ACTIV Financial Systems, Inc. v. Orbixa Management Services, Inc.

109 O.R. (3d) 385

2011 ONSC 7286

Ontario Superior Court of Justice,
Perell J.
December 8, 2011

Arbitration -- Award -- Enforcement -- International Commercial Arbitration Act constituting complete code for enforcement of international commercial arbitration awards -- Common law application to enforce foreign judgment confirming arbitration award converted into application under Act -- Arbitrator's failure to give reasons not amounting to ground for refusing to enforce award in circumstances of this case -- International Commercial Arbitration Act, R.S.O. 1990, c. I.9.

A dispute between the parties over alleged non-payment under their software licence agreement was submitted to arbitration. Under Rule 42 of the Commercial Arbitration Rules of the American Arbitration Association, incorporated by reference in the software licence agreement, reasons for an arbitral award are optional. The parties agreed that they would accept a standard award format that did not require reasons for the award. The arbitrator issued an award in favour of the applicant in the amount of US$539,482.88. The respondent took the position that the award was contrary to New York State law under which unreasonable liquidated damages clauses are illegal. The award was confirmed by the U.S. District Court. The applicant brought an application to enforce the judgment of the court. It did not purport to rely on the International

Commercial Arbitration Act; rather, it relied on the common law relating to the enforcement of foreign judgments.

Held, the application should be granted.

An international commercial arbitration award must be enforced exclusively under the International Commercial Arbitration Act. It would be a source of unnecessary confusion and expense to have two enforcement mechanisms. It was the intention of the legislature to introduce a complete code about the enforcement of foreign arbitration awards under the Act. It was appropriate to treat this application as an application under the Act. The applicant had complied with the requirements of the Act, with the exception of the requirement under art. 35(2) to provide certified copies of the award and the arbitration agreement. The provisions of art. 35(2) are directory but not mandatory. There was no dispute in this case about the contents of the arbitration agreement or the arbitrator's award. The absence of reasons for the award did not amount to a ground for refusing to [page386] enforce it where the court could determine on the record that the arbitration award did not deal with a dispute beyond the terms of the submission and that the award was not contrary to the public policy of Ontario. There was no doubt that the arbitrator decided a dispute within his jurisdiction, and he applied essentially the same law that would apply in Ontario.

Cases referred to

Schreter v. Gasmac Inc. (1992), 7 O.R. (3d) 608, [1992] O.J. No. 257, 89 D.L.R. (4th) 365, 6 B.L.R. (2d) 71, 10 C.P.C. (3d) 74, 41 C.P.R. (3d) 494, 31 A.C.W.S. (3d) 736 (Gen. Div.), consd

Sanokr-Moskva v. Tradeoil Management Inc., [2010] O.J. No. 2204, 2010 ONSC 3073, not folld

Other cases referred to

Beals v. Saldanha, [2003] 3 S.C.R. 416, [2003] S.C.J. No. 77, 2003 SCC 72, 234 D.L.R. (4th) 1, 314 N.R. 209, J.E. 2004-127, 182 O.A.C. 201, 39 B.L.R. (3d) 1, 39 C.P.C. (5th) 1, 113 C.R.R. (2d) 189, 127 A.C.W.S. (3d) 648; Bush v. Mereshensky, [2008] O.J. No. 5, 48 R.F.L. (6th) 450, 162 A.C.W.S. (3d) 925 (S.C.J.); Collier v. Hatford, [2001] O.J. No. 6101, 46 C.P.C. (5th) 366, 133 A.C.W.S. (3d) 428 (S.C.J.); Dunlop

