

ARBITRAL AWARDS: APPEALS, SETTING ASIDE AND ENFORCEMENT

Colin P. Stevenson
Stevenson Whelton MacDonald & Swan LLP
LSUC Primer on Arbitration April 5, 2016

1. Canadian judges did not tend to defer to domestic and international arbitral awards until after 1986. Indeed

"Until the 1990s commercial arbitration in Canada was not regarded as a substitute for the courts and the provinces were slow to recognize any distinction between domestic arbitration and international arbitration."¹

2. In 1986 Canada:

- (a) acceded to the *U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (June 10, 1959—the "New York Convention");
- (b) enacted federal legislation incorporating the New York Convention into Canadian law (the *U.N. Foreign Arbitral Awards Convention Act*, R.S.C. 1985, c. 16 (2nd supp.); and
- (c) adopted the Model Law on International Commercial Arbitration which had been prepared in June 1985 by the U.N. Commission on International Trade Law (UNCITRAL) and which was later implemented in every province pursuant to provincial undertakings to do so.

¹ J.B. Casey and J. Mills, *Arbitration Law of Canada: Practice and Procedure* (2005) at pp. 2-3.

3. The federal legislation meant that Canada was the first country to adopt legislation based on the UNCITRAL Model Law.²
4. Ontario enacted the Model Law on international commercial arbitrations with few modifications as a schedule to the *International Commercial Arbitrations Act* ("ICAA").³
5. The Model Law was also the basis for Ontario's *Arbitration Act*,⁴ which applies to domestic Canadian arbitrations. This Act, though, has slightly more variations from the Model Law than in the case of international commercial arbitrations.
6. The policy behind the Model Law, and therefore the policy underlying both the ICAA and the *Arbitration Act*, is to recognize the autonomy of the parties to agree upon and implement their own dispute resolution mechanism outside the court processes.
7. The enactment of the ICAA and the *Arbitration Act* meant that by the late 1980s and early 1990s, the Ontario courts were generally much more inclined to enforce parties' express agreements to refer disputes to arbitration and to enforce arbitral awards.⁵

² Pepper, *Why Arbitrate? Ontario's Recent Experience with Commercial Arbitration*, 36 Osgoode Hall Law Journal No. 4 (1988) at pp. 807-845.

³ *International Commercial Arbitrations Act*, R.S.O. 1990 c. I.9 ("ICAA").

⁴ *Arbitration Act, 1991*, S.O. 1991 c. 17.

⁵ See e.g. *Boart Sweden AB v. NYA Stromnes AB* 1988, 41 BLR 295 and *Automatic Systems Inc. v. Bracknell Corp.* 1994 12 BLR (2d) 132 (OCA).

8. The Ontario courts now accept as a general proposition that arbitration agreements should be given a liberal interpretation and readily enforced, and that arbitrators should be allowed to exercise their power to rule first on their own jurisdiction⁶ Ontario (and U.K.) courts, therefore, now lean towards any contractual interpretation that favours arbitration.⁷

9. The virtues of commercial arbitration have been recognized and to some extent welcomed by the Supreme Court of Canada, although subject to express statutory exceptions.⁸ In *Seidel v. Telus* the Supreme Court of Canada recognized that private arbitral justice, because of its contractual origins, is necessarily limited and pointed out that some types of relief can only be provided by a Superior Court.⁹

10. There are limits to party autonomy under both the *Arbitration Act* and the ICAA. It must be recognized that:

- (a) any arbitration procedure must incorporate basic principles of fairness; and
- (b) enforcement of any arbitral award still requires court or state intervention.

⁶ See *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 (OCA) at paras. 21-22; *Ontario Medical Association v. Willis Canada Inc.* 2013, ONCA 745 at para. 20; *Dell Computer Corp. v. Union des Consumateurs* 2007 SCC 34 at paras. 84-85; *Seidel v. Telus Communications Inc.* 2011 SCC 15 at paras. 29 and 114 and *Edmonton (City) v. Lafarge Canada Inc.*, 2015 ABQB 56.

