the Dreyfus Expert Reports infringe on the exclusive domain of the trial judge and accordingly are inadmissible.

[1] Dreyfus contests the *Motion to Strike* and seeks its dismissal.

II. PERTINENT FACTS AND PROCEEDINGS

[2] The pertinent facts and proceedings are not in dispute. They are summarized as follows in paragraphs 2 through 8 of the *Motion to Strike:*

> 2. The procedural context relevant to the present motion is described in Petitioners' *Motion in special case management* dated January 21, 2004, a copy of which is communicated as **Exhibit R-1** As appears from the Court record, this motion was granted on August 24, 2004;
>
> 3. For the purposes of the present motion, it is sufficient to note that the present actions relate to the validity of two decisions rendered by the Mis-en-cause arbitration tribunal (the "Tribunal") after the issuance of a partial arbitration award issued on January 31, 1996 (the "Partial Award"):
>
> a) On March 21, 1996, the Tribunal issued an order (hereinafter the "Reconsideration Order") purporting to decide that the Tribunal had the power to reconsider the Partial Award; and
>
> b) On May 29, 1997, the Tribunal issued an arbitration award (hereinafter "Award #2") revising the Partial Award and deciding that the Tribunal would not implement the orders contained in the Partial Award;
>
> 4. Holding Tusculum B.V. ("Tusculum") has attacked both these decisions rendered by the Tribunal on the following basis:
>
> a) Tusculum seeks annulment of the Reconsideration Order on the basis that the Partial Award was final and that the Tribunal was *functus officio* and had no jurisdiction to revisit it, the whole as appears from Tusculum's introductory motion in case number 500-05-017680-966, a copy of which is communicated as;
>
> b) Tusculum seeks annulment of Award #2 on the basis that the Tribunal was *functus officio*, that it had misconstrued its own jurisdiction by refusing to implement and by effectively nullifying the Partial Award, and that it had disregarded the applicable arbitration procedure, the whole as appears from Tusculum's introductory motion in case number 500-05-035275-971, a copy of which is communicated as **Exhibit R-3**;

5. Petitioners in continuance of suit Ronald W. De Ruuk and Bulk Oil Group Limited have filed a continuance of suit in both of the two present court files (as well as in a related file introduced by Dreyfus), the whole as appears from the court record;

6. As will be more fully demonstrated below, the reports filed by Dreyfus in the present cases essentially contain the opinion of their authors on the merits of the arguments submitted by Tusculum and Petitioners, thereby purporting to answer the legal questions submitted to the Superior Court in the present case, and constitute in essence written argumentation submitted by persons who are not attorneys *ad litem*;

C. The reports filed by Dreyfus

7. On November 28, 2005, Dreyfus filed into the court record three (3) expert reports prepared respectively by Mr. Emmanuel Gaillard (the "Gaillard Report"), Mr. William Laurence Craig (the "Craig Report") and Mr. Eric A. Schwartz (the "Schwartz Report") (collectively, the "Dreyfus Expert Reports"). Copies of these reports are communicated as **Exhibit R-4** (Gaillard Report), **Exhibit R-5** (Craig Report) and **Exhibit R-6** (Schwartz Report);

8. All three of the Dreyfus Expert Reports relate to the application of the principles of international arbitration law raised in the present cases, *e.g.* the extent of the jurisdiction of an arbitration tribunal, the doctrine of "*functus officio*" and the procedure to be followed by an arbitration tribunal;

[3] Holding Tusculum B.V.'s (**"Tusculum"**) *Introductory Motions* in cases number 500-05-017680-966 and 500-05-035275-971, **(**collectively the **"Tusculum Annulment Proceedings")** are presently pending.

