

Schreter v. Gasmac Inc.*

7 O.R. (3d) 608
[1992] O.J. No. 257
Action No. B56/91

ONTARIO
Ontario Court (General Division),
Feldman J.
February 13, 1992

1992 CanLII 7671 (ON SC)

*A notice of appeal was served February 24, 1992.

Arbitration -- Award -- Enforcement -- Georgia arbitration award confirmed by judgment of Georgia court -- Award not merging in judgment so as to preclude its enforcement under International Commercial Arbitration Act -- Failure of arbitrator to give reasons not amounting in circumstances to breach of natural justice -- Fact that award provided for acceleration of future damages not contemplated by agreement between parties not rendering its enforcement contrary to Ontario public policy -- International Commercial Arbitration Act, R.S.O. 1990, c. I.9.

Civil procedure -- Commencement of proceedings -- Application -- Proceedings to enforce foreign arbitration award under International Commercial Arbitration Act properly commenced as application rather than as action -- International Commercial Arbitration Act, R.S.O. 1990, c. I.9.

The applicant S and his company entered into an agreement with the respondent G Inc. for the sale of assets along with the right to manufacture and sell certain equipment in the United States and Canada, with royalties and commissions being paid to S. The agreement provided that the governing law of the agreement was the law of the state of Georgia, and contained an arbitration clause which provided that any dispute arising out

of or in relation to the agreement was to be determined by binding arbitration conducted in Atlanta.

S demanded arbitration in 1989, requesting, among other relief, past due royalties and accelerated annual royalty payments which would have been due had G Inc. not breached the contract. G Inc. received notice of the submission and information about how to counterclaim. Representatives of G Inc., along with Georgia counsel, appeared in person at the hearing. An arbitration award was delivered, without reasons, in S's favour. The award was subsequently confirmed by a Georgia court judgment.

S applied to enforce the award under the Ontario International Commercial Arbitration Act . G Inc. resisted enforcement on the grounds that: (1) the matter was commenced incorrectly as an application rather than an action and was not authorized under Rule 14 of the Rules of Civil Procedure; (2) the award had merged in the Georgia court judgment and could only be enforced as a foreign judgment and not as an arbitration award; (3) there was a denial of natural justice because the arbitrator failed to give reasons; and (4) it would be contrary to the public policy of Ontario to enforce the award because the award included a sum which represented an acceleration of future damages not contemplated by the agreement between the parties.

Held, the application should be allowed.

(1) Rule 14.05(2) of the Rules of Civil Procedure permits the commencement of a proceeding by application if a statute so authorizes. The Act provides that the Model Law on Commercial Arbitration is in force in Ontario. The Model Law is made a schedule to the Act and is enacted as part of the Act. Under article 35(1) of the Model Law, an arbitral award shall be recognized and enforced "upon application" in writing to the competent court. Where a statute uses the word "application", the proceeding may be commenced by originating notice. It is appropriate that a foreign arbitral award be recognized by the Ontario courts under Rule 14.

(2) Article 35 of the Model Law makes mandatory the enforcement of an award upon compliance with that article, and subject to the grounds for refusal set out in article 36. Nothing in articles 35 and 36 suggests that if an award has been confirmed by a court order or judgment in the jurisdiction where the award was made, it will not then be enforced in Ontario. Any such bar to enforcement would create a gaping hole in the scope of the Act. The arbitral award in this case did not merge in the confirmatory judgment.

(3) In the circumstances, failure to give reasons for the award did not constitute a denial of natural justice, and it could not be said that the arbitrator took jurisdiction over a dispute beyond the terms of the submission.

(4) The fact that the award provided for the acceleration of royalty payments did not make its enforcement contrary to the public policy of Ontario. If an Ontario court could re-open the merits of an arbitral decision on legal issues decided in accordance with the law of a foreign jurisdiction and where there has been no misconduct, under the guise of ensuring conformity with the public policy of the province, the enforcement procedure of the Model Law could be brought into disrepute. In any event, there is precedent in Ontario law for the acceleration of future payments as damages for anticipatory breach, so that the concept of acceleration without previous agreement cannot be said to be per se contrary to the public policy of Ontario.

Stolp & Co. v. W.B. Browne & Co. (1930), 66 O.L.R. 73, [1930] 4 D.L.R. 703 (H.C.J.), not folld.