Pneumatic Tyre Co. v. New Garage & Motor Co., [1915] A.C. 79 (H.L.); Equitable Lumber Corp. v. IPA Land Development Corp., 38 N.Y. 2d 516, 344 N.E.2d 391, 381 N.Y.S.2d 459 (C.A. 1976); Four Embarcadero Center Venture v. Kalen (1988), 65 O.R. (2d) 551, [1988] O.J. No. 411, 27 C.P.C. (2d) 260, 10 A.C.W.S. (3d) 9 (H.C.J.); H.F. Clarke Ltd. v. Thermidaire Corp., [1976] 1 S.C.R. 319, [1974] S.C.J. No. 151, 54 D.L.R. (3d) 385, 3 N.R. 133, 17 C.P.R. (2d) 1; King v. Drabinsky (2008), 91 O.R. (3d) 616, [2008] O.J. No. 2961, 2008 ONCA 566, 276 O.A.C. 22, 295 D.L.R. (4th) 727, 168 A.C.W.S. (3d) 79, 58 C.P.C. (6th) 223; Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, [1990] S.C.J. No. 135, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, J.E. 91-123, 52 B.C.L.R. (2d) 160, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 24 A.C.W.S. (3d) 478; Pine Wyn Invts. Ltd. v. Banhap Invts. Ltd. (1975), 8 O.R. (2d) 647, 61 D.L.R. (3d) 486 (C.A.), affg (1974), 3 O.R. (2d) 566, [1974] O.J. No. 1888, 46 D.L.R. (3d) 186 (H.C.J.); Pro Swing Inc. v. Elta Golf Inc., [2006] 2 S.C.R. 612, [2006] S.C.J. No. 52, 2006 SCC 52, 273 D.L.R. (4th) 663, 354 N.R. 201, J.E. 2006-2235, 218 O.A.C. 339, 41 C.P.C. (6th) 1, 52 C.P.R. (4th) 321, 152 A.C.W.S. (3d) 70, EYB 2006-111169; Stolp & Co. v. W.B. Browne & Co. (1930), 66 O.L.R. 73, [1930] O.J. No. 10, [1930] 4 D.L.R. 703 (H.C.J.); UBS Real Estate Securities Inc. v. Mundi, [2007] O.J. No. 5446, 167 A.C.W.S. (3d) 295 (S.C.J.)

Statutes referred to

International Commercial Arbitration Act, R.S.O. 1990, c. I.9 [as am.], ss. 1(1), (6), (8) [as am.], 2(1), (2), 10, 11(1), (2), Sch., arts. 1(1), 28(1), 31, (1), (2), 35, (1), (2), 36, (1)(a)(iii), (b)(ii)

Authorities referred to

American Arbitration Association, Commercial Arbitration Rules (American Arbitration Association), rules R-42, R-48(c)

APPLICATION to enforce an arbitration award.

Jason Squire, for applicant.

Morris Cooper, for respondent. [page387]

PERELL J.: --

A. Introduction

[1] This application raises the question of whether an Ontario court should enforce an international commercial arbitration award where the arbitrator awarded US$553,070.38 plus interest at 9 per cent per annum but did not give reasons for his award.

[2] The application also raises the question of whether, if at all, an application to enforce an international commercial arbitration award pursuant to the common law about the enforcement of foreign judgments can be converted or treated as an application to enforce the award under the International Commercial Arbitration Act, R.S.O. 1990, c. I.9 (the "Model Law" or the "Act").

[3] Finally, this application raises the question of whether an international commercial arbitration award must be enforced exclusively under the International Commercial Arbitration Act or whether the arbitral award can also be enforced by resort to the common law about the enforcement of foreign judgments.

B. Factual and Legal Background

1. The arbitration hearing

[4] ACTIV Financial Systems, Inc., a software supplier, and Orbixa Management Services, Inc. were parties to a Software Licence Agreement dated January 28, 2008.

[5] ACTIV claimed that Orbixa had not paid for services in accordance with their Software Licence Agreement.

[6] Article XI.6 of the Software Licence Agreement provided for a submission of disputes to arbitration. It stated:

> XI.6 Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment

on the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The location of the Arbitration shall be New York, New York.

[7] Article XI.7 of the Software Licence Agreement was the governing law clause. It stated:

XI.7 This Agreement shall be construed in accordance with and governed by the laws of the State of New York.

[8] Rule R-42 of the Commercial Arbitration Rules of the American Arbitration Association, incorporated by reference in the parties' Software Licence Agreement, provided a rule about [page388] the form of the award that makes reasons optional. Rule R-42 states:

R-42. Form of Award

(a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the manner required by law.

(b) The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.

[9] On March 21, 2011, the lawyers for ACTIV and Orbixa had a telephone conference with Michael Blechman, whom the parties had agreed would be the arbitrator. In this conference call, it was agreed that as cost-saving measures, the arbitration hearing would proceed without a court reporter and the parties would accept a standard award format that did not require reasons for the award.

[10] The arbitration hearing went ahead in New York City on May 24 and 25, 2011.