III. POSITIONS OF THE PARTIES

(1) Petitioners

[4] Petitioners argue that all three Dreyfus Expert Reports are inadmissible and should be struck from the record for the following reasons:

4. En effet, il ressort clairement que leurs auteurs respectifs ont — en ne se limitant pas à exposer les règles applicables et en prétendant appliquer celles-ci aux faits de l'espèce — très largement outrepassé les limites de l'expertise, empiétant ce faisant de façon inacceptable sur le domaine réservé exclusivement au juge du fond;

5. De même, il ressort de la lecture de ces rapports que ceux-ci sont en fait de véritables plaidoiries écrites soumises au tribunal par des personnes qui ne sont ni procureurs *ad litem* de Dreyfus, ni membres du Barreau du Québec, ce qui est contraire aux règles applicables au témoignage d'experts et aux dispositions de la *Loi sur le Barreau*;

> 6. Dans les circonstances, il serait contraire aux intérêts des requérants et de la justice que ces trois rapports soient autorisés à demeurer au dossier de la Cour — ce qui ne laisserait aux Requérants d'autre choix que de produire en réponse, et à grands frais, des rapports de même nature préparés par d'autres experts en droit international, le tout alors que l'admissibilité de tels rapports demeurerait incertaine;

(2) Dreyfus

[5] Dreyfus argues that the Dreyfus Expert Reports are not only admissible but are essential to a complete and final determination of the issues raised in the Tusculum Annulment Proceedings. It argues:

> A. Expert opinions on international arbitration law and practice are clearly admissible;
>
> B. The mere fact that experts have applied the relevant rules and principles to the facts of the case, or may have reached conclusions on the issues before the Court, does not render their opinions inadmissible;
>
> C. Similarly, the fact that one of the expert reports makes reference to certain arbitration rules as set out in the Québec *Code of Civil Procedure,* does not render it inadmissible;
>
> D. Any doubt as to the admissibility of the expert reports should be resolved in favour of the Respondent; and
>
> E. Finally, Petitioners' allegations relating to the potential costs of obtaining expertises similar to those produced by Respondent, is clearly an insufficient basis for striking out Respondent's expert reports.

IV. ISSUES

[6] The *Motion to Strike* raises two principal issues :

(i) Is the evidence contained in the Dreyfus Expert Reports relevant and necessary, in the sense that it provides information which is likely to be outside the experience and knowledge of a judge? and

(ii) To the extent that the Dreyfus Expert Reports purport to opine on international arbitration laws and customs, to apply these laws and customs to the facts and express opinions on the issues which are at the core of the Tusculum Annulment Proceedings (the "ultimate issue"), are these sufficient grounds to render the Reports inadmissible?

V. ANALYSIS

(i) <u>Is the evidence contained in the Dreyfus Expert Reports relevant and necessary, in the sense that it provides information which is likely to be outside the experience and knowledge of a judge?</u>

[7] The criteria for the admissibility of expert evidence was examined by Sopinka J. in the Supreme Court of Canada in *R.* v. *Mohan*[1]*:*

> Admission of expert evidence depends on the application of the following criteria:
> (a) relevance;
> (b) necessity in assisting the trier of fact;
> (c) the absence of any exclusionary rule;
> (d) a properly qualified expert.

[8] As to the relevance of the expert evidence in question, it is common ground that the principles of international arbitration law are applicable to the Tusculum Annulment Proceedings and that they are not part of the domestic law of Québec. The dispute is rather as to the necessity of this evidence.

[9] Petitioners argue: *Le témoignage de l'expert doit être nécessaire pour aider le tribunal à comprendre et apprécier la preuve...* and that, in the present proceedings, the Dreyfus Expert Reports are unnecessary.

[10] They continue:

> Le tribunal étant spécifiquement chargé de l'application du droit aux faits et étant lui-même « expert » en matière de raisonnement juridique, un expert ne saurait être autorisé à fournir son opinion à l'égard d'une question de nature juridique, ou encore à fournir son opinion quant à la façon dont le tribunal devrait trancher le litige qui lui est soumis :…

[11] Notwithstanding these submissions, Petitioners have acknowledged in various interlocutory proceedings that the Tusculum Annulment Proceedings …*involve intricate and important questions of Québec and international arbitration law*. Moreover, in this regard and presumably for this reason, Petitioners filed their own expert report, dated October 27, 2005, dealing with the relevant and applicable principles of international arbitration law.

[12] While the Court may agree with Petitioners that it is presumed to be "expert" in matters of legal reasoning, it is necessary in order for this expertise to be exercised, that a qualified expert inform the Court as to the meaning of the foreign statute and, if necessary the applicable rules of construction and interpretation. See in this regard: *Dicey and Morris on The Conflict of Laws*, *Eleventh edition*.[2] :

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[1] [1994] 2 S.C.R. 9, 20.