Other cases referred to

Chilian v. Augdome Corp. (1991), 2 O.R. (3d) 696, 49 C.P.C. (2d) 1, 78 D.L.R. (4th) 129, 44 O.A.C. 263 (C.A.), *Compania Maritima Villa Nova S.A. v. Northern Sales Co.*, F.C.A., November 20, 1991; *Four Embarcadero Center Venture v. Kalen* (1988), 65 O.R. (2d) 551, 27 C.P.C. (2d) 260 (H.C.J.); *Highway Properties Ltd. v. Kelly Douglas & Co.*, [1971] S.C.R.

562, 17 D.L.R. (3d) 710, [1972] 2 W.W.R. 28; Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 50 B.C.L.R. (2d) 207, [1991] 1 W.W.R. 219 (C.A.) [leave to appeal to S.C.C. refused (1990), 50 B.C.L.R. (2d) xxvii]; Waterside Ocean Navigation Co. v. International Navigation Ltd., 737 F.2d 150 (U.S.C.A., 2nd Cir., 1984)

Statutes referred to

International Commercial Arbitration Act, R.S.O. 1990, c. I.9, ss. 2(2), 11, 13, Schedule (Model Law), Chapter VIII, articles 8, 9, 35, 35(2), 36, 36(1)(a), (a)(ii), (a)(iii), (v), (b), (b)(ii), (2)

United Nations Foreign Arbitral Awards Convention Act, R.S.C. 1985, c. 16 (2nd Supp.)

United States Arbitration Act, U.S.C. 1988, Title 9, 9

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, Rule 14, rules 2.01(2), 14.05(2) [am. O. Reg. 711/89, s. 14]

Authorities referred to

Canada Gazette, Part I, Vol. 120, No. 40, October 4, 1986, Supp., pp. 3, 97

Castel, J.-G., Canadian Conflict of Laws, 2nd ed., Supp. (Toronto: Butterworths, 1990), pp. 38-39 para. 183

Dicey and Morris on the Conflict of Laws, 11th ed. by L. Collins (gen. ed.) (London: Stevens & Sons, 1987), pp. 564-65

Domke on Commercial Arbitration, revised ed. by G.M. Wilner, cum. supp. (Wilmette, Ill.: Callaghan, 1990), p. 506

McLeod, J.G., The Conflict of Laws (Calgary: Carswell, 1983), pp. 660, 664

Piggott, F., Foreign Judgments and Jurisdiction, 3rd ed., Part I (London: Butterworths, 1908), pp. 95-96

Russell on the Law of Arbitration, 20th ed. by A. Walton and M. Vitoria (London: Stevens & Sons, 1982), p. 368

APPLICATION to enforce foreign arbitration award under Ontario International Commercial Arbitration Act .

Valerie A.E. Dyer, for applicant.
Gretchen A. Timmins, for respondent.

FELDMAN J.:--This is an application to enforce a foreign arbitration award under the International Commercial Arbitration Act, R.S.O. 1990, c. I.9, or alternatively under the federal United Nations Foreign Arbitral Awards Convention Act, R.S.C. 1985, c. 16 (2nd Supp.).

Enforcement is resisted by the respondent on the following grounds:

1. The matter was commenced incorrectly as an application rather than an action and is not authorized under Rule 14 of the Rules of Civil Procedure, O. Reg. 560/84.
2. As the award was confirmed by a court judgment in the State of Georgia where the arbitration was held, the award has merged in the judgment and can only be enforced as a foreign judgment and not as an arbitration award.
3. The respondent has a substantial counterclaim which it has not yet asserted. This proceeding should be stayed while the respondent arbitrates the counterclaim in Georgia or asserts it in the present proceeding.
4. There was a denial of natural justice because the arbitrator failed to give reasons, limiting the respondent's right to judicial review of the award, and the court's ability to discern whether the award goes beyond the proper submission to arbitration.
5. It would be contrary to the public policy of this province to enforce the award because the award includes a substantial sum which appears to represent an acceleration of future damages not contemplated by the agreement between the parties, and contrary to the law of this jurisdiction.

