# SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-023188-044

DATE: OCTOBER 5 , 2005

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**BY: THE HONOURABLE DANIEL H. TINGLEY, J.S.C**

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**DOMOTIQUE SECANT INC.** **(Secant)**
Plaintiff/Cross-Defendant
v.
**SMART SYSTEMS TECHNOLOGIES INC.** **(Smart Systems)**
Defendant/Cross-Plaintiff
-and-
**DOMINIQUE ZAURRINI**
**W.C. (WOODY) SMITH**
**WILLIAM J. COOKSEY**
Mis en cause

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JUDGMENT
(On Applications to Annul an Arbitration Award
and to Homologate a Foreign Judgment)

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## THE DEBATE

[1] Secant asks the Superior Court of Quebec to annul an arbitration award made in New Mexico, one of the United States of America,[1] on May 11, 2004 ostensibly in

[1] Pursuant to articles 33 and 947 C.C.P. which provide: ***33.*** *Excepting the Court of Appeal, the courts within the jurisdiction of the Parliament of Québec, and bodies politic, legal persons established in the public interest or for a private interest within Québec are subject to the superintending and reforming power of the Superior Court in such manner and form as by law provided, save in matters declared by law to be of the exclusive competency of such courts or of any one of the latter, and save in cases where the jurisdiction resulting from this article is excluded by some provision of a general or special law.* ***947.*** *The only possible recourse against [a Québec] arbitration award is an application for its annulment.*

accordance with the Model Law on International Commercial Arbitration as adopted by UNCITRAL[2] and transformed into a judgment of the United States District Court, District of New Mexico on July 9, 2004 wherein it was:

> [...] ADJUDGED, ORDERED, AND DECREED THAT THE ARBITRATION AWARD (EXHIBIT 1) IS ADOPTED BY THIS COURT IN ITS ENTIRETY AND SHALL BE DEEMED, FOR ALL PURPOSES, TO BE A JUDGMENT OF THIS COURT. IT IS FURTHER HEREBY ORDERED, ADJUDGED, AND DECREED THAT:
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> 1. Smart Systems Technologies, Inc. recover judgment in the sum of Five Hundred and Twenty Five Thousand Dollars ($525,000.00 USD) against Domotique Secant, Inc. as compensatory damages for loss sustained by Smart Systems Technologies, Inc.;
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> 2. Smart Systems Technologies, Inc. recover its attorneys' fees against Domotique Secant, Inc. in the amount of Seventy Five Thousand Dollars ($75,000.00 USD);
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> 3. Smart Systems Technologies, Inc recover its legal taxable costs, the amount of which will be determined by the stipulation of counsel, or by arbitration ruling, the final amount of which will be set forth in an Amended Judgment from Domotique Secant, Inc.;
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> 4. Smart Systems Technologies, Inc. recover from Domotique Secant, Inc. all of Smart Systems Technologies, Inc.'s fees and costs paid by it to the Arbitrators, including Twenty Thousand Dollars ($20,000.00 USD) deposited in trust for use by the arbitrators as costs and fees; and
>
> 5. Upon request by Domotique Secant, Inc., such request being made on or before May 26, 2004, Smart Systems Technologies, Inc. shall return to Domotique Secant, Inc., at the sole expense of Domotique Secant, Inc., all Cardio and Cardio II units in Smart Systems Technologies, Inc.'s possession (approximately 244 units). Upon receipt of notice requesting return of the units, with shipping arrangements paid for and such arrangements conveyed to Smart Systems Technologies, Inc., the units shall be shipped to Domotique Secant, Inc. no later than June 11, 2004.

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[2] (1986), Canada Gazette 120, Part I, Supplement no. 17.

