*Zodiak International Productions Inc.* v. *Poland (Republic)*

Supreme Court of Canada
File No.: 16739.

1983: May 17.

Present: Laskin C.J. and Dickson, Beetz, Estey, McIntyre, Chouinard and Wilson JJ.

English version of the judgment of the Court delivered by

CHOUINARD J.:— This appeal relates to an undertaking to arbitrate [la clause compromissoire], arts. 940 to 951 C.C.P., and is based on a declinatory exception.

By a contract concluded in Montreal on April 27, 1970 an enterprise known as Film Polski appointed appellant its exclusive agent to distribute Polish films in Canada and in certain other territories mentioned in the contract.

The contract contained the following clause:

> 16. (a) Any controversy or claim arising out of or relating to this Agreement, or any breach thereof, shall be settled by arbitration and judgment upon the award resulting from such arbitration may be entered in any Court having jurisdiction thereof. In case arbitration is commenced by ZODIAK against FILM POLSKI, arbitration shall take place in Poland under the Rules of the Arbitration Court at the Polish Chamber of Foreign Trade in Warsaw. In case arbitration is commenced by FILM POLSKI against ZODIAK, the arbitration shall take place in the United States under the Rules of the American Arbitration Association.

Before going any further some clarification of respondent's identity is necessary. The party signing the contract is described as follows: "Film Polski, Export and Import of Films [ ... ] a State Enterprise, Polish Government-Agency". Respondent told the Court, as it has alleged in its plea on the merits, that Film Polski is a business having a distinct personality, and that any proceeding should be directed against it and not against the State, the Polish People's Republic. However, this point is not at issue in the declinatory exception here and for the purposes of this appeal it can be disregarded. For this reason, without making any ruling on the point, I will use the word "respondent" without distinction, as if Film Polski and the Polish People's Republic were the same person.

Appellant alleged a breach of the exclusivity clause and an unauthorized rescission of the contract by respondent, and applied to the Court of Arbitration at the Polish Chamber of Foreign Trade in Warsaw. By a petition dated February 22, 1971, appellant and a U.S. company claimed the sum of $643,800 damages from respondent.

Respondent filed an appearance in the arbitration, asked by a plea on the merits that appellant's claim be dismissed and by a counterclaim sought the sum of $42,749.93 from appellant.

Appellant submitted considerable documentation and took part in the arbitration, which lasted for two days, May 19 and 22, 1972, being represented by its president with the assistance of counsel.

In its award of some 121 pages (English version), dated August 15, 1972, the Court did not award appellant any compensation. However, it did allow the counterclaim by respondent against appellant in the amount of $1,867.20.

As if nothing had transpired, appellant on April 2, 1973 commenced the action at bar in the Superior Court based on the same causes of action, claiming from respondent the sum of $191,000. Respondent filed an appearance in the action and a plea of general denial on June 8, 1973, followed by a specific plea on July 12 of the same year. It should be noted that in its plea respondent relied on clause 16(a) of the contract, the arbitration and the award made, and alleged in consequence that the Superior Court lacked jurisdiction.

On February 24, 1977 respondent made a declinatory exception, pleading its state immunity. This declinatory exception was allowed by the Superior Court on March 7, 1977 and dismissed by the Court of Appeal the following November 25.

On May 12, 1980, a few days, so we were told, before the day set for the hearing, respondent filed the declinatory exception now before the Court. It cited clause 16(a) of the contract and alleged that the Superior Court lacked jurisdiction ratione materiae.

By a judgment of July 25, 1980, the Superior Court dismissed the declinatory exception on the ground that clause 16(a) was not a complete undertaking to arbitrate, but merely a so-called condition precedent arbitration clause, and that accordingly it did not have the effect of ousting the jurisdiction of the Superior Court.

In its decision of June 9, 1981, the Court of Appeal reversed the Superior Court and held that clause 16(a) was a complete undertaking to arbitrate, that this type of clause is now valid in Quebec law, and that its effect is to remove from the ordinary courts of law any issue arising out of obligations resulting from the contract.

Appellant submitted a number of arguments against the decision of the Court of Appeal which, for the sake of convenience, may be grouped as follows:

1. a complete undertaking to arbitrate is invalid in Quebec law;
2. the undertaking to arbitrate stipulated in the contract at bar is not a complete undertaking to arbitrate;
3. the declinatory exception is tardy and should be dismissed on that account;
4. the judgment dismissing the declinatory exception was not appealable to the Court of Appeal;
5. the undertaking to arbitrate provided for foreign arbitration

and the arbitration award which resulted from that arbitration is subject to the rules of the Code of Civil Procedure regarding the exemplification of judgments: if these rules are not complied with the award is not enforceable;

6. the arbitration was conducted in an unfair manner contrary to the most elementary rules of public order, and the arbitration and the award are without effect.

1. VALIDITY OF A COMPLETE UNDERTAKING TO ARBITRATE IN QUEBEC LAW

A complete undertaking to arbitrate, described variously as true, real or formal, is that by which the parties undertake in advance to submit to arbitration any disputes which may arise regarding their contract, and which specifies that the award made will be final and binding on the parties.