FACTS

On November 13, 1987, Schreter and his company, Enatech Corporation, entered into an agreement in writing with the respondent, Gasmac Inc. (Gasmac Canada), and its subsidiary, Gasmac Incorporated (Gasmac U.S.), for the sale of certain assets along with the right to manufacture and sell burners and related equipment in the United States and Canada, and included provision for the payment of royalties and commissions to Schreter. The agreement provided that the governing law of the agreement was the law of the State of Georgia. Paragraph 16 of the agreement is an arbitration clause which provides:

16. Any dispute arising out of, in connection with or in relation to this agreement or its interpretation shall be determined by binding arbitration conducted in Atlanta in accordance with the then-existing rules of the American Arbitration Association. The parties renounce resort to judicial proceedings in connection with this agreement other than to enforce an arbitration award.

At the time of the agreement, Schreter and Enatech operated in Georgia, Gasmac Canada in Ontario, and Gasmac U.S. in Pennsylvania.

The applicant demanded arbitration by letter of April 17, 1989 requesting the following relief:

- (a) \$20,000 minimal annual royalties past due plus interest;
- (b) \$80,000 accelerated minimal annual royalty payments which would have been due later had the respondent not breached the contract;
- (c) an accounting for all royalties in excess of the minimum annual royalties;
- (d) an accounting for payment of all sales commissions;
- (e) damages for breach of the best efforts clause;
- (f) damages for the cost of the applicant obtaining insurance;

(g) attorneys' fees, costs and expenses.

The respondent and Gasmac U.S. received notice of the submission from the American Arbitration Association in a letter of April 20, 1989, which included information about how to counterclaim, and which provided a list of proposed arbitrators to which objection could be taken. No objection was taken to any of those listed, nor was a counterclaim asserted.

The arbitration hearing took place on August 21-22, 1989 in Atlanta before Todd Deveau, one of the listed arbitrators from the American Arbitration Association. George and Martin Scarborough of the respondent along with Georgia counsel appeared in person at the hearing. All parties presented evidence and argument briefs on the merits and on certain issues of arbitrability and jurisdiction, including the claim for accelerated payment, the claim for the cost of liability insurance which was governed by a separate but related agreement, and the claim for attorneys' fees, not referenced in the agreement.

The arbitral award dated October 19, 1989 was delivered without reasons, and awarded:

- (1) on the claim, \$91,186.47 (U.S.);
- (2) on the claim for attorneys' fees, \$14,000 (U.S.);
- (3) interest at the rate of 12 per cent on the total award.

No steps were initiated by Gasmac Canada nor Gasmac U.S. to challenge or set aside the award. The applicant filed a motion to confirm the award in the United States District Court, Northern District of Georgia, Atlanta Division on March 13, 1990 pursuant to the United States Arbitration Act, U.S.C. 1988, Title 9, 9. On that hearing, the respondent and Gasmac U.S. did not seek to vary or set aside the award, but did oppose confirmation on the following grounds: (1) the court lacked personal jurisdiction over Gasmac Canada and (2)

subject-matter jurisdiction because the award did not properly exceed \$50,000; (3) the arbitrator exceeded his power by accelerating payment; (4) the award lacked foundation in reason or fact and legally lacked rationality. Both Gasmac corporations appeared by counsel on the hearing and further affidavit evidence was filed on behalf of Gasmac Canada.

The United States court rejected all of these arguments in reasons delivered June 26, 1990, and the award was confirmed by judgment dated June 29, 1990.

THE LEGISLATION

International Commercial Arbitration Act, R.S.O. 1990, c. I.9
-- The Model Law

The Ontario Act came into force on June 8, 1988, but applies to commercial arbitration agreements and awards whether made before or after that date (s. 2(2)). It brings into force in Ontario the [Uncitral] Model Law on [International] Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985. The Model Law is a schedule to the Act. Chapter VIII of the Model Law is entitled "Recognition and Enforcement of Awards" and contains articles 35 and 36 which are set out in full:

Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case, or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced, or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place, or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of

the country in which, or under the law of which,
that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of
settlement by arbitration under the law of this
State, or

(ii) the recognition or enforcement of the award would
be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an
award has been made to a court referred to in paragraph (1)
(a)(v) of this article, the court where recognition or
enforcement is sought may, if it considers it proper, adjourn
its decision and may also, on the application of the party
claiming recognition or enforcement of the award, order the
other party to provide appropriate security.