⁷ *CNR v. Lovat Tunnel Equipment* (1999), 174 D.L.R. (4th) 385 (Ont. C.A.); *Anzen Limited v. Hermes One Limited*, [2016] UKPC 1.

⁸ *Seidel v. Telus*, *supra*, at para. 23. For an example of a statutory exception see Ontario's *Consumer Protection Act*, 2002, S.O. 2002 c. 30, Schedule A, ss. 7-8 and 100.

⁹ *Seidel v. Telus*, *supra*, at paras. 7 and 89.

DOMESTIC ARBITRATION IN ONTARIO

11. Ontario's *Arbitration Act*, s. 6, does, however, preclude court intervention in arbitration except to:

- (a) assist the conducting of arbitrations;
- (b) ensure that arbitrations are conducted in accordance with arbitration agreements;
- (c) prevent unequal or unfair treatment of parties to arbitration agreements; and
- (d) enforce awards.

REMEDIES UNDER THE DOMESTIC ACT

12. In Ontario the arbitral tribunal can make interim awards (s. 41) as well as final awards (ss. 38 and 42). The domestic Act expressly provides that the arbitral tribunal may order specific performance, injunctions and other equitable remedies. The parties can, however, choose to contract out of these provisions.

13. Indeed, the parties to the arbitration agreement may contract out of all of the *Arbitration Act's* provisions other than (leaving aside family arbitration):

- (a) s. 5(4) (*Scott v. Avery* clauses—i.e., clauses which require matters to be adjudicated by arbitration before they can be dealt with by a court);
- (b) s. 19 (equality and fairness);
- (c) s. 39 (extension of time limits);
- (d) s. 46 (setting aside award);

- (e) s. 48 (declaration of an invalidity of arbitration); or
- (f) s. 50 (enforcement of award).

APPEALS

14. Parties may, therefore, contract out of any appeal route, although, if an arbitration agreement is silent on the topic, a party may appeal to the court on a question of law with leave, which is strictly limited by s. 45 of the Act and rule 62.02(4).¹⁰

STANDARD OF REVIEW ON APPEAL

15. The Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*¹¹ dealt with both the proper approach to contractual interpretation and the standard of review by the courts in respect of the appeal of a domestic arbitration award.

16. In *Sattva* the Supreme Court restored the arbitrator's decision and decided that the courts should generally take a deferential approach to the arbitrator. An arbitrator's decision need only be reasonable, rather than correct, if the question is one of contractual interpretation, which, as stated by the Supreme Court, is not a constitutional question or a pure question of law of general importance. In such circumstances, the arbitrator's decision will, therefore, only be overturned if it does not meet "the reasonable threshold of justifiability, transparency and intelligibility."¹²

¹⁰ *Arbitration Act*, s. 45(1).

¹¹ 2014 SCC 53.

¹² *Sattva* at para. 119.

17. The result is that, even where the parties have preserved a right of appeal, the prospects for a successful appeal have been substantially reduced. One should also expect that if leave is required to appeal an arbitrator's decision on a question of law (i.e., s. 45(1) of the *Arbitration Act* applies) this will rarely be granted because contractual interpretation should generally be considered a question of mixed fact and law.¹³

18. If parties wish to maintain expansive appeal rights they should do so by inserting an appropriate express contractual provision in the arbitration agreement.

SETTING ASIDE A DOMESTIC AWARD

19. Apart from a possible appeal, a party may apply to set aside an arbitral award.¹⁴ While the parties can contract out of any right of appeal, they cannot avoid s. 46 which sets out mandatory, basic principles of fairness.

