COURT OF APPEAL FOR ONTARIO

CITATION: Popack v. Lipszyc, 2018 ONCA 635
DATE: 20180712
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Doherty, Brown and Nordheimer JJ.A.

BETWEEN

Jospeh Popack, United Northeastern Retail Portfolio Inc., United Burlington Retail Portfolio Inc., Capture Real Estate LLC, Miriam Popack, Ephriam Piekarski, Mendel Hendel, Schneur Zalmen Hendel, Sholom Ber Hendel, Rivka Feldman and Deborah Zissy Raskin

Applicants (Appellants)

and

Moshe Lipszyc and Sara Lipszyc

Respondents (Respondents)

Marvin J. Huberman and Daniel Sheppard, for the appellants

Colin P. Stevenson and Neil G. Wilson, for the respondents

Heard: February 8, 2018

On appeal from the order of Justice Grant R. Dow of the Superior Court of Justice, dated August 28, 2017, with reasons reported at 2017 ONSC 4581.

Brown J.A.:

I. OVERVIEW

[1] This appeal concerns when an international commercial arbitration award becomes “binding” on the parties for the purposes of judicial recognition and enforcement.

[2] In Ontario, the recognition and enforcement of international commercial arbitration awards is governed by the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sched. 5 (the "*ICAA*"),[1] the successor to the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9, the legislation in effect at the time of the arbitration in this case.

[3] The *ICAA* states that two international instruments concerning international commercial arbitration have the force of law in Ontario: (i) the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, adopted by the United Nations Conference on International Commercial Arbitration in New York on June 10, 1958 (the "Convention"); and (ii) the *UNCITRAL Model Law on International Commercial Arbitration*, adopted by the United Nations Commission on International Trade Law on June 21, 1985, as amended on July 7, 2006, (the "Model Law"). The Supreme Court of Canada has described the Model Law as a codification of "best practices": *Yugraneft Corp. v. Rexx Management Corp.*, 2010 SCC 19, [2010] 1 S.C.R. 649, at paras. 10-11.

[4] In August 2013, the appellants obtained an international commercial arbitration award against the respondents. It was in an amount significantly lower than the appellants had sought in the arbitration. The appellants applied to set

[1] Section 5(3) of the *ICAA* provides that "[t]he Model Law applies to international commercial arbitration agreements and awards made in international commercial arbitrations, whether made before or after the coming into force of [the ICAA]" (which was March 22, 2017).

aside the award under art. 34 of the Model Law on the basis that the arbitrators had followed an improper procedure. In February 2016, this court affirmed the dismissal of the appellants' set aside application.

[5] The appellants thereupon applied under arts. 35 and 36 of the Model Law for the recognition and enforcement of the award.

[6] The application judge dismissed the application, holding that the award was not yet binding on the parties because the respondents were seeking to raise further issues before the arbitral panel and the panel had expressed its willingness to consider the further issues.

[7] The appellants appeal. I would allow the appeal. The application judge erred in law in interpreting the recognition and enforcement provisions of the Model Law and made palpable and overriding errors in applying the Model Law to the circumstances of this case.

II. THE EVENTS CONCERNING THE ARBITRATION

[8] The appellant, Joseph Popack, and the respondent, Moshe Lipszyc, jointly invested in commercial real estate in the Greater Toronto Area. In 2005, disputes arose between them.

[9] After disagreeing for several years about how to resolve their differences, they submitted their disputes to arbitration before the Beth Din (or Bais Din) of Mechon L'Hoyroa (the "Beth Din"), a rabbinical court in New York, pursuant to an

Agreement to Submit to Arbitration dated November 10, 2010, as amended by an addendum dated January 11, 2011 (collectively the “Arbitration Agreement”).

[10] At the time the parties entered into the Arbitration Agreement, Mr. Popack resided in New York State and Mr. Lipszyc lived in Ontario.

[11] In the Arbitration Agreement, the parties agreed that the Beth Din was a tribunal subject to the *ICAA*.

[12] The rest of the appellants are corporations controlled by Mr. Popack, or individuals aligned in interest. The respondent Sara Lipszyc is the spouse of Moshe Lipszyc.

[13] Under the Arbitration Agreement, the arbitral panel was free to choose the appropriate procedures by which to conduct the arbitration, no record was to be kept of the evidence or the submissions, and no reasons for decision were required from the panel.