[2] London, Stevens & Sons Limited, 1987, page 224.

> The function of the expert witness in relation to the interpretation of foreign statutes must be contrasted with his function in relation to the construction of foreign documents. **In the former case, the expert tells the court what the statute means, explaining his opinion, if necessary, by reference to foreign rules of construction.** In the latter case, the expert merely proves the foreign rules of construction, and the court itself, in light of these rules, determines the meaning of the documents.
>
> (Our emphasis)

[13] Petitioners acknowledge in the *Motion to Strike*:

> 8. All three of the Dreyfus Expert Reports relate to the application of the principles of international arbitration law raised in the present cases, *e.g.* the extent of the jurisdiction of an arbitration tribunal, the doctrine of "*functus officio*" and the procedure to be followed by an arbitration tribunal;

[14] As to necessity of assisting the trier of fact, Sopinka, J. wrote in *Mohan*, *at page 23:*

> This pre-condition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in *R. v. Abbey*, *supra*.

[15] The Dreyfus Expert Reports opine on foreign legal rules or principles of which the Court is not aware and of which, except in special circumstances, it cannot take judicial notice. The evidence contained in the Reports is not only helpful, it is necessary to enable the Court to ultimately make an informed decision in the Tusculum Annulment Proceedings. More particularly, referring to international arbitration law and practice, the Reports opine on the rules and principles applicable to the allegations of fact and the conclusions sought in the Tusculum Annulment Proceedings, including the allegations of excess of jurisdiction, that the arbitral tribunal acted *functus officio* and that the "applicable arbitration procedure" was not followed.

[16] Although international arbitration law does not *per se* constitute laws of a foreign state or jurisdiction, it is at the very least a highly specialized field of law which falls outside of the scope of the domestic law of Québec and which is likely to be beyond the experience or knowledge of the Court.

[17] In the Supreme Court of Canada judgment in *R.* v. *Burns*[3], McLachlin J., as she then was, wrote at page 666:

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[3] [1994] 1 S.C.R. 656.

> The general rule is that expert evidence is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of the judge and jury : R. v. Marquard, [1993] 4 S.C.R. 223, at p. 243 (per McLachlin J.); R. v. Béland, [1987] 2 S.C.R. 398, at p. 415 (per McIntyre J.); R. v. Abbey, [1982] 2 S.C.R. 24, at p. 42 (per Dickson J.).

[18] Neither of to the two remaining criteria referred to by Sopinka, J. in *Mohan*, the absence of any exclusionary rule and a properly qualified expert, are of concern. There are no applicable exclusionary rules and the qualification of the three experts concerned is not in issue.

[19] In view of the foregoing and for these reasons, the Court finds that the evidence contained in the Dreyfus Expert Reports is indeed relevant and necessary. At this stage of the proceedings, the Court is not in a position to and does not express any views or make any judgment whatsoever with respect to the validity or the probative value of the opinions expressed in each of the Reports.

> ***(ii) To the extent that the Dreyfus Expert Reports purport to opine on international arbitration laws and customs, to apply these laws and customs to the facts and express opinions on the issues which are at the core of the Tusculum Annulment Proceedings (the "ultimate issue"), are these sufficient grounds to render the Reports inadmissible?***

[20] Petitioners' counsel invited the Court to carefully scrutinize the content of each of the Dreyfus Expert Reports. In their oral arguments as well as in their written *Plan d'argumentation,* they refer to the allegedly offending passages of each of the Reports and conclude at paragraph 16 and 19:

> 16. Quant aux questions auxquelles les trois experts de Dreyfus ont répondu, celles-ci démontrent sans l'ombre d'un doute que leurs rapports visent bel et bien l'application du droit aux faits de l'espèce, de même que l'interprétation à donner aux décisions arbitrales attaquées :…
>
> […]
>
> 19. Tel que démontré ci-haut, les rapports produits par Dreyfus outrepassent de façon évidente les limites imposées au témoignage d'expert, et empiètent de façon importante sur le domaine réservé exclusivement au tribunal;

[21] In support of their arguments, Petitioners counsel cite precedents, some of which date as far back as 1863 as well as other authorities most of which have been reversed, revised or become obsolete in recent years. By force of circumstances and considering the evolution and ever increasing intricacies of litigation in recent years, the role of the expert before the Court has similarly evolved. The limitations previously imposed on expert witnesses have similarly evolved to reflect this trend.

