NORTH AMERICA

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Arbitral award enforcement in Canada: deference to arbitrators and the right to be wrong

Two Ontario Appeals Court decisions, *Popack v Lipszyc* ('*Popack*') and *Ottawa (City) v Coliseum Inc* ('*Coliseum*'), have recently reinforced the long-held principle in Canada that deference is owed by courts when reviewing arbitral awards. In respect of arbitral awards issued in domestic or international arbitrations, courts across Canada will typically defer to arbitrators' decisions, and interfere only where the decision falls into a very narrow category of issues that affect Canadian society more broadly. Such a category is necessarily narrow because arbitrations, by definition, are private, and most often confidential, which limits the precedent-setting value of any particular award.

In Ontario, grounds for annulling an arbitral award are limited. For international arbitrations, they are confined to the express grounds set out in the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the 'Model Law'), which is a schedule to Ontario's International Commercial Arbitration Act. Domestic arbitrations, which are governed by the Arbitration Act, 1991, are subject to similarly limited grounds for setting aside.

Under the International Commercial Arbitration Act, there are only three categories of grounds under which an award may be set aside: (1) jurisdictional grounds (eg, where a tribunal exceeds its jurisdiction); (2) due process grounds (eg, defects in the procedure); (3) and a violation of public policy. Awards under the domestic Arbitration Act, 1991, may also be set aside on these grounds.

Under the Model Law, if any of these grounds are met, judges still have discretion not to set aside an award. The test for domestic arbitrations in Ontario is substantially the same.

Facts of *Popack*

Popack and Lipszyc had agreed to submit a dispute to arbitration by a New York rabbinical court (the 'Panel'). Under their agreement, the Panel was given the discretion to set the procedure for the arbitration. One of the procedural rules stipulated that the parties had a right to appear before the panel at all 'scheduled hearings'. Before releasing its decision, the panel met ex parte with a prior adjudicator of the parties' dispute. Popack subsequently applied to have the arbitral award set aside under Article 34(2)(a)(iv) of the Model Law, on the basis that the arbitrators violated the parties' right to due process. Specifically, Article 34(2)(a)(iv) provides that a court 'may' set aside an award if the arbitration was not in accordance with the agreement of the parties. Popack argued that the panel had abused the process by hearing evidence without the parties present.

The application judge found that the ex parte meeting did breach the agreed-upon procedure, and that this could provide a ground on which to set aside the award. However, the application judge also noted that she had discretion under Article 34(2) of the Model Law to uphold the award, and after considering several factors relevant to the exercise of her discretion, she decided to uphold the award despite the panel's acknowledged procedural error. Popack appealed to the Ontario Court of Appeal, arguing that the application judge had drawn the boundaries of her discretion far too widely and considered immaterial factors in arriving at her decision, when in fact she should have reached a conclusion that was (allegedly) in line with case law from other jurisdictions under the Model Law to conclude that she must set aside the award.

Court of Appeal's analysis in *Popack*

The Court of Appeal noted that the parties' choice of private arbitration implied a preference for the outcome arrived at in that forum and a limited role for judicial oversight.

The court then addressed the scope and form of the court's discretion in reviewing an arbitration award. Popack argued that discretion must be interpreted consistently with the jurisprudence of other countries if commercial consistency and predictability is to be achieved. However, the Court of Appeal disagreed with Popack's view of the available case law, holding that, in fact, cases to set aside arbitration awards under the Model Law indicated that the scope of discretion under Article 34(2) depended largely on the alleged ground on which the award was to be set aside. Discretion to set aside an award should be exercised when the issue goes to the substantive heart of the award. If, for example, there was no valid arbitration agreement, then there would be considerably less discretion to uphold the award.

The Court of Appeal adopted the view, consistent with other international jurisdictions, that discretion under the Model Law is intended to prevent real unfairness and real practical injustice, not minor procedural irregularities. The essential question of Article 34(2) of the Model Law thus remains the same, regardless of how the matter is characterised: what did the procedural error do to the reliability of the result, or to the fairness, or the appearance of fairness of the process?

