Kluwer Arbitration Blog

The Arbitrability of Libyan Terrorist Claims

Roger Alford (General Editor) (Notre Dame Law School) · Monday, March 8th, 2010

As I have noted earlier, there is a pitched battle between victims of Pan Am 73 terrorist hijacking over the distribution of treaty funds secured by the United States for American victims in a 2008 diplomatic settlement with Libya. The treaty and Executive Order stipulate that the money shall be distributed solely for the benefit of United States nationals, but foreign nationals are claiming that they are entitled to the overwhelming majority of the funds pursuant to a Joint Prosecution Agreement signed among the passengers of Pan Am 73, most of whom were non-Americans. The American terrorist victims argue that the contract is inapplicable to a diplomatic settlement, and alternatively, that it is void for public policy because the contract cannot contravene the federal policy designed to distribute these funds for American victims, and only American victims. They contend that the JPA places an obstacle in the way of the United States' efforts to effectuate the comprehensive settlement on behalf of U.S. nationals and undermines the essential purpose of applicable federal law.

Last week, a federal district court judge in Washington, D.C. heard oral arguments on a motion to compel arbitration of this dispute pursuant to an arbitration clause in the Joint Prosecution Agreement. Press reports of the developments are here, here, and here.

One of the most unusual twists in the case is that the implementing statute, the Libyan Claims Resolution Act ("LCRA"), immunizes the assets from "attachment or any other judicial process" before, during, and after the assets are held by the U.S. Department of Treasury for distribution to the American victims. In other words, when Treasury cuts a check to the American victims who succeed before the Foreign Claims Settlement Commission, those assets remain immune from attachment or any judicial process. How then can non-American victims attempt to seize those assets pursuant to a contract claim? The answer should be that they cannot. Consistent with the arbitrability doctrine, a competing federal statute overrides the general requirements of the FAA, precluding arbitration of the contract claims.

Serving as an expert consultant on the case on behalf of the American victims, I read this statute as precluding "any judicial process" whatsoever, which includes court proceedings to compel arbitration. Section 4 of the LCRA states that "[n]otwithstanding any other provision of law, any property described [below] … shall be immune from attachment or any other judicial process." The property is defined as "any property that relates to the [U.S.-Libya] claims agreement" and "for purposes of implementing the claims agreement" is "held by," "transferred to," or "transferred from" the Department of Treasury. See 73 Fed. Reg. 50666 (Aug. 27, 2008). Thus, it seems clear that the assets the non-Americans are seeking to attach were immunized by law from "attachment

or other judicial process" under the LCRA in order to guarantee that they would reach the intended recipients after they were "transferred from" the Department of Treasury.

During the hearing Judge Bates was very intrigued by the argument, but frankly it was impossible to tell which way he would rule on the arbitrability question. He was particularly interested in hearing that the Department of State was considering filing a Statement of Interest in the case to articulate the federal policy interests that are at stake. The American victims argued that one of the reasons the case should not go to arbitration is that there are clearly established rules requiring federal courts to give deference to such Executive Branch concerns, whereas in arbitration there is no obvious means for the United States to intervene in the arbitration, nor any guarantee that the panel would give the government's Statement of Interest any weight.

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