[2] Smart Systems submits that our Court lacks jurisdiction to annul a New Mexico Arbitration Award that has already been homologated by a final judgment of a New Mexico Court, yet concludes in its cross-demand for the homologation of the said New Mexico judgment.[3]

[3] In response, Secant invokes articles 519, 949 and 950 of our Code of Civil Procedure[4] asserting that it would be contrary to public order to recognize an unmotivated arbitration award, adding amongst other vices that the award "contains decisions on matters beyond the scope of the agreement".[5]

## THE FACTS

[4] As of December 1, 1998, Secant and Smart Systems entered into a 5 year Distribution Agreement for the exclusive sale "F.O.B. Place of Shipment", promotion and distribution throughout the United States by Smart Systems of Secant's home automation products and software. The Agreement stipulated, amongst other things:

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[3] Pursuant to article 3155 C.C.Q. which provides that: ***3155.*** *A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases: (1) the authority of the country where the decision was rendered had no jurisdiction under the provisions of this Title; (2) the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered; (3) the decision was rendered in contravention of the fundamental principles of procedure; (4) a dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in Québec, whether it has acquired the authority of a final judgment (*res judicata*) or not, or is pending before a Québec authority, in first instance, or has been decided in a third country and the decision meets the necessary conditions for recognition in Québec; (5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations; (6) the decision enforces obligations arising from the taxation laws of a foreign country.*

[4] contained in Title II (of Recognition and Execution of Arbitration Awards Made Outside Québec) of Book VII (Arbitration), providing that: ***949.*** *An arbitration award [made outside Québec] shall be recognized and executed if the matter in dispute is one that may be settled by arbitration in Québec and if its recognition and execution are not contrary to public order.* ***950.*** *A party against whom an arbitration award is invoked may object to its recognition and execution by establishing that: (1) one of the parties was not qualified to enter into the arbitration agreement; (2) the arbitration agreement is invalid under the law elected by the parties or, failing any indication in that regard, under the laws of the place where the arbitration award was made; (3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case; (4) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement; (5) the manner in which the arbitrators were appointed or the arbitration procedure did not conform with the agreement of the parties or, if there was no agreement, with the laws of the place where the arbitration took place; or (6) the arbitration award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the place or pursuant to the laws of the place in which the arbitration award was made. In the case of subparagraph 4 of the first paragraph, if the irregular provision of the arbitration award described in that paragraph can be dissociated from the rest, the rest may be recognized and declared executory.*

[5] Ibid article 950.(4).

18. LIMITATION OF LIABILITY Neither party shall be liable to the other party or its assigns for any consequential, incidental, exemplary or special damages (including damages for loss of business profits) or like damages, regardless of the legal form or basis for such damages whether based on tort, contract, strict liability or otherwise. Distributor shall, to the extent allowed by the law, limit any liability for incidental, consequential or special damage towards customers.

19. CONFIDENTIALITY AND PROPRIETARY RIGHTS This Agreement establishes an obligation of Distributor, including its partners, agents, employees and consultants, to maintain strict confidentiality as to any trade secret or other proprietary information contained in the Products or the services provided by SECANT. Distributor shall include and shall not alter or remove the copyright, trade secret and other proprietary notices or legends on all copies of the Products, equipment and materials. The provisions of this Section 19 shall survive termination of this Agreement.

20. ARBITRATION AND APPLICABLE LAW In the event that any dispute for a value in excess of $10,000 arises between the Parties with respect to the interpretation or the execution of any term or condition of this Agreement, Parties shall refer the matter to arbitration to be governed in accordance with the Model Law on International Commercial Arbitration as adopted by UNCITRAL on June 21, 1985. Either Party shall give a written notice to the other party of the referral of a dispute to an arbitration which shall be composed of three arbitrators, namely one chosen by the grieving Party, the second by the other Party and the third to be chosen by the other two arbitrators. In the event of a deadlock, the arbitrators shall refer to the relevant tribunal having jurisdiction where the arbitration is held to appoint the third arbitrator. The jurisdiction and the governing law shall be the ones of the domicile of the grieving Party. The grieving Party shall deposit in escrow an amount of $5,000 (US) to cover the costs of the arbitration and as advance to the other Party for the institution of the proceedings. Parties agree that the arbitrators shall have exclusive competence and jurisdiction and that their decision shall be binding, final and without any right to appeal. It is agreed that the losing Party shall bear all reasonable costs of the arbitration including lawyer's fees or as other wise directed by the arbitrators.

