

CHALLENGES TO ARBITRAL AWARDS IN ONTARIO
UNDER THE MODEL LAW

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January 8, 2010

As recent economic trends have shown, the nations of the world are irretrievably connected. Events in one country may have consequences in another, a sign that international commerce and business are pervasive and affects us all. A complex system of treaties, rules and laws govern how business and commerce are conducted and, importantly, how the inevitable disputes that arise are dealt with.

The United Nations' efforts to establish a uniform mechanism for the resolution of international commercial disputes was codified in the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*¹, the objective of which was to provide parties with relative confidence that, in conducting business across borders, a universal set of principles would apply amongst all nations in the resolution of commercial disputes in a manner consistent with principles of justice and fairness. From the Convention arose the *UNCITRAL Model Law on International Commercial Arbitration*², adopted by the United Nations Commission on International Trade Law on June 21, 1985. The Model Law has now been adopted by most nations of the world as the basis and law for the resolution through arbitration of international commercial disputes.

The Model Law was adopted in the Province of Ontario by the promulgation of the *International Commercial Arbitration Act*.³ The Model Law is appended as a schedule to the Act and provides, in part, as follows:

¹ United Nations, 1958.

² United Nations Document A/40/17, annex 1.

³ R.S.O. 1990, c. I.9 (hereinafter "Act").

Article 5 – Extent of Court Intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 18 – Equal Treatment of Parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

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 decision on matters submitted to arbitration can be separated from those not so submitted, only that party 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 to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.⁴

Ontario being a signatory to the Model Law, the courts in this province are expected to show considerable deference to arbitral decisions and restraint in the manner in which they intervene, if at all. Article 5 of the Model Law contains mandatory language which precludes a court from intervening except in the limited circumstances set out therein.⁵ That Article “expressly limits the scope for judicial intervention except by application to set aside the award or to resist enforcement of an award under one or more of the limited grounds specified in Articles 34 [in the case of an application to set aside an award] or 36 [in respect of an application to resist enforcement of an award].”⁶ The grounds set out in the two Articles are essentially the same.

The limited grounds, for our purposes, resolve themselves to the following:

1. where a party has not been treated by the arbitral tribunal with equality in the opportunity given to it to present its case fully;⁷ that is, where there has been a denial of natural justice or due process; and,
2. where the award conflicts with the public policy of the state in which it is sought to be enforced (Ontario in the present case).⁸

⁴ *UNCITRAL Model Law on International Commercial Arbitration*, adopted by the United Nations Commission on International Trade Law on June 21, 1985 (hereinafter “Model Law”).

⁵ Model Law, Article 5.

⁶ *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A.*, 1999 CarswellOnt 2988 at paragraph 21 (hereinafter “*STET*”).

⁷ In contravention of Article 18 of the Model Law and as contemplated by Article 34(2)(ii) thereof.

⁸ See Articles 34(2)(b)(ii) and 36(2)(b)(ii). There are other grounds provided for in Articles 34 and 36, such as incapacity of a party to the arbitration (34(2)(a)(i) and 36(2)(a)(i)) or the exercise of jurisdiction by the arbitral tribunal beyond that permissible by its terms of reference (34(2)(a)(iii) and 36(2)(a)(iii)). Also, where proper notice of the arbitration proceeding has not been given (34(2)(a)(ii) 36(2)(a)(ii)) and or the composition of the arbitral tribunal is inconsistent with the agreement of the parties (34(2)(a)(iv) and 36(2)(a)(iv)). One might expect that challenges under these other grounds do not come before the courts with frequency and that such challenges are more frequently dealt with by the arbitral tribunal itself. The grounds themselves are derived from Article V of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, United Nations Conference on International Commercial Arbitration, United Nations, 1958.

These two grounds are not always distinguishable, and it has been found that they overlap. In *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A.*, a decision of the Ontario Superior Court of Justice (the Court designated by the Act to determine challenges to arbitration awards), Justice Lax states that:

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.⁹

In essence, the doctrines of fairness and due process are so fundamental to our system of law that to be deprived of these in an arbitral (or any other) proceeding is offensive to us and conflicts with our public policy. Arguably, whether a challenge is premised on a lack of procedural fairness or a less tangible "public policy" argument, it is treated by the courts in the same manner. Indeed, Article 34(2)(b)(ii) is intended to cover both substantive and procedural matters.¹⁰

What constitutes a breach of due process is not always easy to determine. In *STET*, Justice Lax found that:

Guidance as to the kind of conduct which could justify setting aside an award under the Model Law for the failure to observe procedural fairness can be found in commentary on the meaning of public policy under Article 34(2)(b)(ii) since the latter is intended to include both substantive and procedural aspects. This is evident from the following extract from the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (June 3-21, 1985) at p. 63, *The Canada Gazette*, Part 1, vol. 120, No. 40, October 4, 1986, Supplement 1988, c.30, S.13:

It was understood that the term "public policy", which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted,

⁹ *STET*, supra, at paragraph 33.