20. Thus, an arbitral award may be set aside on the grounds specified in s. 46(1):

1. a party entered into the arbitration agreement while under a legal incapacity;
2. the arbitration agreement is invalid or has ceased to exist;
3. the award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement;

¹³ But *c.f.* a case such as *Ledore Investments Ltd. cob Ross Steel Fabricators and Contractors v. Ellis Don Construction Ltd.*, 2015 ONSC 6536, where Ellis Don was given leave to appeal an arbitrator's finding that letters sent by Ellis Don did not satisfy the notice provision in a subcontract. (The *Sattva* approach does not appear to have been universally accepted by the lower courts.)

¹⁴ S. 46 of the domestic Act.

4. the composition of the arbitral tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with that matter, was not in accordance with the domestic Act;
5. the subject matter of the dispute is not capable of being the subject of arbitration under Ontario law;
6. the applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or the appointment of an arbitrator;
7. the procedures followed in the arbitration did not comply with the domestic Act;
8. an arbitrator committed a corrupt or fraudulent act or there was a reasonable apprehension of bias;
9. the award was obtained by fraud;
10. the award was a family arbitration award which was not enforceable under the *Family Law Act, 1991*, c. 17, s. 46(1).

21. Although the parties cannot contract out of these grounds for review, it should be noted that under ss. 46(3), (4), (5) and (6) waiver and related issues may preclude a successful application to set aside an award. Furthermore, s. 46 is discretionary rather than mandatory, which means that even if a court concludes the domestic arbitral tribunal contravened these basic principles, the court may decline to set the award aside. The terms of s. 46 are comparable to the equivalent provisions of the ICAA and it is likely the Ontario courts will construe these provisions narrowly under both the domestic Act and the ICAA to honour the policy and intent of the Model Law.

TIME LIMIT

22. Any appeal or an award of any application to set aside an award must be commenced within 30 days after receipt of the award except where the allegation involves corruption or fraud.¹⁵

ENFORCEMENT OF A DOMESTIC ARBITRAL AWARD

23. A party which wishes to enforce a domestic arbitral award, whether interim or final, must apply to the court for judgment for recognition and enforcement pursuant to s. 50 of the *Arbitration Act*.

24. The Ontario court must recognize and enforce the award unless:

- (a) the 30 day period for commencing the appeal or application to set aside has not yet elapsed;
- (b) there is a pending appeal or application to set aside;
- (c) the award has been set aside or declared invalid; or
- (d) the award is a family arbitration award.¹⁶

25. Domestic arbitration awards originating elsewhere in Canada are also enforceable in Ontario by means of an application for an order of recognition and enforcement.¹⁷ Note that a

¹⁵ s. 47 of the domestic Act. The time limit cannot be extended: *R&G Draper Farms (Keswick) Ltd. v. 1758691 Ontario Inc. cob ATV Farms*, 2014 ONCA 278 at paras. 16-21.

¹⁶ s. 50(3) of the domestic Act.

¹⁷ s. 50(4) of the domestic Act.

party may object to recognition of a non-Ontario domestic arbitral award on the basis that the subject matter of the award is not capable of being the subject of arbitration under Ontario law.¹⁸

26. The limitation period for seeking recognition and enforcement of an arbitral award is, generally speaking, two years, subject to discoverability.¹⁹

27. Ultimately the court's powers of enforcement are used to enforce arbitral awards.²⁰ Any costs award by an arbitrator will also be enforced in the same manner as any court judgment.²¹

28. In addition to the usual court mechanisms for enforcement²² (e.g., fine, imprisonment, attachment of bank accounts, seizure of assets, judicial²³ or sheriff's sale of real estate), in appropriate circumstances an applicant wishing to enforce an arbitral award might seek an oppression remedy from the court pursuant to s. 248 of the Ontario *Business Corporations Act*, especially if there is concern that the directors, officers or affiliates have

¹⁸ s. 50(4)(d) of the domestic Act.