This may be contrasted, first, with a clause which is purely optional. It may also be contrasted with a "pre-judicial" or "condition precedent" arbitration clause, which requires the parties to submit their dispute to arbitration, but does not preclude an action in the ordinary courts of law once the arbitration is completed. It may further be contrasted with the submission defined as follows by art. 1431 of the 1897 Code of Civil Procedure:

> Submission is an act by which persons, in order to prevent or to put an end to a lawsuit, agree to abide by the decision of one or more arbitrators whom they agree upon.

A submission applies only to existing disputes, while an undertaking to arbitrate also extends to future disputes.

Under the 1897 Code of Civil Procedure, and before the new Code came into effect on September 1, 1966, a complete undertaking to arbitrate was ruled invalid as contrary to public policy. The Code made no mention of such an undertaking. It mentioned only the submission.

By its decision in Vinette Construction Ltée v. Dobrinsky, [1962] Que. Q.B. 62, the Court of Appeal put an end to a controversy of more than sixty years' standing by ruling a complete undertaking to arbitrate to be invalid.

This decision was approved by this Court in National Gypsum Co. v. Northern Sales Ltd., [1964] S.C.R. 144. In that case, the Exchequer Court for the Quebec Admiralty District had dismissed a declinatory exception based on the following contractual clause:

NEW YORK PRODUCE EXCHANGE
ARBITRATION CLAUSE

> Should any dispute arise between owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so

chosen; their decision or that of any two of them, shall be final and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men.

Fauteux J., as he then was, who wrote the majority judgment, first considered art. 94 C.C.P., then in effect, which dealt with the place where an action should be instituted:

> 94. In matters purely personal, other than those mentioned in Articles 96, 97, 98, 103 and 104, the defendant may always, notwithstanding any stipulation, agreement or undertaking to the contrary, be summoned;
>
> 1. Before the court of his real domicile, or in the cases provided by Article 85 of the Civil Code before the court of his elected domicile;
>
> 2. Before the court of the place where the action is personally served upon him;
>
> 3. Before the court of the place, where the whole cause of action has arisen, or if it concerns a suit for libel published in a newspaper, before the court of any district in which such paper is circulated, and in which the plaintiff resides;
>
> 4. Before the court of the place where the whole or part of his property is situated, when he has left his domicile in the Province, or has never had such domicile, but has property therein, and the cause of action has not arisen therein;
>
> 5. Before the court of the place where the contract was made.
>
> In matters of contract by agency, or resulting from an order given to or received by an agent, mandatary or representative, the place where the contract was made is that where the consent of the party, to whom the thing forming the object of the contract is deliverable, was given, or that where the order was given to or received by the said agent, mandatary or representative.

(Emphasis added.)

The place where the action was instituted in that case was where the whole cause of action arose, while in the case at bar it is where the contract was made, but this distinction is immaterial here.

The preamble to art. 68 of the present Code is to the same effect as that of the old art. 94:

> 68. Subject to the provisions of articles 70, 71, 74 and 75, and notwithstanding any agreement to the contrary, a purely personal action may be instituted:

(Emphasis added.)

> Concerning art. 94 C.C.P., Fauteux J. wrote at p. 150:
> That, under the Code of Civil Procedure, such a clause, even if valid, is ineffective to preclude the institution of this action before the Court in

the territorial jurisdiction of which the whole alleged cause of action has arisen is settled by art. 94, para. 3, of the Code of Civil Procedure. In Gordon and Gotch (Australasia) Ltd. v. Montreal Australia New Zealand Line Ltd., (1940), 68 Que. K.B. 428, where the effect of art. 94 was considered by the Court of Appeal, St-Jacques J., with the concurrence of Létourneau, Bond and Galipeault JJ., said at p. 431:

> [TRANSLATION] The Code says, with a finality which in my opinion is not subject to question: henceforth the courts of the province, which have been created under the royal prerogative and the provisions of the Code of Civil Procedure, shall not take into account the"stipulations, agreements or undertakings" which might have the effect of removing a litigant from the jurisdiction of the courts which have been created in that province.

Then, going on to consider the actual validity of the arbitration clause, Fauteux J. continued:

> The Court below being properly seized with this action, its jurisdiction to try the merits of the case cannot be interfered with by the arbitration clause and the Court cannot be asked to enforce it if, as contended for by respondent and held by the Court of first instance, this arbitration agreement is invalid as being against public policy under the lex fori, to wit, the law of the Province of Quebec.

After a review of the law in France and in Quebec, and in particular a reference to Vinette Construction (supra), Fauteux J. wrote at p. 151:

> After anxious consideration, I have formed the opinion that the Vinette case, supra, expresses the law of the Province in the matter and the arbitration clause precited must, therefore, be held invalid as being against public policy.

Before arriving at this conclusion, Fauteux J. made the following observation in the course of his comments:

> Desirable as it may be in private international law, with respect to commercial matters, the Quebec legislature has not yet seen fit to make any enactment substantially similar to the one made in France to le Code du Commerce.