[14] Following an eight-week arbitration, held between January 2011 and March 2013 in Toronto, the arbitral tribunal issued an award, styled a Rabbincial Court Ruling, dated August 15, 2013 (the “Award”). The Award described the appellants as “Party A” and the respondents as “Party B”. The Award stated:

> [T]he following Rabbincal Court Ruling was issued by us:

> 1) The funds escrowed with the Rabbincal Court [i.e., the sum of $440,000] shall be returned to Party A.
>
> 2) Party B shall pay Party A the sum of $400,000, whereby the parties are released from each other.

[15] Mr. Popack thereupon brought an application under art. 34 of the Model Law to set aside the Award on the ground that the panel had breached the procedure agreed upon by the parties by holding an *ex parte* meeting with a rabbi who initially had been appointed to arbitrate the parties' dispute.

[16] Justice Matheson found that although the *ex parte* meeting breached the agreed upon procedure, providing a basis to set aside the Award, she would exercise her discretion under art. 34(2)(a)(iv) of the Model Law to refuse to set aside the Award. She dismissed Mr. Popack's application: 2015 ONSC 3460.

[17] Mr. Popack appealed. By a decision dated February 18, 2016, this court dismissed Mr. Popack's appeal: 2016 ONCA 135, 129 O.R. (3d) 321. Mr. Popack paid all costs of the set aside proceedings ordered by the Ontario courts.

[18] On April 11, 2016 appellants' counsel wrote to the respondents' counsel stating: "[N]ow that the setting aside litigation has been finally concluded, and the costs issue now resolved, we would appreciate prompt payment of the *beth din*'s award" (italics in original).

[19] Respondents' counsel replied by letter dated April 22, 2016, stating:

> [Y]our client should already be aware that my client will be asking the Beth Din to reduce the award by the amount he has wasted responding to Mr. Popack's failed court proceedings, including all related, uncompensated costs and damages. This matter is, as I understand it, currently before the Beth Din. Consequently, I will leave this to be dealt with between the rabbinical lawyers.

[20] On June 24, 2016 the appellants commenced this application under arts. 35 and 36 of the Model Law seeking an order recognizing and enforcing the Award and requiring the respondents to pay them the Canadian dollar equivalent of US$400,000.

[21] In responding to the application, Mr. Lipszyc deposed that his claim for costs and damages, referred to in his counsel's April 22, 2016 letter, would exceed $400,000. He took the position the Award was denominated in Canadian, not American, dollars. Mr. Lipszyc understood that the Beth Din was willing to address these issues only if and when Mr. Popack attended before it, which he refused to do.

[22] On September 18, 2016 the Beth Din wrote to the parties in respect of its Award, stating:

> The $400,000.00 Dollars award issued pertained to business transactions that [were] transacted in Canadian currency.
>
> At no time during the proceedings did any of the parties raise the issue of distinguishing between United Sates Dollars and Canadian Dollars. However, as a matter of standard practice, claims asserted regarding business

> dealings transacted in Canadian funds result in awards that are calculated in Canadian Funds.
>
> Accordingly, should any of the parties have claims and/or proofs that relate to the currency issue and for that matter any other claims that the parties wish to be resolved by the Rabbincal Court, please contact the Court Clerk, to schedule a hearing before the Rabbincal Court.

[23] The Beth Din wrote the parties a further letter dated June 7, 2017, which stated:

> The Bais Din has ordered that the [Award] is stayed until Popack comes back to the Bais Din for a hearing to determine Lipszyc's claim, that Popack continuously breached the Arbitration Agreement, and what are the consequences for breaching the Arbitration Agreement.

III. THE REASONS OF THE APPLICATION JUDGE

[24] The application judge heard the application to recognize the Award at the same time as a motion by the respondents to stay recognition of the Award.

[25] The respondents opposed the application to enforce on the basis the Award had not yet become "binding" on the parties within the meaning of art. 36(1)(a)(v) of the Model Law and art. V(1)(e) of the Convention.

[26] The application judge accepted the respondents' position. He identified three reasons why the Award was not "binding" on the parties: (i) he disagreed with Mr. Popack that at the time of his application to enforce there was an absence of any pending proceeding to appeal the award; (ii) he found that Mr. Lipszyc had expressed an intention "to pursue further issues related to the

subject matter arbitrated" (para. 12); and (iii) the two post-Award statements from the Beth Din indicated that the arbitration process was not yet complete and the arbitral tribunal was not *functus officio*: at para. 13.

[27] The application judge dismissed both the appellants' application for recognition and the respondents' motion to stay recognition of the Award.