[5] Disputes arose in 2000 and 2001 between Secant and Smart Systems concerning the payment of certain products shipped by Secant to Smart Systems and the fitness of such products for sale to U.S. consumers. Through its Quebec counsel, Secant threatened arbitration if it was not paid U.S. $191,472. past due for products previously sold and delivered. Smart Systems countered, through its New Mexico attorneys, formally demanding an arbitration in respect of four disputes:

> The dispute in part is whether the units shipped to [Smart Systems] are FCC[6] compliant on parts 15 and 68 and if not who shall pay the cost to repair and replace.
>
> The dispute in part is whether [Smart Systems] has a right to review the KTL report to assure itself that the units shipped after August, 2000 are FCC compliant on parts 15 and 68.
>
> The dispute in part is whether the design (both pre and subsequent August, 2000) causes the telephone number dialled to be incorrect.
>
> The dispute in part is whether payment should be made to Secant for approximately $200,000 when [Smart Systems] is not able to verify that all units are FCC compliant (parts 15 and 68) and the units are "bug" free.

[6] Following protracted litigation initiated by both parties to the Distribution Agreement before the U.S. District Court, this latter on July 3, 2002 stayed all proceedings before it, ordered the parties to proceed by arbitration, yet remained seized of their "consolidated actions [...] until further notice". These orders were never appealed.

[7] After several more trips by the parties to the U.S. District Court concerning the appointment of arbitrators, the arbitration finally took place in Albuquerque, New Mexico over some 3 days in May 2004. On May 11, 2004, the three arbitrators without giving reasons decided that:

> **IT IS DETERMINED** that the distribution contract between the Parties is deemed null and void, and thereby, determined to never have existed in accordance with Section 1422 of the Civil Code of Quebec.
>
> **IT IS FURTHER DETERMINED** that in accordance with the provisions of Section 1407 of the Civil Code of Quebec, and the New Mexico Unfair Practices Act, Sections 57-12-1, et. seq. (1967), [Smart Systems] is entitled to an award for its damages, costs and attorney fees.
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> **IT IS ORDERED** by the unanimous vote of the Arbitrators that the following amounts and recovery be and hereby are awarded Smart Systems against [Secant]:
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> A. Its attorney fees in the amount of $75,000.00, including New Mexico Gross Receipts Tax.
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> B. Its legal taxable costs, to be determined by the stipulation of counsel, or if necessary, by the further order of the Arbitrators, applying the standards of approval for costs under the New Mexico Rules of Civil Procedure.

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[6] that is, Federal Commerce Commission.

C. The fees and costs of the Arbitrators.

**IT IS FURTHER ORDERED** by majority vote of the Arbitrators (W.C. Woody Smith and W.J. Cooksey) that the additional sum of $525,000.00 in damages under the New Mexico Unfair Practices Act be and hereby is awarded Smart Systems against Secant.

**IT IS FURTHER ORDERED** that the dissenting vote of the Arbitrator, Dominique Sarrini, Esq., to the award recited in the previous paragraph, be noted to the extent that his vote was to award only $300,000.00 in damages.

**IT IS FURTHER ORDERED** that the goods which are in the possession of Smart Systems consisting of approximately 250 cardio and cardio II units, shall be returned to Secant at its sole expense, within thirty (30) days of the date of this Award. Also, Secant shall within fifteen (15) days of this Award, instruct counsel for Smart Systems in writing as to Secant's arrangements for the return of the subject goods. It is the contemplation of the Arbitrators that the goods to be returned are encompassed by the units depicted in Smart System's Exhibit 23, Pages 1-3. Further, it is the requirement of the Arbitrators that Smart Systems provide its full, complete and reasonable assistance to Secant in the facilitation of the return of the subject goods.

**IT IS FURTHER ORDERED** that William J. Cooksey disburse and pay the Arbitrators for their fees and costs upon receipt of written invoices evidencing the same, from the funds held in his Firm's trust account presently escrowed for payment of all such fees and costs.

[8] This award was preceded by an order of the Arbitrator Panel concerning the choices of law and the locale of the arbitration hearing:

1. For purposes of determining the "grieving party" with respect to the claims pending between the parties pursuant to the contract of December 1, 1998, specifically the paragraph entitled "Arbitration and Applicable Law" [Smart Systems], hall be the grieving party with respect to all claims and assertions set forth in its position statement dated May 23, 2003, as submitted to the Arbitration Panel. [Secant] shall be the "grieving party" with respect to all claims and assertions set forth in its Statement of Counterclaim submitted to the Arbitration Panel on June 6, 2003.