Section 11 of the Act provides that an arbitral award
recognized by the court is enforceable in the same manner as a
judgment or order of the court.

The Model Law applies to international commercial
arbitrations conducted in Ontario or elsewhere, but the only
articles which apply to arbitrations conducted outside Ontario
are articles 35 and 36, as well as articles 8 and 9 which deal
with other court functions where there is an arbitration
agreement.

The applicant has complied with article 35(2). Therefore the
court shall enforce the award which shall be recognized as
binding unless the court exercises its discretion based on one
of the grounds set out in article 36. The onus is on the
respondent under article 36(1)(a) to prove that one of the
grounds exists for the court to exercise its discretion to
refuse to recognize or enforce the arbitral award. Even then,
the court is not obliged to refuse recognition of the award.
Alternatively, under article 36(1)(b) there is no onus of
proof on the respondent to prove that the award is contrary to

the public policy of Ontario, but if the court so finds, it still retains discretion to recognize an award even in such a case.

Section 13 of the Act provides guidance to an interpreting court by permitting recourse to two commentaries on the Model Law, the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session, June 3-21, 1985 (the June 1985 Report), and the Analytical Commentary contained in the Report of the Secretary General to the eighteenth session of the United Nations Commission on International Trade Law (the Analytical Commentary). These are published in the Canada Gazette, Part I, Vol. 120, No. 40, October 4, 1986, Supplement [at pp. 3 and 97 respectively].

United Nations Foreign Arbitral Awards Convention Act, S.C. 1986, c. 21 -- The New York Convention

The constitutional validity of the federal Act has recently been addressed in the Federal Court of Appeal decision in *Compania Maritima Villa Nova S.A. v. Northern Sales Co.*, November 20, 1991. That court held that the federal Act is "valid federal legislation for the recognition and enforcement in Canada of foreign arbitral awards having a federal character in a constitutional sense. Questions will no doubt arise in individual cases as to whether a particular award is one whose enforcement falls within the proper ambit of the legislation".

No argument was addressed on this application as to the constitutional applicability of the federal Act to this award, nor to any distinctions between the federal and Ontario Acts which might affect the judgment of this court on the recognition and enforcement of this award. It is therefore unnecessary to address the applicability of the federal Act for the purposes of this decision.

THE ISSUES

(1) The application procedure

The respondent submits that the procedure to enforce a foreign judgment is by action and that by analogy the same procedure should be used to enforce a foreign arbitration award, particularly where the reference to "application" is not contained in the Act itself, but only in the Model Law which is a schedule to the Act.

Rule 14.05(2) [am. O. Reg. 711/89, s. 14] of the Rules of Civil Procedure permits the commencement of a proceeding by application if a statute so authorizes. The International Commercial Arbitration Act provides that the Model Law is in force in Ontario. The Model Law is made a schedule to the Act and is enacted as part of the Act. No authority was cited to suggest that the Model Law is any less an enactment of the legislature of this province because it was enacted in the form of a schedule.

Under article 35(1) of the Model Law, "An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36". (I note that one reading of this clause may suggest that the court application refers only to enforcement rather than recognition of an award. Article 36 makes it clear that both recognition and enforcement are in the discretion of the court. The Analytical Commentary explains that the award may be recognized for other purposes without court recognition for enforcement (*supra*, pp. 164-65, para. 4).)

In the case of *Chilian v. Augdome Corp.* (1991), 2 O.R. (3d) 696, 78 D.L.R. (4th) 129, the Ontario Court of Appeal clarified the issue of the propriety and availability of the two modes of commencing a proceeding, by action and by originating notice. Where a statute uses the word "apply" or "application", the proceeding may be commenced by originating notice although it may also be commenced as an action. In my view, it is appropriate that a foreign arbitral award be able to be recognized by this court using Rule 14. Oftentimes there will be no dispute and the application will proceed expeditiously to an order. In such cases, as well as where the material facts

can be put before the court by affidavit evidence and cross-examination thereon if necessary, it would be unnecessarily cumbersome, costly and inefficient for the matter to be required to proceed by way of action.