[11] The subject of the arbitration was ACTIV's claim for licence fees for the use of its software. The focus of the dispute was a clause in the contract that the parties regarded as a provision for liquidated damages. Clause 3.1 of the

Software Licence Agreement specified the term of the agreement and for automatic renewal unless written notice was given 60 days before the end of the annual term. Clause 1.3 states:

> The term of this Agreement shall take effect as of the Effective Date, and shall remain in effect for a term of twenty four (24) months ("Initial Term"), beyond the Delivery Date as set forth in Section III of this Agreement. After expiration of the Initial Term, this Agreement shall thereafter renew automatically for successive twelve (12) month terms ("Renewal Term") unless: (i) written notice to terminate is delivered by either party to the other at least sixty (60) days prior to the expiration of the Initial Term or any subsequent Renewal Term, or (ii) this agreement is terminated pursuant to Section IX hereof. Initial Term and Renewal Term are collectively referred to herein as Term.

[12] ACTIV claimed $544,452.10, of which $352,306.75 (65 per cent) was for fees after October 24, 2010 and of which $137,048.00 (25 per cent) was for services that Orbixa denied that it had requested or used. Orbixa asserted that it had terminated the contract in August 2010 and that it stopped using the software on October 24, 2010. However, at the arbitration hearing, ACTIV argued that the contract was automatically extended unless terminated 60 days before July 31, 2011, which had not occurred, and it argued that Orbixa was obliged to pay for the software for another full year under Clause 3.1. [page389]

[13] On June 8, 2011, Arbitrator Blechman issued his award in favour of ACTIV in the amount of US$539,482.88 plus US$13,587.50 for administrative fees.

[14] Orbixa submits that the award is contrary to New York State law under which unreasonable liquidated damages clauses are illegal. It submits that under New York State law, an unreasonable liquidated damage clause is unenforceable on grounds of public policy as a penalty. To be enforceable, the liquidated amount must be reasonable in light of the anticipated or actual harm caused by the breach of contract. See Equitable Lumber Corp. v. IPA Land Development Corp., 38

N.Y. 2d 516, 344 N.E.2d 391 (C.A. 1976). Orbixa submits that Arbitrator Blechman should have concluded that $352,306.75 (65 per cent) of the ACTIV's claim was a penalty.

[15] It will be important to note that the Ontario law about the enforcement of penalty clauses and liquidated damages clauses is comparable, if not identical, to the New York law. The leading English case on penalties is Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co., [1915] A.C. 79 (H.L.).

[16] Dunlop Pneumatic Tyre is frequently referred to in the Canadian jurisprudence, and it establishes the following principles. The characterization of the payment by the parties is again not determinative. The court will review the circumstances at the time of the making of the contract to determine whether, as a matter of interpretation, the payment is liquidated damages, being a genuine pre-estimate of the loss, or rather a penal provision stipulated in terrorem of the offending party. See H.F. Clarke Ltd. v. Thermidaire Corp., [1976] 1 S.C.R. 319, [1974] S.C.J. No. 151; Pine Wyn Invts. Ltd. v. Banhap Invts. Ltd. (1974), 3 O.R. (2d) 566, [1974] O.J. No. 1888 (H.C.J.), affd (1975), 8 O.R. (2d) 647, 61 D.L.R. (3d) 486 (C.A.).

2. The enforcement of the arbitration award

[17] The Commercial Arbitration Rules of the American Arbitration Association provide for the registration of the award as a court order. Rule 48(c) states:

> R-48(c) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

[18] On the application of ACTIV, on July 26, 2011, the U.S. District Court for the Southern District of New York confirmed the arbitration award and entered judgment against Orbixa for US$553,070.38, plus interest at the rate of 9 per cent per [page390] annum. Orbixa did not contest the arbitration award becoming a judgment in New York.

[19] The time for appeal of the New York judgment expired on August 26, 2011.

[20] ACTIV applied for an Ontario judgment to enforce the judgment of the New York State court. Its notice of application does not purport to rely on the International Commercial Arbitration Act, which is sometimes referred to as the Model Law. Rather, ACTIV relies on the common law about the enforcement of foreign judgments.