2. Regarding the claims and assertions of [Smart Systems], as the grieving party, the law of the domicile of New Mexico shall be applicable to such claims and assertions.

3. Regarding the claims and assertions of [Secant], as the grieving party, the law of the domicile of the Province of Quebec, Canada, shall be applicable to such claims and assertions.

> 4. In the event that a conflict shall arise during the arbitration hearing in connection with the application of which domiciliary law shall apply in the resolution of any claim or assertion of a party, the Arbitration Panel, by vote, shall resolve such conflict at the time it arises during the hearing.
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> 5. The parties are directed to simultaneously provide short trial briefs setting forth the law supporting their respective claims and assertions for the purpose of facilitating the resolution of any conflict on a choice of law decision arising during the arbitration.
>
> 6. The location of the arbitration hearing shall be Albuquerque, New Mexico, which hearing is presently scheduled for May 3, 2004 through May 7, 2004. [...]

and followed by a further award by the Arbitrator Panel pronouncing on law costs of U.S. $8,962.78 claimed by Smart Systems. This award was added to the May 11, 2004 award in an Amended Judgment on Arbitration Award rendered on October 4, 2004.

[9] Smart Systems promptly applied to the U.S. District Court for an order homologating the arbitration award. A true copy of this application was served upon Secant's Albuquerque counsel on May 27, 2004. Secant did not appear to contest this application and Madame Justice M. Christina Armijo rendered the judgment reproduced in paragraph [1] above exactly in the draft form submitted to her by Smart System's counsel. Like the award, this judgment is not supported by any reasons.

[10] On the same day, Madame Justice Armijo granted a Motion brought by Secant's counsel on June 14, 2004 to withdraw as attorneys of record. This was done with Secant's consent as it had instructed its New Mexico counsel to do nothing further after learning of the arbitration award. According to its Vice-President, Secant preferred to resort to the Superior Court of Québec rather than attack the award before the New Mexico Courts.

[11] Then, also in June 2004, Secant brought its application to annul the arbitration award before this Court. Smart Systems appeared in these proceedings and filed a Plea and Cross-demand, concluding for the homologation of both the award and the judgment ratifying the award. Both parties have amended and re-amended their proceedings and the conclusions they seek, as noted above in paragraphs [2] and [3]. Smart Systems further amended its Plea and Cross-demand just prior to the hearing to withdraw its request to homologate the arbitration award, as it had since been ratified by the U.S. District Court in New Mexico.

[12] Five days before the trial of this matter, Secant applied for security for its costs from Smart Systems. The Special Clerk dismissed this application, relying on the Court

of Appeal decision in Acker Industries Inc. c. Dramex Corporation.[7] Secant has appealed the Special Clerk's decision to this Court.

[13] Secant's action to annul an award of so-called "compensatory damages" of U.S. $525,000. has been met by Smart System's defense intended in part to enforce a foreign judgment that ratified the award. The amounts in issue are the same.

[14] The decision of our Court of Appeal in Boyd c. Nexchem Inc. et al[8] has resolved this issue. Smart Systems is a defendant in these proceedings. It has appeared in Secant's action in part to protect its interests in respect of the arbitration award. It would be wrong in the circumstances of this case to oblige a foreign defendant to post security for a Quebec plaintiff's costs at a time when the issues on the merits are under advisement. Accordingly, the Court dismissed Secant's Motion to Revise the Special Clerk's judgment.[9]

## THE LAWS OF NEW MEXICO

[15] At trial, Secant's Counsel led evidence concerning the application of the laws of the State of New Mexico to the arbitration and to the award made by the Arbitrator Panel. Mr. Lawrence Hill, a member of the Bar of New Mexico with an impressive resumé, opined amongst other things that under New Mexico Law and the Distribution Agreement:

(a) the parties did not contract to arbitrate violations of the New Mexico Unfair Trade Practices Act (UPA),[10]

(b) the nature of the damages awarded by the Arbitrator Panel under the UPA - described as "treble damages" - are punitive damages and included in the phrase "consequential, incidental, exemplary or special damages…" contained in section 18 of the Distribution Agreement, reproduced in paragraph [4] above,