IV. POSITIONS OF THE PARTIES

The appellants

[28] Mr. Popack submits the application judge erred in finding that the Award had not yet become binding on the parties within the meaning of art. 36(1)(a)(v) of the Model Law. In making that finding, the application judge committed three errors: (i) he ignored the mandatory rules in arts. 32 and 33 of the Model Law concerning the termination of arbitral proceedings; (ii) he improperly deferred to the Beth Din's view about the nature of the Award when, under the Model Law, it is the courts who determine whether an award is binding; and (iii) he failed to recognize that the matters raised by Mr. Lipszyc following this court's 2016 order were new issues, which did not affect the binding nature of the Award.

The respondents

[29] The respondents submit the application judge reasonably concluded that the Award was not yet binding because after the release of this court's 2016 decision it was apparent both sides were asking the tribunal for an interpretation

of the currency in which the Award was denominated and to decide the post-Award cost issues.

[30] The respondents contend an award cannot be binding when it is ambiguous and the tribunal has not yet declared the proceedings terminated. A party's request for costs or clarification of the currency of an award should be treated in the same fashion as a court challenge to set aside an award. Therefore, it was reasonable for the application judge to conclude the award was not yet binding because the tribunal had not yet determined whether it had fully adjudicated all issues.

V. STANDARD OF REVIEW

[31] The interpretation of a statute, such as the *ICAA* and its schedules, involves a question of law reviewable on a correctness standard: *Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8; and *Wilk v. Arbour*, 2017 ONCA 21, 135 O.R. (3d) 708, at para. 18. Deference, however, is shown to a court's determination of mixed questions of fact and law, such as the application of the statute to the circumstances of the case or the interpretation of an arbitration agreement: *6524443 Canada Inc. v. Toronto (City)*, 2017 ONCA 486, 415 D.L.R. (4th) 475, at para. 11.

[32] The respondents contend that deference is owed to the application judge's interpretation of the *ICAA* and its schedules, including the Model Law. They point

out that in its endorsement in *6524443 Canada* this court stated, at para. 11, that the reasonableness standard applied to the motion judge's interpretation of an arbitration agreement because her "interpretation involved, as an integral part of the interpretation process, consideration of the meaning of the provisions of the relevant arbitration statutes. This was not however an 'extricable' legal issue, that would be reviewable on a standard of correctness."

[33] I read the endorsement in *6524443 Canada* in a different way. This court's statement was directed to the specific circumstances of that case, which did not call for an interpretation of the applicable domestic arbitration legislation but turned on the interpretation of the language of the particular arbitration agreement.

[34] By contrast, the present case is concerned with the interpretation of the recognition and enforcement provisions of the Model Law, in conjunction with the provisions of the Model Law concerning the termination of proceedings (art. 32) and the correction of awards (art. 33). These are issues with a high degree of generality, having implications beyond the parties and their specific Arbitration Agreement. Consequently, they are questions of law and the correctness standard applies: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 51. As this court recently stated, the standard of review applicable to the "interpretation of the Model Law and *ICAA*, as an issue

of law," is correctness: *Trade Finance Solutions Inc. v. Equinox Global Limited*, 2018 ONCA 12, 420 D.L.R. (4th) 273, at para. 31.

VI. THE GOVERNING PRINCIPLES

A. The recognition and enforcement of awards under the Model Law

[35] International and provincial instruments have established, in Ontario, a strong "pro-enforcement" legal regime for the recognition and enforcement of international commercial arbitration awards: see Gary B. Born, *International Commercial Arbitration*, 2d ed. (The Netherlands: Kluwer Law International, 2014), vol. 3 at p. 3410. Article 35(1) of the Model Law mandates the recognition or enforcement of an arbitral award, subject to specified exceptions. Article 35(1) states:

> 35 (1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article[2] and of article 36.

[36] In the present case, the respondents opposed recognition of the Award on the basis that it had "not yet become binding on the parties," an exception to recognition or enforcement contained in art. 36(1)(a)(v) of the Model Law, which states:

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[2] Art. 35(2) states: "The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language."

> 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 full text of arts. 32-36 of the Model Law are reproduced in Appendix A to these reasons.)

[37] The provisions of the Model Law regarding the recognition and enforcement of awards work together with those in art. 34 that specify the grounds upon which a party may have recourse against an arbitral award in the place of arbitration. Article 34(1) states that recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with arts. 34(2)-(3).

[38] Article 34(3) pertains to timing requirements for bringing an application for setting aside an award: within three months from receipt of the award or, if a request was made under art. 33, within three months of when the request was disposed of by the tribunal.