[21] At common law, a foreign judgment for the payment of money is enforceable by action in the domestic court. In an action to enforce the foreign judgment, the Ontario court will not relitigate the underlying litigation that gave rise to the judgment, and subject to certain defences, if the foreign judgment is proven and is final, the Ontario court will enforce the foreign court's judgment with a judgment of its own: Pro Swing Inc. v. Elta Golf Inc., [2006] 2 S.C.R. 612, [2006] S.C.J. No. 52; Beals v. Saldanha, [2003] 3 S.C.R. 416, [2003] S.C.J. No. 77. Subject to the defences, a Canadian court will enforce a foreign judgment if the foreign court or foreign jurisdiction had a "real and substantial connection" to the dispute: Beals v. Saldanha, supra; Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, [1990] S.C.J. No. 135; Bush v. Mereshensky, [2008] O.J. No. 5, 48 R.F.L. (6th) 450 (S.C.J.).

[22] The traditional defences to the enforcement of a foreign judgment are: fraud in obtaining the judgment; violation of the principles of natural justice, including whether the defendant received proper notice; or violation of domestic public policy: Beals v. Saldanha, supra; King v. Drabinsky (2008), 91 O.R. (3d) 616, [2008] O.J. No. 2961 (C.A.); UBS Real Estate Securities Inc. v. Mundi, [2007] O.J. No. 5446, 167 A.C.W.S. (3d) 295 (S.C.J.); Collier v. Hatford, [2001] O.J. No. 6101, 46 C.P.C. (5th) 366 (S.C.J.); Four Embarcadero Center Venture v. Kalen (1988), 65 O.R. (2d) 551, [1988] O.J. No. 411 (H.C.J.).

3. The International Commercial Arbitration Act

[23] For the purposes of deciding this application, the relevant provisions of the International Commercial Arbitration

Act are set out below.

Definition

1(1) In this Act,

"Model Law" means the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985, as set out in the Schedule. [page391]

. . . . .

(6) In articles 1(2) and (5), 27, 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, "this State" means Ontario.

. . . . .

Definition of "competent court" in Model Law

(8) In the Model Law, a reference to "a competent court" means the Superior Court of Justice.

Model Law in force in Ontario

2(1) Subject to this Act, the Model Law is in force in Ontario.

Application

(2) The Model Law applies to international commercial arbitration agreements and awards, whether made before or after the coming into force of this Act.

. . . . .

Recognition and enforcement of foreign arbitral awards

10. For the purposes of articles 35 and 36 of the Model Law, an arbitral award includes a commercial arbitral award made outside Canada, even if the arbitration to which it relates is not international as defined in article 1(3) of the Model Law.

Enforcement

11(1) An arbitral award recognized by the court is enforceable in the same manner as a judgment or order of the court.

Idem

(2) An arbitral award recognized by the court binds the persons as between whom it was made and may be relied on by any of those persons in any legal proceeding.

. . . . .

SCHEDULE

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

(As adopted by the United Nations Commission on International Trade Law on 21 June, 1985)

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

(1) This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.

. . . . . [page392]

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

. . . . .

Article 31. Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. . . .

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

. . . . .

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

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:

. . . . .

(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

. . . . . [page393]

(b) if the court finds that:

(i) . . . , or

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

C. The Position of the Parties

[24] Orbixa's first argument is that the enforcement of a foreign arbitration award is exclusively governed by the International Commercial Arbitration Act and it is now too late for ACTIV to convert its application under the common law to an application under the statute, which it was invited to do. Therefore, Orbixa submits that ACTIV's wrongly conceived application should be dismissed with costs but without prejudice to ACTIV commencing an application under the statute.

[25] ACTIV disputes that the common law has been displaced by the International Commercial Arbitration Act and without making any formal request to convert its common law application into one based on the statute, it submits that the result is the same under the common law or under the statute and that the court is required to enforce the foreign arbitration award.

[26] Orbixa's second and alternative argument is that if the application can be converted or treated as an application under the International Commercial Arbitration Act, then it should be dismissed for one of three mutually exclusive reasons:

-- (1) under the International Commercial Arbitration Act, an Ontario court should not approve a foreign arbitration award in the absence of reasons from the arbitrator and, therefore, Arbitrator Blechman's award should not be enforced;

-- (2) under the International Commercial Arbitration Act, an Ontario court should not approve a foreign arbitration award where there are no reasons from the arbitrator, unless the court can ascertain from the record the nature of the arbitrator's decision and whether the award was within the arbitrator's jurisdiction to make, which cannot be ascertained in the case at bar, and, therefore, Arbitrator Blechman's award should not be enforced; or

-- (3) under the International Commercial Arbitration Act, there are grounds to refuse to enforce Arbitrator Blechman's award because he enforced a penalty which is contrary to New York State law and Ontario public policy. [page394]

[27] ACTIV's response to Orbixa's second argument is essentially the same as it was to Orbixa's first argument; i.e., without formally relying on the International Commercial Arbitration Act, ACTIV submits that it is entitled to enforce the foreign arbitral award under the Model Law.