In 1964, shortly after this judgment was rendered on December 16, 1963, the Commissioners responsible for drafting a new Code of Civil Procedure submitted a final draft. In the accompanying report, they wrote regarding the undertaking to arbitrate:

> The Commissioners felt obliged to complete and modernize the present provisions of the Code of Procedure concerning arbitration, because of the increasingly important role which this method of settling disputes plays in the present law, an importance which is even likely to

> increase with the growth of the economy, particularly if the clause containing an agreement to arbitrate is recognized. The validity of this clause, it is true, raises a problem which is not one of procedure but of substantive law, and which belongs to the legislator or to the judge to settle; but the Commissioners have considered it wise to provide for the day when it will be determined.

The Commissioners accordingly proposed an article of new law, art. 951, which provides as follows:

> 951. In cases where an undertaking to arbitrate is permitted, it must be set out in writing.
>
> When the dispute contemplated has arisen, the parties must execute a submission. If one of them refuses, and does not appoint an arbitrator, a judge of the court having jurisdiction makes such appointment and states the objects in dispute, unless the agreement itself otherwise provides.

In adopting this article, however, the legislature amended it and replaced the first paragraph by the following:

> 951. An undertaking to arbitrate must be set out in writing.

The Commissioners suggested that the legislature adopt provisions to recognize the validity of the complete undertaking to arbitrate in Quebec law. The legislature did not see fit to adopt further specific special provisions. In adopting the Code, it merely deleted from the article proposed by the Commissioners the words "In cases where an undertaking to arbitrate is permitted". The text adopted simply provides that the clause must be set out in writing.

However, the second paragraph indicates the binding nature of the clause: "When the dispute contemplated has arisen, the parties must execute a submission". If one of the parties refuses to do so, then the Court is empowered to act in his place.

The actual submission and arbitration are governed by arts. 940 et seq. and in particular by art. 950, which provides:

> 950. The award of arbitrators can only be executed under the authority of a court having jurisdiction, and upon motion for homologation, to have the party condemned to execute it.
>
> The court before which such suit is brought may examine into any grounds of nullity which affect the award or into any other questions of form which may prevent its being homologated; it cannot, however, enquire into the merits of the contestation.

The prevailing opinion since the coming into effect of the new Code of Civil Procedure is that the adoption of art. 951 in its present form sufficed to render the complete undertaking to arbitrate valid. The old Code of Procedure was silent as to the undertaking to arbitrate: it was not mentioned. The present situation is

accordingly quite different from that prevailing when Vinette Construction (supra) and National Gypsum (supra) were rendered, decisions which some have suggested have become obsolete.

This was the opinion of commentators immediately following the introduction of the new Code:

> --W.S. Tyndale, Q.C., "Notes on the new Code of Civil Procedure", (1966) 26 R. du B. 345, at p. 359;
> --Thomas Tôth, Barreau de la province de Québec--Conférences--Le code de procédure civile (1966), at pp. 141-42;
> --Émile Colas, Q.C., "Clause compromissoire, compromis et arbitrage en droit nouveau", (1968) 28 R. du B. 129, at p. 132;
> --L. Kos-Rabcewicz-Zubkowski, "Arbitration in the Code of Civil Procedure of Quebec", (1968) R.J.T. 143, at pp. 159 et seq.;
> --John E.C. Brierley, "Aspects of the Promise to Arbitrate in the law of Quebec", (1970) 30 R. du B. 473;
> --Judge Philippe Ferland, "L'arbitrage sans action en justice dans la province de Québec", (1971) 31 R. du B. 69, at p. 86.

To cite only one, this is what Mr. Émile Colas, Q.C., has to say at pp. 132 and 133 of the article mentioned above:

> [TRANSLATION] In recognizing the principle contained in article 940 of the new Code, the legislator adopted rights that were substantive; and when article 951 provides that "an undertaking to arbitrate must be set out in writing", this too is substantive law.
>
> Once it is set out in writing, such an undertaking to arbitrate is valid, and the Code goes on to state what happens in the event of a refusal to execute a submission when the dispute has arisen.
>
> It should further be noted that the final wording of article 951 C.C.P. differs from the draft submitted by the codifiers. It can be seen in the draft Code of Civil Procedure for books V, VI and VII published in 1964, at page 52, that article 951, first paragraph, began with the words: "In cases where an undertaking to arbitrate is permitted, it must be set out in writing". The legislature abandoned this wording and the first paragraph of article 951 C.C.P. provides in its final version: "An undertaking to arbitrate must be set out in writing". An undertaking to arbitrate is now legal and the problem takes a different form: the legislature has by a provision of substantive law recognized the validity and legality of the undertaking to arbitrate.

In Syndicat de Normandin Lumber Ltd. v. The "Angelic Power", [1971] F.C. 263, Pratte J., now a member of the Federal Court of Appeal, was of the same opinion and he wrote, at p. 268: "... I do not see how the Quebec legislator could have regulated the form and effect of an agreement whose validity he does not admit".

In 1973 the Court of Appeal unanimously adopted the same interpretation in Ville de Granby v. Désourdy Construction Ltée, [1973] C.A. 971.