Referring to rule 2.01(2) (an originating process shall not be set aside because the other should have been used), the Court of Appeal pointed out that a court may order the one mode of commencement if either unauthorized or inappropriate, to be treated as the other. In this case, the respondent takes the secondary position that there are facts in dispute and that the matter should be treated as an action or the trial of an issue ordered. For reasons set out below, the application will be disposed of based on the material before the court.

I also note that the argument of this case proceeded only after extensive affidavit evidence as well as cross-examination thereon was prepared and transcripts filed. It would be more appropriate to challenge the jurisdiction of the court to hear the case by application before such a record is created. On such a motion, even if the application procedure is held to be available, the court and the parties may determine at an early stage the most expeditious procedure for putting the necessary evidence before the court.

(2) Merger of the award into the Georgia judgment

The respondent submits that the International Commercial Arbitration Act cannot apply where the arbitral award has been made an order or judgment of a foreign court. The argument is that at that point the award itself no longer exists as it has merged in the judgment, and only the foreign judgment can be enforced under the common law rules for enforcement of foreign judgments.

This argument is based on a decision of the High Court of Ontario in *Stolp & Co. v. W.B. Browne & Co.* (1930), 66 O.L.R. 73, [1930] 4 D.L.R. 703, which stands for two propositions: (1) an Ontario court will not enforce a foreign arbitral award; and (2) where a foreign award is confirmed by a judgment of the court where the award was made, that judgment can be enforced

in our courts as the award is merged in the judgment. For the proposition that the award merges in the confirmatory judgment, the court only quoted from the textbook, F. Piggott, *Foreign Judgments and Jurisdiction*, 3rd ed., Part I (London: Butterworths, 1908) as follows (at pp. 95-96):

The decision of a dispute by any other person or body, even with consent of the parties, does not amount to a judgment; the remedy in case of failure to carry out the decision would probably lie on the contract to refer the dispute and accept the decision. Thus, an award of an arbitrator abroad does not come within the definition of a foreign judgment until it is made an order of Court; it is then merged in that order, which is in effect the judgment of the Court in the matter.

(Emphasis added)

Both the first proposition and the doctrine of merger from the *Stolp* decision have been questioned by textbook writers (see, for example, J.G. McLeod, *The Conflict of Laws* (Calgary: Carswell, 1983) at pp. 660, 664; and J.-G. Castel, *Canadian Conflict of Laws*, 2nd ed., Supp. (Toronto: Butterworths, 1990), at pp. 38-39, para. 183), nor is there reported authority which follows or approves the case. The learned authors [A. Walton and M. Vitoria] of *Russell on the Law of Arbitration*, 20th ed. (London: Stevens & Sons, 1982), at p. 368 [footnote 46], point out that Piggott was in error, and that the law in England (which was the same in Canada) was that although a cause of action merges in a local judgment, a foreign judgment does not merge nor efface the underlying cause of action. Therefore, there was no basis for suggesting it would merge or efface an arbitral award which it confirms.

In *Dicey and Morris on the Conflict of Laws*, 11th ed. by L. Collins (gen. ed.) (London: Stevens & Sons, 1987), the learned authors also discuss this issue. They point out first that the question whether the award has merged in the judgment on the award is to be determined by the *lex fori* of the enforcing court. In England, the doctrine of non-merger in relation to foreign judgments has been abolished by statute, so that although the authors take the view that as a matter of policy

the entry of judgment abroad on the award for the purpose of enforcement should not bar enforcement of the award in England, in fact the effect of merger may be that only the judgment may be enforced there (pp. 564-65).

The new law of Ontario on the enforcement of foreign commercial arbitral awards is the International Commercial Arbitration Act, including its schedule, the Model Law. Article 35 makes mandatory the recognition and enforcement of an award upon compliance with that article, and subject to the grounds for refusal set out in article 36. There is no definition of "arbitral award" in the articles of the Model Law which apply to foreign awards. However, read in the context of articles 35 and 36, the arbitral award is the award of the arbitrator or of the arbitration tribunal itself. Nothing in those articles suggests that if an award has been confirmed by a court order or judgment in the jurisdiction where the award was made, it will not then be enforced in Ontario.

It is clear that any such bar to enforcement would create a gaping hole in the scope of the Act and in the assistance and encouragement it is able to offer to those who wish to use the mechanism of international commercial arbitration with relative ease and with confidence in the enforcement procedure.

