Ontario Supreme Court
Corporation Transnacional de Inversiones, S.A. de C.V. v. STET International S.p.A., Date: 1999-09-22

Re Corporacion Transnacional de Inversiones, S.A. de C.V. et al.

and

STET International, S.p.A. et al.

Superior Court of Justice, Lax J. September 22, 1999

Burton Tait, Q.C., Harry C.G. Underwood and Thomas N.T. Sutton, for applicants/respondents by counter-application.

William G. Horton and W. Brad Hanna, for respondents/applicants by counter-application.

LAX J.:—

The Applications

[1] These applications arise out of an international commercial arbitration that was held in Ottawa, Canada before the International Court of Arbitration of the International Chamber of Commerce. The application and counter-application are brought pursuant to the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), brought into force in Ontario by the *International Commercial Arbitration Act,* R.S.O. 1990, c. I.9 (the "ICAA"). The applicants apply to set aside the awards or, in the alternative, to direct the Arbitral Tribunal to resume the proceedings and conduct a rehearing. The respondents seek an order recognizing and enforcing the awards.

Background to the Arbitration

[2] The respondents, together referred to as "STET", are an Italian company and its Netherlands subsidiary. They commenced the arbitration against the four corporate applicants who are Mexican companies that are owned and/or controlled by the personal applicant, Javier Garza Calderón ("Garza"). Except as may be necessary to distinguish among the applicants, I will refer to them collectively and interchangeably as "COTISA" and by their acronyms, "DOMOS", "CINCO", "COTISA" and "CITEL".

[3] In 1994, CITEL acquired 49 per cent of the shares in Empresa de Telecomunicaciones de Cuba S.A. ("ETECSA") from Universal Trade and Management Corporation S.A. ("UTISA"). Both are corporations controlled by the Cuban government and ETECSA is the Cuban

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national telephone company. As part payment for the acquisition, CITEL had undertaken to discharge and refinance a Cuban national debt obligation and to post a guarantee to a Mexican bank for a portion of the debt.

[4] In 1995, STET entered into an agreement (“the subscription agreement”) with COTISA to purchase a 25 per cent interest in CITEL for US$291.2 million and thereby acquire an indirect 12.25 per cent interest in ETECSA. CITEL’s sole asset was its 49 per cent interest in ETECSA. STET’s only purpose in entering into the subscription agreement was to acquire an indirect interest in the Cuban national telephone company through its ownership of shares in CITEL.

[5] The subscription agreement closed in April 1995. However, STET did not know until seven months later that COTISA had entered into agreements with UTISA that enabled COTISA to deliver false certificates on closing regarding payment for and ownership of the ETECSA shares. Contrary to the representations, warranties and covenants in the subscription agreement, CITEL did not have full ownership and had not fully paid for the ETECSA shares on the day of closing.

[6] When COTISA defaulted on its obligations to UTISA, it commenced a lawsuit in Cuba to nullify the agreement under which CITEL was to acquire a 49 per cent interest in ETECSA. After the commencement of the Cuban lawsuit and after STET learned that CITEL did not have ownership of the ETECSA shares, it initiated negotiations with UTISA to acquire a direct interest in ETECSA. UTISA was not prepared to negotiate unless STET was prepared to make a larger investment than it had originally contemplated. STET was ultimately successful in acquiring, pursuant to an agreement dated April 19, 1996 and an amendment dated February 1997 (the “STET/UTISA agreements”), a 29.29 per cent interest in ETECSA for US$305 million.

[7] The April agreement between UTISA and STET contemplated two scenarios: one in which COTISA was to participate (Scenario A) and one in which it was not involved (Scenario B). If it did not participate, STET agreed to acquire a direct 29.29 per cent interest. Under this scenario, STET was not initially required to pay for 12.25 per cent of the ETECSA shares, but it was required to use its best efforts to recover the US$291.2 million paid to CITEL and to pay UTISA a maximum of US$176,632,750 out of any amount recovered.

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[8] On December 5, 1996, the Cuban court rendered a final judgment in favour of UTISA in which it ordered rescission of the agreement, the return of the ETECSA shares to UTISA, damages and penalties. One month later, the Cuban court's judgment was affirmed on appeal.

[9] On February 10, 1997, STET and UTISA modified the terms of their April 1996 agreement. The modification provided that the purchase price for STET's acquisition of 29.29 per cent of the ETECSA shares would include a credit of US$12.3 million to reflect a portion of the dividends that had been declared by ETECSA but not paid to CITEL because of the Cuban lawsuit. The credit is in an amount equal to 12.25 per cent of the declared dividends on the ETECSA shares for the period June 30, 1995 to February 10, 1997. As with the April agreement, STET was required to use its best efforts to recover from COTISA, the amount of the dividends for which it was receiving credit.

[10] Following the affirmation on appeal of UTISA's lawsuit against COTISA, they entered into negotiations to resolve the consequences of the judgment of the Cuban court. This resulted in a letter of commitment in March 1997 and its formal execution in November 1997 (the "COTISA/UTISA agreements"). These agreements provided, among other things, for CITEL to be credited with the sum of US$176.6 million and with the further sum of US$12.3 million. According to COTISA, the Cubans agreed to preserve STET's rights in ETECSA so as to honour STET's purchase of the ETECSA shares through CITEL to the extent of a 12.25 per cent interest, including its right to receive dividends and to participate in management.

[11] The COTISA/UTISA agreements and the STET/UTISA agreements were reached independently of one another. COTISA first learned of STET's acquisition of shares in ETECSA from press reports in February 1997. STET first learned of the COTISA/UTISA agreements when they were produced in the arbitration.