[22] Moreover, the expert evidence referred to in the more recent jurisprudence cited by Petitioner[4], must be distinguished from the allegedly offending expert evidence contained in the Dreyfus Expert Reports. In both cases cited, the experts in question purported to opine on pure questions of domestic law which were found to fit within the competence and expertise of the Court. In *Parizeau*[5]*,* Crête, J. wrote at page 13:

> **On ne laisse pas un témoin, tout expert qu'il soit, témoigner sur le droit interne.** C'est aux avocats qu'appartient le rôle d'instruire le tribunal à ce sujet.
>
> (Emphasis added)

[23] The Dreyfus Expert Reports, while referring to Québec Law in order to situate the context in which they are rendered, do not purport to opine on Québec law *per se*.

[24] What is really at issue in the *Motion to Strike* is whether, because the Dreyfus Expert Reports purport to address the "ultimate" issue", by so doing they are inadmissible and accordingly struck in their entirety.

[25] The issue has in the past been the subject of considerable controversy and divergence of opinion in both the jurisprudence and the doctrine. See in this regard, Jean-Claude Royer, *La Preuve Civile 3e édition*[6] :

> **474** – *Question factuelle finale* – L'expert peut-il se prononcer directement sur la question finale que le tribunal doit trancher? Une controverse doctrinale et jurisprudentielle subsiste sur ce sujet. Dans l'arrêt *Graat* c. *R.*, la Cour suprême du Canada a décidé que même le témoin ordinaire peut exprimer son opinion sur la question finale. Ce principe est, *a fortiori*, valable pour le témoin expert et s'applique en droit civil québécois. Il fut même décidé que l'opinion d'un expert fait parfois jurisprudence et entraîne une connaissance judiciaire. Toutefois, les tribunaux refusent parfois d'admettre l'opinion d'un expert sur la question finale lorsqu'ils se considèrent aussi bien placés que l'expert pour trancher cette question.
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> (Citations omises)

[26] In more recent years the Supreme Court of Canada has had occasion to revisit the subject, in the light of the importance and the increased dependence of the Courts on expert evidence in complex litigation. In *Burns*[7]*,* McLachlin J. (as she then was), wrote at page 666:

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[4] *Levasseur* v. *Pelmorex Communications,* B.E. 2000BE-1127 (Gomery, J.); *Parizeau* v. *Lafrance,* [1999] R.J.Q. 2399; J.E. 99-1892 (Crête, J.).
[5] *Ibid*, note 4.
[6] Montreal, Éditions Yvon Blais, 2003, page 305.
[7] Ibid, note 3.

> The respondent does not argue that psychiatric evidence bearing on a witness's behaviour is for that reason inadmissible. His objection is that "the opinion of Dr. Maddess went to the very root of the issue before the learned trial judge" and that "allowing that opinion usurped the function of the trial judge": the so-called **"ultimate issue rule"**. However, the jurisprudence does not support such a strict application of this rule. **While care must be taken to ensure that the judge or jury, and not the expert, makes the final decisions on all issues in the case, it has long been accepted that expert evidence on matters of fact should not be excluded simply because it suggests answers to issues which are at the core of the dispute before the court**: *Graat v. The Queen*, [1982] 2 S.C.R. 819. See also *Khan v. College of Physicians and Surgeons of Ontario* (1992), 9 O.R. (3d) 641 (C.A.), at p. 666 (*per* Doherty J.A).
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> (Emphasis added)

[27] It is now generally accepted that both ordinary witnesses as well as expert witnesses may express opinions on the “ultimate issue” without thereby becoming disqualified. See in this regard: J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada, Second Edition,* (Toronto: Butterworths, 1999) at pp. 634-635; *Phipson on Evidence, Sixteenth Edition,* (Loondon: Maxwell & Sweet, 2005) at pp. 973-975; *Droit de la famille – 1618,* J.E. 94-176 (C.A.) at p. 6; and *Chambly Toyota Inc.* v. *Carignan (Ville de),* J.E. 97-1876 (Mercure, J.) at pp.8-9.

