“To Boldly Go Where No One Has (Arbitrated) Before”: The Star Trek Mythos as an Heuristic Paradigm for Jurisdictional and Arbitration Issues

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Domestic and international arbitration agreements represent significant consensual dispute resolution mechanisms outside the regular court system. Hence, arbitration, as an alternative to court-based dispute resolution, reflects the primacy of party autonomy, foreseeability and certainty in international commercial transactions, most recently lauded by Mr. Justice Le Bel as fundamental principles underlying Canada’s role in the private international law order. Under the aegis of jurisdiction (when can or should the “court speak?”), arbitration agreements and arbitration clauses represent a party-centric conduit and juridical filter for resolution of disputes within the spheres of private international law (involving individual non-state parties), and public international law (involving bilateral investor-state or multilateral-state-to-state parties).

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2 Onex Corp. v. Ball, 1994 O.J. No. 98 (S.C.J.) (“as a result of the enactment of the ICAA [International Commercial Arbitration Act] and the Arbitration Act, 1991, the law of Ontario now encourages parties to submit their disputes to consensual dispute resolution mechanisms outside the regular court system.”)


The recognition of the autonomy of the parties reflected in the enactment of art. 3148, para. 2 C.C.Q. [the applicable Quebec Civil Code statutory reference] is also related to the trend toward international harmonization of the rules of conflict of laws and of jurisdiction. That harmonization is being achieved by means, inter alia, of international agreements sponsored by international organizations such as the Hague Conference on Private International Law and the United Nations Commission on International Trade Law (“UNCITRAL”).

... Thus the wording and legislative context of art. 3148, para. 2 C.C.Q. confirm that in enacting the provision, the legislature intended to recognize the primacy of the autonomy of the parties in situations involving conflicts of jurisdiction. Moreover, this legislative choice, by providing for the use of arbitration clauses and choice of forum clauses, fosters foreseeability and certainty in international legal transactions.
By comparison, the interdisciplinary study of law and humanities and the impact of law on popular culture—from mainstream media such as television and films—have provided insight on how narrative storytelling techniques influence viewer beliefs in legal norms, jury decision-making and generally, the legitimacy (or illegitimacy) of the justice system, based upon the audience’s subjective interpretation of ethos, logos, pathos and mythos. Hence, Hollywood tends to focus the camera lens on the criminal justice system (e.g. CSI: Crime Scene Investigation/CSI:NY/CSI:Miami; Law and Order/Law and Order:SVU/Law and Order: Criminal Intent), the practice of law (e.g. L.A. Law, Shark) or the courtroom drama (e.g. Erin Brockovich, A Civil Action).

Admittedly, the topic of international arbitration has failed to capture the interest of Hollywood producers or television audiences, yet the science fiction genre surprisingly yields a serendipitous result. In a Star Trek: The Next Generation episode, the interplay of the issues of the rule of law, jurisdiction and international (more accurately, “intergalactic”) comity within the context of arbitration, were highlighted. In an episode entitled “The Ensigns of Command”, the U.S.S. Enterprise receives a message from the Sheliak (a decidedly austere and imperialistic alien race) who order the crew to remove all humans from the planet Tau Cygna V. According to a Federation treaty, the planet belongs to the alien race, who wants to take control of their property and have given the crew four days to evacuate the men and women now living there. If the U.S.S. Enterprise

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7 STAR TREK: THE NEXT GENERATION, "The Ensigns of Command", #40273-149, Written by H. B. Savage, Directed by Cliff Bole. 3rd Revised Final Draft. Copyright 1989 Paramount Pictures Corporation. All Rights Reserved. (The author had to Google "Star Trek" and "scripts" to find out both the title of the episode and excerpt the relevant dialogue.

does not complete the task, the Sheliak will exterminate all of the humans, whom they consider "vermin." While a speech by Lieutenant Data (an android) convinces some colonists to revolt against the colonists’ leader who opposes evacuation, in the following dialogue exchange, Capt. Jean-Luc Picard buys time when he finds a clause in the Federation treaty that allows him to demand third party arbitration of the evacuation dispute:

52 INT. MAIN BRIDGE (OPTICAL)
Troi is seated at Science One with Picard hanging over her shoulder. Riker and Worf are at Science Two.
Pages of treaty crawl past on both screens.

