CJ.

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO: 262/2000

BETWEEN : TERK TECHNOLOGIES CORPORATION PLAINTIFF

AND: DEVAN DOCKERY FIRST DEFENDANT

AND: WINDMASTER MANUFACTURING SECOND DEFENDANT

16-06-00

APPEARANCES:

Mr. Ramon Alberga Q.C., and Ms. Linda Dacosta for the Defendants

Mr. Elliot Simpson for the Plaintiff

BEFORE MR. JUSTICE SANDERSON

REASONS FOR JUDGMENT

FACTS

On December 3rd 1999 an arbitration panel, in the state of Michigan, handed down an award in favour of the plaintiff and against the defendants in the amount of U.S. $6,758,433. Upon application of the plaintiff the arbitral award was entered as a Judgment in the United States District Court, Eastern District of Michigan, on February 2, 2000. The defendants applied to the District Court to set aside the judgment and to vacate the arbitral award but both motions were denied by the Court on April 14, 2000. The defendants then appealed the Courts decision to the United States Circuit Court of Appeals for the Sixth Circuit. That appeal is now pending.

GRAND COURT - CAYMAN ISLANDS

On April 17, 2000 the Plaintiff obtained an ex parte order from me, pursuant to Section 5 of the Foreign Arbrital Awards Enforcement Law (1997 Revision) granting leave to enforce the arbitral award in the Cayman Islands. The Foreign Arbitral Awards Enforcement Law (1997 Revision) provides, in part;

> 2(1) In this Law
> "Convention award" means an award made in pursuance of an arbitration agreement in the territory of a State, other than the Islands, which is a party to the New York Convention;
>
> "New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on the 10th of June, 1958".
>
> 5. A Convention award shall, subject to this Law, be enforceable in the Grand Court in the same manner as an award under Section 22 of the Arbitration Law (1996 Revision) and shall be treated as binding for all purposes on the persons between whom it was made and may accordingly be relied upon by any of those persons by way of defence, set off or otherwise in any legal proceedings in the Islands and any reference in this Law to enforcing a Convention award shall be construed as including references to relying upon such award.
>
> 7. (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in subsections (2) and (3).
>
> (2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves -
>
> (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;
> (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
> (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
> (d) subject to subsection (4), that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions

on matters beyond the scope of the submission to arbitration;

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

(f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.

(4) A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in paragraph (f) of subsection (2), the court, before which enforcement of the award is sought, may, if it thinks fit, adjourn proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security."

It is agreed by all parties that arbitral award in this case is a "Convention Award".

The order I granted on April 17th provided in part;

> "PROVIDED THAT within 28 days after service of this order on them, the Defendants may apply to set aside this Order and the award shall not be enforced until after the expiration of that period or if the Defendants apply within that period to set aside the Order, until the application is finally disposed of."

ISSUES

The defendants have now applied to set aside that order. Several grounds were set out by the Defendants in their summons but were not pursued during the application. The

main argument advanced by Mr. Alberga was that since the arbitral award had been entered as a judgment in the U.S. District Court in Michigan, the award had, therefore, merged with the judgment and was no longer an arbitral award that could be independently enforced pursuant to the Foreign Arbitral Awards Enforcement Law (supra). He said that the original arbitral award no longer existed as it had merged with the judgment and that the plaintiff should have commenced an action in the Cayman Islands suing on the foreign judgment.

LAW

According to both counsel there are no applicable reported cases that are binding on this Court. Mr. Alberga referred to two Canadian cases that appeared to be conflicting In Stolp & Co. v. Brown & Co. [1930] 4 D.L. R. 703 Ont. S.C., the plaintiff had obtained an arbitral award in Holland which it then entered and became a judgment of the Arrondissement Tribunal at Amsterdam, a Court of record in for the Kingdom of Holland. The Plaintiff sued the Defendant upon the judgment in the Province of Ontario and the question was whether the foreign judgment was capable of being sued upon in Ontario. The Defendant argued that it was not a judgment of a foreign Court of record but rather an arbitral sentence of a foreign board of arbitrators and that the order was merely an order of execution and not a judgment after a hearing on the merits. Mr. Justice Logie concluded that the judgment was capable of being sued upon in Ontario. He quoted the following passage from Piggott's Foreign Judgment and Jurisdiction, 1908, p.95-96;

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

Although Mr. Justice Logie did not deal directly with the question of enforcement of an foreign arbitral award, Mr. Alberga relies upon the passage quoted from Piggotts Foreign Judgments and Jurisdiction (supra) to support his argument that the award here has been merged in the judgment of the Michigan Court.