The Arbitration

[12] STET commenced the arbitration in June 1996 pursuant to the arbitration clause in the subscription agreement and sought rescission of the subscription agreement and damages. A three-person Arbitral Tribunal was constituted under the International Court of Arbitration of the International Chamber of Commerce (the "ICC") to conduct the arbitration proceedings. The three arbitrators were Professor Jean-Gabriel Castel of Canada, Dr. Leonel Pereznieto

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Castro of Mexico and Professor George Bermann of the United States of America. In accordance with the arbitration clause in the subscription agreement, the arbitration was conducted in the English language, was held in Ottawa and was governed by Mexican law.

[13] The arbitration was conducted under the ICC Rules. The parties agreed upon the terms of reference which identified 11 factual and legal issues to be resolved. On February 20, 1998, the parties attended in Ottawa for a full-day initial hearing and submitted evidence, legal argument, opinions of experts on Mexican law and Mexican jurisprudence in regard to the first four issues, which included an application by STET for interim and conservatory orders.

[14] At the initial hearing, COTISA resisted STET's application for interim and conservatory orders. Its position was (and is) that as the COTISA/UTISA agreements fully protect the interest in ETECSA that STET acquired through CITEL, STET suffered no loss from COTISA's breaches of the subscription agreement. STET does not agree. It says that it acquired the ETECSA shares pursuant to its own agreements with UTISA and that COTISA's agreements with UTISA do not operate as a release of STET's obligations to UTISA to seek recovery from COTISA. Further, under the subscription agreement, STET paid COTISA US$291.2 million for CITEL shares that the Cuban court ordered returned to UTISA. STET claims that under Mexican law, this entitles it to rescission of the subscription agreement and damages.

[15] At the initial hearing, STET disclosed that it had acquired a 29.29 per cent interest in ETECSA from UTISA. It advised the Arbitral Tribunal that it had sought confirmation from UTISA that the language of the COTISA/UTISA agreements constituted a waiver of any claim by UTISA against STET to use its best efforts to recover from COTISA the amounts provided in their agreements. STET gave an undertaking to the Arbitral Tribunal to reduce its claim if UTISA provided a waiver, but none was forthcoming. The arbitration therefore proceeded on the basis that STET sought full recovery of the US$291.2 million paid to CITEL for the ETECSA shares and US$12.3 million for lost profits, together with interest and costs.

[16] An interim award dated March 20, 1998 determined Issues 1 to 4 in favour of STET. The final hearing before the Arbitral Tribunal on Issues 5 to 11 took place on May 27-28, 1998 and resulted in a unanimous final award in favour of STET on August 5, 1998. The Arbitral Tribunal found, among other things, that it had jurisdiction over all the applicants and that the

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applicants were all jointly and severally liable to compensate the respondents for the losses they incurred as a result of the breaches of the subscription agreement. The Arbitral Tribunal awarded STET approximately US$305 million (which included the return of its investment of US$291.2 million in CITEL, lost profits and damages) plus interest and costs.

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Outline of COTISA's Position

[17] The awards are attacked on the grounds that the Arbitral Tribunal was without jurisdiction in respect of three of the applicants, that the applicants were denied equality of treatment and the opportunity to present their case, and that the awards are in conflict with the public policy of Ontario. In particular, COTISA asserts that the Arbitral Tribunal conducted itself in such a manner as to deny COTISA both fundamental procedural rights and fundamental justice in the substantive remedy granted to STET in that:

> (i) it failed to require disclosure of the STET purchase agreements with UTISA;
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> (ii) it failed to respond to the request by COTISA for assistance in obtaining foreign evidence;
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> (iii) it concluded the hearing without determining if the parties to the arbitration had settled their dispute; and
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> (iv) there was no factual or legal foundation for an award of rescission.

[18] COTISA also submits that the Tribunal lacked jurisdiction in respect of DOMOS, CINCO and Garza and asks the court to set aside the awards against them under Article 34.

[19] Article 18 of the Model Law is the primary foundation of the applicants' case. It states:

> The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

[20] Article 18 is linked to Articles 34(2)(a)(ii) and (b)(ii). They provide that an arbitral award may be set aside if:

> (a) the party making the application furnishes proof that:
>
> > (ii) the party making the application 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

(b) the court finds that:

(ii) the award is in conflict with the public policy of this State.

Governing Principles of the Model Law

[21] The Model Law is a collaborative effort among nations to facilitate the resolution of international commercial disputes through the arbitral process. It is in force in numerous jurisdictions around the world, including Ontario and Mexico. Article 5 of the Model Law expressly limits the scope for judicial intervention except by application to set aside the award or to resist enforcement of an award under one or more of the limited grounds specified in Articles 34 or 36. Under Article 34 of the Model Law, the applicants bear the onus of proving that the awards should be set aside. If the applicants fail to satisfy this onus, Articles 35 and 36 of the Model Law expressly require this court to recognize and enforce the awards.

[22] The broad deference and respect to be accorded to decisions made by arbitral tribunals pursuant to the Model Law has been recognized in this jurisdiction by the Ontario Court of Appeal in *Automatic Systems Inc. v. Bracknell Corp.* (1994), 18 O.R. (3d) 257 at p. 264, 113 D.L.R. (4th) 449 at p. 456:

> The purpose of the United Nations Conventions and the legislation adopting them is to ensure that the method of resolving disputes in the forum and according to the rules chosen by the parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale: *Kaverit Steel & Crane Ltd. v. Kone Corp.* (1992), 87 D.L.R. (4th) 129 at p. 139, 85 Alta. L.R. (2d) 287 (C.A.).

