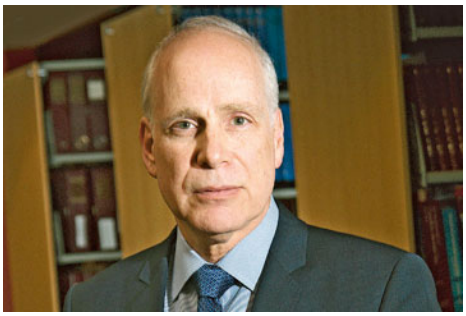
Law Times Anita Balakrishnan

OCA upholds U.S. rabbinical court's award

Province a leader in international commercial arbitration

July 30, 2018 | Written By Anita Balakrishnan



Marv Huberman says a recent Court of Appeal decision is relevant to courts around the world that use Model Law.

The Ontario Court of Appeal has upheld the enforcement of a New York rabbinical court's award in a real estate dispute in Ontario, reinforcing the province's role as a leader in international commercial arbitration law, say lawyers.

In *Popack v. Lipszyc, 2018 ONCA 635,* an appellant, Joseph Popack of New York, and a respondent, Moshe Lipszyc of Ontario, had a 2005 dispute over a joint real estate venture, which included two Ontario shopping malls, Royal York Plaza and Burlington Mall.

The case involved international commercial arbitration in New York rabbinical court tribunal Beth Din (or Bais Din) of Mechon L'Hoyroa, in Brooklyn.

On July 12, Justice David Brown of the Ontario Court of Appeal, with justices David Doherty and Ian Nordheimer concurring, decided that the award presented by the tribunal was finalized or "binding," despite new issues that arose after the award was issued in the rabbinical court in 2013.

While the tribunal proceedings took place in New York, the case was seated in Ontario.

Marvin Huberman, a commercial litigator and chartered arbitrator in Toronto, says the case focused on the issue of when an international commercial arbitration award decided in a cross-border arbitration became "binding" for the purposes of judicial enforcement in Ontario.

Huberman, one of the lawyers who represented the appellants, says the ruling adheres closely to an international standard called Model law.

The decision is clear and exhaustive enough to be relevant to courts around the globe that use Model Law, such as the U.K. and Europe, he says.

"The overall theme is that if the parties have agreed to arbitrate their cases in front of an arbitral tribunal, that's where they are going to go. And the courts are going to take a hands-off approach for the most part, unless there are circumstances, statutes or otherwise, which dictate judicial involvement. That's generally the starting point now, and [now] that's beyond question," says Huberman, who represented Popack and other people, such as family members, who aligned with Popack's interests.

According to a 2008 Ontario Superior Court of Justice decision, *Popack v. Lipszyc, 2008 CanLII 43593*, Lipszyc agreed to sell his stake in their joint real estate business to Popack.

But Popack was concerned that he bought the business at a "fraudulently inflated price," alleging Lipszyc failed to disclose reductions in the original purchase price of the plazas and was taking an "improper" share of the management fees, as well as diverting payments for his own benefit, according to the decision.

Ultimately, Justice Andra Pollak ruled that Popack had not "established a '*prima facie* case' of fraud," and ordered that he had to pay Lipszyc $45,000 in costs. Over the course of the next year, Lipszyc was awarded another $27,500 in costs as Popack and Lipszyc litigated various aspects of their business dispute, according to an April 2009 decision.

However, the rabbinical court decided in 2013 that Lipszyc should pay Popack $400,000 in Canadian funds, according to a 2015 decision. There were also further complications.

Law Times Poll

A judge has ruled the provincial

Without notifying the parties, the arbitral tribunal met privately in 2013 with a rabbi who had earlier acted as a judge and arbitrator at the beginning of the dispute in 2005, according to a 2015 decision.

In 2015 and 2016 appeal decisions, Popack's counsel asserted that a 2013 unannounced meeting with the rabbi was a breach of the agreed-upon procedure, and that the award for $400,000 should be set aside, since Popack didn't know about the meeting when the award was set. Popack sought a higher amount in damages — with the 2016 decision citing a letter from Popack's counsel to the arbitration panel, which says that Popack was "not prepared to lose many millions based on 'ex parte' testimony."

However, Popack lost his bids at the Superior Court of Justice and the Ontario Court of Appeal to have the rabbinical court award set aside in 2015 and 2016 appeals, and Lipszyc was awarded another $25,000 in costs, a 2016 decision said.

With the appeals finished, Popack attempted to enforce the $400,000 award and requested payment in a letter on April 22, 2016, according to the 2018 decision in the case.

Lipszyc responded that he asked 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," according to the 2018 decision.

Justice Grant Dow of the Superior Court of Justice decided in 2017 that given Lipszyc's requests and the Beth Din's responses, the $400,000 sum was not yet binding, and that the arbitration process was not yet complete. Dow wrote in his 2017 decision that he would award Lipszyc $15,000, the "quantum" of costs to be awarded.

But Brown overturned Dow's decision and allowed Popack's 2018 appeal.

By enforcing the Beth Din's award as "binding," the decision also supported a trend that Canada is "pro-enforcement" when it comes to these type of cases, Huberman says.

Neil Wilson, a partner at Stevenson Whelton MacDonald & Swan LLP and one of the lawyers who represented Lipszyc and Lipszyc's wife, Sara, concurred that the decision reinforced Ontario as a "pro-enforcement" regime when it comes to upholding awards reached in arbitration.

"In this specific issue, there are a series of quite narrow grounds for declining to enforce an award. And one of those grounds, which was what the issue was in this case, was that the award had not yet become binding," he says.

"In this case, the court found the award had become binding."

William Horton, who practises as an arbitrator of Canadian and international business disputes, says because the OCA ruling cites applications of Model Law from around the world, it helps establish Ontario as a sophisticated forum for international commercial arbitration, including Model Law and another international framework called the New York Convention, Horton says.

"We had a few moments a couple of years ago where we had, particularly, one decision out of the Court of Appeal — the *Novatrax* decision — which gave people some pause as to whether or not the Ontario bar was arguing these cases properly before the court," he says.

"And, whether or not the court had enough expertise in the area to be able to develop the kind of jurisprudence that we need in Ontario to establish Ontario as a sophisticated jurisdiction to conduct international arbitration."

Brian Casey, an arbitrator at Bay Street Chambers, says the pro-enforcement decision "continues to keep Ontario as an attractive place for arbitration."

"It demonstrates that the Ontario Court of Appeal is well positioned to deal with sophisticated arguments involving the New York Convention and Model Law," says Casey.

The decision could help legal professionals that are drafting arbitration agreements as well, says David Alderson, senior counsel of commercial litigation at Gilbertson Davis LLP, who was not involved in the case.

"This court looks at the terms of the underlying arbitration agreement, and things turn on it," Alderson says.

arbitration | **Corporate/commercial law** | **International/crossborder law** | **litigation**

COMMENTS

RELATED **ARTICLES**

Crown must pay costs after being 'overly enthusiastic'

An Ontario Superior Court judge has ordered the provincial Crown to pay costs to a representative plaintiff over actions taken during cross-examinations during a motion in the certification process of the proposed class action.

Most Popular

- Crown must pay costs after being 'overly enthusiastic'
- OCA upholds U.S. rabbinical court's award
- Monday, July 30, 2018
- Ford schools critics on legislative process

Personal injury lawyers turn to litigation financing

Lawyers who represent plaintiffs in smaller personal injury firms say they are turning to specialized litigation financing to fund disbursements and expert witnesses, as well as other expenses.

RELATED **VIDEOS**

The Countdown to Legalization: Marijuana and corporate/commercial law