Canada—Ontario court clarifies when an arbitration award becomes ‘binding’ (Popack v Lipsyc)

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Arbitration analysis: Sarah J Armstrong and Alexandra Logvin, of Fasken Martineau DuMoulin LLP, discuss an Ontario Court of Appeal decision which provides certainty surrounding the interpretation by domestic courts of the term ‘binding’ in relation to international commercial arbitration awards.

Popack v Lipszyc 2018 ONCA 635

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What are the practical implications of the case?

The Ontario Court of Appeal recently clarified the law on when an international commercial arbitration award becomes ‘binding’ for the purposes of its recognition and enforcement by Ontario courts.

Noting commentators’ frustration with ‘considerable uncertainty’ surrounding the interpretation by domestic courts of the term ‘binding’ as used in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the UNCITRAL Model Law on International Commercial Arbitration as amended (both adopted in the Ontario International Commercial Arbitration Act 2017 (ICAA)), the panel unanimously ruled in *this case* that when the available appeal or setting aside procedures have been exhausted or the time for them has expired, the award becomes ‘binding’ on the parties, triggering the availability of recognition and enforcement.

In respecting and enforcing the parties’ agreement to arbitrate their dispute, the court’s decision sends an unequivocal message that Ontario has been, and remains ‘a strong “pro-enforcement” legal regime for the recognition and enforcement of international commercial arbitration awards’ (*Popack* para [35]). The court re-affirmed its long-standing view that the grounds for refusal of enforcement of an international arbitral award are to be construed narrowly.

For practitioners, the decision of the court sets an important precedent. It includes a detailed review and interpretation of the law and also comments on and provides concrete examples, with comprehensive reasoning on the issue of when an award is or is not yet binding.

What was the background?

The parties, Ontario and US residents, jointly invested in commercial real estate in the Greater Toronto area. A dispute arose between them in 2005, which they submitted to arbitration in a rabbinical court in New York, which was agreed to be a tribunal under the ICAA as the hearing was agreed to proceed in Toronto, where the respondents resided.

Following the hearing, the tribunal rendered a ruling on the merits of the case and the amounts claimed. It awarded Mr Popack (the claimant in the arbitration and the appellant before the Court of Appeal) an amount that was significantly less than he claimed in the arbitration. Mr Popack sought to have the award set aside on the grounds of procedural irregularities. Ontario courts dismissed his application, including on appeal.

Mr Popack then sought to have the award recognised and enforced in Ontario. The application judge denied recognition on the basis that the award was not yet binding. The judge agreed with the respondents that because they were seeking to raise further issues with the tribunal and the tribunal indicated it would consider them, the award did not become binding within the meaning of Article V(1)(e) of the Convention and Article 36(1)(a)(v) of the Model Law, and could not therefore be recognised and enforced. The application judge disagreed with Mr Popack, who argued that there was no pending appeal or review, and that the award was therefore binding and enforceable.

Mr Popack appealed the application judge’s ruling. The Ontario Court of Appeal allowed the appeal, set aside the decision, and substituted it with the order recognising and enforcing the award. The unanimous panel ruled that the

award was ‘binding’ within the meaning of the applicable law and could therefore be recognised and enforced in Ontario.

What did the Court of Appeal decide?

Agreeing with Mr Popack, the Court of Appeal found that the application judge erred in:

a) ignoring Articles 32 and 33 of the Model Law governing termination of arbitration proceedings and correction and interpretation of awards or issuing additional awards

b) incorrectly adopting the tribunal’s view as to whether the award was final and binding, while, under the Model Law, this task lies with the court in which recognition and enforcement is sought, and

c) failing to recognise that the respondents’ ‘further issues related to the subject matter arbitrated’ were new and did not affect the binding nature of the impugned award

These errors, the Court of Appeal ruled, were subject to the correctness standard, as at the heart of the appeal were the provisions of the Convention and the Model Law as adopted in the ICAA, rather than the application of the statute to the facts of the case or interpretation of the arbitration agreement (*Popack* paras [31]–[34]).

The court began its analysis under the rubric of ‘governing principles’ with the statement that ‘international and provincial instruments have established, in Ontario, a strong “pro-enforcement” legal regime’ for recognition and enforcement of international commercial awards (*Popack* para [35]).

It reconfirmed the principle, citing from its own decisions, that the general rule of interpreting the recognition and enforcement provisions of the Convention and the Model Law is that ‘the grounds for refusal of enforcement are to be construed narrowly’ (*Popack* para [40]).

It concluded that grounds for setting aside an award stated in Article 34 of the Model Law ‘work together’ and ‘mirror’ those on recognition and enforcement provided in Model Law Article 36, with one exception—setting aside does not include the ground that the award has not yet become binding on the parties, which is provided in Article 36(1)(a)(v) (*Popack* paras [37]–[39]).