[39] Under art. 34(2), the grounds for setting aside an award mirror those for refusing to recognize and enforce an award found in art. 36(1), with one

exception – they do not include that the award has not yet become binding on the parties, as provided in art. 36(1)(a)(v).

[40] The general rule of interpreting the recognition and enforcement provisions of the Convention and Model Law is that "the grounds for refusal of enforcement are to be construed narrowly": *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A.* (1999), 45 O.R. (3d) 183 (S.C.), at para. 26, aff'd (2000), 49 O.R. (3d) 414 (C.A.), leave to appeal refused, [2001] 1 S.C.R. xi.

B. The meaning of "not yet binding on the parties"

[41] In his treatise, Born provides a useful commentary on the origins and possible meaning of the term "binding" used in both art. V(1)(e) of the Convention and art. 36(1)(a)(v) of the Model Law.

[42] Born observes, at pp. 3607-08, that one of the principal innovations of the Convention was its abandonment of the "double *exequatur*" procedure, which required obtaining judicial confirmation of the award in the local court of the place of arbitration before seeking judicial enforcement abroad. As well, the Convention specifically abandoned the "finality" requirement contained in the *Geneva Convention on the Execution of Foreign Arbitral Awards of 1927* in favour of permitting the non-recognition of an award that "has not yet become binding on the parties".

[43] However, as Born notes at p. 3610, “there remains considerable uncertainty surrounding the meaning of the [Convention’s] new requirement that an award be ‘binding’.” He observes, at p. 3611, that “[i]n the words of one commentator, frustrated after a detailed review of Article V(1)(e)’s drafting history, ‘the meaning of this term [*i.e.*, ‘binding’] has always been a mystery’” (citations omitted).

[44] Born offers, at p. 3610, a possible range of meanings for the term “binding” as a matter of pure textual construction:

> [A]n arbitral award might be considered “binding” under the Convention when the award: (a) is made by the arbitral tribunal, without regard to possible or pending judicial, institutional, or other review under any foreign law; (b) is made by the tribunal, provided that no available internal appellate review within the relevant arbitral institution has been invoked; (c) is made by the arbitral tribunal, provided that no application for judicial review has been filed in an arbitral seat; (d) is made by the arbitral tribunal, and the time for pursuing an ordinary judicial challenge to the award in an action to annul under local law in the seat has expired, or any application for such review has been denied; (e) is made by the tribunal, and the time for seeking extraordinary judicial review under local law in the seat has expired, or any application for such review has been denied; (f) is made by the tribunal, and the award has been confirmed by a local court in the seat; or (g) is made by the tribunal, and all of the avenues of judicial review in paragraphs (a)-(f) have been exhausted, or the time for doing so has expired.

[45] In Born's view, an award should be considered binding "when the parties' arbitration agreement provides that it is either final or binding, regardless of the possibility of subsequent judicial challenges of any sort": at p. 3617.

[46] A number of national courts do not share Born's view. They interpret an award as "binding" when it is no longer open to recourse on its merits. This position finds expression, for example, in the decision of the Belgian Cour de Cassation, in *Inter-Arab Investment Guarantee Corporation v. Banque Arabe et Internationale d'Investissements*, (1999) XXIV Y.B. Comm. Arb. 603 (Belgian Cour de Cassation), at para. 17, where that court stated:

> It appears from the set-up of Art. V(1)(e) of the New York Convention [mirroring Art. 36(1)(a)(v) of the Model Law] that the award is binding on the parties, within the meaning of this provision, when it is no longer open to recourse on the merits. The question whether the award is open to such recourse is to be solved by referring, successively and one in the absence of the other, to the arbitration agreement, the law that it designates for such purpose, and, last, the law of the country in which the award was rendered.

[47] Some national courts have divided avenues of recourse on the merits into "ordinary" and "extraordinary" ones, with a significant number of courts taking the view that an award becomes "binding" when a party has exhausted avenues of "ordinary recourse."

[48] For example, in *Diag Human SE v. Czech Republic*, [2014] EWHC 1639 (Comm), [2014] 1 C.L.C. 750, the English Queen's Bench Division, Commercial

Court, considered the meaning of “binding” within the context of the Convention. The court discussed the distinction between “ordinary” and “extraordinary” means of recourse in respect of an international arbitration award. In broad terms, “ordinary” recourse denotes a genuine appeal on the merits of an award to a second, review arbitral tribunal or a court; “extraordinary” recourse encompasses what the Convention and Model Law describe as set aside proceedings: at pp. 760-63; see also *Dowans Holdings SA v. Tanzania Electric Supply Co. Ltd.*, [2011] EWHC 1957 (Comm), at paras. 17-27. In *Diag Human*, the court concluded that the arbitration agreement involved in the case permitted the appeal of a tribunal’s award to a review panel, which made the tribunal’s award subject to “ordinary recourse”. Consequently, the award was not binding for the purposes of the Convention pending the determination of that review: at pp. 779-80. See also J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 3d ed. (Huntington, NY: JurisNet, 2017), at pp. 550-51.