Owen J.A., with whom Tremblay C.J.Q. concurred, wrote at pp. 982-83:

> As far as I have been able to ascertain there has been no judgment of this Court or of the Supreme Court of Canada rendered in a case which called for a decision on the question as to whether art. 951 C.P. provides that a true clause compromissoire is now valid.
>
> The present case involves a true clause compromissoire and a dispute between the parties both of which are subsequent to the coming into force of art. 951 C.P. The trial judge has expressed the opinion that:
>
> > [TRANSLATION] ... responding to several recommendations, the legislator finally resolved the debate by the first paragraph of art. 951 C.P., and he legalized the undertaking to arbitrate as a substantive right.
>
> In my opinion the legislator by art. 951 C.P. has provided that a true clause compromissoire is valid.

Tremblay C.J.Q. further observed, at p. 984:

> [TRANSLATION] I think it is clear that the undertaking to arbitrate in question is that by which a party undertakes in advance to make the submission contemplated in the preceding articles, namely, the submission which will lead to a final and definitive award, and that such an undertaking to arbitrate is valid in all cases where the submission is lawful, namely, in all cases other than those mentioned in the second paragraph of art. 940 C.C.P.

Gagnon J.A., in separate reasons but concurring in the result, wrote at pp. 986, 987 and 988 the following passage which I adopt:

> [TRANSLATION] By a law of December 31, 1925 the French legislator made an exception to the rule stated by the Cour de Cassation that an undertaking to arbitrate was invalid. He amended article 631 of the Commercial Code, which fixed the jurisdiction of the commercial courts, by adding the following wording:
>
> > However, the parties may agree at the time they enter into a contract to submit the above disputes to arbitrators when they arise.
>
> Our legislature would undoubtedly have been well advised to use equally clear language, but I am nonetheless of the opinion that its intention to authorize an undertaking to arbitrate, whether complete or merely pre-judicial, can be inferred from the context of the case law when it acted, as well as from the wording of article 951 C.C.P. and the place it occupies in the new Code.
>
> The decision in Vinette Construction Ltée v. Dobrinsky, [1962] Que. Q.B. 62, was a precedent in more than one way when the new Code of Civil Procedure was adopted. Fauteux J. as he then was--speaking for the majority of the Supreme Court in National Gypsum Co.

Inc. v. Northern Sales, [1964] S.C.R. 144, at p. 151, was of the view that this decision approved the weight of Quebec judicial authorities on the point. Cartwright and Ritchie JJ. dissented, but on other grounds.

In Vinette v. Dobrinsky, Choquette J.A. stressed that the last word had not been said on the validity of an undertaking to arbitrate (p. 65), and he invited the legislature to intervene to put an end to a controversy which had lasted over sixty years (p. 67). This decision, affirmed by the Supreme Court in National Gypsum, can nonetheless be regarded as having unequivocally held a formal undertaking to arbitrate to be invalid, while the undertaking to arbitrate which creates only a pre-judicial obligation could expect to have more favourable treatment. These are the circumstances surrounding the action by the legislator.

I feel it is significant--and I refer in particular to the reasons of Choquette, Casey and Badeaux JJ.--that the decision of this Court was based first on the provisions of the old Code of Procedure, in Chapter LXXIII, titled "Arbitrations", which made no mention of an undertaking to arbitrate. Article 1431 defined a submission as an act by which the parties agreed to abide by the decision of one or more arbitrators in order to prevent or to put an end to a lawsuit. This definition may have been wide enough to include an undertaking to arbitrate relating to an issue which had not yet arisen, since the submission would serve "to prevent [ ... ] a lawsuit". However, article 1434 provided that deeds of submission made out of court must state the names and qualifications of the arbitrators, the objects in dispute and the delay within which the award of the arbitrators must be given. It was accordingly necessary -- and that at least is how it has been understood -- that the dispute should have arisen or at least that it should relate to one or more well-defined questions. Choquette J.A. cited (at p. 66) Planiol, Ripert and Boulanger (Traité de droit civil, t. 3 (1958), No. 2486, p. 814), who observe:

> Undertaking to arbitrate. A submission can only be made for a dispute which has already arisen or is on the point of arising; a party cannot agree in advance that he will submit future lawsuits to the decision of one or more arbitrators; this general clause, known as an undertaking to arbitrate, would be invalid because a party is not able to define in advance the thing which is the subject of the arbitration or the names of the arbitrators who will be responsible for dealing with it.

In spite of this, there is a line of judicial authority which has recognized the validity of an undertaking to arbitrate, as a condition precedent to a possible court action. Additionally, the arbitration award was not capable of being reviewed on its merits (art. 1444).