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7 (1970) C.A. 172, at page 175 where Mr. Justice Turgeon observed that the first sentence of article 65 C.C.P. [...] *impose au demandeur seulement l'obligation de fournir caution. Comme le fait remarquer mon collègue, M. le juge Tachereau, il s'agit d'un article d'exception qui doit être interprété d'une façon restrictive.*

8 C.A.M. 500-09-011982-022, 2002-08-22, where Mr. Justice Morin of our Court of Appeal opines at page 5 of his reasons: *[46] Avec égards, je considère que les juges Fournier et Hilton ont donné une portée qu'elle n'a pas à la modification apportée à l'article 172 du* Code de procédure civile *par l'article 7 du chapitre 70 des lois de 1972. [...]* [50] *Avec déférence pour l'opinion contraire, je ne vois pas en quoi ce changement doit conduire à réviser les principes énoncés dans l'arrêt* Acker Industries inc. c. Dramex Corporation. *Ces principes, en effet, n'ont pas été établis en se fondant sur le fait qu'il était plus ou moins facile d'intenter une demande reconventionnelle. Ils ont plutôt tenu compte du fait que c'est le demandeur principal et non le demandeur reconventionnel qui prenait l'initiative de s'adresser aux tribunaux et qu'il serait malavisé d'exiger un cautionnement d'une personne qui doit, au départ, se défendre contre une action intentée contre elle.*

9 See the procès-verbal for September 28, 2005.

10 N.M. Stat. Ann. § 57-12-1 (2004).

which provides that "neither party shall be liable to the other party" for any such damages; and

(c) arbitrators do not have the authority to award punitive damages,[11] they can only recommend such a sanction.

[16] Mr. Hill's written report and testimony lead to the ineluctable conclusion that had the arbitration award been challenged before the New Mexico courts by a timely motion to vacate it, Secant should have succeeded.

## DISCUSSION

### A. Power to Annul a Foreign Arbitration Award

[17] Smart Systems submits that the Superior Court cannot annul an arbitration award rendered outside Québec, particularly where, as here, that award has already been ratified by a court exercising its jurisdiction *rationae loci.* The Court agrees. Unlike the regime established in our Code of Civil Procedure to homologate local arbitration awards (articles 946 to 947.4 C.C.P.), the separate regime to deal with recognition of foreign awards (articles 948 to 951.2 C.C.P.) does not include a provision to annul such foreign awards.

[18] The power to refuse to recognize a foreign arbitration award or a foreign judgment ratifying such award[12] is not at all the same as the power to annul it. As our Code of Civil Procedure only authorizes the Court to annul arbitration awards rendered in Québec,[13] implicitely therefore, it lacks authority to annul foreign awards.[14]

[19] This legislative restraint makes perfectly good sense. It avoids the possibility of contradictory judgments in different jurisdictions and recognizes the rule of comity that a trial court in one jurisdiction should not sit in appeal from the decision of a trial court in another jurisdiction. The U.S. District Court had jurisdiction to pronounce on the recognition or vacating of the arbitration award. Smart Systems seized that Court with the matter and Secant elected to boycott the proceeding. This in itself is probably justification to refuse to annul what a New Mexico Court has ratified, albeit by default.

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11 Per Shaw v. Kuhnel, 102 N.M. 607, 698, P.2d 880 (1985) and Aguilera v. Palm Harbor, 132 N.M. 715, 54 P.3d 993 (2002).

12 given pursuant to article 3155 C.C.Q., articles 785 and 786 C.C.P. and articles 949 and 950 C.C.P., supra, Notes 3 and 4.

13 See articles 947 to 947.4 inclusive C.C.P., supra, Note 1.

14 As noted by Professors Gérald Goldstein and Ethel Groffier, Droit International Privé, Tome II, Cowansville 2003, at p. 692 where they say: *Alors que la procédure relative aux sentences étrangères est une requête en homologation, selon l'article 949.1 C.p.c., les sentences rendues au Québec (internationales ou non) sont sujettes, soit à une requête en homologation (selon l'article 946 C.p.c.), soit à une requête en annulation de la sentence ou à une défense en annulation, opposée à la requête en homologation (selon les articles 947 et 947.1 C.p.c.). On ne peut donc pas annuler au Québec une sentence rendue hors de cette province.*

In sum, this Court's general superintending power found in article 33 C.C.P. should not be used to annul a foreign arbitration award that has already been recognized by an authority having jurisdiction over the disposition of such foreign award.