[49] A number of national courts regard set aside proceedings under art. 34 of the Model Law as a form of “extraordinary recourse”, the availability or initiation of which does not render an award non-binding. The Supreme Court of Canada is not one of them.

[50] In *Yugraneft*, the Supreme Court of Canada took a different view. Although the Supreme Court did not employ the distinction between “ordinary recourse” and “extraordinary recourse”, it held, at paras. 54-55, that an award is

"not…binding" under art. V(1)(e) of the Convention (or art. 36(1)(a)(v) of the Model Law) if it is open to being set aside under art. 34 of the Model Law, either because the three-month period in which to bring a motion to set aside has not expired or the set aside proceedings have not yet come to an end.

[51] Moreover, the Supreme Court's treatment of the impact of the availability of a route of appeal or review on the recognition or enforcement of an award suggests that an award would not be binding while an "ordinary recourse" review or appeal remained outstanding. This result seems implicit in para. 57 of the court's reasons, where it stated:

> A second consideration in the context of a recognition and enforcement of foreign arbitral awards is whether non-performance of the arbitral debtor's obligation to pay arises when the award becomes final or only when an actual refusal to pay the award becomes apparent to the arbitral creditor. In my opinion, *the obligation to pay the award becomes exigible on the date the appeal period expires or, if an appeal is taken, the date of the appeal decision*. Failure to make payment on that date would constitute non-performance of the obligation. Thus, the injury has occurred and the conditions set out in s. 3(1)(a)(i) and (ii) are satisfied on that date. [Emphasis added.]

[52] In any event, it is not necessary for the purposes of this appeal to express any definitive view on whether an award is not "binding" while an avenue of "ordinary recourse," such as a review or appeal, remains open to a party. In the present case, the Award was issued on August 15, 2013. By the terms of the Arbitration Agreement, the arbitral tribunal's "decision [was] not open for appeal

neither in any religious court nor in any secular court." Accordingly, by its terms the Arbitration Agreement did not provide for "ordinary recourse" against the Award on its merits.

VII. APPLICATION OF THE GENERAL PRINCIPLES

[53] Under the terms of the Arbitration Agreement, the Beth Din was operating as an arbitral tribunal to which the *ICAA* regime applied. Mr. Popack applied under art. 34 of the Model Law, within the stipulated three months from his receipt of the Award, to set aside the Award. His application was finally disposed of by the February 18, 2016 order of this court. In those circumstances, the principles in *Yugraneft* would suggest that the Award became "binding" on the parties on that date, for the purposes of recognition under arts. 35 and 36 of the Model Law.

[54] That was not the view taken by the application judge. He identified three reasons why the Award was not "binding" on the parties: (i) he disagreed with Mr. Popack that at the time of his application to enforce there was an absence of any pending proceeding to appeal the award; (ii) he found that Mr. Lipszyc had expressed an intention "to pursue further issues related to the subject matter arbitrated" (para. 12); and (iii) the two post-Award statements from the Beth Din indicated that the arbitration process was not yet complete and the arbitral tribunal was not *functus officio*.

A. Whether there was a pending proceeding to appeal the Award

[55] Dealing with the first reason, the application judge appeared to take the view that Mr. Lipszyc enjoyed some right to further recourse against the Award. In para. 12, the application judge stated:

> Joseph Popack also relies on the absence of *any pending proceeding to appeal the award*. I disagree. Moshe Lipszyc made it clear within the three months permitted following the release of the Court of Appeal reasons dealing with Joseph Popack's efforts to set aside the award of its intention to pursue further issues related to the subject matter arbitrated that were not identified as dealt with in the Beth Din's communication of August 15, 2013 which could affect the obligation and amount one of the parties is to pay the other. [Emphasis added.]

[56] To the extent this passage suggests that Mr. Lipszyc was entitled to take steps to appeal the Award, the application judge made a palpable and overriding error in interpreting the Arbitration Agreement, which specifically precluded any right of appeal from the Award.