The Model Law recognizes the possibility of court involvement after the award in article 36(1)(a)(v) which provides that one ground for refusal of recognition or for a stay of the recognition proceedings is if "the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made".

As the grounds set out in article 36, including article 36(1)(a)(v), are discretionary, it is within the discretion of the Ontario court, that is, the enforcing court, to recognize and enforce the arbitral award even where it has not become binding or has been set aside by a court in the jurisdiction of the award. It would be anomalous indeed if an Ontario court were precluded from enforcing a confirmed arbitral award under the Model Law, but allowed to enforce an award that no longer

exists in its "home jurisdiction" because it has been set aside.

The respondent argues that if in accordance with the law of Georgia the award has merged in the Georgia judgment, then there is no award to enforce and the Ontario Act can have no initial application. The court was referred to some commentary in Russell, *supra*, p. 368, and in Domke on Commercial Arbitration, revised ed. by G.M. Wilner, cum. supp. (Wilmette, Ill.: Callaghan, 1990), p. 506, suggesting that in many states of the United States the award does merge in the confirming judgment, possibly precluding further action on the award.

However, the respondent has not brought evidence before the court to suggest and prove that the confirmatory judgment of the Georgia court had the effect of effacing the underlying award, rather than being just a common procedure for obtaining enforcement of the award in Georgia. At the end of argument there was a request for an adjournment for the respondent to make further inquiries, and if so advised, to bring further evidence before the court on the Georgia law. As there had already been ample opportunity to put relevant evidence before the court including evidence to raise a triable issue, the adjournment was denied. Furthermore, the effect of any such evidence is unclear when, as set out in Dicey and Morris, *supra*, it is the *lex fori*, i.e., the law of Ontario, which determines whether the award has merged for the purpose of recognition and enforcement in Ontario.

The doctrine of merger is not addressed in the Ontario Act implementing the Model Law nor do the two commentaries on the law referred to in s. 13 of the Act raise the issue of the effect of a confirmatory judgment on the existence of the award for the purpose of enforcement. The purpose of enacting the Model Law in Ontario and in other jurisdictions is to establish a climate where international commercial arbitration can be resorted to with confidence by parties from different countries on the basis that if the arbitration is conducted in accordance with the agreement of the parties, an award will be enforceable if no defences are successfully raised under articles 35 and 36.

The decision in the Stolp case, *supra*, denying direct enforcement of a foreign award and requiring a foreign judgment confirming the award, is directly contrary to the Model Law which in effect overrules it for foreign commercial arbitration awards. There is no basis or reason to give further effect to part of the underlying rationale for that decision, the doctrine of merger of the award in a confirmatory judgment.

Following on the merger argument, the respondent made many submissions attacking the enforceability of the Georgia judgment. The applicant has clearly not sought to enforce that judgment as its application is brought pursuant to the Ontario and federal Acts for enforcing foreign arbitration awards. Therefore there is no need to deal with those issues raised by the respondent.

(3) Outstanding counterclaim

One of the remedies sought by the respondent was a stay of the application to allow the respondent to pursue a counterclaim through further arbitration in Georgia or by way of action or counterclaim in the within proceeding in the courts of Ontario. Since the argument of the application, counsel has advised by written correspondence that Gasmac Canada has withdrawn its claim for arbitration in Georgia. Arbitration is clearly the only procedure contemplated in the agreement between the parties and it is the only one for which there was an argument, at least, that this court could adjourn this application pursuant to article 36(1)(a)(v) and 36(2).

(4) Denial of natural justice by failure to give reasons for the award and the applicability of article 36(1)(a)(iii)

The issue of natural justice is addressed in article 36(1)(a)(ii) as one of the grounds for refusal to recognize or enforce the award. The components of natural justice referred to are notice and the ability of the respondent to present its case. There is no issue on these two matters raised in this case. The respondent had adequate notice of the arbitration and full opportunity to present its case through counsel with

presentation of evidence and legal briefs.

The article does not refer to the lack of reasons for an award, nor to error of law on the face of the record. The respondent argues that failure to provide reasons may have precluded the respondent from initiating judicial review proceedings.