¹⁹ s. 52 of the domestic Act and *Yugraneft Corp. v. Rexx Management Corp.*, 2010 SCC 19, 2010 1 S.C.R. 649 (dealing with an international arbitration commercial arbitration award).

²⁰ s. 50(8) of the domestic Act.

²¹ s. 56(8) of the domestic Act.

²² Rule 60 of the *Rules of Civil Procedure* and the *Execution Act*.

²³ *Canaccede International Acquisitions Ltd. v. Abdullah*, [2015] ONSC 6553.

improperly prejudiced the applicants by restructuring the corporation's affairs or assets in a manner which precludes or hinders enforcement.²⁴

INTERNATIONAL COMMERCIAL ARBITRATION

29. Ontario's *International Commercial Arbitration Act* by definition only applies to international commercial arbitrations.²⁵ In addition, the ICAA (i.e., the Model Law incorporated as a schedule to the ICAA) provides a more restrictive basis for court intervention into the international commercial arbitral process than the *Arbitration Act* does for domestic arbitration.

30. First, however, it is worth noting that there are many parallel provisions between the ICAA and the domestic Act, including in the context of remedies and enforcement.

31. An international arbitral tribunal may award interlocutory relief, which is described in s. 9 of the ICAA as an interim measure of protection and the provision of security in connection with it.

32. Similarly, in order to be enforced, an international arbitral award, whether interim or final, has to first be recognized by the Ontario court, after which if it is enforceable in the same manner as any judgment or order of the court.²⁶

²⁴ *T. Films SA Future Films (3) Ltd. v. Cinemavault Releasing International Inc.*, 2015 CarswellOnt 112, 2015 ONSC 6608.

²⁵ *R&G Draper Farms (Keswick) Ltd. v. 1758691 Ontario Inc. cob ATV Farms*, *supra*, note 15, at paras. 6-15.

²⁶ ICAA s. 11.

APPEALS

33. The most important difference between the ICAA and the domestic Act is that the ICAA does not provide for any appeal from an international commercial arbitral award.

APPLICATION TO SET ASIDE

34. Article 5 of the Model Law expressly provides that no court shall intervene except where so provided in the Model Law. The only means to challenge an arbitral award under the ICAA is by an application to the court to set the arbitral award aside under Article 34 of the Model Law.

35. Article 34(2) provides that:

(2) An arbitral award may be set aside by the court specified in article 6 [i.e. the Ontario Superior Court] 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.

36. Furthermore, Articles 34(3) and (4) provide that:

(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 [correction and interpretation of an award], 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.

RECOGNITION AND ENFORCEMENT

37. Article 35 of the Model Law mandates the Ontario court to recognize and enforce an international commercial arbitral award, except in the limited circumstances set out in Article

36. Articles 35 and 36 provide as follows:

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.

38. Thus, a party which wants to enforce a foreign arbitral award in Ontario must commence an application for recognition and enforcement of that award.

39. The fact that more than 140 countries have acceded to the New York Convention means that the beneficiary of an international commercial arbitral award (whether granted in e.g., the U.S., the U.K., Canada, Russia or Mexico) can seek enforcement in any of these 140+ countries and should be able to easily have that award recognized or enforced in any one of those participating nations where the respondent has assets.²⁷

40. As Justice Feldman noted in *Schreter v. Gasmac Inc.*²⁸ at para. 32:

"The purpose of enacting the Model Law in Ontario and in other jurisdictions is to establish a climate where international commercial arbitration can be resorted to with confidence by parties from different countries on the basis that if the arbitration is conducted in accordance with the agreement of the parties an award will be enforceable if no defences are successful raised under Articles 35 and 36."

²⁷ *Sociedade-de-fomento Industrial Private Ltd. v. Pakistan Steel Mills Corp. (Private) Ltd.*, 2014 BCCA 205 (leave to appeal to SCC denied); *Chevron Corporation v. Yaiguaje* (2015 SCC 42) confirms there can be no jurisdictional issue based on any alleged lack of a "real and substantial connection" between the parties and Canada.