[57] The application judge referred to Mr. Lipszyc's expression of his intention to take further steps "within the three months permitted following the release of the Court of Appeal reasons." The application judge did not explain to what three-month period he was referring. The Arbitration Agreement contained no provision entitling a party to take steps against the Award within a three-month period.

[58] If the application judge was referring to the three-month period to initiate set aside proceedings under art. 34(3) of the Model Law, then the application judge committed a palpable and overriding error in finding such recourse was available to Mr. Lipszyc. It clearly was not. Recourse against an award under art. 34 is only available where a party seeks to set aside the award. Mr. Lipszyc expressed no intention to do so.

B. The correction or interpretation of the Award

[59] Consideration of the application judge's second and third reasons requires a review of the provisions of the Model Law dealing with the correction or interpretation of awards and the termination of arbitration proceedings.

[60] In concluding that the Award was "not yet binding" on the parties, the application judge relied not only on Mr. Lipszyc's intention "to pursue further issues related to the subject matter arbitrated" (para. 12), but also on statements issued by the arbitral tribunal. He wrote, at para. 13 of his reasons:

> My conclusion that the communication by the arbitral tribunal or here, the Beth Din that the sum of $400,000.00 was to be paid by Moshe Lipszyc to Joseph Popack is not yet binding relies on the fact the Beth Din has released statements on two subsequent occasions, September 18, 2016 and June 7, 2017. On September 18, 2016 the Beth Din stated its willingness to consider additional issues. On June 7, 2017 the Beth Din stayed the award until Joseph Popack appears before it. Both statements are an indication that the arbitration process the parties committed to is not yet complete. As a result enforcement proceedings are

> premature. The Beth Din is not yet at the stage of being functus officio.

[61] The respondents contend that the application judge's conclusion was reasonably supported by the Model Law and the language of the Arbitration Agreement. They advance two main arguments: (i) the respondents' request that the tribunal consider new issues falls within the procedure under art. 33 of the Model Law enabling a tribunal to correct or interpret an award or make an "additional award"; and (ii) their request falls within the continuing jurisdiction of the Beth Din under the Model Law and the language of the Arbitration Agreement.

(i) First argument: Correcting or interpreting the Award

[62] The respondents invoke art. 33 of the Model Law, which permits a party to apply to a tribunal, within 30 days of receipt of an award, to: "correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature" (art. 33(1)(a)); "give an interpretation of a specific point or part of the award"(art. 33(1)(b)); or "make an additional award as to claims presented in the arbitral proceedings but omitted from the award" (art. 33(3)). All such requests require notice to the other party. An interpretation can only be requested if so agreed by the parties.

[63] The application judge did not identify which provisions of the Model Law, if any, he applied to reach his conclusion that Mr. Lipszyc's intention "to pursue

further issues related to the subject matter arbitrated" (para. 12) meant the Award was not "binding." However, contrary to the submission of the respondents, art. 33 did not offer a route to reach that conclusion.

[64] The respondents submit the dispute about whether the Award was denominated in Canadian or American dollars would fall within art. 33(1)(b) as a request for the arbitral tribunal to give an interpretation of a specific point or part of the Award. Whether it would or not need not be decided on this appeal. At the hearing of the appeal, the appellants unequivocally acknowledged, for all purposes, that the Award is denominated in Canadian dollars. As a result, the currency of the Award is not in dispute. No interpretation from the arbitral tribunal is required.

[65] The respondents next submit that their intention to seek from the arbitral tribunal a reduction in the Award by the amount Mr. Lipszck has "wasted responding to Mr. Popack's failed court proceedings" would fall within art. 33(1)(a) – a correction – or 33(3) – an additional award. As a result, the application judge did not err in concluding the Award was not binding in the face of Mr. Lipszck's stated intention.

[66] I am not persuaded by that submission. Born, at pp. 3126-27, described the narrow and limited scope of those provisions as follows:

> The Model Law's provisions regarding corrections reflect the prevailing approach towards corrections in

> most jurisdictions – essentially, as a necessary evil that is tolerated, but not encouraged, and narrowly regulated. Notably, corrections are only available within a very limited time period (for both requesting and making a correction) following notification of the award and for only very limited reasons. These restrictions are imposed in order to safeguard the finality of awards, to limit uncertainty and to prevent ongoing disputes after an award has been made.
>
> It is clear that only very narrow categories of "errors" may be corrected under the Model Law. In particular, only "*errors in computation*, … *clerical or typographical errors* or … *errors of similar nature*" may be corrected. Article 33(1) is directed towards simple arithmetic mistakes in calculation or typographical errors (*e.g.*, failure to include one of a number of categories of damages which have been found payable in the dispositive section of the award, when this was clearly intended).
>
> In contrast, errors in the tribunal's reasoning in the body of its award are not subject to correction. As courts in some Model Law jurisdictions have reasoned, an arbitral tribunal is not authorized by Article 33 to correct errors of judgment, whether of law or fact.
>
> Even if a tribunal demonstrably misunderstands or overlooks some critical provision of the parties' agreement or some essential piece of evidence, the remedy is not generally correction of the award under Article 33, but rather an application to annul. [Italics in original and citations omitted.]