The present article 941 C.C.P. reproduced in substance the old articles 1434 and 1435, and the submission has remained intact together with its rules. Alongside article 941, however, is a new article, 951, which does not refer to a submission but rather to an undertaking to arbitrate, and which requires writing as a condition of the validity of such an undertaking. Article 951 adds that, when the dispute

> contemplated has arisen, the parties must execute a submission. This is the second stage. In order to execute a submission, the parties must submit in particular to the provisions of article 941, and as the Chief Justice observed, to the other provisions of the chapter.
>
> Article 951 for the first time gives statutory recognition to an undertaking to arbitrate, and as far as the pre-judicial undertaking to arbitrate is concerned, no legislation was needed to recognize its validity. I feel, therefore, that when the legislator adopted article 951, without any limitation, and rejected the wording proposed by the Commissioners, he intended to make a step forward and wished to authorize a real undertaking to arbitrate.
>
> If, as I think, this is the correct solution, the objections based on public policy cannot stand, because it is the legislature, when it takes a position, who is the final arbiter in the matter. I considered whether the second paragraph of article 940, which does not allow a submission to be made on certain matters, and in particular on matters concerning public policy, was a bar. I think a negative answer must be given to this question, first because in the context it is the object of the dispute and not the way in which it is treated that is at issue, and most importantly because otherwise we would have to conclude that any submission which provides that the decision of an arbitrator will be final, and which does not allow the Court to examine the merits of the case, would be invalid. Such a result would clearly be incompatible with the provisions of the old Code, as well as with those of the new.

There has since been abundant judicial authority on the point, based on Désourdy (supra), both in the Superior Court and in the Court of Appeal. In addition to its decision in the case at bar, I would refer to the following decisions of the Court of Appeal: Société québécoise d'exploitation minière v. Hébert, [1974] C.A. 78; Liman v. K.L.M. Royal Dutch Airlines, [1974] C.A. 505; Commission scolaire régionale des Bois Francs v. J.H. Dupuis Ltée, [1975] C.A. 759; Heyman v. Lafferty, Harwood & Co., [1979] C.A. 231.

I conclude that a complete undertaking to arbitrate is valid in Quebec law.

2. THE NATURE OF THE UNDERTAKING TO ARBITRATE STIPULATED IN THE CONTRACT AT BAR

I have no hesitation in finding, like the Court of Appeal, that the undertaking to arbitrate stipulated in the contract at bar is a complete undertaking to arbitrate.

The Code of Civil Procedure contains no provision regarding the form of an undertaking to arbitrate. It will be sufficient if it contains the essential ingredients, namely that the parties have undertaken to execute a submission and that the arbitration award is final and binding on the parties.

The language used cannot in my opinion be interpreted in any other way: "Any controversy or claim [ ... ] shall be settled by arbitration and judgment upon the award resulting from such arbitration may be entered in any Court having jurisdiction thereof".

The verb "shall" is imperative. "Settled" means "réglé". In this context, "régler" means according to Petit Robert "résoudre définitivement" [finally resolve].

It is sufficient to refer to the following cases in which terms similar or comparable to those used here have been held to constitute complete undertakings to arbitrate: Commission scolaire régionale des Bois Francs (supra): "sera réglé"; Liman (supra): "shall be finally settled"; Prevost Silk Screen Inc. v. Produits Franco Inc., J.E. 80-298 (S.C.), rendered on March 12, 1980: "shall be settled by arbitration".

3. LATENESS OF THE DECLINATORY EXCEPTION

Although this argument was raised in the Court of Appeal, it was not considered by that Court.

Declinatory exceptions are governed by arts. 163 and 164 C.C.P.:

> 163. A defendant, summoned before a court other than that before which the suit should have been instituted, may ask that the suit be referred to the competent court within the legislative authority of Québec, or that the suit be dismissed if there is no such court.
>
> 164. Lack of jurisdiction by reason of the subject matter may be raised at any stage of the case, and it may even be declared by the court of its own motion. The court adjudicates as to costs according to the circumstances.

Article 163 deals with lack of jurisdiction that is ratione personae or relative. Article 164 deals with lack of jurisdiction that is ratione materiae or absolute.

In Garsonnet, Traité théorique et pratique de procédure, t. I, Paris, 1892, at pp. 635-36, it is said that:

> [TRANSLATION] CXLIX. The theory of jurisdiction may be divided into two quite separate parts: jurisdiction ratione materiae and jurisdiction ratione personae. Jurisdiction ratione materiae is the right of the courts of a given jurisdiction to take cognizance of a case to the exclusion of the courts of another jurisdiction; jurisdiction ratione personae is the right of courts of a given jurisdiction to take cognizance of a case to the exclusion of the other courts of the same jurisdiction. The first jurisdiction is thus named because cases are divided among the different kinds of courts by reason of their nature, and the name of the other derives from that jurisdiction in courts of the same kind is usually determined by the defendant's domicile or residence. On the other hand, a court has no jurisdiction ratione materiae in cases belonging to another jurisdiction; it is without jurisdiction ratione personae only in those cases which belong to another court of the same kind.
>
> The application of these principles usually presents no difficulties. 1. The following do not have jurisdiction ratione materiae: (1) an appellate court in cases which have not been heard at the first level of jurisdiction; (2) a Justice of the Peace in actions involving real

> property or relating to personal status; (3) a labour board in disputes which do not occur between an employer and an employee in the course of employment; (4) a commercial court in cases of a purely civil character.

In his Dictionnaire de maximes et locutions latines utilisées en droit québécois, Montreal, 1972, Albert Mayrand J., now a justice of the Court of Appeal, gives the following definitions at pp. 163-64:

> [TRANSLATION]
>
> RATIONE MATERIAE
>
> By reason of the subject matter
>
> This Latin phrase is used in the French version of article 164 of the Code of Civil Procedure.
> The jurisdiction ratione materiae of a judge or court is that given to him to hear a case by reason of its subject matter. It is a jurisdiction that is based on the subject matter or is assigned (e.g. arts. 32 and 35, C.C.P.).