WORF
This is hopeless. Fighting would be preferable.
A look from Riker.

PICARD
That's it.
He indicates a clause.

TROI
I don't follow you, sir.

PICARD
Worf, get me the Sheliak.

WORF
(just heard the reprieve)
Yes, sir!
Picard, Riker and Troi return to the command station.
The strange Sheliak scene replaces a view of the ship.

PICARD
Pursuant to paragraph one thousand two hundred and ninety I formally request third party arbitration of our dispute.
A beat while they look it up.

SHELIAK
Agreed.

PICARD
And further, pursuant to subsection D, three, I name the Grizzelas to arbitrate.

SHELIAK
Grizzelas?
Riker glances, puzzled, at Troi.

RIKER
(months)
Grizzelas?
Troi quells him with a look.

PICARD
Unfortunately they are currently in their hibernation cycle, but they'll awaken in six months, and then we'll get this matter settled. Now, do you want to wait... or give me my three weeks?

SHELIAK
Absurd. We carry the membership!
We can brook no delay!

PICARD
Then I declare the treaty in abeyance!
SHELIAK

Wait! Negotiation is --
Picard gestures to Worf -- cut the transmission. Worf obeys. A long beat.

RIKER

(smiling)
You enjoyed that.

PICARD

You're damn right.

WORF

Captain, they are hailing us.
Picard studies his nails. Takes a turn around the bridge. Settles himself back in the command chair.

WORF

(continuing)
Sir?

PICARD

(a beat)
On screen.
The Sheliak reappear.

SHELIAK

You may have your three weeks, Picard of the Enterprise.

PICARD

(with careful enunciation)
Thank you. [bolded emphasis added]

While the foregoing is perhaps an unconventional illustration of the concepts of jurisdiction and arbitration, television often mirrors the political, social and legal values of the time. For example, the original Star Trek show has been heralded as promoting the concept of universalism (e.g. the “United Nations” as a precursor to the “United Federation of Planets”); customary international law (the “Prime Directive” of non-interference with developing alien cultures as a critique of “imperialistic colonialism”), and the 60’s civil rights movements (e.g. a multi-specie crew engaging in diplomatic and inter-personal conflict resolution). Thus, there is some heuristic value gained through a pop culture reference to an otherwise highly specialized, technical and complicated area of private and/or public international law.
“Beaming up” and departing from the fictional Star Trek universe, one may observe third-party arbitration in the real-world context. Arbitration is a preferred method of dispute resolution at the multi-state level and provides a sophisticated procedural mechanism for Canadian private parties to enforce their rights against foreign state actors. In January 1994, Canada, the United States and Mexico launched the North American Free Trade Agreement (NAFTA) and formed the world's largest free trade zone. According to the Foreign Affairs and International Trade Canada website:

“The Agreement has brought economic growth and rising standards of living for people in all three [sic] countries. In addition, NAFTA has established a strong foundation for future growth and has set a valuable example of the benefits of trade liberalization.”  

Canada has also entered into bi-lateral treaties with other countries, such as Chile\(^{10}\), Costa Rica\(^ {11}\) and Israel\(^{12}\). Chapter Eleven of NAFTA contains provisions designed to protect cross-border investors and facilitate the settlement of investment disputes. For example, each NAFTA Party must accord investors from the other NAFTA Parties national (i.e. non-discriminatory) treatment and may not expropriate investments of those investors except in accordance with international law. Chapter Eleven permits an investor of one NAFTA Party to seek monetary damages for measures of one of the other NAFTA Parties that allegedly violate those and other Chapter Eleven. Investors may initiate arbitration against the NAFTA Party under the Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL Rules”) or the Arbitration (Additional