[67] According to Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration*, 6th ed. (Oxford: Oxford University Press, 2015), at p. 565, the purpose of art. 33(3) dealing with additional awards "is to ensure that the arbitrators may complete their mission if they have omitted from

their award decisions in relation to any of the claims presented in the proceedings."

[68] The respondents' stated intention to seek costs relating to the set aside and enforcement proceedings Mr. Popack took in the Ontario courts certainly does not constitute a computational, clerical or typographical error in the Award, nor a request to make an "additional award" as to "claims presented in the arbitral proceedings but omitted from the award."

[69] The respondents' stated intention is based on events that took place after the Award was made; it raises a "new issue." I note that respondents' counsel, in cross-examination of Mr. Popack on his affidavit, accepted that Mr. Lipszyc's claim for costs incurred after the issuance of the Award in the Ontario court proceedings was a "new issue". Article 33 does not apply in those circumstances.

[70] The respondents point to the decision of the Federal Court, Trial Division, in *Relais Nordik Inc. v. Secunda Marine Services Ltd.*, 1990 CarswellNat 1320 (F.C.T.D.) to support their position. Although in that case the court refused recognition of an award on the ground it was "not yet binding" on the parties, the facts of that case bear no resemblance to those in this case. The *Relais Nordik* case concerned an arbitration governed by the *Commercial Arbitration Code* (the "Code"), adopted by the *Commercial Arbitration A*ct, R.S.C. 1985, c. 17 (2d. Supp.). The Code is based on the Model Law. At issue was a request to correct

an obvious computational error of $500, in the context of an award of over $1 million. As well, the requesting party had complied with the 30-day time period in which to seek a correction to a computational error. Given those facts, that decision does not assist the respondents in this case.

(ii) Second argument: The continuing jurisdiction of the arbitral tribunal

[71] The respondents further submit there was no error in the application judge's conclusion that the Award was not "binding" in light of the September 18, 2016 and June 7, 2017 statements from the tribunal indicating its willingness to consider further claims by the parties.

[72] The tribunal's first letter dealt largely with the issue of the Award's currency. As mentioned, that no longer is an issue.

[73] However, the Beth Din's first letter also stated that the parties could contact the rabbinical court clerk if the parties had "any other claims that the parties wish to be resolved". The second letter purported to stay the Award until Mr. Popack returned to the Beth Din for "a hearing to determine Lipszyc's claim, that Popack continuously breached the Arbitration Agreement, and what are the consequences for breaching the Arbitration Agreement." The application judge regarded those letters from the arbitral tribunal as "an indication that the arbitration process the parties committed to is not yet complete": at para. 13.

[74] The application judge did not explain which provisions of the Model Law or Arbitration Agreement led him to regard the tribunal's statements as supporting his conclusion that the Award was not "binding." Nevertheless, in my respectful view, the application judge erred in law by conflating two distinct issues: first, whether the Award was "binding" for purposes of recognition or enforcement pursuant to the Model Law; and, second, whether the Beth Din had jurisdiction under the Arbitration Agreement to accept new claims from a party following the issuance of the Award. The application judge seemed to reason that if a party approached the arbitral tribunal with a request to consider a new issue some three years after the Award had issued, the Award was not binding for purposes of the Model Law.

[75] With respect, the application judge fell into error by adopting such an approach. It ignored the operation of art. 32 of the Model Law. Article 32(1) of the Model Law states, in part, that "arbitral proceedings are terminated by the final award". Article 32(3) provides that "[t]he mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4)" – i.e., subject to a request for a correction or interpretation of an award, an additional award, or a suspension of setting aside proceedings by a court.

[76] As Born points out at p. 3117, arts. 32(1) and (3) of the Model Law are subject only to "specific, carefully-defined exceptions for corrections and interpretation":

> [S]ave for the particular statutory authorizations contained in the Model Law for corrections or interpretations of the award, a tribunal loses its capacity to act in an arbitration after the final award has been made. Thus, under the Model Law, the rule that an arbitral tribunal becomes "*functus officio*" is expressly mandated, but with specified and carefully-delineated residual statutory authority. [Italics in original and citations omitted.]