D. Discussion

1. Methodology

[28] As I will explain below, my opinion is that Orbixa is correct that ACTIV's common law claim to enforce the international commercial arbitration award has been supplanted by the International Commercial Arbitration Act, but ACTIV is incorrect in asserting that this application cannot be decided as an application made under the Model Law.

[29] It is further my opinion that the application should be decided under the Model Law with the result that there should be a judgment enforcing the arbitrator's award in Ontario.

[30] My explanation will be in three parts. First, I will assume that the application is under the statute and describe why Arbitrator Blechman's award must be enforced in Ontario. This explanation will involve my discussing Justice Feldman's decision in Schreter v. Gasmac Inc. (1992), 7 O.R. (3d) 608, [1992] O.J. No. 257 (Gen. Div.), which was the only decision

that the parties could find that addressed issues comparable to the ones raised in the case at bar.

[31] Second, I will explain why I shall treat this application professedly made under the common law as an application under the International Commercial Arbitration Act.

[32] Third, I will explain why the International Commercial Arbitration Act supplants the common law about the enforcement of foreign arbitration awards.

2. Enforcing the award under the International Commercial Arbitration Act

[33] Assuming that ACTIV's application is under the International Commercial Arbitration Act, in my opinion, it is enforceable notwithstanding that (a) Arbitrator Blechman did not provide reasons for his award; and (b) Orbixa's other arguments that an application under the Act should be dismissed.

[34] The discussion may begin by noting that the International Commercial Arbitration Act accepts that that arbitration awards do not require reasons if the parties agree. Article 31 of the Model Law provides: "The award shall state the reasons upon [page395] which it is based, unless the parties have agreed that no reasons are to be given."

[35] In Schreter v. Gasmac Inc., Justice Feldman considered the problems associated with the absence of reasons for an arbitration award. In this case, Schreter (and his company, Enatech Corporation) granted Gasmac Canada and Gasmac U.S. the right to manufacture and sell burners in North America. The written agreement between the parties stipulated that the governing law was the law of the State of Georgia. The agreement contained an arbitration clause.

[36] There was a dispute about the payment of royalties to Schreter, and he applied for arbitration. Schreter's claim for royalties included a claim for $80,000 of accelerated royalty payments. The arbitrator awarded US$91,186.47 for the claim, US$14,000 for attorney fees and interest at the rate of 12 per

cent on the total award. The arbitral award was delivered without reasons.

[37] Gasmac Canada and Gasmac U.S. did not take steps to challenge or set aside the award and Schreter filed a motion to confirm the award in the District Court, Northern District of Georgia, Atlanta Division. The Gasmac corporation opposed the motion but the United States court rejected all of these arguments and the award was confirmed by a judgment.

[38] Schreter and his corporation then applied to enforce the arbitrator's award in Ontario under the International Commercial Arbitration Act. In resisting the application under the Act, Gasmac Canada argued, among other things, that (1) the arbitral award had merged in the Georgia judgment; (2) 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; and (3) it would be contrary to the public policy of Ontario to enforce the award, because it included a substantial sum of damages not contemplated by the agreement between the parties, and contrary to the law of Ontario. Justice Feldman rejected all of these arguments and enforced the award.

[39] Gasmac's merger argument was based on the old Ontario decision of Stolp & Co. v. W.B. Browne & Co. (1930), 66 O.L.R. 73, [1930] O.J. No. 10 (H.C.J.), which stood for the propositions that while an Ontario court would not enforce a foreign arbitral award, if the foreign arbitral award was merged into a judgment of a foreign court, an Ontario court would enforce the foreign judgment. Gasmac was using this authority to advance the [page396] proposition that a foreign arbitral award could not be enforced under the International Commercial Arbitration Act.

[40] Justice Feldman reviewed the jurisprudence and the academic commentary, and she doubted whether Stolp was correct or good law about how to enforce a foreign arbitral award. For present purposes, more importantly, in paras. 26 to 34 of her judgment, she concluded that the contemporary law of Ontario

about the enforcement of foreign commercial arbitral awards was the International Commercial Arbitration Act, under which art. 35 makes mandatory the enforcement of an award subject to the grounds for refusal set out in art. 36.