¹⁰ *STET*, supra, at paragraph 32.

in that connection, that the wording “the award is in conflict with the public policy of this State” was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at.¹¹

Further, in *STET*, Justice Lax goes on to conclude that:

The broad deference and respect to be accorded to decisions made by arbitral tribunals pursuant to the Model law has been recognized in this jurisdiction by the Ontario Court of Appeal in *Automatic Systems Inc. v. Bracknell Corp.* (1994), 113 D.L.R. (4th) 449 (Ont. C.A.) at p. 456:

The purpose of the United Nations Conventions and the legislation adopting them is to ensure that the method of resolving disputes in the forum and according to the rules chosen by the parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale: 40 C.P.R. (3d) 161, 4 C.P.C. (3d) 99 (Alta. C.A.).¹²

The onus of proving that an award should be set aside, not unexpectedly, rests with the party that seeks to have it set aside. If that onus is not met, a court is required, expressly by Articles 34 or 36, to recognize and enforce the challenged arbitral award.¹³ Courts in Ontario have, accordingly, exercised restraint in assessing challenges to arbitral awards and have generally shown the deference that is provided for in the Model Law.

Justice Lax continues:

The public policy ground for resisting enforcement of an arbitral award has also been narrowly construed. In *Schreter v. Gasmac Inc.* (1992), 7 O.R. (3d) 608 (Ont. Gen. Div.), Feldman J., as she then was, states at p. 623:

The concept of imposing our public policy on foreign awards is to guard against enforcement of an award which offends our local principles of justice and fairness in a fundamental way, and in a way which the parties could attribute to the fact that the award was made in another jurisdiction where the procedural or substantive rules diverge markedly from our own, or where there was ignorance or corruption on the part of the Tribunal which could not be tolerated or condoned by the courts.

At p. 624 of *Schreter v. Gasmac Inc.*, *supra*, the court quotes with approval from the decision of the United States Court of Appeals Second Circuit in *Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150 (U.S. 2nd Cir. N.Y. 1984) at p. 152. It was held there that public policy grounds for the setting aside of an award should apply only where enforcement would violate our “most basic notions of morality and justice”. In this jurisdiction, the Ontario Court of Appeal has emphasized the care which courts must exercise in relying upon public policy as a reason for refusing enforcement of a foreign award. In *Boardwalk Regency Corp. v. Maalouf* (1992), 6 O.R. (3d) 737 (Ont. C.A.), the court states at p. 743:

¹¹ *STET*, *supra*, at paragraph 32.

¹² *STET*, *supra*, at paragraph 22.

¹³ *STET*, *supra*, at paragraph 21.

The common ground of all expressed reasons for imposing the doctrine of public policy is essential morality. This must be more than the morality of some persons and must run through the fabric of society to the extent that it is not consonant with our system of justice and general moral outlook to countenance the conduct, no matter how legal it may have been where it occurred.¹⁴

In *STET* the court concluded then that, for a challenge to an arbitral award to succeed on the basis of public policy, the impugned award must “offend the most basic and explicit principles of justice and fairness in Ontario, or evidence intolerable ignorance or corruption on the part of the Arbitral Tribunal.” The award must, and the party seeking to set it aside must establish, that it is “contrary to the essential morality of Ontario”.¹⁵ As the learned justice concludes, corruption, bribery or fraud not only “offend the essential morality of Ontario”, but of all those who share similar concepts of justice.¹⁶

The Ontario Court of Appeal revisited the issue in 2005, in its decision in *United Mexican States v. Karpa*.¹⁷ *Karpa* was decided in the context of an arbitration that took place under the provisions of the North American Free Trade Agreement.¹⁸ At issue was whether Mexico had preferred domestic exporters of cigarettes in the granting of tax concessions over a foreign exporter operating in that country. In discussing the standard of review to be applied to an arbitral award, the court concluded that:

Notions of international comity and the reality of the global marketplace suggest that courts should use their authority to interfere with international commercial arbitration awards sparingly.¹⁹

The court went further, however, in stating that, apart from principles of international comity, the law in Canada recognized a great deference to specialized tribunals that have

¹⁴ *STET*, supra, at paragraphs 28 and 29. Emphasis added.

¹⁵ *STET*, supra, at paragraph 30.

¹⁶ *STET*, supra, at paragraph 34. *STET* was upheld by the Ontario Court of Appeal (2000 CarswellOnt 3315); leave to appeal to the Supreme Court of Canada denied (2001 CarswellOnt 5612).