[77] As noted, on its face the Award was framed as a final award – the arbitral tribunal ordered the respondents to pay the appellants "the sum of $400,000, whereby the parties are released from each other." In the Award, the Beth Din did not identify any other matter that required determination in the arbitration before the parties were "released from each other."

[78] However, the respondents argue that costs were one such matter. They contend that an arbitral tribunal possesses the jurisdiction to issue cost awards and therefore their request for costs relating to the Ontario court proceedings fell within the continuing jurisdiction of the arbitral tribunal.

[79] As Casey notes, at p. 227: "The Model Law does not address costs or scale of costs." As Born points out at pp. 3093-95, most international arbitration institutional rules grant the tribunal broad powers to award legal costs; even

where they do not, the arbitration agreement should be interpreted to grant impliedly such authority.

[80] In the present case, the Arbitration Agreement does not address the issue of costs. Even if the power to grant costs is to be implied, no evidence was filed on the recognition application that either party had asked the Beth Din to include costs in the Award. Even if they had and the Beth Din simply overlooked that claim, arts. 33(1) and (3) required any such request to be made within 30-days of receipt of the Award. The respondents made no request in that period of time.

[81] The evidence is clear why the respondents did not. Their request that the Beth Din consider a claim for court costs incurred after the issuance of the Award does not involve a matter of correction or an additional award "as to claims presented in the arbitral proceedings but omitted from the award" within the meaning of art. 33 of the Model Law. It is a request to adjudicate a new issue.

[82] Even if it is a new issue, the respondents submit that the language of the Arbitration Agreement supports the application judge's conclusion that the arbitral tribunal was not *functus officio* and the Award therefore was not binding.

[83] The Arbitration Agreement provides: "In the event that after an award is made a dispute between the parties arises as to the interpretation of the award, compliance of the parties, or if a party motions for reargument due to their claim of a judicial error or new evidence etc. the parties agree that the arbitrators shall

have jurisdiction on the matters *to the extent permitted by law*" (emphasis added). The respondents contend that since the Beth Din indicated its willingness to entertain Lipszyc's new issue about post-Award costs, it was exercising its jurisdiction within this language of the Arbitration Agreement, with the result the Award was not binding.

[84] I make no comment on whether, under the Arbitration Agreement, the Beth Din would have jurisdiction to consider Lipszyc's request for costs incurred in the Ontario court proceedings following issuance of the Award. That is a matter for the tribunal to decide. However, in regard to an application for the recognition and enforcement of an award, arts. 35-36 of the Model Law make it clear that it is up to the competent court to determine whether to recognize and enforce an award, including determining whether the award is "binding" on the parties. The final determination of any issue that may be raised under art. 36, including whether the award is "binding", rests with the court, not the arbitral tribunal: *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 (C.A.), at para. 47.

[85] On the facts of this case, the potential jurisdiction of the Beth Din 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 art. 34 is at an end. Mr. Lipszyc's request for post-Award costs does not fall within the categories of matters covered by art. 33 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.

[86] That conclusion is not affected by the Beth Din’s June 7, 2017 statement that the Award is stayed. Under art. 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 – the application judge dismissed the respondents’ motion for a stay, and the respondents have not cross-appealed from that order.

[87] Moreover, as the respondents conceded in their factum, “[t]he Beth Din's stay order does not tell the courts how to behave – the Beth Din has its own religious enforcement procedures, e.g., a contempt order called a ‘sirov’. The award got stayed for purposes of Torah law.”

VIII. DISPOSITION

[88] For the reasons set out above, I would allow the appeal, set aside the order of the application judge, and substitute an order recognizing and enforcing the Award.

[89] In accordance with the agreement of the parties, the appellants are entitled to their costs of the appeal fixed in the amount of $25,000, inclusive of disbursements and applicable taxes. As well, the appellants are entitled to their

costs of the proceeding before the application judge, fixed in the amount of $15,000, inclusive of disbursements and all applicable taxes.

Released: “DD” Jul 12 2018

“David Brown J.A.”
“Doherty J.A.”
“I.V.B. Nordheimer J.A.”

APPENDIX A

THE MODEL LAW

Article 32. Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34(4).

Article 33. Correction and interpretation of award; additional award

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII.
RECOURSE AGAINST AWARD

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award

which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

CHAPTER VIII.
RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.

Article 36. Grounds for refusing recognition or enforcement

(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:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(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; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.