Goodmans LLP Update

Court of Appeal Decision Reinforces Ontario's "Pro-Enforcement" Arbitration Regime

A recent Ontario Court of Appeal decision recognized and enforced a final and binding international arbitration award even though the arbitral tribunal (in this case, a rabbinical court) made post-award statements that the award had been stayed. The decision in *Popack v Lipszyc* reinforces Ontario's "pro-enforcement" regime, and highlights Ontario as an arbitration-friendly jurisdiction which holds parties to their agreements to arbitrate their disputes and then enforces those arbitral decisions once properly made.

Recognition and enforcement of international arbitration awards

Ontario has been positioning itself to be a destination of choice for international arbitration. Last year, the new *International Commercial Arbitration Act, 2017* (the "**New Act**") came into force and replaced the previous *International Commercial Arbitration Act*. Both the previous and current legislation incorporated the UNCITRAL Model Law (the "**Model Law**"), attaching it as a schedule, but the New Act appends the most recent version of the Model Law as it was amended in 2006. This meant that the New Act modernized international commercial arbitration in Ontario by, among other things, including provisions about interim measures and preliminary orders, and liberalizing the form in which an arbitration agreement can be made. The New Act also establishes a 10-year limitation period on the enforcement of arbitral awards, and expressly adopts the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which it appends as a schedule.

Ontario courts have for quite some time adopted a hands-off approach in getting parties to an arbitral award – for example, staying court proceedings when there is an arbitration agreement and letting arbitral tribunals determine questions of jurisdiction at first instance. But equally as important as giving arbitral tribunals the space to make awards is recognizing and enforcing them.

Article 35 of the Model Law provides that an arbitral award, irrespective of the country in which it was made, shall be recognized as binding and shall be enforced, subject to the exceptions in article 36. Article 36 sets out limited grounds for a court to refuse to recognize or enforce an arbitral award. One ground for such refusal is where the award has not yet become "binding" on the parties. It was the question of when an award becomes "binding", and whether post-award events can affect an award's "binding" status, that was at issue in *Popack*.

Facts and decision

Joseph Popack of New York and Moshe Lipszyc of Ontario jointly invested in commercial real estate in the Greater Toronto Area. A dispute arose between them, and they ultimately entered into an arbitration agreement which established a rabbinical court in New York (although seated in Ontario) as the arbitral tribunal. Since the arbitration was seated in Ontario and the parties were from different countries (U.S. and Canada), Ontario's international commercial arbitration statute applied.[1] The rabbinical court issued an award which directed Lipszyc to pay a specific amount to Popack.

Since Popack had not achieved the amount he wanted, he brought an application to set aside the award on the basis that the rabbinical court had met *ex parte* with a previous arbitrator, which was ultimately dismissed. Lipszyc then refused to pay the award, arguing that the amount should be reduced (to nil) by his uncompensated costs in responding to Popack's unsuccessful application to set aside. Popack commenced an application to recognize and enforce. Before the application was heard, the rabbinical court wrote to the parties indicating that it had ordered the award stayed until Popack returned before it for a hearing to determine Lipszyc's claim for costs.

At first instance, the application judge accepted Lipszyc's position that the arbitral award was not "binding" within the meaning of the Model Law because Popack had expressed an intention to pursue further issues related to the subject matter arbitrated and the post-award statements from the rabbinical court indicated that the arbitration process was not yet complete.

On appeal, the Court of Appeal noted that Ontario has a strong "pro-enforcement" legal regime and the grounds for refusal of enforcement are to be construed narrowly. Article 32 of the Model Law provides that arbitral proceedings are terminated by the final award, subject to limited continuing jurisdiction of the arbitral tribunal to correct or interpret the award (typically reserved for computational, clerical or typographical errors) or to make an additional award to deal with claims raised in the arbitral proceedings but omitted from the award. Lipszyc's claims were based on events that took place after the award was made and could not fit into these categories.

The rabbinical court's post-award statement that the award had been stayed did not affect the analysis. While the Court would not comment on whether the arbitral tribunal had jurisdiction to determine new or additional disputes (as described above, Ontario courts have held that this is a question for the tribunal at first instance), the issued award was "binding" under the Model Law and must be recognized and enforced.

Takeaways

Ontario courts will take seriously enforcing international arbitration awards, subject only to the narrow exceptions set out in the Model Law. The decision highlights Ontario's "pro-enforcement" regime and reinforces Ontario as a destination of choice for international arbitrations.

For further information concerning the Court of Appeal's decision, or any other information regarding international arbitration in Ontario, please contact any member of our Litigation Group.

[1] At the time of the arbitration and during the subsequent application to set aside the award, Ontario's previous legislation applied. However, by the time of this recognition and enforcement proceeding, the New Act had been proclaimed in force and applied.

Author

Tamryn Jacobson
tjacobson@goodmans.ca
416.597.4293