. . .

> RATIONE PERSONAE
>
> By reason of the person
>
> Jurisdiction ratione personae of a judge or court depends on the geographical connection of the cases with a judicial district. This connection may result either from the situation of the litigant (usually the defendant), or from the location of the item in dispute or the place where the dispute arose. In the first case, it is jurisdiction ratione personae strictly speaking. In the second, it is better known as jurisdiction ratione loci.

The effect of an undertaking to arbitrate is to remove the dispute from the ordinary courts of law. As we have seen, the parties must execute a submission and refer the dispute to arbitration. The award will be submitted to the competent court to be homologated, but under the second paragraph of art. 950 C.C.P., the court "cannot [...] enquire into the merits of the contestation".

Is the case at bar one of lack of jurisdiction that is ratione personae or relative, or is it one of lack of jurisdiction that is ratione materiae, or absolute?

In the first case, under art. 161 C.C.P. the declinatory exception must be urged, together with the other grounds mentioned in that article, "within five days of the expiry of the time fixed to appear, or of the notice provided for by article 152 or, if there has been a motion in evocation, from the date of the judgment thereon". In the case at bar, if the lack of jurisdiction is ratione personae or relative, it goes without

saying that the declinatory exception, urged almost seven years after the action was instituted, should be dismissed as tardy.

Under article 164, however, a lack of jurisdiction ratione materiae may be raised at any stage of the case.

Only three cases were cited dealing with this point.

In Régie des installations olympiques v. D'Astous, [1981] C.S. 258, it was held that the lack of jurisdiction was relative. The Superior Court came to the same conclusion in Guité v. Club de hockey Les Nordiques de Québec Inc., J.E. 81-800 (S.C.), rendered on June 17, 1981.

In Prevost Silk (supra), on the other hand, the Superior Court held that the lack of jurisdiction was ratione materiae. The argument was raised by the plea on the merits and Reeves J. dismissed the action on this ground at the hearing on the merits. He wrote, at pp. 6 and 7 of his judgment:

> [TRANSLATION] This is an undertaking to arbitrate which is valid.
>
> When the dispute arises, the parties must execute a submission (articles 951 and 941 C.C.P.).
>
> That being so, the Court, deciding this aspect of the matter only, must find that it lacks jurisdiction to rule on the merits.

The judge went on to say:

> [TRANSLATION] However, defendant could and must decline the jurisdiction of the Court in limine litis, under article 163 C.C.P. Costs will be awarded accordingly, pursuant to the discretion conferred on the Court by article 164 C.C.P.

The Court accordingly dismissed the action with costs of an action dismissed on a declinatory exception before plea.

Relying just on this last passage and on the reference made in it to art. 163, counsel for the appellant maintained that this case held that the lack of jurisdiction was relative rather than absolute. This is a misinterpretation by counsel. It is apparent that the Court considered that its lack of jurisdiction was absolute, since it dismissed the action. Exercising its discretion, it limited the costs.

On the other hand, in his article cited above, "Clause compromissoire, compromis et arbitrage en droit nouveau", Mr. Colas gives the following opinion at pp. 136 and 137:

> [TRANSLATION] Such lack of jurisdiction by the ordinary courts of law is only relative, since in the absence of an undertaking to arbitrate the dispute must necessarily fall within their jurisdiction. It is therefore at the start of the proceeding, in limine litis, after the exception for surety judicatum solvi, but before all other exceptions and defences, that

the declinatory exception to jurisdiction by reason of the undertaking to arbitrate must be presented;

In Caribou Construction Inc. v. Robert McAlpine Ltd., [1976] C.A. 393, the Court of Appeal reversed a judgment of the Superior Court which had declared of its own motion its lack of jurisdiction ratione materiae in light of an undertaking to arbitrate, and dismissed the action on this ground. The Court of Appeal did not rule on the question of whether lack of jurisdiction ratione personae or ratione materiae was involved, but based its judgment on the fact that, by its actions, defendant had waived the clause. Defendant had pleaded on the merits, asking that its prior offer of settlement be declared good and valid. Casey J.A. wrote for the Court, at pp. 393-94:

> These paragraphs may be read as referring to arbitration but in the circumstances above related they cannot be read as a refusal to submit to the Court or as destroying the waiver that Respondent's prior conduct necessarily implied. In these circumstances the clause could not be unilaterally [sic] revived either by Respondent or by the trial judge.

In France the point has been the focus of a controversy which has never been resolved. In his treatise Arbitrage civil et commercial, 3rd ed., 1961, t. I, Jean Robert wrote at p. 128:

> [TRANSLATION] 1. There is not yet any unanimity as to the nature of the lack of jurisdiction created by the undertaking to arbitrate: the division is total.

He mentions that he himself changed his opinion several times, and finally in this third edition adopted the theory of relative lack of jurisdiction.