It is true that reasons are important for any award as they demonstrate to the parties that their evidence and arguments have been understood and considered. They also provide the basis for challenge of a factual or legal conclusion in certain circumstances. A very significant consequence of the failure to give reasons in the context of the Model Law is the inability of the parties to determine if the award deals with a dispute beyond the terms of the submission (article 36(1)(a)(iii)), or if the recognition or enforcement of the award is contrary to the public policy of Ontario (article 36(1)(b)(ii)).

One of the complaints of the respondent was that the submission included a claim for indemnity for product liability insurance, which insurance was required under a "companion agreement" to the main agreement, and which former agreement did not contain an arbitration clause. This jurisdiction issue was raised before the arbitrator. Because there are no reasons, it is unclear whether the arbitrator took jurisdiction over that issue and whether any portion of the award includes indemnity for the insurance.

I am satisfied that in the circumstances of this case, this failure does not amount to a ground upon which this court should exercise its discretion to refuse enforcement of the award for two reasons. The first is because the parties agree that the substantial portion of the award on the claim represents damages for accelerated royalty payments. Based on the evidence of the applicant before the arbitrator, \$90,437.50 (U.S.) represented accelerated royalties, overdue sales commissions and overdue consulting fees. That leaves only an insubstantial part of the award, \$748.97 (U.S.), which might be attributable to insurance.

The more important reason is that the insurance issue was submitted and if it was included by the arbitrator, it was included on the basis that under Georgia law the companion agreement involved matters which came within the scope of the arbitration clause in the main agreement. Under article 36(1) (a), the burden was on the respondent to provide proof that under Georgia law, which is the governing law of the agreement, the arbitrator was incorrect in this conclusion. To the extent that we have any evidence of Georgia law on the point, it is to the contrary and is contained in the confirmatory judgment of the Georgia court.

The same analysis holds true on the complaint by the respondent that the arbitrator acted beyond his jurisdiction and beyond the terms of the agreement by including attorneys' fees in the award, and by accelerating the royalty payments when the contract provided that they were payable over five years. The arguments were made to the arbitrator, and in the case of the accelerated payment, also to the Georgia court. They each applied Georgia law and concluded that the acceleration of the royalties and, in the case of the arbitrator, the inclusion of attorneys' fees were not inappropriate. Because it is Georgia law which governs, the respondent must provide to this court evidence of Georgia law if it wishes to demonstrate that the award dealt with matters not properly within the submission.

The failure to give reasons, although less helpful to the parties, is not on its own a ground for refusing to enforce this award, nor has the respondent satisfied the onus upon it to rely on article 36(1)(a)(iii).

(5) Public policy -- Article 36(1)(b)(ii)

The respondent submits that the public policy of Ontario should be more broadly construed when a court is reviewing an arbitral award as opposed to the judgment of a foreign court, and that this court should be prepared to look more closely at the merits underlying the award decision, in exercising its discretion to refuse to recognize an award. In particular, the respondent argues that the acceleration of royalty payments for

breach of contract is contrary to the law of Ontario, and that this error of law is contrary to the public policy of this province.

The concept of public policy in the context of impeachment of a foreign judgment was discussed in the case of *Four Embarcadero Center Venture v. Kalen* (1988), 65 O.R. (2d) 551, 27 C.P.C. (2d) 260 (H.C.J.). There the respondent also wished to challenge the foreign judgment on the merits and invoked the public policy ground as the basis for so doing. The court rejected the argument (at pp. 573-74 O.R., 289-90 C.P.C.):

I agree that in the final analysis it is for the trial judge to decide, inventively or not, whether the circumstances of this case call for refusal to enforce the rights and obligations created by the foreign court on the grounds that to do so would be contrary to the public policy of Ontario, but the defendant must do more than raise the public policy as an issue. He has not done so. What he intends is to urge upon the court that the foreign judgment ought not to be enforced because the plaintiffs had no valid claim against him on the merits and that the judgment awarded by default without trial of the merits is wrong. In my opinion the law as I have defined it on the authorities has been conclusively settled against that argument. Having regard to the state of the law I can see no justification for the court reaching the conclusion that enforcement in this action would be contrary to public policy on the ground that the California judgment was wrong, or that it did not proceed to trial on the merits, or that the defendant had a good defence on the merits if they had been adjudicated in a full trial. To do so would be tantamount to the court rejecting what has, for a century and a half, been established in this jurisdiction as fundamental common law principles. The subject-matter (merits) on which the defendant seeks to have discovery is irrelevant.