²⁸ (1992), 7 O.R. (3d) 608 at para. 32.

41. The Court of Appeal for Ontario has held that a party may successfully enforce a foreign arbitral award in Ontario even though the same party is challenging the very same award in a foreign court.²⁹

FOREIGN ISSUE ESTOPPEL

42. The fact that a successful party may seek to enforce an international arbitral award in various countries can sometimes create contradictory results. For example, an arbitral award that was set aside by the UK Supreme Court has been held to be enforceable by the Paris Court of Appeal.³⁰

43. In *Yukos Capital S.A.R.L. v. OJSC Rosneft Oil Company*³¹ the English Court of Appeal considered whether it should follow a decision of the Dutch Court of Appeal to the effect that it would not recognize a decision of a Russian court, setting aside an international commercial arbitration award in Russia, because in the Dutch court's view the Russian court was "partial and dependent" on the executive.

44. The English Court of Appeal refused to recognize this finding by the Dutch Court of Appeal on the basis that the public policy of England differed from the public policy of the Netherlands. Thus, the English court had to make its own independent determination with respect to this matter.

²⁹ *Accentuate Ltd. v. Asigra Inc.*, 2010 ONSC 3364; 2011 ONCA 99.

³⁰ *Dallah v. Pakistan*, February 17, 2011, No. 09-28533.

³¹ [2012] EWCA Civ 855.

45. The English Court of Appeal held that the primary requirements for foreign issue estoppel were:

- (a) the foreign judgment must be final on the merits and decided by a court of competent jurisdiction;
- (b) the parties must be identical;
- (c) the issue in the earlier action must be identical to that in the later action;
- (d) even if these requirements are met the court has as residual discretion to refuse to give effect to a foreign finding in appropriate circumstances.³²

LIMITATION PERIOD

46. The Supreme Court of Canada in *Yugraneft Corp.*³³ had to determine the enforceability of a Russian arbitral award in favour of Yugraneft against an Alberta company, Rexx, in the amount of US\$952,614.43. Yugraneft applied more than three years after the Russian arbitral award pursuant to Alberta's *International Commercial Arbitration Act* for an order recognizing and enforcing the Russian arbitral award in Alberta.

47. The Supreme Court in *Yugraneft* confirmed that foreign arbitral awards are not equivalent to domestic judgments and therefore require a recognition order (or "homologation") before they can be the subject of enforcement measures.

³² *Yukos Capital S.A.R.L. v. OJSC Rosneft*, *supra*, note 31, at para. 147. *C.f. Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 and *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19.

³³ *Yugraneft Corp.*, *supra*, note 19.

48. The Supreme Court concluded that Alberta's two year limitation period applied to foreign arbitral awards with the result that Yugraneft's action was barred by Alberta's limitation statute.

49. It is worth noting, however, that the commencement of any limitation period is subject to discoverability rules. Thus, if an applicant seeking to enforce an arbitral award did not reasonably anticipate the respondent had assets within a particular jurisdiction until a later time, it does not need to worry about the limitation period starting until that specific point in time.

50. Furthermore, the limitation clock does not start ticking until the three months time limit under the Model Law to apply to the local courts to have an award set aside has run its course.³⁴

APPROPRIATE PROCEDURE

51. The appropriate procedure to enforce an international arbitral award in Ontario is by means of an application to recognize the foreign arbitral award, not to recognize any foreign judgment recognizing that award in any other jurisdiction.³⁵ It does not matter that a foreign arbitral award has been recognized (or domesticated) by an order of a foreign court.