See also, *Noble China Inc. v. Lei* (1998), 42 O.R. (3d) 69 at pp. 87-88 and 89, 42 B.L.R. (2d) 262 (Gen. Div.).

[23] Similar language is found in jurisprudence from other jurisdictions. In *Quintette Coal Ltd. v. Nippon Steel Corp.,* [1991] 1 W.W.R. 219, 50 B.C.L.R. (2d) 207 (C.A.) (leave to appeal to S.C.C. refused (1990), 50 B.C.L.R. (2d) xxvii), the court refused to set aside an international commercial arbitration award under legislation comparable to the ICAA. The court provided these comments on the standard of review at p. 229:

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> We are advised that this is the first case under the British Columbia Act which a party to an international commercial arbitration seeks to set aside an award. It is important to parties to future such arbitrations and to the integrity of the process itself that the court express its views on the degree of deference to be accorded the decision of the arbitrators. The reasons advanced in the cases discussed above for restraint in the exercise of judicial review are highly persuasive. The "concerns of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" spoken of by Blackmun J. are as compelling in this jurisdiction as they are in the United States or elsewhere. It is meet, therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia.

[24] The reference to the words of Blackmun J. is a reference to the decision of the United States Supreme Court in *Mitsubishi Motors v. Soler Chrysler-Plymouth Inc.,* 473 U.S. 614. To the same effect is the decision of the English House of Lords in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.,* [1984] 3 All E.R. 229 at p. 232, [1984] 3 W.L.R. 592.

[25] Academic commentators have also noted the importance of supporting the international enforcement structure which took over 25 years to build: J.L. Gelander, "Judicial Review of International Awards: Preserving Independence in International Commercial Arbitrations", 80 *Marq. L. Rev.* 625 at pp. 626, 641-42; E.P. Mendes, "Assessing the Ultimate Question About International Commercial Arbitration" (1992), 5 *C.U.B.L.R.* 234 at pp. 250 and 265; Henri C. Alvarez, "Judicial Intervention and Review under the International Commercial Arbitration Act" as published in *UNCITRAL Arbitration Model in Canada: Canadian International Commercial Arbitration Legislation,* Robert K. Paterson and Bonita Thompson eds. (Toronto: Carswell, 1987), 137 at pp. 138-40.

[26] The grounds for challenging an award under the Model Law are derived from Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Accordingly, authorities relating to Article V of the New York Convention are applicable to the corresponding provisions in Articles 34 and 36 of the Model Law. These authorities accept that the general rule of interpretation of Article V is that the

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grounds for refusal of enforcement are to be construed narrowly: A.J. Van Den Berg, *New York Convention of 1958 Consolidated Commentary,* cited in Yearbook Comm. Arb. XXI (1996) at pp. 477-509.

[27] An arbitral award is not invalid because, in the opinion of the court hearing the application, the Arbitral Tribunal wrongly decided a point of fact or law: *Quintette Coal, supra,* at p. 227. Where a tribunal's jurisdiction is called into question as it is here, an applicant must overcome "a powerful presumption" that the Arbitral Tribunal acted within its powers: *Quintette Coal, supra, per* Hutcheon J.A., at p. 223, citing with approval *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de L'Industrie du Papier,* 508 F.2d 969 (2nd Cir. 1974).

[28] The public policy ground for resisting enforcement of an arbitral award has also been narrowly construed. In *Schreter v. Gasmac Inc.* (1992), 7 O.R. (3d) 608, 89 D.L.R. (4th) 365 (Gen. Div.), Feldman J., as she then was, states at p. 623:

> 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.

[29] At p. 624 of *Schreter v. Gasmac, supra,* the court quotes with approval from the decision of the United States Court of Appeals Second Circuit in *Waterside Ocean Navigation Co. v. International Navigation Ltd.,* 737 F.2d 150 (1984) at p. 152. It was held there that public policy grounds for the setting aside of an award should apply only where enforcement would violate our "most basic notions of morality and justice". In this jurisdiction, the Ontario Court of Appeal has emphasized the care which courts must exercise in relying upon public policy as a reason for refusing enforcement of a foreign award. In *Boardwalk Regency Corp. v. Maalouf* (1992), 6 O.R. (3d) 737 at p. 743, 88 D.L.R. (4th) 612 (C.A.), the court states:

> The common ground of all expressed reasons for imposing the doctrine of public policy is essential morality. This must be more than the morality of some persons and must run through the fabric of society to the extent that it is not consonant with our system of

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justice and general moral outlook to countenance the conduct, no matter how legal it may have been where it occurred.

[30] Accordingly, to succeed on this ground the awards must fundamentally offend the most basic and explicit principles of justice and fairness in Ontario, or evidence intolerable ignorance or corruption on the part of the Arbitral Tribunal. The applicants must establish that the awards are contrary to the essential morality of Ontario.

[31] The conduct of the Arbitral Tribunal is the third prong of COTISA's attack on the awards. This brings into issue the due process requirements of the Model Law. There does not appear to be a single definition or explanation of what conduct may be of sufficient character to cause the court to set aside the award: J.B. Casey, *International and Domestic Commercial Arbitration* (Toronto: Carswell, 1993), at pp. 9-19 to 9-20. Some courts have described due process in arbitral proceedings as entailing "fundamental fairness" which means that "the 'minimal requirements of fairness'—adequate notice, a hearing on the evidence and an impartial decision" have been met: *Generica Ltd. v. Pharmaceutical Basics, Inc.,* 125 F.3d 1123 at pp. 1129-30 (7th Cir. 1997). One commentator has proposed that conduct justifying intervention is "such a mishandling of the arbitration as to likely to amount to some substantial miscarriage of justice": Mustill and Boyd, The *Law and Practice of Commercial Arbitration in England,* 2nd ed. (London: Butterworths, 1989) at p. 550, fn. 4 (referred to in Mr. Casey's text at pp. 9-19 and 9-20). This articulation accords with the general approach to the setting aside of arbitral awards.