Mr. Pattillo supports his argument on the public policy ground by reference to the writings of learned jurists on this subject, viz., Castel, op. cit., p. 153 and McLeod, op. cit., p. 620. The authors' comments essentially outline the

principle that the scope of public policy is never closed and may be extended by the court of the forum as the circumstances require. That states no more than trite law or truism. There is no suggestion that any of the above factors urged in this case would justify such an extension. Both authors refer to Read, p. 292, in drawing the principle that the forum ought not to enforce the judgment for the payment of money if action on the original claim could not be maintained because of illegality under the law of the law district where enforcement is sought. Professor McLeod puts it at p. 621, that the public policy prohibition ought to be invoked only if the judgment involves an act that is illegal in the forum or where the action involves acts repugnant to the orderly functioning of the social or commercial life of the forum. An obvious example would be the enforcement of a gambling debt which would be illegal in Ontario. No such element is asserted in the case at bar, which, as I have said is essentially that the California judgment is wrong or is a breach of natural justice.

The June 1985 Report also gives some guidance on the intended scope of the public policy ground for refusal of recognition (p. 63):

296. In discussing the term "public policy", it was understood that it was not equivalent to the political stance or international policies of a State but comprised the fundamental notions and principles of justice . . .

297. . . . It was understood that the term "public policy", which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording "the award is in conflict with the public policy of this State" was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at.

The concept of imposing our public policy on foreign awards

is to guard against enforcement of an award which offends our local principles of justice and fairness in a fundamental way, and in a way which the parties could attribute to the fact that the award was made in another jurisdiction where the procedural or substantive rules diverge markedly from our own, or where there was ignorance or corruption on the part of the tribunal which could not be seen to be tolerated or condoned by our courts.

It is true that arbitral awards have been viewed with less confidence than judgments of a court because the procedures of the courts are more regulated and standardized, and judges are sworn to uphold those procedures and to apply the law, while the qualifications and training of arbitrators may diverge greatly. And it is of concern to a court in this jurisdiction that a party to a foreign arbitration may feel that justice was not done or that the award is perverse in law.

However, if this court were to endorse the view that it should re-open the merits of an arbitral decision on legal issues decided in accordance with the law of a foreign jurisdiction and where there has been no misconduct, under the guise of ensuring conformity with the public policy of this province, the enforcement procedure of the Model Law could be brought into disrepute.

A similar sentiment was expressed by the United States Court of Appeals Second Circuit in the case of *Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150 (1984) [at p. 152]:

This defense must be construed in light of the overriding purpose of the Convention, which is "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries" . . . Thus, this court has unequivocally stated that the public policy defense should be construed narrowly. It should apply only where enforcement would violate our "most basic notions of morality and justice."

And see, for example, the analysis of the British Columbia Court of Appeal in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 50 B.C.L.R. (2d) 207, [1991] 1 W.W.R. 219 (C.A.) [leave to appeal to S.C.C. refused (1990), 50 B.C.L.R. (2d) xxvii].

In this case, the respondent had a full hearing and full argument in front of the arbitrator. The arbitrator did not accept its evidence or its position on the law. The parties agreed to submit all disputes to arbitration in Georgia and that Georgia law would apply. There is precedent in our law for the acceleration of future payments as damages for anticipatory breach, subject to the duty to mitigate (for example, in commercial leases: *Highway Properties Ltd. v. Kelly Douglas & Co.*, [1971] S.C.R. 562, 17 D.L.R. (3d) 710), so that the concept of acceleration without previous agreement cannot be said to be per se contrary to the public policy of Ontario. There is no basis in these circumstances for this court to direct the re-trial of the issues on the merits.

CONCLUSION

The award of the arbitrator filed with this court is therefore recognized by this court under article 35 of the Ontario Act, and may be enforced in accordance with s. 11 of that Act.

If the parties wish to attend or make written submissions as to the costs of this application, they may do so within two weeks of the date of release of these reasons. Otherwise, costs shall follow the event.

Application allowed.