In Schreter v Gasmac Inc. (1992) 7 O.R. (3d) 608., Mr. Justice Feldman considered this issue directly. In that case the plaintiff obtained an arbitral award in the State of Georgia. He confirmed the award by filing a motion for judgment in the United States District Court, Northern District of Georgia. That motion was granted. He then applied in Ontario to enforce the arbitration award under the International Commercial Arbitration Act R.S.O. 1990, C. 1.9. That legislation is set out on page 613 of the judgment and is very similar to the legislation here. It provided in part;

Article 35, Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognised 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

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

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

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

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

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

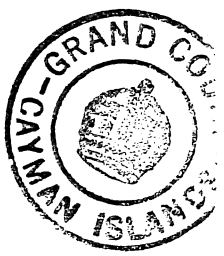
(iv) the composition of the arbitral or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place, or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law if which, that award was made; or

(b) if the court finds that:

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

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



The Defendant in that case argued that the order itself no longer existed as it had been merged in the judgment and it relied upon the decision of Logie J. in Stolp & Co. v. WB Brown & Co. (supra) and the passage quoted from Piggot, Foreign Judgments and Jurisdictions (supra). Feldman J. made these observations at p. 617.

> "Both the first proposition and the doctrine of merger from the Stolp decision have been questioned by textbook writers (see, for example, J.G. McLeod, The Conflict of Laws (Calgary: Carswell, 1983) at pp. 660, 664: and G. Castal, Canadian Conflict of Law J, 2nd ed., Supp. (Toronto: Butterworths, 1990), at pp. 38-39, para. 183, nor is there reported authority which or approves the case. The learned authors [A. Walton and M. Victoria] of Russell on the *Law of Arbitration*, 20th ed. (London: Stevens & Sons, 1982) at p. 368 [footnote] 461, point out that Piggott was in error, and that the law in England (which was the same in Canada) was that although a cause of action merges in a local judgment, a foreign judgment does not merege nor efface the underlying cause of action. Therefore, there was no basis for suggesting it would merge or efface an arbitral award which it confirms."

He continued at page 618;

> "The new law of Ontario on the enforcement of foreign commercial arbitral awards is the *International Commercial Arbitration Act*, including its schedule, the Model Law Article 35 makes mandatory the recognition and enforcement of an award upon compliance with that article, and subject to the grounds for refusal set out in article 36. ... However, read in the context of articles 35 and 36, the arbitral awards is the award of the arbitrator or of the arbitration tribunal itself. Nothing in those articles suggest that if an award has been confirmed by a court order or judgment in the jurisdiction where the award was made, it will not then be enforced in Ontario...
>
> The model law recognises the possibility of court involvement after the award in article 36 (1) (a)(v) which provides that one ground for refusal of recognition or for a stay of the recognition proceedings is if "the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made."

The analysis of Feldman J. of the Ontario legislation is, in my opinion, applicable to the analysis of the legislation here.

At page 619 Feldman J. concluded;

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

I think the decision in Scheter v. Gasmac Inc. supra , has greater relevance and is more persuasive than the decision in Stolp & Co., supra, because in Stolp there was no legislative provision dealing with enforcement of foreign arbitrial awards. In Scheter v. Gasmac Inc., supra and in this case there are similar legislative schemes. As Feldman J. said at page 619;

> "The purpose of enacting the Model Law in Ontario and in other jurisdictions is to establish a climate where International Commercial Arbitration can be restored 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 defenses are successfully raised under article 35 and 36."

This Court has considered section 5 and 7 of the Arbitral Award Enforcement Law in, In Re. Swiss Oil Corp. 1988 - 89 CILR P.277. The Plaintiff in that case sought to enforce a foreign arbitral award in the Cayman Islands and the Defendant opposed the application on the basis that it also had a arbitral award in its favour and wanted to claim it as a set-off. Collett C.J., granted leave to enforce the Plaintiff's arbitral award on the basis that section 7 was mandatory and required enforcement unless the Defendants failed within the enumerated exceptions of section 7 (2) or 7 (3) . He stated at page 282-283;

> "It is plain upon the wording of sub-s. (1) that enforcement of a Convention award duly evidence is mandatory upon this court except in one or other of the circumstances detailed in paras. (a) to (f) of sub-s. (2) or in sub-s. (3). The circumstances that the award relied on has been subsumed (if this be the case) by operation of the law of the country where the arbitration took place or by operation of the law governing the reference to arbitration is not mentioned among them....
>
> Viewed in context, s. 7 of the Law must be regarded as a comprehensive provision detailing exhaustively the only circumstances under which this court is entitled to refuse to enforce a Convention award which is regular on its face....
>
> That being so, I am compelled to conclude that, whatever the merits may be of the defendant's present condition founded upon the doctrines of French, Swiss or combined French and Swiss Law, they are not contentions which can't be properly advanced or given effective in these proceedings."

The Defendants American attorney swore an affidavit in these proceedings which said that his opinion the arbitration award was merged in the judgment pursuant to 9 USC 13 in Montana v.The United States 490 US 147, 153, 99 S. C. T. 970 59 L. E. D. second 210 [1979].

The Plaintiff's American attorney then wrote an opinion letter to the contrary, stating that Montana vs The United States did not involve the enforcement of arbitration awards and in particular did not address the issue of whether an arbitration award is deemed to be merged in a judgement once a judgment is entered. Indleed, upon a closer examination of the defendants US. attorneys opinion, it does seem to deal primarily with the issue of whether or not a plaintiff's initial claim or cause of action will be merged into any subsequent judgement. In any event, both counsel to this dispute had agreed that the

question of whether the arbitration award was merged in the judgment is to be determined by the *lex fori* of the enforcing court.