[28] In the present cases, the Court finds that the Dreyfus Expert Reports should not be struck for the sole reason that they purport to opine on international arbitration laws and customs, to apply these laws and customs to the facts and to express opinions on the issues which are at the core of the Tusculum Annulment Proceedings.

[29] Two other grounds raised by Petitioners for striking the Dreyfus Expert Reports may be dismissed summarily. They argue:

> 26. Furthermore, the Dreyfus Expert Reports constitute the equivalent of written arguments on the very issues that have to be decided by this Court, and are as such inadmissible, constituting pleadings submitted by persons who are neither the attorneys *ad litem*, nor members of the Québec Bar;
>
> 27. If the Dreyfus Expert Reports are allowed to remain in the court record until trial, Petitioners will have no choice but to respond to them and file, as Dreyfus did, written similar opinions (essentially equivalent to written pleadings) of international law experts supporting their position, the whole at great cost and expense of time and financial resources;

[30] Concerning the grounds raised in paragraph 26 of the *Motion to Strike*, Petitioners refer to Article 128 (2) a) of the *Bar Act*[8] and submit that: *… plaider pour le compte d'autri est un acte qui est du resort exclusive des avocats inscrits au Table de l'Ordre…*

[31] With respect, the Court cannot subscribe to Petitioners' submission in this regard. The Dreyfus Expert Reports cannot be considered … *plaider pour le compte d'autri.*

[32] Dreyfus is represented by two firms of attorneys *ad litem.* There is no reason to believe that either firm will not represent the interests of their client before the Courts as required by the standards of their profession without the necessity of engaging the services of one or more of the experts to plead or to act before the Court in a manner prohibited by the Bar Act. That is not to say that, if called upon to testify, the experts may not choose to explain and elaborate upon the content of their respective reports. That is certainly within the scope of their mandate and authority

[33] Concerning the grounds raised in paragraph 27 of the *Motion to Strike*, relating to the potential costs to Petitioners of obtaining expert reports to respond to the Dreyfus Expert Reports, although the Court may be sympathetic to this argument, these concerns are not relevant given the complex nature of the Tusculum Annulment Proceedings. Indeed it is best that both parties be given ample opportunity, well before the hearing on the merits, to prepare and file appropriate expert reports to prove the relevant provisions of international arbitration law and practice applicable to the facts in these proceedings and assist the Court in this regard.

[34] It must be remembered that Petitioners chose intervene and continue the suits originally instituted by Tusculum. The Tusculum Annulment Proceedings seek the annulment of the "Reconsideration Order" and the "Award #2" (as defined in the *Motion to Strike).* Dreyfus did not commence either proceeding. It was Petitioners' author in title, Tusculum, who sought to annul the Reconsideration Order and he Award. Dreyfus was, at all times, an unwilling Respondent in both these proceedings. It is now required to contest both proceedings in order to defend its interests.

[35] It would be unjust and inappropriate in the present circumstances, to limit Dreyfus in the manner in which it chooses to defend its interests.

[36] Petitioners have not alleged that they are without financial means to support the costs of the preparation of expert reports necessary to respond to the Dreyfus Expert Reports. If, as they claim, the additional expert reports are useless or unnecessary, they may choose not to respond. Should Petitioner choose to file counter expertises as a precaution, then the Court will be free to address the issue of the necessity of these reports after a full and complete hearing on the merits and provide appropriate financial relief should it deem it appropriate, through an order as to costs in both proceedings.

[8] L.R.Q. c. B-1.

FOR THESE REASONS, THE COURT:

[37] **DISMISSES** *Petitioners in Continuation of Suit's Motion to Strike out of the Record Certain Expert Reports Filed by Respondent;*

[38] **THE WHOLE** with costs.

JOËL A. SILCOFF, J.S.C.

Me Babak Barin (WOODS & ASS.)
Me Georges R. Hendy and
Me Anne-Marie Legendre-Lizotte (*OSLER, HOSKIN & HARCOURT*)
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Dates of hearing : May 17, 2006