[41] Justice Feldman noted that there was nothing in the Act to support the proposition that if an award had been confirmed by a foreign court, it would not then be enforced in Ontario under the Act. In para. 33 of her judgment, Justice Feldman stated that the decision in the Stolp case, denying direct enforcement of a foreign award and requiring a foreign judgment confirming the award, was directly contrary to the Model Law, which in effect overrules Stolp for foreign commercial arbitration awards.

[42] Justice Feldman then went on to decide Schreter's application to enforce under the Model Law and Gasmac's arguments that enforcement under the Act should be rejected because the arbitrator had not provided reasons and because enforcement would be against Ontario public policy.

[43] In the case at bar, Orbixa relies on Schreter v. Gasmac Inc. for a proposition that, in my opinion, Justice Feldman did not decide and did not have to decide. Orbixa deduces from Schreter that a foreign arbitral award cannot be enforced at common law and can only be enforced by an application under the Model Law, which ACTIV does not expressly purport to do.

[44] In the case at bar and in Schreter, the foreign arbitral award was confirmed by the judgment of a foreign court; however, in Schreter the application to enforce was expressly under the Model Law, and Justice Feldman did not have to decide whether the application to enforce could only be made under the Model Law. Her judgment supports the availability of applications under the International Commercial Arbitration Act but, strictly speaking, she does not decide whether the Model Law is the exclusive means to enforce a foreign arbitral award.

[45] As I will explain later, it is my opinion that the International Commercial Arbitration Act is the exclusive means to enforce a foreign arbitral award, but I reach that decision

without relying on Schreter v. Gasmac Inc. Because I see the Model Law as being the exclusive means to enforce the foreign arbitral [page397] award, I agree with Orbixa that an application under the Model Law is not influenced by the fact that another jurisdiction may have covered the arbitral award with a court judgment; that circumstance is neutral to the enforcement under the Model Law.

[46] I do rely on Schreter v. Gasmac Inc. in concluding that if the International Commercial Arbitration Act applies, then ACTIV is entitled to the enforcement of the foreign arbitral award. This brings me to Orbixa's three arguments why an application under the Act should be dismissed and why I reject those arguments.

[47] The first two of those arguments focus on the circumstance that the arbitrator in the case at bar did not provide reasons for his award and the third argument concerns the law about liquidated damages and penalties. Justice Feldman also addressed these matters in Schreter v. Gasmac Inc.

[48] At para. 38 of her reasons, she noted that a very significant consequence of the failure to give reasons in the context of the Model Law was the inability of the parties to determine if the award dealt with a dispute beyond the terms of the submission (art. 36(1)(a)(iii)), or if the recognition or enforcement of the award was contrary to the public policy of Ontario (art. 36(1)(b)(ii)). However, Justice Feldman was satisfied that the failure to provide reasons did not amount to a ground upon which the court should exercise its discretion to refuse enforcement.

[49] She explained why the absence of reasons did not necessarily amount to grounds to refuse enforcement. She reviewed the evidentiary record before the court and was satisfied that she could determine that the arbitrator's award dealt with submissions within his jurisdiction and that his decision did not offend Ontario public policy.

[50] In Schreter, the largest part of the arbitrator's award was about the entitlement to an accelerated payment, which

Justice Feldman was satisfied was a matter within the arbitrator's jurisdiction and not contrary to Ontario's public policy about penalties. The smaller parts of the award could also be identified as falling within the arbitrator's decision.

[51] Several legal conclusions can be drawn from this part of the judgment in Schreter v. Gasmac Inc. First, the absence of reasons for an arbitration award is not categorically a reason not to enforce the award under the International Commercial Arbitration Act. Second, the absence of reasons will not be grounds for refusing to enforce the award when the court can fairly determine on the record before the court that the arbitration award did not deal with a dispute beyond the terms of the [page398] submission and that the award was not contrary to the public policy of Ontario.

[52] These conclusions can also be drawn in the case at bar. There is no doubt that the arbitrator decided a dispute within his jurisdiction, and he applied essentially the same law as would apply in Ontario.

[53] I, therefore, conclude that if the International Commercial Arbitration Act applies, then the New York arbitration award should be enforced in Ontario.

3. Converting the application into an application under the Act

[54] The above conclusion brings me to the matter of whether ACTIV's common law application can be converted into an application under the International Commercial Arbitration Act.

[55] In approaching this question, it is helpful to ask what's missing in ACTIV's application as an application under the Model Law.