³⁴ One can assume Ontario's limitation period and discoverability rules apply to the enforcement of foreign arbitral awards notwithstanding s. 16 of the *Limitations Act, 2002* which removes any limitation period for judgments. See also *Commission de la Construction du Québec v. Access Rigging Services Inc.*, 2010 ONSC 5897 and *PT ATPK Resources TBK (Indonesia) v. Diversified Energy and Resource Corp.*, 2013 ONSC 5913, 2013 CarswellOnt 13545. Note that Ontario's *Limitations Act, 2002* omits any reference to the ICAA and s. 11(1) of the ICAA provides that an arbitral award recognized by the court is enforceable in the same manner as a judgment or order of the court. See also *R&G Draper Farms (Keswick) Ltd. v. 1758691 Ontario Inc. cob ATV Farms*, 2014 ONCA 278; *Edmonton (City) v. Lafarge Canada Inc.*, 2015 ABQB 56.

³⁵ *ACTIV Financial Systems, Inc. v. Orbixa Management Services Inc.*, 2011 ONSC 7286.

THE STANDARD FOR JUDICIAL INTERVENTION UNDER ARTICLE 34/ARTICLE 36 OF THE MODEL ACT

52. The Model Law, like the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards it is based on, favours the enforcement of arbitral awards. Articles 34 (setting aside) and 36 (enforcement) work in tandem and provide that an award may be challenged or enforcement refused only on certain limited grounds.³⁶

53. In Ontario in *Corporacion Transnacional*³⁷ Justice Lax rejected a challenge to an award on various grounds, including the alleged breach of Ontario's public policy:

33 Under the Model Law, the concepts of fairness and natural justice enunciated in Article 18 significantly overlap the issues of inability to present one's case and conflict with public policy set out in Articles 34(2)(a)(ii) and (b)(ii). Since Article 34(2)(b) (ii) is to be interpreted to include procedural as well as substantive justice and is not to exclude the manner in which an award is arrived at, it seems to me that the grounds for challenging an award under Article 18 are the same as they are under Article 34(2)(b)(ii). Accordingly, in order to justify setting aside an award for a violation of Article 18, the conduct of the Tribunal must be sufficiently serious to offend our most basic notions of morality and justice.

34 Instances of corruption, bribery or fraud referred to in the Report of the United Nations would not only offend the essential morality of Ontario, but would offend shared notions of justice that are common to legal systems throughout the world. No court would hesitate to set aside an award arrived at in this manner. In considering other kinds of conduct, it is important to bear in mind that the Report of the United Nations may be used as an interpretive aid to the Model Law and it refers to "similar serious cases". In my view, this contemplates that judicial intervention for alleged violations of the due process requirements of the Model Law will be warranted only when the Tribunal's conduct is so serious that it

³⁶ *Corporacion Transnacional de Inversiones SA de C.V. v. STET, S.p.A.* (1999), 45 O.R. (3d) 183 (S.C.J.), at paras. 26-29; *Gasmac, supra*, note 28, at para. 12. Article 36 was discussed recently in *Assan Co. India Ltd. v. Canoro Resources Ltd.*, 2014 BCSC 370.

³⁷ *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International, supra*, note 36, at pp. 190 h, 191c, 192b, 192d, 194d, 194g, 203c, 204c and 204f.

cannot be condoned under the law of the enforcing State. With all of these principles in mind, I turn to the more detailed arguments advanced by COTISA.

.....

68 whether or not the Awards are legally wrong is not a basis for setting them aside. On this point, I adopt without reservation the following comments of this court in *Schreter v. Gasmac Inc.*, *supra*, at p. 623:

... [I]f this court were to endorse the view that that it should re-open the merits of an arbitral decision on legal issues decided in accordance with the law of a foreign jurisdiction and where there has been no misconduct, under the guise of ensuring conformity with the public policy of this province, the enforcement procedure of the Model Law could be brought into disrepute.