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[32] Guidance as to the kind of conduct which could justify setting aside an award under the Model Law for the failure to observe procedural fairness can be found in commentary on the meaning of public policy under Article 34(2)(b)(ii) since the latter is intended to include both substantive and procedural aspects. This is evident from the following extract from the *Report of the United Nations Commission on International Trade Law on the work of its eighteenth session* (June 3-21, 1985) at p. 63, *The Canada Gazette,* Part I, vol. 120, No. 40, October 4, 1986, Supplement 1988, c. 30, S.13:

> 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,

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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.

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[33] Under the Model Law, the concepts of fairness and natural justice enunciated in Article 18 significantly overlap the issues of inability to present one's case and conflict with public policy set out in Articles 34(2)(a)(ii) and (b)(ii). Since Article 34(2)(b)(ii) is to be interpreted to include procedural as well as substantive justice and is not to exclude the manner in which an award is arrived at, it seems to me that the grounds for challenging an award under Article 18 are the same as they are under Article 34(2)(b)(ii). Accordingly, in order to justify setting aside an award for a violation of Article 18, the conduct of the Tribunal must be sufficiently serious to offend our most basic notions of morality and justice.

[34] Instances of corruption, bribery or fraud referred to in the *Report of the United Nations* would not only offend the essential morality of Ontario, but would offend shared notions of justice that are common to legal systems throughout the world. No court would hesitate to set aside an award arrived at in this manner. In considering other kinds of conduct, it is important to bear in mind that the *Report of the United Nations* may be used as an interpretive aid to the Model Law and it refers to "similar serious cases". In my view, this contemplates that judicial intervention for alleged violations of the due process requirements of the Model Law will be warranted only when the Tribunal's conduct is so serious that it cannot be condoned under the law of the enforcing state. With all of these principles in mind, I turn to the more detailed arguments advanced by COTISA.

The failure to order disclosure of the STET purchase agreement

[35] As a result of submissions made by the parties at the initial hearing on February 20, 1998, the Tribunal made an order on February 23, 1998 which directed STET to disclose the terms of its direct purchase of the ETECSA shares. If these were confidential, they were to be disclosed subject to a confidentiality agreement. On March 11, 1998, STET submitted a form of confidentiality agreement to the Tribunal that was approved. COTISA neither signed the agreement, nor submitted to STET, as the Tribunal later directed, its own form of agreement. Nevertheless, as the Tribunal determined that the question of whether STET "received free or

paid for the 12.25% in ETECSA… is very material to the issue of damages", STET was required to disclose the terms of its purchase, irrespective of the confidentiality agreement.

[36] As required, STET disclosed the terms of the purchase in witness affidavits and in its memorandum on Issues 5-11. These were provided to COTISA four weeks before the final hearing. As well, a STET witness testified at the final hearing and the STET/UTISA agreements, in redacted form, were filed and marked as exhibits.

[37] After these applications were commenced, COTISA executed the confidentiality agreement in the form approved by the Tribunal and STET then produced the agreements. On a motion preliminary to these applications, COTISA sought production of the redacted portions. For written reasons released on June 24, 1999, the motion was dismissed. COTISA brings this issue back and asks the court to re-consider its order.

[38] This issue has been determined and there is no basis for reconsidering it. Moreover, this court does not have the power to order production. Its authority is limited to a consideration of whether the Tribunal acted in such a manner as to deny COTISA equality of treatment or the opportunity to present its case, or, whether the awards, or the manner of arriving at them, are inconsistent with the public policy of Ontario.

[39] COTISA's complaints are that the Tribunal failed to ensure that COTISA received the agreements in a timely manner, that it never addressed the relevancy of the redacted portions and that it allowed STET to determine the form of confidentiality agreement without input from COTISA.

[40] In the arbitration, it was open to COTISA to do any one or more of the following:

(a) sign the confidentiality agreement and obtain the STET agreements with UTISA;

(b) seek clarification from the Tribunal that the execution of the confidentiality agreement was without prejudice to its argument that the Tribunal lacked jurisdiction over DOMOS, CINCO and Garza;

(c) submit a confidentiality agreement to STET in a different form;

(d) object to having to sign the confidentiality agreement as a condition of seeing the STET agreements;

(e) seek production from the Tribunal of the redacted portions of the agreements;

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(f) ask the Tribunal to review the STET/UTISA agreements in full to determine whether all relevant information had been disclosed;

(g) seek an order from the Tribunal that STET was required to produce the agreements whether or not COTISA signed the confidentiality agreements;

(h) at the final hearing, take the position that COTISA was entitled to have the agreements in the same form as the Arbitral Tribunal without signing the confidentiality agreement;

(i) at the final hearing, cross-examine the STET witnesses and attempt to establish a basis for seeking an order from the Arbitral Tribunal directing production of the redacted portions.

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[41] COTISA did none of these things. Instead, on April 25, 1998, which was more than six weeks after STET's form of confidentiality agreement had been submitted and approved, it advised the Tribunal that it would be submitting its own form of confidentiality agreement. The form of agreement which the Tribunal received omitted signatures from DOMOS, CINCO and Garza, although the Tribunal had by then determined that DOMOS and Garza were bound by the submission to arbitration and CINCO had been directed to conduct itself as a party pending a reserved decision on it.