He notes that the Cour de cassation has adopted the theory of an absolute lack of jurisdiction, while the Courts of Appeal have for the most part favoured relative lack of jurisdiction, including the Cour de Paris, which though at first favourable to absolute lack of jurisdiction has come to support relative lack of jurisdiction. He goes on, at p. 129:

> [TRANSLATION] However, as we noted above, this distinction between absolute and relative nullity has lost almost all practical importance at the present time. In the old version of the Code of Civil Procedure, article 170 provided that if the court lacked jurisdiction by reason of the subject matter, a dismissal could be sought "at any stage of the case", and if it was not, the Court was required to dismiss the action of its own motion. This meant that conversely if the lack of jurisdiction was relative, the combined effect of articles 168 and 192 was that the exception of lack of jurisdiction ratione loci was inadmissible if it was not urged before a finding had been reached on the merits.
>
> In the revision of December 22, 1958:
>
> (a) exceptions of lack of jurisdiction must be raised after the exception for surety and before any other exceptions and defences, even if the rules of jurisdiction were matters of public policy (art. 168 new);
>
> (b) lack of jurisdiction ratione materiae can be declared of the

> Court's own motion only if the law confers jurisdiction on a repressive or administrative court, in cases where the rules of jurisdiction are of public policy (divorce, matters of state and so on), when the dispute is within the jurisdiction of last resort of the court of first instance (art. 171 new).
>
> As a consequence the parties must always raise the exception of lack of jurisdiction in limine litis, or lose their right to do so, with the result that so far as they are concerned the distinction as to the nature of the jurisdiction remains of no consequence. As regards the Court, cases in which it may raise the exception of its own motion are reduced almost to nothing, since matters in which the rules of jurisdiction are of public policy are matters that should be brought to the attention of the public prosecutor in which a submission cannot be made, and where consequently a dispute as to jurisdiction could not arise between arbitrators and the ordinary courts of law.

This amendment to the French Code as a consequence of which the parties must always raise the exception of lack of jurisdiction in limine litis, or lose their right to do so, seems to me to be equivalent in practice to a legislative ruling on the matter, or at least on its effects.

On the other hand, the Cour de cassation in a decision on January 23, 1951, J.C.P. 1951, IV, p. 45, held that an exception of lack of jurisdiction as the result of an undertaking to arbitrate could be declared by the Court of its own motion:

> [TRANSLATION] Arbitrators-Arbitration.--An exception of lack of jurisdiction based on the fact that a rental contract stipulated that at the end of the lease the increase or decrease in value of the equipment, an integral part of the leased premises, would be established by mutually agreed-upon arbitrators can even be raised of its own motion by the court hearing the matter brought in violation of this arbitration clause, and without the exception being expressly stated in the defendant's conclusions (Comm., January 23, 1951; Merat).

Similarly, before revising its opinion and, as we have seen, adopting the theory of relative lack of jurisdiction, the Cour de Paris in a decision of December 13, 1950, Rep. Commaille II, 1951, p. 146, No. 18394, had held:

> [TRANSLATION] 18394.--Arbitration.--Undertaking to arbitrate.--Commercial Court lacks jurisdiction.--Exception may be admitted at any time.--The result of an undertaking to arbitrate is that the Commercial Court lacks jurisdiction ratione materiae; this lack of jurisdiction may be pleaded at any time and can only be covered by the unequivocal intention of the defendant to waive it. Such a waiver does not necessarily result from the fact that a conclusion has first been reached on the merits in the Commercial Court (Cour Paris, 4th Ch., December 13, 1950, Gaz. Pal. April 20, 1951).

In the Encyclopédie Dalloz, Répertoire de droit commercial, vol. I, 1980, 2nd ed., verbo "Arbitrage commercial", it is stated at No. 57:

> [TRANSLATION] 57. An undertaking to arbitrate, regarded as a conferral of jurisdiction by mutual agreement (Paris, June 27, 1957, J.C.P. 1958. IV. 96; May 14, 1959, D. 1959. 437), unquestionably removes jurisdiction from the ordinary courts of law (Civ. January 9, 1933, D.H. 1933. 164, S. 1933. 1. 145; February 27, 1939, Gaz. Pal. 1939. 1. 678; January 22, 1946, D. 1946. 239; Com. October 11, 1954, Rev. arb. 1955. 58; Paris, February 23, 1959, ibid., 1959. 87). It does not matter whether the lack of jurisdiction is relative or absolute, ratione loci or materiae, since the parties must necessarily raise this exception in limine litis (V. Décr. No. 72-684 of July 20, 1972, art. 14, D. 1972. 428).

While it was open to the French legislature to require that lack of jurisdiction ratione materiae be raised at the outset of a proceeding, or the right to do so will otherwise be lost, in the same way as lack of jurisdiction ratione personae, the situation is different here. In France, all levels of jurisdiction derive their authority from the same source. By providing that if lack of jurisdiction ratione materiae is not raised within a specified time it can no longer be raised, the French legislature is able to confer on the court hearing the case the jurisdiction needed to proceed with the matter. That is not entirely possible here, where for example some courts derive their authority from the provincial legislator and others from the federal legislator. Accordingly, a provision of the Code of Civil Procedure stipulating that unless a declinatory exception is made within the specified time limits the Superior Court has jurisdiction, would be inapplicable in a case where the matter falls within the exclusive jurisdiction of the Federal Court. In any event, art. 164 C.C.P. still provides that lack of jurisdiction ratione materiae may be raised at any stage of the case. The question is therefore still an important one and the Court must determine whether the Superior Court's lack of jurisdiction as the result of an undertaking to arbitrate is of this nature.