The Court of Appeal identified four categories for the test of exercising judicial discretion: (1) relevance or the seriousness of the breach; (2) potential impact of that breach on the result to the fairness of the arbitral proceedings; (3) potential prejudice flowing from the need to redo the arbitration if set aside, which may be less relevant in assessing 'real and practical injustice'; and (4) the parties' conduct after learning of the procedural breach, which may be significant in certain instances. Ultimately, the court upheld the decision to refuse to set aside the award.

In doing so, and perhaps most importantly, the Court of Appeal reinforced the main organising principle of deference to arbitral decision-makers.

Facts of *Coliseum*

Coliseum entered into a long-term lease agreement with the City of Ottawa (the 'City'). A dispute arose that was resolved and produced minutes of settlement. A second dispute later arose that required arbitration under the Ontario Arbitration Act, 1991, to interpret two provisions of the minutes of settlement. The arbitrator interpreted the provisions in favour of Coliseum, and the City appealed the arbitration award. The City was successful in appealing the award, as the application judge disagreed with the arbitrator's interpretation of the minutes of the settlement, substituted her interpretation, and accordingly overturned the arbitrator's award. Coliseum appealed to the Ontario Court of Appeal, arguing, inter alia, that the application judge erred in finding the arbitrator's interpretation of the minutes unreasonable, and should have exercised a greater degree of deference.

Court of Appeal's analysis in *Coliseum*

The Court of Appeal, citing the recently decided Supreme Court of Canada decision in *Sattva Corp v Creston Moly Corp*, stated that the standard of review on appeal from a commercial arbitration will generally be reasonableness. The court also highlighted the statement from *Popack* that the parties' choice of alternative dispute resolution reflects their desire for limited judicial oversight.

A court may deviate from the reasonableness standard only when there are constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise.

Citing the Supreme Court, in the *Dunsmuir* case, the Court of Appeal stated that 'reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions.'

On that basis, the Court of Appeal found that it was wrong for the application judge to find that the arbitrator's decision was unreasonable because the arbitrator's interpretation of the minutes of the settlement was within a range of reasonable outcomes. The application judge did not have the authority to substitute her own interpretation of the minutes based on a disagreement with the arbitrator's interpretation.

Discussion

These two recent Ontario decisions reaffirm that Canadian courts will treat arbitrators' awards with deference, notwithstanding certain procedural errors or a court's disagreement with the arbitrator's findings. The bar for overturning or setting aside an award on the reasonableness standard remains high indeed, provided the arbitrator's reasoning is logical and gives rise to a feasible interpretation of the dispute. Essentially, arbitrators have the 'right' to be wrong, provided their reasoning is sound and their decision falls within the spectrum of possible, reasonable outcomes.

Notwithstanding the differences between *Popack* and *Coliseum*, both arrive at the same conclusion, supported by similar reasoning: *Popack* addressed a discretionary question under the Model Law, while *Coliseum* addressed a question of contractual interpretation under the domestic Arbitration Act of Ontario. Although dealing with two different issues, both cases were guided by notions of deference. Both relied on the guiding principle that the parties' selection of their arbitral forum implies both a preference for the outcome arrived at in that forum and a limited role for judicial oversight of the award made in that forum.

As more domestic and international disputes are decided in alternative dispute fora, such as arbitration, adjudication and dispute review boards (in the construction industry), it should be reassuring to parties in Canada that they can expect certainty and finality in their dispute resolution practices outside the court room. This is particularly important as we see more non-lawyers playing important decision-making roles. The industry's continued march towards these alternative forums, with expert decision-makers rather than strictly legal ones, should be viewed as a reflection of a general preference for the efficiencies and benefits of these alternatives to litigation.

Canadian courts recognise the commercial benefit to parties of timely and efficient dispute resolution practices, and that parties willingly balance these benefits against the risk of imperfectly reasoned decisions. But when one party seeks to change that essential bargain, courts have sent a message: you made your bed, now you must lie in it. Once a party has committed to final and binding arbitration, the bar will be very high to escape that commitment.