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Arbitrator Award of Attorneys' Fees Enforced in U.S. Court

Jason File (Wilmer Cutler Pickering Hale and Dorr LLP) · Friday, May 1st, 2009 · WilmerHale

For international arbitrations seated in the United States, there has sometimes been a tension between the so-called "American rule" against the shifting of attorneys' fees and litigation costs to the loser of the proceedings, and the more accepted practice of fee-shifting in international arbitrations as expressed in procedural rules such as the UNCITRAL and LCIA Rules. Indeed, even for arbitrations seated outside the United States, parties that have gone to a U.S. court seeking to confirm or enforce an award that includes an award of fees and costs have not been uniformly successful in obtaining decisions that enforce the award of fees and costs.

The source of this tension often emanates from inconsistencies in the choice of law governing the award of attorneys' fees, as well as in the application of that law. To the extent that U.S. judges apply U.S. law, some U.S. state laws, for example, contain restrictions on fee-shifting, while the Federal Arbitration Act (FAA) is silent on the issue, creating the result that even if a judge elects to apply the FAA to the enforcement of a fee-shifting award, there is no explicit statutory guidance for how or whether to enforce that component of the award that involves attorneys' fees.

A recent federal district court decision, however, underscores the willingness of many U.S. courts to enforce international arbitration awards that include awards of attorneys' fees, confirming the default application of the FAA to such awards and using the FAA to import the procedural rules selected by the parties that, in this case, provided for fee-shifting.

The decision by the United States District Court for the Southern District of Texas sitting in Houston, *Willbros West Africa, Inc. v. HFG Engineering US, Inc.*, 2009 WL 411565, held that the FAA, not state rules, apply to arbitrations involving interstate or foreign commerce unless the arbitration clause clearly states otherwise, and that the parties' selection of arbitration procedural rules that permit the arbitrator to award attorneys' fees to the prevailing party grants the arbitrator the authority to do so under the FAA.

The case commenced as an arbitration stemming from several subcontracting agreements related to liquefied natural gas systems in and around Nigeria. HFG, the subcontractor, filed an arbitration asserting contractual claims, pursuant to the terms of the arbitration agreement, in Houston, Texas, administered by the American Arbitration Association ("AAA") in accordance with the UNCITRAL Rules. After a five-day hearing in March 2008, the arbitrator found in favor HFG, and in addition to damages, awarded HFG attorneys' fees and costs of over $675,000. In this respect, the arbitrator's award provided: "Both parties have asserted claims for Attorneys [sic] fees in excess of $500,000.00. this indicates to me that each would say the amounts are 'reasonable.'

Since [HFG] is the prevailing party in the arbitration I award them their attorney's fees and costs …"

Willbros subsequently filed a Motion to Vacate (in part) the award in Texas state court and HFG removed the case to the federal district court for determination. Part of Willbros's motion sought to vacate the arbitrator's award of attorneys' fees and costs. Willbros argued that the arbitrator's ruling was "arbitrary, unreasonable, and without regard to guiding legal principles," and contended that the arbitrator should have applied the Texas Arbitration Act, which requires an arbitrator to consider evidence beyond mere billing statements to determine what amount of attorneys' fees is reasonable. As the arbitrator had only considered the attorneys' billing statements, Willbros argued that the arbitrator had insufficient evidence to determine whether the amount was reasonable, and therefore exceeded his authority in making the award.

The court stated at the outset of its analysis, and in recognition of U.S. court deference to and support of the arbitral process, that the scope for review of an arbitral award is "extraordinarily narrow" and "exceedingly deferential," and there are few, narrow grounds for vacating an arbitral award under the FAA. Citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 (1995), the court held that the FAA, and not state statutes such as the Texas Arbitration Act, applies to arbitrations that involve interstate or foreign commerce unless the arbitration clause "clearly and unambiguously mandates that a state arbitration statute applies." This was true despite the contract's Texas choice-of-law clause, because there was no explicit reference to, or adoption of, the Texas Arbitration Act – a general choice-of-law provision is not evidence of the parties' clear intent to opt out of the FAA rules.

The court went on to note that under the FAA, an arbitrator's construction of a contract must be enforced so long as it is rationally inferable from the letter or purpose of the underlying agreement. In this case, the arbitration clause provided for the use of the UNICTRAL Arbitration Rules, Article 40 of which in turn provides that "the costs of arbitration shall in principle be borne by the unsuccessful party" and gives the arbitrator broad authority to determine and award attorneys' fees to the prevailing party. Consequently, it was rational for the arbitrator to infer that the parties' selection of the UNCITRAL Rules indicated their assent to its provisions governing the allocation of fees and costs. The only remaining question, then, was with respect to the actual amount of attorneys' fees awarded, and here the court concluded that "improvident, even silly factfinding" does not provide a basis for a reviewing court to refuse to enforce the award.

This decision highlights an appropriate analysis by which U.S. judges may give effect to international arbitration awards containing awards of attorneys' fees under the FAA. In so doing, the U.S. decision brings the United States into line with decisions and statutory regimes in other developed jurisdictions. The decision nonetheless emphasizes the need for parties to express their preferences for rules governing the allocation of such fees that deviate from their selected procedural rules in the event that they wish to tailor their arbitration agreements in this way.

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