[42] COTISA was advised by the Tribunal that STET might not wish to sign COTISA's version of confidentiality agreement, but that it should nevertheless be immediately forwarded to STET. COTISA did not do this. It simply ignored the Tribunal's direction and sought no further ruling from it. Further, COTISA withdrew at the beginning of the final hearing on May 27 (a decision now conceded to have been ill advised), and thereby forfeited the opportunity to cross-examine the STET witnesses about the agreements or to obtain a further order from the Tribunal. Prior to its withdrawal, it made no request for production of the agreements. Nor did the written Memorandum that it had filed disputing STET's claims on Issues 5 to 11 refer to an inability to defend the claims without the STET/UTISA agreements.

[43] The concept of "fairness" obviously entails fairness to both sides. For this reason, the English Court of Appeal refused an injunction to restrain arbitrators from making an award where the impugned conduct was the arbitrators' refusal to grant an adjournment. It was pointed out that any decision-maker has to balance the prejudice that might result from delay with the duty to hear all material evidence: *Sanko Steamship Co. Ltd. v. Shipping Corporation*

of India, [1980] 2 Lloyd's Rep. 569 (Q.B.) at p. 572. Similarly, in *Parsons & Whittemore, supra,* the court refused to set aside an award when a party was unable to secure the attendance of a witness and the Tribunal refused to postpone the hearing. The court held that this did not constitute an inadequate opportunity to present a case under Article V(1)(b) of the New York Convention.

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[44] The applicants rely on the decision of the Supreme Court of Canada in *R. v. Stinchcombe,* [1991] 3 S.C.R. 326, 18 C.R.R. (2d) 210 as authority for the proposition that full disclosure is a fundamental principle of Canadian justice, in both criminal and civil matters, and that it is inconsistent with Ontario public policy to deny it. There are, of course, well-recognized limits on disclosure, which include doctrines of privilege and confidentiality. Be that as it may, the point is not whether disclosure is a fundamental requirement of our justice system, but rather, if the failure to observe this requirement in another jurisdiction is offensive to our essential morality. This will depend on whether it is serious.

[45] Likely, we would regard it as serious if a Tribunal deliberately concealed documents from a party, or if it obtained its own evidence on which it relied, but failed to disclose the evidence to one or both of the parties. These are the kind of circumstances in which courts elsewhere have set aside arbitral awards and they are referred to at paras. 141 and 143-45 of COTISA's factum: *P. v. F.,* Appeal Court of Hamburg (April 3, 1975); *Iran Aircraft Industries v. Avco Corporation* (1993), Yearbook Comm. Arb. XVIII, p. 536; *Kersten & Co. v. Société Commerciale Raoul-Duval et Cie,* Court of Appeal of Amsterdam, July 16, 1992; *Paklito Investment Limited v. Klockner East Asian Limited* (1994), Yearbook Comm. Arb. XIX, p. 664. But, how can it be said that the applicants were denied equality of treatment or that the Tribunal acted in a manner inconsistent with Ontario public policy when the Tribunal was never asked to determine the relevancy of the redacted portions or to order their production?

[46] In fact, COTISA obtained disclosure. Notwithstanding its failure to follow a procedure that would have allowed it to obtain the purchase agreements in a timely manner and, if it saw fit, address objections to the documents, it was nevertheless informed of the substance of the agreements between STET and UTISA well before the final hearing. This was a fair balancing of the considerations on both sides, which COTISA must be taken to have accepted.

The Cuban witnesses

[47] At the initial hearing on February 20, 1998, COTISA advised the Arbitral Tribunal that it intended to introduce evidence from Cuban witnesses. The Arbitral Tribunal advised COTISA that it would approve of any steps that were required to obtain this evidence, including the taking of evidence in Cuba, so long as counsel for all parties were present to ask questions, there was translation of the testimony in English, and that two weeks notice was given of the proposed witnesses, the subject matter of their testimony and the arrangements for the taking of their evidence. The Tribunal agreed to postpone the hearing on the merits so that COTISA could have sufficient time to obtain the evidence. COTISA did not ask the Tribunal to take direct evidence.

[48] On February 23, 1998, the Tribunal issued a timetable for the remainder of the arbitration, including deadlines for both parties regarding the taking of evidence. COTISA's deadline for the evidence of the Cuban witnesses was May 4, 1998. Early in March, counsel for COTISA advised STET and the Tribunal that they would communicate their arrangements for taking evidence in Cuba "in due time". They did not do this. Instead, they wrote to the Tribunal on May 4, 1998 (the date by which the evidence was to be completed) and requested that the Tribunal order the Cuban witnesses to produce their testimony since they could not leave the country and were unwilling to provide evidence without a formal request made through mechanisms established under the laws of Cuba.

[49] Article 27 of the Model Law provides:

> The arbitral Tribunal or a party with the approval of the arbitral Tribunal may request from a competent court *of this State* assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.
>
> (Emphasis added)

[50] Contrary to the submission of the applicants, the Arbitral Tribunal had no power to compel evidence from the Cuban witnesses. Article 27 of the Model Law does not authorize an arbitral Tribunal to issue Letters of Request to a foreign court. It only authorizes requests for assistance in taking evidence being made to courts *within the State* where the arbitration is being conducted which, in this case, was Ontario: the analytical commentary contained in the *Report of the Secretary General to the eighteenth session of the United Nations Commission on International Law,* at p. 150, *The Canada Gazette,* Part I, vol. 120, No. 40, October 4, 1986, Supplement 1988, c. 30, S.13; Howard E. Holtzmann and Robert E.

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Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Denver: Kluwer Law and Taxation Publishers, 1989).