[56] In this regard, ACTIV has made an application in writing, which is what art. 35(1) requires. However, art. 35(2) requires ACTIV to supply (a) the duly authenticated original award or a duly certified copy; (b) the original arbitration agreement or a duly certified copy; and (c) if the award or agreement is not made in an official language (English or

French), a duly certified translation.

[57] Thus, what is missing in the case at bar for an application under the Model Law are certified copies of the award and the arbitration agreement.

[58] In my opinion, there are two reasons not to regard these missing matters as reasons not to convert the common law application into an application for enforcement under the Model Law. First, I interpret these provisions of art. 35(2) as directory but not mandatory. Second, I conclude that, if necessary, the court could adjourn its decision to enforce the award until the certified copies were supplied. This, however, is unnecessary in the case at bar because there is no dispute that there was an agreement to arbitrate and there is no dispute about the content of the arbitration agreement or the arbitrator's award.

[59] I note, in arriving at my decision, that art. 35(2) is not mandatory or is not mandatory in the circumstances of the case at bar, I have not followed the obiter of Justice Low in Sanokr-Moskva v. Tradeoil Management Inc., [2010] O.J. No. 2204, 2010 ONSC 3073, which I discovered by my own research.

[60] In this case, Sanokr-Moskva sued Tradeoil Management to enforce a foreign arbitration award, and when Tradeoil did [page399] not defend, a registrar signed a default judgment. When Sanokr-Moskva brought a second action involving the principal of Tradeoil, it moved to have the default judgment set aside.

[61] Justice Low held that arts. 35 and 36 of the Model Law are a complete code for the recognition and enforcement of arbitration awards. (This is the conclusion I also reach in the next section of this judgment.) Then, she held that a registrar does not have jurisdiction to sign a default judgment in respect of a foreign arbitration award, either with or without compliance with art. 35(2) of the Model Law. In what I regard as obiter, Justice Low held that the procedural aspects of art. 35(2) were mandatory. I, however, do not follow this part of her judgment in the circumstances of the case at bar.

[62] Therefore, I am converting the common law application into an application under the International Commercial Arbitration Act and granting the application.

4. The Act supplants the common law

[63] If I am correct that the International Commercial Arbitration Act applies, then, strictly speaking, I need not answer the question whether this Act supplants the common law application.

[64] However, if I am wrong, then I need to address Orbixa's argument that ACTIV's common law application should be dismissed because the Model Law has become the exclusive means to enforce a foreign arbitral award and ACTIV's counter-argument that a foreign arbitral award can either be enforced under the Model Law or under the common law.

[65] My answer here is that I agree with Orbixa's argument and I disagree with ACTIV's counter-argument. I also agree with Justice Low's ruling that arts. 35 and 36 of the Model Law are a complete code for enforcement. Thus, if I had not converted the common law application into an application under the Act, I would have dismissed ACTIV's common law application.

[66] In my opinion, it would be a source of unnecessary confusion and unnecessary expense to have two enforcement mechanisms. I conclude as a matter of statutory interpretation that it was the intention of the legislature to introduce a complete code about the enforcement of foreign arbitration awards under the International Commercial Arbitration Act.

[67] Justice Feldman noted, at para. 27 in Schreter v. Gasmac Inc., that the Act was designed to assist and encourage the mechanism of international commercial arbitration with relative ease and with confidence in the enforcement procedure. At para. 32, she stated that [page400]

> [t]he 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.

[68] The Model Law appears to be comprehensive, and, in my opinion, recognizing two means of enforcement would introduce unease and a lack of confidence in the enforcement procedure under the Model Law and perhaps result in inconsistency in enforcement of foreign arbitral awards. There is no apparent advantage to having two enforcement mechanisms and no apparent need for more than what the Model Law offers.

[69] Therefore, I conclude that an international commercial arbitration award must be enforced exclusively under the International Commercial Arbitration Act, which is what I [propose] to do.

E. Conclusion

[70] I conclude that ACTIV should have judgment against Orbixa for the Canadian dollar equivalent of US$553,070.38 plus pre-judgment and post-judgment interest at the rate of 9 per cent per annum from July 26, 2011.

[71] At the argument of the application, I was advised that the parties had agreed that the successful party should have costs in the amount of $5,000, all inclusive. ACTIV is the successful party, and it should have costs of $5,000, all inclusive.

Application granted.