54. Apart from the fact that there are limited grounds to set aside an arbitral award under Article 34, the court also has a discretion not to set aside an award even if Article 34 is breached. The exercise of this discretion must be informed by the principle of party autonomy and the strong policy preference of recognizing and enforcing international commercial arbitral awards.³⁸

55. It is interesting to note that some states, including France and Germany, disagree that any discretion exists. Most states, however, acknowledge the existence of a judicial discretion under Articles 34 and 36, although there are nuances in the caselaw as to when and whether a court in exercising its discretion to recognize a foreign arbitral award (or to enforce that award) should take into account whether the breach had a material impact on the arbitral decision.³⁹

³⁸ *Popack v. Lipszyc*, 2016 ONCA 135.

³⁹ See *Paklito Investments Ltd. v. Clocknew East Asia Ltd.*, 1993 2 HKLR 39 (CFI) at para. 74; *Brunswick Bowling and Billiards Corp. v. Shanghai Zhonglu Industrial Co. Ltd. and Anor*, 2009 HK CFI 94 at paras. 34-35; *Pacific China Holdings Ltd. (in liquidation) v. Grand Pacific Holdings Ltd.*, 2012 HKCA 200 at para. 101 and 2013

56. The court's discretion not to set aside (under Article 34) or not to enforce (under Article 36) was raised in the BC (NAFTA) case of *United Mexican States v. Metalclad Corp.*,⁴⁰ the BC Court of Appeal case of *Quintette Coal*,⁴¹ and the Québec Court of Appeal case of *Rhéaume c. Société d'investissements l'Excellence inc.*⁴² In the latter case the Québec court stated:

"A court called upon to adjudicate such a proceeding must balance the nature of the breach in the context of the arbitral process that was engaged, determine whether the breach is of such a nature to undermine the integrity of the process and assess the extent to which the breach had any bearing on the award itself."

57. The factors to be considered by a judge in exercising that discretion were recently addressed in depth by the Court of Appeal for Ontario in *Popack v. Lipszyc*.⁴³

58. In considering its discretion under Article 34, a Canadian court will consider the extent to which the breach undermines the fairness or the appearance of fairness of the arbitration.⁴⁴

HKCFA 13 at para. 6; *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*, 2010 UKSC 46 at paras. 68-69 and 127-131.

⁴⁰ 2001 BCSC 664 at paras. 129-131.

⁴¹ *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), [1991] 1 WWR 219 at 229 (BCCA); leave to appeal refused [1990] SCCA No. 431.

⁴² 2010 QCCA 2269 at para. 61.

⁴³ *Popack v. Lipszyc*, 2016 ONCA 135.

⁴⁴ *Popack, supra*, at para. 31.
The United Mexican States v. Metalclad Corporation, 2001 BCSC 664, 14 D.L.R. (3d) 285 at paras. 127-129.
Rhéaume, supra, at para. 61.

59. If, however, the court is satisfied that the award was made in circumstances where there was no valid arbitration agreement, then the judge will have considerably less discretion to maintain the award than where the breach is a procedural error made in the course of an otherwise proper arbitration.⁴⁵

60. The Court of Appeal for Ontario in *Popack* adopted the reasoning of the New Zealand Court of Appeal in *Kyburn Investments Limited v. Beca Corporate Holdings Limited*:⁴⁶

"While the discretion in Article 34 is of a wide and apparently unfettered nature it must be exercised in accordance with the purposes and policy of the act which emphasize the finality of arbitral awards and reduce the scope for a curial intervention in accordance with the intentions of the parties to arbitration . . .
(para. 28)

No single factor is decisive or necessary for an award to be set aside. Sometimes the breach will be sufficiently serious as to speak for itself. In other cases the court will need to consider the materiality of the breach and evaluate whether it was likely to have affected the outcome. Other factors may be relevant to the exercise of the discretion such as the likely cost of holding a rehearing."
(para. 47)

61. The Court of Appeal for Ontario also relied on the reasoning of the Federal Court of Australia in *TCL Air Conditioner (Zhongshan) Co. Ltd. v. Castel Electronics Pty Ltd.*⁴⁷ in which the court stated that the object of the exercise was to prevent "real unfairness and real practical injustice". Notably, the Federal Court of Australia stated, at para. 154:

"The notion of prejudice or unfairness does not involve rerunning the arbitration and quantifying the causal affect of the breach of some rule. The task of the court

⁴⁵ *Popack, supra*, at para. 30.