¹⁷ 2005 CarswellOnt 32 (hereinafter “*Karpa*”).

¹⁸ 1992, C.T.S. 1994/2.

¹⁹ *Karpa*, supra, at paragraph 34.

particular expertise in the subject matter of the disputes placed before them. Even greater deference should be accorded, the court reasoned, to the awards of tribunals that were consensually empanelled and empowered.²⁰ It also concluded that Article 34 of the Model Law restricted “judicial review to traditional jurisdictional grounds”, such as to render such review not unlike that of any decision of a domestic administrative tribunal. The court did, however, recognize that Article 34 also empowers it to set aside an arbitral decision if the subject matter of same is not capable of resolution by arbitration under Ontario law or if the award in question conflicts with the public policy of Ontario.²¹

In *Karpa*, where the court found that the subject matter of the arbitration was “heavily fact laden”, where the tribunal is in the best position to ascertain the facts and where there is sufficient evidence to support its findings of fact, “the court must defer to the tribunal”.²²

The deferential approach has been applied as late as 2009 in cases such as *Abener Energia S.A. v. SunOpta Inc.*²³, a decision of Justice Perell of the Ontario Superior Court of Justice. In *Abener* the applicant sought to stay an arbitral award rendered in Spain on the basis that another arbitration involving related corporate entities was to take place in the United States. The applicant contended that the American arbitration might result in an award in its favour that could be set off against the Spanish arbitral award that had been rendered against it. The applicant contended that, on equitable grounds, the Spanish award should be stayed pending the determination of the American arbitration. Taking the applicant’s case at its highest, the court concluded that there was no equitable or other

²⁰ *Karpa*, supra, at paragraph 37.

²¹ *Karpa*, supra, at paragraph 39.

²² *Karpa*, supra, at paragraphs 42 and 60.

²³ 2009 CarwellOnt 3449.

basis to interfere with the first award. Again, principles of deference and respect for the arbitral process prevailed.

Notwithstanding the significant deference that is shown by the courts to arbitral tribunals and their decisions, arbitral tribunals empowered under the Model Law do have certain obligations. They have a duty to ensure the equal treatment of parties; to ensure that minimum procedural standards are observed; and that their decision is not contrary to public policy.²⁴ If an arbitral tribunal fails to discharge any of the enumerated duties, courts may intervene to set aside its award.²⁵ If the principles of fundamental justice are breached by the tribunal, “the entire resulting decision is invalid”.²⁶

One might glean that, while the courts in Ontario afford significant deference to arbitral awards, they do not by virtue of same abdicate their duty to ensure that justice is done and that it is also seen to be done. The same doctrines of due process and fairness that apply to the conduct of any judicial or administrative proceeding in this province are also applied to the conduct of international commercial arbitrations. Indeed, not do so would violate, as the courts have said, the essential morality of Ontario and, in consequence thereof, be in breach of our public policy.

A similar argument may be made where the impugned award is the result of a compromised arbitration system, be it through bribery, coercion or any other form of corruption. Again, as stated by our courts, any outcome resulting from such a compromised process would offend not only the morality and public policy of Ontario, but of all other jurisdictions that adhere to the same principles of justice.

²⁴ *Bayview Irrigation District No. 11 v. United Mexican States*, 2008 CarswellOnt 2682 at paragraph 14 (hereinafter “*Bayview*”).

²⁵ *Bayview*, at paragraph 14.

²⁶ *Xerox Canada Ltd. v. MPI Technologies Inc.*, 2006 CarswellOnt 7850, at paragraph 110.

The above having been said, it appears that instances where our courts have found it necessary to intervene are not numerous. The overriding principle is one of deference and our courts have compared their duty in reviewing an award to the curial deference accorded to our own administrative tribunals.

All of which ultimately makes sense. Parties that agree to what amounts to a private dispute resolution mechanism and where they are permitted to freely select the method of resolution and the parties that are to preside over it, should, absent extraordinary circumstances, be held to their bargain. Recourse to the courts should be the exception rather than the rule. It would seem that the Model Law contemplates precisely such a methodology.

TABLE OF CASES

1. *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A.*, 1999 CarswellOnt 2988.
2. *United Mexican States v. Karpa*, 2005 CarswellOnt 32.
3. *Bayview Irrigation District No. 11 v. United Mexican States*, 2008 CarswellOnt 2682.
4. *Xerox Canada Ltd. v. MPI Technologies Inc.*, 2006 CarswellOnt 7850.
5. *Abener Energia S.A. v. SunOpta Inc.*, 2009 CarwellOnt 3449.

STATUTES, CONVENTIONS AND REGULATIONS

1. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, United Nations, 1958.
2. *UNCITRAL Model Law on International Commercial Arbitration*, United Nations Document A/40/17, annex 1.
3. *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9.