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One More Hurdle to Annulments: Contracting out of Model Law's Article 34 limits challenges to international arbitration awards

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It has long been recognized that a notable difference between international and domestic arbitration is the ability to challenge the resulting award. While both types of awards are open to limited forms of judicial review, only domestic awards can be appealed with respect to the correctness of the decision.

Although appeal rights, and the ability to contract out of them, vary across the provinces and territories, such appeals are not available under the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration ("Model Law"), which has been adopted right across Canada.

In light of a recent decision from the Ontario Superior Court of Justice, another divergence seems to be arising with respect to the ability of parties to limit challenges to international arbitration awards.

The domestic arbitration acts across Canada stipulate that parties cannot vary or exclude any provision dealing with setting aside an award. In *Popack v. Lipszyc* [2015] ONSC 3460, however, the Ontario Superior Court of Justice recently clarified that parties can limit the court's ability to set aside international arbitration awards.

Pursuant to Ontario's *International Commercial Arbitration Act*, which incorporates the Model Law, Popack sought to set aside an arbitral award rendered by a tribunal in New York City. In response, Lipszyc argued, among other things, that the parties had contracted out of Model Law Article 34, which provides the list of grounds upon which an award may be annulled — the grounds are primarily based on issues regarding the validity of the procedural process.

The parties were business partners who acquired commercial real estate in Ontario. The agreements contained arbitration clauses specifying that disputes would be resolved by the Rabbis of the Crown Heights Beth Din (in New York City.)

The relationship deteriorated and in 2005 the parties proceeded to arbitration. The Rabbinical judges ordered that one of the parties should sell his interest to the other. The parties came to an agreement whereby Lipszyc would sell his interest to Popack. However, Popack discovered what he believed to be fraud committed by Lipszyc, and the parties went back to arbitration in 2011.

During the second arbitration, the arbitral tribunal met with one of the Rabbinical judges that heard the first arbitration, Rabbi Schwei, to get his opinion on the case. The meeting took place without notice to, and without the presence of, the parties. The tribunal eventually decided against Popack and ordered him to pay US$400,000 to Lipszyc.

Lipszyc advanced a preliminary argument that the parties had contracted out of Article 34 of the Model Law. He cited the Ontario case *Noble China Inc. v Cheong* [1998] O.J. 4679 as standing for the proposition that Article 34 is not a mandatory provision of the Model Law and can therefore be excluded by agreement.

The court rejected Lipszyc's interpretation of *Noble China* and held that parties cannot contract out of Article 34 for all purposes. For example, if the parties purported to derogate from a mandatory provision of the Model Law, such as equal treatment of the parties under Article 18, there would be no jurisdiction for the court to set aside such an award as a remedy for a breach of a mandatory provision.

As such, the court determined that the proper approach is to consider to what extent an arbitration agreement seeks to exclude Article 34, and if it does, to what extent it is effective given the specific matters at issue. The Court ultimately concluded that the arbitral tribunal's meeting with Rabbi Schwei was in breach of its obligation to provide notice to the parties under Article 34(2)(a)(iv). However, after considering the severity of the breach, the Court exercised its discretion under Article 34 and determined that the award should not, after all, be set aside.

In the face of mounting case law (at least from Ontario), it appears as though parties have the right to limit their ability to challenge international awards. This ability seems to arise from the distinction between "mandatory" and "non-mandatory" provisions as identified in the Analytical Commentary on the Model Law, which is widely recognized (and legislated) as an aid to interpreting the Model Law.

However, note that the analytical commentary only refers to this distinction with respect to provisions relating to the composition of the arbitral tribunal (Chapter III), the conduct of the arbitral proceedings (Chapter V) and the making of the award (Chapter VI).

The importance of the distinction between mandatory and non-mandatory provisions in these chapters follows as they relate to the arbitration itself — not court intervention — and the distinction is necessary in order to ensure that the parties involved enjoy necessary procedural safeguards. Non-mandatory provisions are thus identified as ones that include the words "unless the parties agree otherwise."

The fact that mandatory provisions are not identified with respect to the extent of court intervention, e.g. in Articles 34 and 36, follows from that fact that Model Law Article 5 expressly stipulates that, in matters governed by the Model Law, "no court shall intervene except where so provided."

It would be odd if the Model Law contemplated limiting court intervention further subject to the agreement of the parties. Nonetheless, decisions from Ontario courts indicate otherwise and should be regarded as an additional notable distinction between domestic and international arbitration.

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