As the Cour de cassation and the Cour de Paris in the foregoing decisions did prior to the amendment of the French Code, and as the Superior Court did in Prevost Silk (supra), I have come to the conclusion that this is a case of lack of jurisdiction ratione materiae. When the legislature expressly provides that the Court "cannot [...] enquire into the merits of the contestation", it is the Court's jurisdiction by reason of the subject matter that it is removing.

I recognize that since the lack of jurisdiction results from the agreement between the parties, the latter can waive the undertaking to arbitrate, as the Court held in Caribou Construction (supra). That is certainly not the case in the proceeding at bar, where the arbitration has in fact taken place on the appellant's initiative and an award has been made. Additionally, it certainly cannot be said that by its subsequent actions respondent waived the clause, since it is cited as a ground of defence in its plea on the merits.

Any other conclusion would seem to limit the practical effect of this new provision included in the revision of the Code of Civil Procedure by the legislature, who has directed that when a dispute has arisen the parties must execute a submission; that if one of them refuses, and does not appoint an arbitrator, a judge makes such

appointment and states the objects in dispute; that the arbitration must take place; and that when a homologation of the award is requested,

> The court before which such suit is brought may examine into any grounds of nullity which affect the award or into any other question of form which may prevent its being homologated; it cannot, however, enquire into the merits of the contestation.

Otherwise, a party who was not satisfied with an arbitration award could, as appellant sought to do in the case at bar, ignore the undertaking to arbitrate, ignore the arbitration award and proceed in the usual way, and if its opponent did not file a declinatory exception within five days, it would be as if the agreement between the parties and the Code of Civil Procedure itself had never existed.

In my view, the Superior Court's lack of jurisdiction could be raised at any stage of the case, and appellant's third argument should be dismissed.

4. DID AN APPEAL LIE FROM THE SUPERIOR COURT'S JUDGMENT DISMISSING THE DECLINATORY EXCEPTION?

This argument, appellant told the Court, was also raised in the Court of Appeal which did not deal with it.

The argument is entirely without basis.

The Court of Appeal has held since 1935 that a judgment dismissing a motion for a declinatory exception can be appealed: St. Lawrence Starch Co. v. Canada Starch Co. (1935), 58 Que. K.B. 469.

In his Manuel de la Cour d'appel, Montreal, 1941, Adjutor Rivard J. writes at p. 103, No. 193.2:

> [TRANSLATION] 2. On an interlocutory judgment dismissing a declinatory exception, the effect of which could only be to have the action dismissed, it was first held that leave to appeal had to be denied because, by revising the interlocutory judgment, the final judgment could correct the error; however, the Court of Appeal altered its previous rulings on this point: it grants leave in this case on the ground that, under art. 166 C.C.P., "the declinatory exception is first disposed of, and the other exceptions are then decided by the competent court". It desires that the declinatory exception should be disposed of first by a judgment of last resort, in order to avoid having other exceptions and even the merits decided by a court which could later be found to lack jurisdiction.

Article 161 of the new Code restates the principle of the old art. 166 in its second paragraph, that the court first decides the declinatory exception. The rulings of the Court of Appeal since 1966 are the same on this point as its previous decisions: Herbert Matz (Canada) Ltd. v. Arnsteiner, [1976] R.P. 22; Lafleur v.

Hillinger, [1976] R.P. 28; Sinyor Spinners of Canada Ltd. v. Leesona Corporation, [1976] C.A. 395.

5. EXEMPLIFICATION OF AN ARBITRATION AWARD MADE ABROAD

Appellant submitted that the undertaking to arbitrate provides for arbitration abroad and that the arbitration award resulting from that arbitration is subject to the rules of the Code of Civil Procedure regarding the exemplification of judgments (art. 178). It contended that unless these rules are complied with the award is not enforceable. In my view this point would be relevant if the issue related to the arbitration award, as for example in the case of an application to homologate the award. However, in the case at bar in order for respondent to make its declinatory exception it is not necessary for an arbitration to have taken place or for an award to have been made. Since the case is one of lack of jurisdiction ratione materiae, the mere presence of an undertaking to arbitrate suffices to bar appellant's action in the Superior Court. It is therefore not necessary to rule on the conditions required to make an arbitration award made abroad executory in Quebec, and I shall refrain from doing so.

6. NULLITIES WHICH MAY AFFECT THE ARBITRATION AWARD

For the same reasons as I have stated in connection with appellant's fifth argument, there is no need to rule on this argument, but I would make one observation concerning it. It is a general statement found in appellant's reply to respondent's plea on the merits, which appellant further brought forward as a ground of appeal in this Court. This general statement is not substantiated by any particulars nor by any documents or other foundation.

For these reasons, I am of the view that the appeal should be dismissed with costs.

Appeal dismissed with costs.