

# **Enforcement of Settlement Agreements Reached in Arbitration and Mediation**

## **Kluwer Arbitration Blog**

November 25, 2015

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*Please refer to this post as: Yarik Kryvoi, 'Enforcement of Settlement Agreements Reached in Arbitration and Mediation', Kluwer Arbitration Blog, November 25 2015, <http://arbitrationblog.kluwerarbitration.com/2015/11/25/enforcement-of-settlement-agreements-reached-in-arbitration-and-mediation/>*

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In September 2015 the UNCITRAL Working Group II (Arbitration and Conciliation) continued its work on formulating legal framework on the enforcement of settlement agreements, including a convention, model provisions or guidance texts.

Currently, parties can request arbitration tribunals to record their settlement agreements as consent awards, i.e. an arbitral award on terms agreed upon by the parties. Consent awards are widely used in international arbitration and give rise to a number of legal problems which parties may not anticipate until they actually face them.

### **Rendering a Consent Award: A right or an Obligation of the Tribunal?**

One issue is whether rendering a consent award constitutes a right or an obligation of the arbitral tribunal: in other words, whether an arbitrator should reject a request to record a settlement agreement as an arbitral award if he/she finds that the award may be used for an improper or illegal purpose. A closely related issue is what the consequences of arbitral tribunal's establishment of an illegality hidden in the consent award are.

In an award rendered in June 2014 under the Rules of the International Commercial Arbitration Court (ICAC) at Russian Chamber of Commerce and Industry, the parties (a Latvian and a Russian company) reached a settlement agreement and asked the arbitral tribunal to render an award on the terms agreed by the parties. The parties also asked the arbitrators to hold no hearing in the case. The arbitrators found out that in the settlement agreement the parties settled not only the dispute submitted to the ICAC, but also several other disputes arising from other contractual relations. Those disputes were not submitted to arbitration, and no correspondent arbitration fee was paid.

The arbitrators rendered a consent award, which did not include all provisions of the settlement agreement but only those covered by the arbitration agreement. Subsequently, the respondent failed to perform the agreement and the claimant requested a commercial court in Saint Petersburg to enforce the consent award. The respondent objected and argued that the arbitral tribunal violated its rights by not including part of the terms of the settlement agreement in the consent award. The court refused to grant the enforcement in July 2015 on the ground that the respondent was deprived of the opportunity to present its position on the terms of the settlement agreement, and to negotiate its amendment with the claimant. A higher court sustained its judgment in September-October 2015. This case suggests that the consent award should reflect a lawful agreement, but also should fully

reflect the parties' will.

### **Enforcement of Consent Awards under the New York Convention**

One important difference between consent awards and usual arbitral awards is that an arbitral tribunal records the agreement of the parties rather than renders its own decision on the merits. Such an award will be enforceable under the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), but not in all cases.

A necessary precondition of an "award" in the sense of the New York Convention is the existence of "difference" between the parties. Article I of the New York Convention provides that "This Convention shall apply to the recognition and enforcement of arbitral awards . . . arising out of differences between persons, whether physical or legal." Article II also mentioned submission "to arbitration all or any differences which have arisen or which may arise between them."

Where parties appoint an arbitral tribunal after a settlement merely to record the settlement in the consent award, there is no "difference" between the parties to resolve; the parties have already settled their dispute. Indeed, the arbitrator is not presented with a current dispute. The dispute is extinguished and there is nothing to resolve but to grant the settlement as a form of an arbitral award. Therefore, arguably, where an arbitrator is appointed merely to record the agreement of the parties in an award, such award does not meet a necessary precondition to become internationally enforceable under the New York Convention.

### **Enforcement of Consent Awards Arising out of Mediation**

Additional issues arise with regard to international enforceability under the New York Convention of consent awards resulting from mediation. As in arbitration, parties may want to endow their agreement resulting from mediation with additional enforceability to avoid the necessity and expense of suing on the settlement agreement when the other party fails to fulfil it. The expedited enforcement of a mediated settlement may become important for the parties, especially in international disputes. The parties may agree to appoint the mediator or another person as arbitrator, only to formalise their settlement in an arbitral award. The question is whether such agreements should be enforced as arbitration awards.

It appears from the text of the New York Convention that it does not apply to mediated settlements reached before the commencement of arbitral proceedings. Article I provides that the Convention applies to "the recognition and enforcement of arbitral awards"; this article also states that the term "arbitral awards" shall include "not only awards made by arbitrators appointed for each case, but also those made by permanent arbitral bodies to which the parties have submitted." This implies that the New York Convention covers only the awards rendered in *ad hoc* or institutional arbitrations. Indeed, unlike an arbitrator, a mediator is not deciding the dispute on the merits and not rendering a binding decision.

### **Conclusion**

When parties appoint an arbitral tribunal merely to record a settlement in a consent award, there is no "difference" between the parties to resolve: the parties already negotiated or mediated such difference. From the plain text of the New York Convention it follows that a "difference" is a necessary precondition of an "award" in the sense of the convention. The parties which appoint the arbitrators merely to obtain a consent award actually submit to the arbitral tribunal their agreement rather than difference between them. Notably, the UNCITRAL Model Law on International Commercial Arbitration does not cover a situation where a mediated settlement was reached before the commencement of

arbitration; this article provides only for a settlement reached within an arbitration procedure.

Therefore, if the settlement agreement was concluded before the start of arbitral proceedings, then such agreement should not fall within the notion of an arbitral award under the New York Convention. Such settlement agreement should have the status of a contract and be internationally enforceable as such rather than as an arbitral award.

*The full text of the article "Consent Awards in International Arbitration: From Settlement to Enforcement" published earlier this month in Brooklyn Journal of International Law is available [here](#).*