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U.S. District Courts Rule Consent Awards Fall Within New York Convention

Ava Borrasso (Ava J Borrasso P.A.) · Friday, April 6th, 2018 · ArbitralWomen

The importance of memorializing a settlement agreement into a consent award was recently highlighted in *Transocean Offshore Gulf of Guinea Vii v. Erin Energy Corp.*, Case No. H-17-2623 (S.D. Tex. March 12, 2018). There, a Texas district court addressed whether a consent award is subject to confirmation in the United States pursuant to the New York Convention, as codified in the Federal Arbitration Act. The underlying case involved a contract dispute over drilling equipment and services located in waters off the Nigerian coast culminating in an arbitration before the London Court of International Arbitration.

The parties ultimately agreed to resolve their dispute prior to final hearing and asked the arbitrator to enter a consent award (as well as a partial award on costs that was not challenged). After the respondent failed to pay pursuant the terms of the award, the claimants sought to confirm the award in the Houston district court. The respondent moved to dismiss for lack of subject matter jurisdiction based on the contention that consent awards are not subject to New York Convention because the Convention is silent on the treatment of settlement awards. The respondent cited to a 2016 United Nations Commission on International Trade Law Secretariat Guide on the Convention which noted the silence of the New York Convention as well as the absence of any treatment in case law. The respondent also argued that the LCIA rules, absent other agreement of the parties, require the issuance of a reasoned award. Because the consent award lacked reasons, the respondent contended that it did not constitute an "award."

However, prior to the court's decision, an intervening decision by a New York district court addressed a similar argument which it handily rejected. In *Albtelecom SH.A v. UNIFI Communs., Inc.*, Case No. 16 Civ. 9001, 2017 U.S. Dist. LEXIS 82154 (S.D.N.Y. May 30, 2017), the court confirmed a consent award arising from an ICC proceeding. The Texas district court therefore relied on *Albtelecom* and held that "[n]o binding or persuasive statutory language or case law requires a court to hold that a tribunal must reach its own conclusions, separate from the parties' agreement, to make a valid, binding award subject to the Convention" and that such a rule "would dissuade parties from seeking arbitration in the first place or benefitting from the efficiencies it is meant to provide."

The court also noted the rationale discussed in *Albtelecom* that the parties could have simply resolved their dispute by private settlement agreement but instead elected to request a consent award. As the remedies for breach of a settlement agreement culminating from an arbitration proceeding are generally more cumbersome than confirmation of a consent award, both decisions

highlight the advantages of taking this further step to memorialize settlement agreements through issuance of a consent award when feasible.

Albtelecom further underscores the complications of enforcing a settlement agreement arising from international arbitration proceedings. In that case, the petitioner sought to confirm a consent award issued by an arbitrator from an ICC proceeding. Even more, the petitioner sought damages for breach of the award pursuant to its terms. The respondent sought to dismiss or stay the case, first arguing that the consent award was issued outside of the arbitration and not subject to confirmation under the New York Convention.

The court rejected that argument stressing that the parties requested that the arbitrator enter the award, reviewed and commented on a draft form of the award, and otherwise operated within the context of the arbitration. The court confirmed the consent award as within the scope of the New York Convention.

The next issue was more problematic. In addition to seeking confirmation of the award, the petitioner sought damages for its breach. The consent award included a clause that, if breached, the petitioner was entitled to recover a greater amount, and also provided that disputes unrelated to payment required resolution through arbitration in Switzerland. The respondent next argued that factual circumstances had changed following issuance of the award that excused payment and advised the court that it had instituted an ICC arbitration in Switzerland to resolve those issues.

The court decided it lacked a sufficient record to resolve the damages claim and asked the parties to provide further briefing in the event that the petitioner decided to pursue the claim in the district court. The court also asked the parties to provide briefing as to the proper forum to resolve the pending damages issues.

Albtelecom and *Transocean Offshore* appear to resolve whether consent awards are subject to confirmation pursuant to the New York Convention in the United States. In doing so, they not only demonstrate the advantage of memorializing a settlement agreement into a consent award when the tribunal is inclined to do so, they also highlight issues that may arise post settlement. Despite the agreement of the parties, these cases demonstrate the care required in fashioning consent awards and details for subsequent proceedings in the event of breach.

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