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\(^{13}\) NAFTA - Chapter 11 - Investment Cases Filed against the Government of Canada: (1) Active Arbitrations to which Canada is a Party: United Parcel Service of America, Inc. (“UPS”) v. Government of Canada; and GL Farms LLC and Carl Adams v. Government of Canada (2) Previous Arbitrations to which Canada was a Party: Ethyl Corporation v. Government of Canada; Pope & Talbot Inc. v. Government of Canada; S.D. Myers Inc. v. Government of Canada; Investment Cases Filed against the United States of America: (1) Active Arbitrations involving Canadian parties; Glamis Gold Ltd. v. United States of America; Kenex Ltd. v. United States of America; Grand River Enterprises Six Nations Ltd. et al. v. United States of America; Cattlemen for Free Trade v. United States of America; Methanex Corp. v. United States of America; Mondev International Ltd. v. United States of America; ADF Group Inc. v. United States of America; The Loewn Group, Inc. et al. v. United States of America.
Article 1122-Consent to Arbitration

1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.
2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:
   (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;
   (b) Article II of the New York Convention for an agreement in writing; and
   (c) Article I of the Inter-American Convention for an agreement.\(^\text{15}\)

Under the auspices of the World Bank (the developing world’s “Federation”), ICSID represents an important vehicle for bi-lateral (investor/state) arbitrations. In a recent article, J William Rowley notes:

Resolving commercial disputes efficiently is vital in the modern business world. Until relatively recently, the burden of doing so fell on those national court systems that seemed to capture the bulk of such disputes. But economic liberalisation and technological change have been altering the global economy. In particular, business has responded to the fall of trade barriers by expanding abroad and forging cross-border partnerships and joint ventures of every description. The growing multiculturalism of business and trade alone would have jetpropelled growth in international arbitration. But, because of the uncertainties inherent in court processes and because, for most international transactions, no national court is likely to be acceptable to both sides, the stage was set for processes and institutions more suited to resolving transborder disputes.

Unsurprisingly, the concept and number of international commercial arbitrations have grown enormously. And, with some 2,300 bilateral investment treaties now in place, the increase in investor/state arbitrations – especially those conducted under the auspices of ICSID – has been nothing short of extraordinary. In the last five years, ICSID has seen a 150 percent increase in the number of arbitrations filed over the total number of cases instituted in its first 35 years.\(^\text{16}\)

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Some may be familiar with the ongoing Canada-U.S. Softwood Lumber dispute where the U.S. refused to recognize or comply with three NAFTA Arbitral awards in Canada’s favour, ultimately leading to further rounds of negotiations and a tentative new softwood lumber deal.\(^\text{17} \) By contrast, in the *United Mexican States v. Karpa*, Marvin Feldman, a U.S. citizen, submitted a claim on behalf of CEMSA, a registered foreign trading company and exporter of cigarettes from Mexico, in April 1999. CEMSA alleged that the denial of benefits of a law that allowed certain tax refunds to exporters breached Mexico’s obligations under Chapter Eleven of NAFTA. The NAFTA Arbitration Tribunal rendered its final decision on December 12, 2002, which found that Mexico had violated its national treatment obligations under NAFTA. Mexico brought an application for statutory review to set aside the arbitral decision in the Ontario Superior Court of Justice.\(^\text{19}\) Chilcott, J. dismissed the application to set aside the arbitral award,\(^\text{20}\) which the Court of Appeal for Ontario also affirmed.\(^\text{21}\)

So why in the Star Trek paradigm, did the Sheliak adopt the Mexican, rather than the American, approach to treaty-level arbitration? Perhaps party autonomy, contractual primacy, comity, reciprocity and politico-legal systemic factors all favoured deference to arbitration as a “legal means to a political end.” Conversely, for the United States, “final and binding” arbitration is neither “final” nor “binding” in cases involving powerful lobby interests which exert influence over domestic policy and affect voting patterns for congressional or senatorial incumbents. More directly, the U.S. can exert economic power over both Canada and Mexico, in varying degrees. However, it is far less likely for the U.S. to flout bilateral or multilateral treaty obligations involving private, rather than national, interests. Hence, treaty-level arbitration is a further dispute resolution alternative for private parties in resolving disputes with foreign states.

\(^{17}\) See *Canfor Corp. v. United States of America; Terminal Forest Products Ltd. v. United States of America and Tembec Inc. et al. v. United States of America* (Softwood Lumber Consolidated Proceeding).


\(^{19}\) The NAFTA Arbitration Tribunal (arbitral seat) was in Ottawa, Ontario at the International Centre for Settlement of Investment Disputes (Additional Facilities), which is why the application for statutory review to set aside the arbitral decision was within the Ontario court’s jurisdiction.