## B. Power to Ratify Foreign Awards and Judgments

[20] That said however, where our Court finds that a foreign arbitration award or judgment offends our notion of public order or is otherwise tainted by any of the vices itemized in article 3155 C.C.Q. or in article 950 C.C.P.[15], it must not recognize such decisions nor declare them enforceable in Québec.

[21] Counsel for Secant has raised a litany of reasons[16] why neither the arbitration award nor the New Mexico judgment ratifying it should be recognized by this Court. Of these, the Court seized upon and confronted Counsel for Smart Systems with the brutal fact that neither the award nor the New Mexico judgment are motivated. Counsel acknowledged the absence of reasons in both decisions but suggested that this lacuna, "[...] is not on its own a ground for refusing to enforce [an] award [...]"[17] made pursuant to the UNCITRAL Model Law.[18]

[22] While it is true that "courts should exercise restraint in reviewing arbitration awards in the international arena",[19] this is not to suggest that courts should turn a blind

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15 Supra, Notes 3 and 4.

16 Listed in a Plan d'argumentation, as follows: *A- Le tribunal arbitral n'avait pas compétence pour ordonner la nullité de la convention P-1; B- Le tribunal arbitral n'avait pas compétence pour décider en vertu de la New Mexico Unfair Practices Act (NMPUA); C- Le tribunal arbitral n'avait pas compétence pour accorder des dommages en vertu de la NMPUA; D- La sentence arbitrale _-6 contrevient à l'ordre public en accordant des dommages en vertu de la NMPOA; E- Le tribunal arbitral a excédé sa compétence et contrevenu à l'ordre public en ne motivant pas sa décision; F- Le tribunal arbitral a excédé sa compétence et contrevenu à l'ordre public en communiquant* ex parte *avec la défenderesse; G- La sentence arbitrale P-6 contrevient à l'ordre public en soumettant la demanderesse à deux régimes juridiques en même temps; H- La sentence arbitrale P-6 contrevient à l'ordre public parce qu'elle est non exécutoire; I- Le tribunal arbitral n'avait pas compétence pour adjuger des dépens suivant les New Mexico Rules of Civil Procédure; J- Le tribunal arbitral n'avait pas compétence pour rendre la sentence arbitrale P-7 sur les dépens; K- La demande de reconnaissance est irrecevable vu la conduite de la défenderesse; L- La demande de reconnaissance du jugement étranger est irrecevable vu l'article 948. C.p.c.; III NOTES COMPLÉMENTAIRES A- Les conclusions arbitrales sont indissociables; B- Les articles 18 et 20 de la convention P-1 sont indissociables; C- La loi applicable à la convention d'arbitrage P-1 est la loi du Québec pour le bénéfice de la demanderesse ou subsidiairement la loi du Nouveau-Mexique.*

17 According to Mr. Justice Feldman in Schreter v. Gasmac Inc., (1992) 89 D.L.R. (4th) 365 where this public order issue was found not to prejudice the ability of a respondent in an application to recognize a Georgia award from contesting such recognition.

18 Supra, Note 2.

19 See for example Quintette Coal Ltd. v. Nippon Steel Corp. (BCCA), (1990) 50 B.C.L.R. (2d) 207, per Gibbs, J., citing with approval Blackmun, J. of the Supreme Court of the United States in Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc., (1985), 473 U.S. 614, at pages 629, 638 and 639 and in particular the discussion by Mr. Justice Major in Beals v. Saldanha, (2003) 3 S.C.R. 416 at pages 433 to 441 inclusive.

eye to clear violations of public order, particularly as that term is "understood in international relations".[20] Article 31(2) of the UNCITRAD Model Law provides that "the award shall state the reasons upon which it is based [...]".[21] This is a mandatory requirement the breach of which violates as well our notion of public order and natural justice[22] as it applies to procedural fairness and gives rise to a possible refusal to recognize an award pursuant to article 36 (1)(b)(ii) of the said Model Law.[23]