Carr v. Gallaway Cook Allan, 2014 NZSC 75 at paras. 76-80; rev'g on other grounds 2013 NZCA 11.
Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan, 2010 UKSC 46, at paras. 67-79.

⁴⁶ 2015 NZCA 290, paras. 28 and 47.

⁴⁷ 2014 FCAFC 83.

in assessing prejudice or unfairness or practical injustice is not to require proof of a different result. If a party has been denied a hearing on an issue for instance it is relevant to inquire whether in a real and not fanciful way that could reasonably have made a difference. It should be recalled that the proper framework of analysis for the IAA is the setting aside or non-recognition or enforcement of an international commercial arbitration. In that context it is essential to demonstrate real unfairness or real practical injustice."

62. The end result is that a Canadian court is unlikely to set aside an international arbitral award for a breach of Article 34 unless there was no valid arbitration agreement or the procedural breach produced "real unfairness" or "real practice injustice".⁴⁸

63. As stated by Justice Doherty in *Popack*, in the case of a procedural breach by the arbitrators:

"The essential question remains the same—what did the procedural error do to the reliability of the result or to the fairness or the appearance of the fairness of the process?"⁴⁹

64. In *Popack v. Lipszyc* the tribunal's decision was not set aside. Although the tribunal had met a witness in the absence of the parties and thereby contravened Article 34(2)(a)(iv), notwithstanding that the breach was "significant" (Justice Matheson at first instance, para. 33) and there was a "possibility of prejudice" to Mr. Popack (Justice Matheson at first instance, para. 69) nonetheless in the circumstances the meeting did not produce real unfairness or real practical injustice.

⁴⁸ See *Popack, supra*, at paras. 35, 36, 39, 42 and 45.

⁴⁹ *Popack, supra*, para. 45.

65. The factors properly taken into account by the application judge and endorsed by the Court of Appeal were:

- (a) the panel had not met with the witness on its own initiative;
- (b) the absence of a transcript of the proceedings (as chosen by the parties) made it difficult to know exactly what had happened and the panel could well have been under an honest misapprehension that it could meet with the witness without the parties;
- (c) the witness was not aligned with either party;
- (d) the complainant, Popack, could not show actual prejudice, although there was a possibility of prejudice for both sides flowing from the *ex parte* meeting;
- (e) setting aside the award would mean added costs of another eight week hearing;
- (f) a material witness had died;
- (g) the complainant, Popack, had become aware of the meeting with the witness before the tribunal's decision was issued and had made only a qualified objection, i.e., he had requested a hearing only if the panel considered the evidence relevant to the tribunal's decision; and
- (h) the complainant, Popack, had communicated *ex parte* with the tribunal without notice to the respondent, Lipszyc, thereby himself contravening the procedural rules and raising other fairness concerns.⁵⁰

⁵⁰ *Popack, supra*, para. 23, and *Popack* at first instance, paras. 66-71.

OTHER TREATIES

66. Apart from the New York Convention and the Model Law, there are various other international multilateral and bilateral treaties which provide for arbitration and which may be relevant to a particular dispute. See, for example, the *International Convention on the Settlement of Investment Disputes* between states and nationals of other states (the ICSID Convention) which was ratified by Canada on November 1, 2013 and implemented in Ontario by the *Settlement of International Disputes Act*, S.O. 1999 c. 12, Schedule "D". Investor-state dispute resolution mechanisms are also mandated in various bilateral treaties, including the epitome for investment claims, NAFTA's chapter 11. These treaties sometimes include separate rules for setting aside or annulment applications.