Dicey & Morris on The Conflict of Laws 13th ed. page 621, states;

> "This question should not be confused with the very different question whether, in the event of a judgment having been obtained abroad on the award, the award is merged in that judgment: as in other cases for the enforcement of foreign judgments this is a matter for the *lex fori* of the court asked to enforce it. In England a local award may be enforced under section 66 of the Arbitration Act 1996, under which leave of the court may be obtained to enforce the award in the same manner as a judgment, and also, if the claimant applies, to enter judgment in terms of the award. In most countries a local award may be enforced by a similar or analogous procedure, varying from mere deposit of the award with the court which gives it executory effect or entering judgment in terms of the award. If enforcement measures of this kind are taken in the foreign country, is it the award or the foreign judgment which is to be enforced in England, or does the claimant have an option? There is no doubt that, provided it fulfills the requirements for enforcement, a foreign judgment on a foreign award is regarded as a judgment for the purposes of the rules relating to enforcement of foreign judgments. Nor, where the foreign order has merely the effect of rendering the award executory, is there any reason why the award should not be enforced as such.
>
> A doubt, however, arises whether an award can be enforced as such after entry of judgment on it in the foreign country. The mere fact that the claimant has taken enforcement proceedings involving entry of judgment abroad should as matter of policy be no bar to enforcement of the award, but it is possible that the abolition of the doctrine of non-merger in relation to foreign judgments may have had the unintended result that, provided the judgment is enforceable in England, then it will be the foreign judgment, and not the award, which will be enforceable in England. This anomalous result could only apply to enforcement at common law, since (it is suggested) the provision in section 101 of the Arbitration Act 1966 that Convention awards "shall" be recongised as binding on the parties would apply even if judgment on the award had been entered abroad."

This doubt expressed by the authors was the result of the Civil Jurisdiction and Judgments Acts 1982 s.34, which abolished the right of the plaintiff to sue in England based upon the original cause of action, after the plaintiff had obtained a judgment against the defendant in a foreign jurisdiction. There is, however, no similar legislation in the Cayman Islands and in any event these are not the facts here. The plaintiff is not attempting to sue the defendant here on the original cause of action or the facts giving rise to it. Further, the authors seem to resolve their doubt in favour of allowing the plaintiff to choose whether to sue on the foreign judgment or to enforce the foreign arbitral award. At page 637;

> **"Effect of foreign judgment**. It has been seen that there is controversy whether, when a foreign judgment has been entered on an award, it is the judgment or award which is enforceable. Courts in other countries have regularly enforced awards under the New York Convention which have been declared enforceable by judgments in the country in which they were made, and it is suggested that in such cases the award may be enforced under the 1996 Act, or the judgment may be enforced under whatever regime applies to it."

In the footnotes to this paragraph it states in part;

> "This has been decided by the German Federal Supreme Court, 1984 (1985) 10 yb . Comm. Arb. 427, in relation to the New York Convention, and in Ontario in relation to the UNCITRAL Model Law: *Schreter v. Gasmac Inc.* (1992) 7 O.R. (3d) 608. The trend in the United States is in a similar direction, although there is no clear decision in this sense: *Island Territory of Curacao v. Salitron Devices, Inc.* 439 F. 2d 1313 (2d Cir. 1973); *Fotochrome Inc. v. Copal Co. Ltd,* 517 F. 2d. 512, 518 (2d Cir. 1975): *Waterside Ocean Navigation Co., Inc. v. International Navigation Ltd*, 737 F. 2d 150 (2d Cir. 1984): *Victrix Steamship Co. v. Salem Dry Cargo* AB. 825F. 2d 709 (2d Cir. 1987); *Seetransport Wiking Trader v. Navimprex Cetrala Navara*, 29 F. 3d 79 (2d Cir. 1994*): Cf Oriental Commercial & Shipping Co. (UK) Ltd. v. Rosseel* N.V., 769 Supp. 514 (S.D.N.Y. 1991)."

CONCLUSION

I believe that the reasoning applied by Feldman J. in Schreter v. Gasmac Inc. is correct. The legislation in Canada as here, requires that arbitral awards be enforced provided that certain requirements have been met and of course subject to the enumerated statutory exceptions contained in section 7. I do not think that the arbitral award has been merged in the judgment. What has been merged into the foreign arbitral award, and the foreign judgment are the underlying facts and claims of the plaintiff. It is, however, open for the plaintiff, after obtaining a arbitral award in a foreign jurisdiction and then entering that award as a judgment of the foreign court to enforce either the arbitral award or the judgment in the Cayman Islands by either obtaining leave pursuant to section 5 of the Foreign Arbitral Award Enforcement Law (1997) (Revision) or commencing a common law action on the foreign judgment. Accordingly, I dismiss the application and award costs to the plaintiff.

Finally I am grateful to both counsel for their through review of the law and comprehensive submissions.

Dated this 16th day of June,2000.

D G Sanderson.

Dale Sanderson
Judge of the Grand Court