[23] The absence of reasons to support the "determinations" in the award makes it very difficult if not impossible to assess or even reject any or all of the other grounds raised by Secant to prevent its recognition.[24] At first blush, the award appears to have determined things entirely beyond the scope of both the Distribution Agreement and the demand for arbitration, as for example the annulment of the agreement itself and the award of "consequential" or "exemplary" damages despite the provisions of paragraph 18. of that agreement, given that these "determinations" are nowhere contemplated in

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20 See paragraph (5) of article 3155 C.C.Q., supra Note 3 and the remarks of Mr. Justice Major in Beals, ibid., at pages 448 and 449 where he said: *As previously stated, the denial of natural justice can be the basis of a challenge to a foreign judgment and, if proven, will allow the domestic court to refuse enforcement. A condition precedent to that defence is that the party seeking to impugn the judgment prove, to the civil standard, that the foreign proceedings were contrary to Canadian notions of fundamental justice. A domestic court enforcing a judgment has a heightened duty to protect the interests of defendants when the judgment to be enforced is a foreign one. The domestic court must be satisfied that minimum standards of fairness have been applied to the [Québec] defendants by the foreign court. [...] The defence of natural justice is restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. The defence is limited to the procedure by which the foreign court arrived at its judgment. However, if that procedure, while valid there, is not in accordance with Canada's concept of natural justice, the foreign judgment will be rejected. The defendant carries the burden of proof [...].*

21 Supra, Note 2.

22 As noted by Madame Justice L'Heureux-Dubé in Sport Maska v. Zittrer, (1988) 1 S.C.R. 564, at page 614: *The status of a mediator allows its holder to decide on the basis of equity, without being bound by substantive or procedural rules of law, except of course for rules of public order such as those of natural justice which provide for impartiality, opportunity for the parties to be heard, reasons to be given for the award, and so on.* See also Baker v. Canada, (1999) 2 S.C.R. 817, at page 848; where Madame Justice L'Heureux-Dubé, after reviewing the common law right to reasons in matters involving administrative or judicial review, concludes that: *In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of [the] decision to those affected, [...] militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told when the result was reached.* And see as well article 519 C.C.P. requiring the setting out of reasons for judgments rendered in Québec.

23 Which provides that: ***Art. 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: [...] (b) if the court finds that: [...] (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.*

24 Supra, Note 16.

the four "disputes" first sought to be arbitrated by Smart Systems. Worse, the award makes no determination in respect of these four disputes. On the face of it, the Arbitrator Panel appears to have pronounced on matters not submitted to it and to have failed to pronounce on the disputes that were submitted it.

[24] Counsel for Smart Systems chose not to burden the Court with copies of the documents mentioned by the Arbitrator Panel in their orders made prior to the arbitration hearing recited above in paragraph [8], such as Smart Systems' "position statement", Secant's "Statement of Counter claim" or the parties' "short trial briefs". Could it be that such documents might have served to allay or confirm suspicions that a miscarriage of justice may have occurred on May 11, 2004? Unexplained telephone conversations between Smart Systems' New Mexico counsel and the arbitrators while the matter was under advisement do nothing to allay such suspicions.

## C. Conclusions

[25] In all the circumstances of this case, the Court will not recognize the unmotivated New Mexico judgment ratifying an unreasoned foreign arbitration award that may not have survived a timely Motion to Vacate before the New Mexico Courts. Nor will it homologate the New Mexico Amended Judgment of October 4, 2004. As in the Baker case,[25] the "profound importance of the [award] to those affected [...] militates in favour of a requirement that reasons be provided".

[26] Before citing paragraphs 75 and 76 of the majority opinion in the Beals affair,[26] counsel for Smart Systems ought to have read paragraphs 59, 60 and 64 of that same opinion and, perhaps, paid closer attention to the minority views of Mr. Justice Binnie (at paragraphs 111, 123 and 127) and Mr. Justice LeBel (at paragraphs 133, 152, 171 and 176).

[27] **FOR THESE REASONS, THE COURT:**

[28] **DISMISSES** Plaintiff's Motion to Annul a Foreign Arbitration Award, with costs;

[29] **DISMISSES** Defendant's Cross-Demand to Recognize Foreign Judgments, with costs, including the costs of the expertise and attendance of Mr. Lawrence Hill.

DANIEL H. TINGLEY, J.S.C.

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[25] Supra, Note 22.
[26] Supra, Note 19.

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Dates of hearing: September 26, 27 and 28, 2005