[51] The inability to produce one's witnesses before an arbitral tribunal is a risk inherent in an agreement to submit to arbitration and is not a basis for setting aside an award: *Parsons & Whittemore, supra,* at pp. 975-76. Under Article 27, it was open to COTISA to ask the Tribunal in a timely manner to request the assistance of an Ontario court. It was equally open to COTISA to request the assistance of an Ontario court. The Tribunal had proposed both at the hearing on February 20, 1998 and on February 23, a variety of alternatives so that the testimony could be produced, but COTISA did not pursue any of them. Nor did it request any additional time at the final hearing on May 27, 1998 in which to submit this evidence. This complaint is without merit.

The settlement

[52] Between the initial and final hearing, STET and COTISA were involved in discussions in an effort to settle their dispute. On May 8, 1998, COTISA wrote to STET on behalf of itself and CITEL purporting to accept an offer made by STET on March 4, 1998. STET replied on May 13, 1998 denying that a settlement had been reached, but invited COTISA to meet in Rome several days later to attempt to conclude an agreement. STET attached two conditions. If these were not fulfilled, STET indicated it planned to continue with the arbitral proceeding which was scheduled to resume in Ottawa on May 25.

[53] The following day, COTISA wrote to the Arbitral Tribunal and notified it that on May 4, 1998, COTISA and CITEL had "unconditionally accepted" an offer from STET of March 4, 1998 to settle the dispute. A letter was also sent to the International Court of Arbitration in Paris and copied to the members of the Tribunal and counsel for STET. The letter stated that "the parties have agreed to conclude the present arbitration proceedings as the controversy between the same and the object of the proceedings has been settled". Both letters required the Tribunal to suspend all proceedings in accordance with Article 17 of the ICC Rules of Arbitration. STET immediately wrote to COTISA, the members of the Tribunal and to the International Court of Arbitration to say that no settlement had been reached and urged the Tribunal to resume the hearing as scheduled.

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[54] On May 18, 1998, counsel to the Secretariat of the International Court of Arbitration responded to COTISA's letter of May 14, 1998. The letter states:

> No withdrawal can be entertained by the ICC at the request of one party and in the presence of objections of the other party.
>
> It is apparent that there is no agreement between the parties to withdraw the present arbitration.
>
> Accordingly, the respondent's request contained in their telefax of May 14, 1998 to the Secretariat cannot be granted.

[55] The parties met in Rome the week of May 18, 1998, but the settlement conditions of STET's May 13 letter (which included a deadline by which certain payments were to be made) were not met. STET extended the deadline and agreed to a brief postponement of the scheduled hearing date in Ottawa. COTISA did not meet the conditions by the extended deadline and the hearing on Issues 5 to 11 commenced in Ottawa on May 27, 1998.

[56] When the hearing commenced, the chairman clarified with counsel for COTISA that his power of attorney covered representation for COTISA and CITEL only and that the other defendants, namely DOMOS, CINCO and Garza, were not appearing. He then acknowledged the disagreement between the parties about the settlement. He made reference to the letter sent to the parties from the International Court of Arbitration and indicated that the hearing would proceed and that the question of whether the award ultimately reached was relevant would be a question for the courts, "presumably under Italian law".

[57] Counsel for COTISA then handed up and proceeded to read a prepared statement that had previously been sent to the Tribunal in a slightly different version. It recited that the parties had made a binding agreement under Article 1326 of the Italian Civil Code and that the arbitration proceedings were terminated by virtue of Article 17 of the Rules of Arbitration of the International Chamber of Commerce.

[58] The chairman invited submissions from STET, following which he stated that whether or not a settlement had occurred was outside the mandate of the Tribunal and a matter for the Italian court to decide, in which case, if proved, would annul the decision. Following a recess, the Tribunal delivered the following ruling:

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> We have come to the conclusion that in the absence of a formal and mutual notice of settlement communicated by the parties to the ICC and communicated by the ICC to this Tribunal, we shall proceed with the case.

[59] Following the ruling, counsel for COTISA announced his objection and his intention to withdraw, stating, “we do not accept the jurisdiction of the Tribunal”. He was advised by the chairman that an objection to jurisdiction could be recorded on the record and that COTISA could nevertheless participate in the hearing, subject to objection. Notwithstanding the chairman’s advice, COTISA withdrew and STET began to call its evidence.

[60] COTISA’s position is that the Tribunal lost jurisdiction by refusing to determine if there was a settlement and by deferring to the views of the International Court of Arbitration and basing its ruling on its letter. It places before this court evidence of the events surrounding the purported settlement that was never put before the Tribunal. It contends that had the Tribunal received this evidence, it would have been apparent to the Tribunal that STET’s loss was not as claimed.

[61] The only issue raised by COTISA before the Tribunal was whether or not the Tribunal had jurisdiction to continue the hearing. At no time did COTISA ask the Tribunal to decide if a settlement had been reached. It never asked the Tribunal to hear evidence about the purported settlement. Indeed, in its prepared statement, COTISA took the position that the Tribunal was obliged to accept that under Italian law, there was a settlement. Further, and inconsistently, COTISA agreed with the remarks of the chairman that, if there was “any dispute or controversy” about the settlement agreement, it was to be settled by the “competent Italian courts”.

[62] The only request that was made by COTISA to the Tribunal was that it terminate the hearing under Article 17 of the ICC Rules. In written reasons dated June 11, 1998, the Tribunal formally denied the motion by COTISA and elaborated its ruling delivered orally on May 27. It found that Article 17 applies only to termination of the proceedings by consent, which was manifestly not the case here.