The court then reviewed the term ‘not yet become binding’ in great detail. Citing commentators and foreign precedents, it pointed to the Supreme Court decision in *Yugraneft Corp v Rexx Management Corp* 2010 SCC 19, [2010] 1 SCR 649, which, contrary to some non-Canadian judicial interpretations, stood for the proposition that an international commercial arbitration award would not be binding:

- if it [were] open to being set aside under Article 34 of the Model Law (‘extraordinary recourse’), or
- if it were under judicial review or appeal on its merits (‘ordinary recourse’) (*Popack* paras [49]–[51])

In the case at hand, the parties’ arbitration agreement unequivocally provided that the award was not subject to any appeal. The Court of Appeal therefore ruled out any ‘ordinary recourse’ in the circumstances of this matter (*Popack* para [52]). It disagreed with and overruled the application judge’s finding that the respondents taking steps to refer ‘further issues’ to the tribunal or otherwise complement the award was an indication of any pending proceeding (*Popack* paras [55]–[58]).

The panel further concluded that any ‘extraordinary recourse’ was likewise not applicable given that the Article 34 setting-aside mechanism was exhausted by Mr Popack, with the corresponding application and appeal having been fully adjudicated before the recognition and enforcement proceeding was commenced (*Popack* para [53]).

This led to the conclusion that the nature of the impugned award was ‘binding on the parties for the purposes of recognition and enforcement’ under Articles 35 and 36 of the Model Law, and that the award became binding on the date when the Court of Appeal dismissed Mr Popack’s appeal to have the award set aside (*Popack* para [53]).

The court further considered the application judge’s grounds to deny recognition and enforcement on the basis that the award was not binding in light of the respondents’ application to the tribunal to correct or interpret the award or seek an additional award under Article 33 of the Model Law. The correction or an additional award was argued in the context of the respondents’ attempt to seek a tribunal decision for costs as against the claimant/appellant for his

setting aside and enforcement proceedings, which the respondents claimed they incurred after the tribunal released the award. The Court of Appeal disagreed. It ruled that an award as to costs was not in any manner an award contemplated by Article 33. The court explained that 'correction' was manifestly a matter of a clerical, computation or typographical error or omission, and that the notion of an 'additional award' contemplated an award with respect to a claim presented in arbitration but omitted from the award. As the respondents could not and did not present a claim during the arbitration with respect to the events that took place post-award, their claim for costs was a new issue, to which Article 33 could not and did not apply. The court concluded that these circumstances did not make the award not binding on the parties (*Popack* paras [59]–[70]).

The court also rejected the argument that the award was not binding because the tribunal had invited the parties to submit further claims following the issuance of the award. The court explained that the binding nature of the award was not contingent in any manner on any such claims or the tribunal's statements, and that the arbitration was at an end when the tribunal released the impugned award, which was in all respects final because it had finally disposed of the issues between the parties to arbitration. The court found that this was the only possible outcome contemplated in Article 32 of the Model Law, which provides that an arbitration proceeding is terminated with the issuance of the final award and that the mandate of the tribunal ceases with the termination of the proceeding subject only to Articles 33 (correction/interpretation/additional award) and 34 (suspension/setting aside). Events that take place post-award have no bearing on the finality and binding nature of the award (*Popack* paras [71]–[83]).

The fact that the tribunal had invited submissions regarding further claims, and the fact that the tribunal stated that it would stay the award in the circumstances, did not change the Court of Appeal's review. Even if the tribunal has had jurisdiction to entertain new issues such as costs or claims after an award is rendered, does not impact the final and binding nature of the award. The court unequivocally concluded that the final determination of any issue that may be raised under Article 36, including whether the award is 'binding', rests with the court, not the tribunal, regardless of the tribunal's invitations, the parties' submissions to the tribunal, or the tribunal's statements after the release of the impugned award (*Popack* paras [82]–[84]).

In conclusion, the court summarised and tied all issues together as follows:

> '[85] The potential jurisdiction of the [tribunal] to entertain a new issue about post-award events does not affect the binding nature of the award. The award is framed as a final one. The arbitration agreement did not permit any review or appeal from the award. Mr Popack's set aside proceeding under Article 34 is at an end. Mr Lipszyc's request for post-award costs does not fall within the categories of matters covered by Article 33 of the Model Law. The award therefore is "binding" for the purposes of Articles 35 and 36 of the Model Law and should be recognised and enforced.
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> '[86] That conclusion is not affected by the [tribunal's] June 7, 2017 statement that the award is stayed. Under Article 36(1)(a)(v) of the Model Law, recognition or enforcement may be refused only if the award has been "suspended by a court of the country in which, or under the law of which, that award was made". No such court order has been made […].'

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