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RECENT DEVELOPMENTS & TRENDS IN CASE LAW

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When is an International Arbitration Award "Binding" for the Purposes of Domestic Enforcement?

Successful parties who engage in international commercial arbitration will inevitably want to have the arbitral award recognized and enforced in Ontario. Like its statutory predecessor, the recent *International Commercial Arbitration Act*, 2017, S.O. 2017, c.2, Schedule 5 (the "*ICAA*") provides a mechanism for the recognition and enforcement of such awards domestically. But when is an arbitral award "binding" for the purposes of enforcement under the *ICAA*? A recent decision of the Ontario Court of Appeal, *Popack v. Lipszyc*, 2018 ONCA 635, answers this question.

Popack involved a dispute about commercial real estate in Toronto. The parties chose to have their issues resolved by a rabbinical court in New York pursuant to an arbitration agreement (the "Arbitrator"). The parties agreed that the arbitration would be subject to the *ICAA*.

Following eight weeks of arbitration, the Arbitrator ultimately issued an award requiring the unsuccessful party to pay $400,000.00 to the opposing party (the "Award").

The Award was challenged on procedural grounds. The procedural challenge eventually made its way to the Ontario Court of Appeal (the "Procedural Appeal"). The Procedural Appeal was dismissed.

Following the Procedural Appeal, the successful party demanded payment of the Award. The opposing party advised that it would be seeking a reduction of the Award before the Arbitrator for the Court costs it incurred in responding to the Procedural Appeal (the "Costs Claim").

The successful party subsequently commenced an Ontario Superior Court application under the *ICAA* to have the Award recognized and enforced in Ontario (the "Enforcement Application").

An issue then arose between the parties following the arbitration as to the monetary currency in which the Award had to be paid. The Arbitrator responded to this concern by writing to the parties and advising that should the currency issue or any further issues arise, the Arbitrator could be contacted

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to schedule a hearing. Moreover, the Arbitrator stayed the Award until one of the two parties, who refused to re-attend before the Arbitrator, returned before the Arbitrator to deal with his alleged breaches of the Arbitration Agreement.

The Enforcement Application under the *ICAA* was then heard by the Ontario Superior Court.

The application judge dismissed the application to enforce the Award partly on the basis that the statements of the Arbitrator regarding the currency and other issues following the issuance of the Award meant that the arbitration process was not yet complete and the Arbitrator was not yet *functus officio*.

On appeal, the Court of Appeal overturned the application judge's ruling, holding that the Award was final and binding and could be enforced in Ontario pursuant to the *ICAA*.

When is an International Arbitral Award Binding under the *ICAA*?

The *ICAA* domestically incorporates, amongst other international treaties, the *UNCITRAL Model Law on International Commercial Arbitration*, (the "Model Law").

Article 35(1) of the Model Law provides that an arbitral award, regardless of the country in which it was made, "shall be recognized as binding and, upon application…to the competent court, shall be enforced…".

Article 36(1)(a)(v) of the Model Law, however, creates an exception to the recognition and enforcement of the arbitral award where the award has not yet become binding on the parties:

> 36(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:
>
> …
>
> (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 of which, that award was made…

The Court of Appeal noted that the grounds for the refusal of enforcement of an arbitral award domestically had to be "construed narrowly".

The policy underlying this approach is that Ontario has adopted a "pro-enforcement" legal regime for the recognition and enforcement of international commercial arbitral awards under *ICAA*.

Was the New York Arbitral Award "Binding" in this Case?

The Court of Appeal ultimately held, for a range of reasons, that the application judge erred in finding that the Award was not binding for the purposes of recognition and enforcement in Ontario.

The Court noted that the fact that the Arbitrator was willing to consider further claims by the parties following the issuance of the Award did not mean the Award itself was not yet "binding" and the Arbitrator was not yet *functus* on this issue. The Award was "framed as a final award" requiring the payment of $400,000.00.

In the Court's view, the fact that one of the parties was now seeking a reduction of the Award on the basis of the Costs Claim raised a brand new issue and did not amount to a mere "correction" of the original Award under the *ICAA*.

In any event, even if the Costs Claim raised new issues, this did not detract from the fact that the Award was binding under Article 36(1)(a)(v) of the Model Law:

> On the facts of this case, the potential jurisdiction of [the Arbitrator] 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…[One of the parties'] request for post-Award costs does not fall within the categories or matters covered [by the "correction" article] of the Model Law. The Award therefore is "binding" for the purposes of arts. 35 and 36 of the Model Law and should be recognized and enforced.

Ontario's "Pro-Enforcement" Regime

The Court of Appeal's approach in *Popack* indicates a willingness on the part of Ontario Courts to enforce international commercial arbitral awards domestically, absent extraordinary circumstances.

The policy rationale is clear—the parties engage in international arbitration by choice and ought to be bound by their decision to arbitrate. The fact that new issues may be raised by the parties following the issuance of a final arbitral award in no way detracts from the recognition and enforcement of the award in Ontario.

In this way, the Court of Appeal has given teeth to the enforcement provisions of the *ICAA* and Model Law. Like a Court order, an international arbitral award ought to be binding and enforceable on the parties.