Three Beneficial Terms in Today's Arbitration Clause

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By Maria Eugenia Ramirez and Roland M. Potts

According to a recent study, as many as seventy-five percent (75%) of contracts entered into by the 500 largest global multinationals contain arbitration clauses.[fn]"Hogan Lovells commissioned a research study among the FT Global 500 largest global multinationals, as well as a selection of its own multinational clients, during the fourth quarter of 2013 to capture metrics and opinions in relation to the management of cross-border disputes. Interviews were conducted among 146 general counsel, senior lawyers, and executives across the Americas, Europe, the Middle East, and Asia Pacific. Average annual revenue of respondents was US$16.5 billion." Trends in Complex Cross-Border Disputes, http://www.hoganlovells.com/globalcurrents/, 2014[/fn] The arbitration clauses are as diverse and varied as the agreements containing them and the parties who enter into such agreements. What is certain is that within the ever increasing global landscape of business, the "arbitration clause" continues to be the security blanket of business development and cross-border relations between parties to international agreements. Equally evident is that with the increase in international arbitration, there have been continual challenges to the enforcement of arbitral awards by the losing party in an effort to derail collection efforts on arbitral awards.

Aside from including the governing law in an arbitration clause, and understanding its implications, three additional terms in a well-crafted arbitration clause could have an impact on enforcement of an arbitral award. These three terms are: (1) language entitling an arbitral award to finality or non-appeal; (2) language creating a favorable "seat of arbitration;" and (3) if in the United States, language incorporating the "Inter-American Convention on International Commercial Arbitration" ("Inter-American Convention") and "New York Convention" (together, the "Conventions") into the contract, expressly or impliedly. While the permutations of challenges are as mixed as the situations they arise from, these three terms go a long way to stave off a challenge to enforcement of an arbitral award.

When a party suffers an adverse arbitral award, and the winning party seeks to enforce collection on that award, the losing party may challenge the enforcement of the arbitral award. In those circumstances, there is solace in knowing your arbitration clause is as ironclad as it can be. *Juan Jose Castillo Bozo v. Leopoldo Castillo Bozo and Gabriel Castillo Bozo, 12-cv-24174-Williams*, in the United States District Court for the Southern District of Florida, 2013 is an example of the importance of including terms of finality, the seat of arbitration, and the Conventions in an arbitration clause.

The Facts

In 2008, three brothers, Juan Jose Castillo Bozo ("Petitioner"), Leopoldo Castillo Bozo, and Gabriel Castillo Bozo (together, the "Respondents"), entered into a stock purchase agreement. The agreement was relatively straight forward. Petitioner was to transfer his interest in Venezuelan companies to Respondents in exchange for US $25,000,000.00. The agreement also contained an arbitration clause, which required, *inter alia*:

1. The Agreement to be **governed by the laws of Florida**
2. Any and all disputes settled through arbitration conducted by the American Arbitration Association ("AAA") in accordance with the **AAA's International Arbitration Rules**
3. **Seat** of Arbitration to be **Miami, Florida**
4. Panel's decision "**shall be binding** for the Parties and compliance therewith is mandatory. The decision of the arbiters **shall not be subjected to appeal** and must be processed and adopted so that it may be **executed in any jurisdiction** that may be involved in the dispute, particularly in the Bolivian Republic of Venezuela and in the United States of America."

A dispute arose with respect to payment, requiring Petitioner to file a Request for Arbitration in December 2010 before the AAA. Petitioner was successful in obtaining a favorable outcome in the arbitration proceeding, and on November 13, 2012, Petitioner obtained a Final Award for full payment of the US $25,000,000.00 under the stock agreement. Within a week, Petitioner filed an action in the United States District Court for the Southern District of Florida to enforce the Final Arbitration Award under the authority granted to that court by the Inter-American Convention and 9 U.S.C. § 301, *et. seq.* Immediately thereafter, Respondents began their assault on the award.

Subsequent to the filing of the Southern District action, despite the fact that the arbitration clause called for Florida law to apply, and that the seat of the arbitration was Miami, Florida, Respondents began an action in Venezuela to vacate the arbitral award on Venezuelan constitutional and public policy grounds. The Venezuelan court suspended the effect and enforcement of the award, ordering a stay of the effects of the award and barring enforcement in Venezuela. The Final Arbitral Award, the Venezuelan court declared, was unenforceable, null and void. That court went on to urge foreign jurisdictional authorities not to enforce or recognize its contents or else be in contempt of the Venezuelan court's order. Respondents then sought enforcement of the Venezuelan Court's order in the Southern District of Florida, seeking dismissal of the entire action brought by Petitioner in November 2012.