[63] When a party fails to appear at a hearing or to produce documentary evidence, Article 25(c) of the Model Law and Article 15(2) of the ICC Rules expressly authorizes an arbitral tribunal to continue the proceedings and make an award on the evidence before it,

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which it did. It is abundantly clear from the transcript of proceedings on May 27 that the Tribunal did not abdicate its responsibility “to an ICC official in Paris” as the applicants contend. In all respects, the Tribunal properly exercised its jurisdiction and, in my opinion, correctly answered the only question it was asked to determine.

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The decision to award rescission

[64] This issue dominated the applicants’ written argument and oral submissions. However, it amounts to no more than the presentation to this court of the evidence and arguments that COTISA could have presented to the Arbitral Tribunal, but didn’t. In effect, COTISA seeks to appeal the award of rescission and damages on its merits under the guise of alleged breaches of Article 18 and Article 34(2)(b)(ii).

[65] It is clear that when a party refuses to participate in an arbitration, it is deemed to have deliberately forfeited the opportunity to be heard: A.J. Van Den Berg, *New York Convention of 1958 Consolidated Commentary, supra,* at p. 506:

> Due process, which pertains to public policy, implies as a fundamental principle, that the parties have an equal opportunity to be heard. This principle demands that each party must have been effectively offered such opportunity. But if, after having been duly notified, a party refuses to participate or remains inactive in the arbitration, it must be deemed to have deliberately forfeited the opportunity. Default in arbitration, after having been duly notified, has been invariably held not to bar enforcement of a Convention award. *In other words, the counterpart of due process is an active participation in the arbitration.*

(Emphasis added)

See also, *Geotech Lizenz AG v. Evergreen Systems,* 697 F.Supp. 1248 at p. 1253 (E.D.N.Y. 1988).

[66] COTISA was not an active participant in this arbitration. It has now decided that it wishes to have the issues in the arbitration addressed. It asks this court to rely on “fresh evidence” either as a basis for setting aside the awards or as a basis for directing the Tribunal to resume the arbitration and conduct a rehearing. Under Article 34(4) of the Model Law, the court, when asked to set aside an award, may, *where appropriate,* suspend the setting aside

proceedings in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action, as in the arbitral tribunal's opinion, will eliminate the grounds for setting aside. In my opinion, the key words here are, "where appropriate". The evidence I am asked to consider or remit to the Tribunal to be considered, may be "fresh" to these applications, but COTISA has offered no credible explanation why it could not have been presented in the arbitration. I therefore find it to be inappropriate to exercise my discretion as requested.

[67] I have already considered COTISA's submissions on the procedural aspects of Article 34(2)(b)(ii) and found them unpersuasive. COTISA's argument on substantive fundamental justice is that the award of rescission and damages is wrong on the facts and wrong in law and therefore inconsistent with the public policy of Ontario.

[68] First, whether or not the awards are legally wrong is not a basis for setting them aside. On this point, I adopt without reservation the following comments of this court in *Schreter v. Gasmac, supra,* at p. 623:

> …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.

[69] Second, whether or not the awards are factually wrong is not a basis for setting them aside. STET presented documentary and testimonial evidence, including expert opinion on Mexican law to establish their claims. COTISA did not challenge this evidence, nor present evidence of its own. Nevertheless, the Tribunal carefully considered whether the COTISA/UTISA agreements and the STET/UTISA agreements established that UTISA transferred 12.25 per cent of ETECSA "at no cost" and thereby satisfied STET's obligations to UTISA. The arbitrators unanimously concluded that it did not in light of STET's obligation to use its best efforts to recover US$176.6 million and US$12.3 million from COTISA.

[70] Third, the Tribunal explicitly addressed whether STET received "at no cost" 12.25 per cent of the ETECSA shares under the COTISA/UTISA agreements. It concluded that it lacked evidence and jurisdiction to determine whether or not UTISA had complied with its obligations

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to COTISA. There was evidence that STET had sought a release from UTISA during the arbitration proceedings, but that UTISA had not provided this.

[71] Although COTISA did not participate in the final hearing, one of the three arbitrators was Dr. Pereznieto Castro. He is a Mexican lawyer and professor of private international law and arbitration at the National University and the Instituto Tecnologico Autonomo de Mexico in Mexico City. In fact, he was the arbitrator whom the applicants chose to sit on the Arbitral Tribunal. Undoubtedly, the Tribunal (and indirectly, COTISA) benefited from his understanding of the factual and legal issues that were to be resolved under Mexican law.

[72] Based upon the evidence presented and the relevant provisions of Mexican law, the Tribunal concluded that COTISA had breached the subscription agreement and that STET was entitled to recover under Article 376 of the Mexican Commercial Code the sum that it had paid to COTISA for the ETECSA shares together with its lost profits. This was without prejudice to COTISA's rights regarding UTISA's compliance with its obligations to COTISA. The Arbitral Tribunal evaluated each head of damages claimed and rendered a unanimous decision in favour of STET, based on the evidence and the applicable law. To suggest that this is a denial of fundamental justice under Article 34(2)(b)(ii) of the Model Law is wrong.

[73] The purpose of Article 18 is to protect a party from egregious and injudicious conduct by a Tribunal. It is not intended to protect a party from its own failures or strategic choices. It was COTISA who deprived itself of the rights it now asserts were denied to it by the Tribunal. This cannot and does not amount to a lack of opportunity to present one's case or to be treated with equality. The purpose of Article 34(2)(b)(ii) is to guard against the enforcement of awards that are morally repugnant, or that are arrived at in a manner that is contrary to our notions of morality and justice. Neither is the case here.

[74] In the arbitration and before this court, STET has stated that it would accept a proper release from UTISA, as partial payment of the final award, thereby reducing the amount owing to it under the final award. This is all that the applicants can expect.