The Southern District Court's Order

The Court relied on United States and Florida law as well as the stock agreement between the parties in ultimately denying the Respondents' challenge stemming from the Venezuelan court annulment, and granted Petitioner's request for Confirmation of the Final Arbitral Award.[fn]A copy of the Order of the Court can be found here.[/fn] The Court analyzed some of the limited grounds upon which refusal of recognition of an arbitral decision can be granted under Article 5 (1) (a) (d) (e) and (2) (b) of the Inter-American Convention:

a. "[T]hat the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified, under the law of the State in which the decision was made."

d. "That…the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties;"

e. "That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made."

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b. If “recognition or execution of the decision would be contrary to the public policy (“order public”) of that State.”

The Court then addressed Respondents’ four primary arguments, denying each one, in turn. First, Respondents argued that compliance with Venezuelan law was a condition of enforceability of the arbitration award under the terms of the stock agreement and, since the Venezuelan court had found constitutional violations, the Award did not comply with Venezuelan law. Because the arbitration clause required that the award be enforceable in every jurisdiction, Respondents argued, the award had to be valid under each jurisdiction’s law. *Ipso facto*, the Award could not be enforced.

The Court ultimately rejected this “strained reading” of the arbitration clause, finding instead the clause plainly called for the application of “Florida law.” Under Florida law, the plain meaning of the terms of a contract govern when such terms are clear and unambiguous. In rejecting Respondents’ argument, the Court noted:

(1) that the arbitration clause language was intended to ensure that a prevailing party could seek enforcement of an arbitral award “in any jurisdiction that may be involved in the dispute,” not as Respondents argued, be valid according to the laws of every country;

(2) that the Respondents’ reading would be tantamount to an appeal of an arbitral award by a Venezuelan court, an act forbidden under the non-appealability terms of the arbitration agreement; and

(3) the Respondents’ reading would ignore the arbitration provisions’ explicit adoption of the AAA International Arbitration Rules which clearly contemplate enforcement under the Conventions which promote neutrality and forbid “secondary jurisdictions” (particularly the home court of the losing parties), from becoming *de facto* appellate courts over arbitral decisions.

Second, the Court dismissed Respondents’ argument that the Court could and should decline to enforce the arbitral award since the award was “not valid under the law to which the parties have submitted it.” The Court quickly ruled out this option since the parties had agreed to be governed by Florida law, not Venezuelan law.

Third, the Court found Respondents’ argument that the Venezuelan court was a competent authority “according to the law of which the [arbitral] decision had been made” and their annulment of the award was valid under Art. 5 (1) (e) unavailing. Again, the artfully crafted arbitration clause provided a defense to this position. Specifically, the Court found that the phrase “under the law of which” the decision was made stemmed from procedural law governing the underlying agreement.[fn]Citing to Belize Soc. Dev., Ltd. B. Gov’t of Belize, 668 F.3d 724, 731 (D.C. Cir. 2012); Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 289 (5th Cir. 2004).[/fn] Specification of the seat of arbitration, the Court determined, creates a “strong presumption” that the procedural law of the seat of the arbitration was meant to govern the parties’ agreement and, accordingly, disputes arising out of or related to same. This “strong presumption” can be overruled only by “express designation” of procedural law in the agreement.[fn]Karaha Bodas, 364 F.3d at 291.[/fn] The Court determined that there was no procedural law expressed other than the seat of arbitration as Miami, Florida, and, consequently, the Venezuelan court’s order was not a court “…in which, or according to the law of which, the decision has been made.”[fn]Inter-American Convention Art. 5 (1) (e).[/fn]

Fourth, and finally, the Court denied Respondents’ argument that enforcing the arbitral award would

somehow be contrary to the established policy of respecting foreign decrees under principles of comity. The Court noted that because the Venezuelan annulment did not come from a court "…in which, or according to the law of which, the decision has been made,"[6.Id.] it should not afford it comity. Under the Conventions, the United States had "primary jurisdiction," and Venezuela had "secondary jurisdiction." Accordingly, the Court was under no requirement to set aside the award according to a Venezuelan annulment.

Conclusion

Because the arbitration clause contained (1) terms for the seat of arbitration in Miami, Florida; (2) non-appeal or finality terms; and (3) adoption of AAA International Arbitration Rules, the Petitioner was able to successfully enforce his award and thwart a collateral attack. The Southern District Court, in issuing its award, sent a message that Florida seated arbitrations could enjoy protections of deference to arbitration awards when the right clauses are included in a contract's arbitration clause.