[75] *The tribunal's jurisdiction over DOMOS, CINCO and Garza*

[76] I accept that the Model Law contemplates that this court may review for jurisdictional error, although the applicants must overcome the "powerful presumption" that the Tribunal acted within its powers: *Quintette Coal, supra,* at p. 223. However, I have concluded that the

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Tribunal correctly determined that it had jurisdiction over DOMOS, CINCO and Garza for the reasons it gave in regard to DOMOS and Garza in its initial award and in regard to CINCO in its final award.

[77] This argument turned on whether the three parties up the corporate chain from COTISA and CITEL, had, by reason of amendments to the subscription agreement, similarly bound themselves to submit to arbitration. Article 7 of the Model Law defines what constitutes a valid arbitration agreement. Article 7(1) states that "[a]n arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement." The relevant portion of Article 7(2) provides:

> The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties… The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

[78] Article 1423 of the Mexican Commercial Code states:

> The arbitration agreement shall be in a writing and signed by the parties, or it may be in an exchange of letters, telexes, telegrams or faxes, or any other means of telecommunication that properly records the agreement. It may also be an exchange of a written complaint and a written answer from which the agreement can be affirmed by one party without being denied by the other. A reference made in an agreement to a document that contains a committing clause to arbitrate shall constitute an agreement to arbitrate as long as such agreement is in writing and the reference creates the implication that such clause is part of the agreement.

[79] Accordingly, Article 7 of the Model Law and Mexican law both contemplate that parties may enter into a valid arbitration agreement by entering into a contract that incorporates by reference another document that provides for arbitration. In other words, the reference need only be to the document that provides for arbitration—there is no need to specifically refer to the arbitration clause contained therein: *Analytical Commentary, supra,* at pp. 115-17. Consequently, an agreement that incorporates by reference another document containing an arbitration clause, while not specifically referring to the arbitration clause, may constitute a valid arbitration agreement under the Model Law.

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[80] The evidence before the Tribunal established that the subscription agreement to which STET, COTISA and CITEL were signatories contained a mandatory arbitration clause in s. 12.7. It also imposed joint and several liability on DOMOS in s. 11.2 for all obligations undertaken by COTISA. DOMOS signed the subscription agreement and specifically acknowledged the arbitration clause.

[81] In the amendment to this agreement on March 1, 1995 (the “March amendment”), Garza agreed to be jointly and severally liable for any and all obligations assumed by COTISA. One of these obligations was the agreement to submit disputes to arbitration.

[82] Prior to the closing of the subscription agreement, STET learned, that contrary to the representations in recital II.2 of the subscription agreement, CINCO appeared to have a majority interest in COTISA. On April 11, 1995, COTISA, CITEL and Garza, executed a further amendment (the “April amendment”). This set out the ownership structure of the several Garza companies including that DOMOS, through a subsidiary, Domos Corporation, S.A. de C.V. owned 99.99999 per cent of CINCO, that CINCO owned 74 per cent of COTISA (the remaining 26 per cent owned directly by Garza) and that COTISA, in turn, owned 99.99999 per cent of CITEL. The April amendment confirmed that Garza owned 99.99999 per cent of DOMOS.

[83] The April amendment did not specifically refer to the arbitration clause or to any other specific clauses of the subscription agreement, but referred generally to “any obligations of COTISA” under the agreements, one of which was the obligation to arbitrate any disputes. The Tribunal noted that under the April amendment, Garza is deemed to be included in any reference to the parent company of CITEL and COTISA and to any subsidiary company, entity or agreements through which they own directly or indirectly and from time to time, shares or a beneficial interest in shares of COTISA and/or CITEL. It further noted that the next paragraph in the April amendment provides that any obligation of COTISA under the agreements for the benefit of STET or its assignees “applies equally to Domos Corporacion, S.A. de C.V., to Garza, and to DOMOS”.

[84] DOMOS had subscribed to the original subscription agreement with the language “DOMOS CORPORACION, S.A. DE C.V. acknowledges in its entirely [*sic*] and specifically agrees with clauses 2.1,3,7,9 and 12.7.” The Tribunal interpreted this to mean that DOMOS had agreed to arbitrate. The March amendment substituted Garza for DOMOS in clause 11.2

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and on the signature page. However, the April amendment provided that Domos Corporacion, S.A. de C.V. was included in the reference to the parent company. The Tribunal concluded that Domos Corporacion, S.A. de C.V. was also bound by the arbitration clause.

[85] With regard to CINCO, it is a subsidiary company through which DOMOS and Garza own shares in COTISA and/or CITEL within the meaning of the April amendment. CINCO is therefore included in any reference to the parent company of CITEL and/or COTISA contained in the subscription agreement as amended. The Tribunal noted that CINCO had conferred full powers of attorney upon Garza through its by-laws and that STET had reason to believe that, in signing the April amendment, Garza was, in that context, also appearing for CINCO. Finally, the record showed that CINCO received US$83.6 million of the US$291.2 million that STET paid on the closing of the subscription agreement.

[86] The applicants contend that the failure to expressly reference s. 12.7 of the subscription agreement in the signature blocks of the March amendment and the April amendment means that DOMOS, CINCO and Garza did not agree to arbitrate. Article 7 of the Model Law is clear that no specific reference is required. DOMOS, CINCO and Garza were expressly made liable for all of COTISA's obligations. I agree with the submission of STET that it would make no sense to conclude that COTISA and CITEL were proper parties to the arbitration, but that the individual who owned and controlled the corporate group and the two other entities which he owned and controlled, all of which were jointly and severally liable for the same obligations, were not intended to be parties or to be bound by the ICC arbitration.

Order

[87] For all the above reasons, the application is dismissed with costs and the counter-application is allowed with costs.

Order accordingly.

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