Kluwer Arbitration Blog

New Strides in Confidentiality During Enforcement Proceedings

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One of the defining and distinguishing features of arbitration is the privacy that it affords parties. However, as all practitioners recognize, arbitration is rarely conducted in full secrecy and applications to vacate or confirm an award can bring the existence, subject matter, and outcome of an arbitration to the forefront of public discourse.

Often times, practitioners seek to protect from such future disclosure through artful drafting of arbitration confidentiality clauses, but this is rarely enough to shield the contents of an award. U.S. Courts do not have any specific confidentiality rules governing arbitral awards. Moreover, filing an arbitral award under seal with a federal court must be done at the outset of a vacatur or enforcement application and usually becomes a cumbersome process.

Perhaps the biggest hurdle stems from courts' hesitancy to acquiesce to these thoughtful efforts. One Indiana district court judge denied a joint application to seal documents that referenced or were part of a domestic arbitration award in spite of a confidentiality agreement. The court reasoned that "once a confidential settlement agreement or arbitration decision becomes the subject of litigation, it must be opened to the public just like any other information." Mead Johnson & Co. v. Lexington Ins. Co., Dkt No. 3:11-cv-00043-RLY-WGH (S.D. Ind. Sept. 28, 2011).

Similarly, in Global Reinsurance Corp.-U.S. Branch v. Argonaut, 2008 WL 1805459 (S.D.N.Y. 2008), a New York district court initially sealed an arbitration award submitted for enforcement, yet reversed itself on reconsideration. The court found that the plaintiff did not demonstrate harm sufficient to justify limiting public access to judicial materials. The court also reasoned that the mere filing of an award for enforcement did not require the disclosure of any underlying documents or materials, all of which remained confidential and protected.

Under this backdrop, the recent decision in Decapolis Group, LLC v. Mangesh Energy, Ltd. et al., Dkt. 3:13-cv-01547-M (N.D. Tex. Feb. 24, 2014), may offer relief to some practitioners. Here, in proceedings to confirm an international arbitration award, a Texas district court determined that the respondent's confidentiality and privacy concerns required sealing of the confirmation proceedings and the underlying award.

The underlying contract in this matter concerned oil and gas rights in Iraqi Kurdistan and contained a fairly standard confidentiality provision, which required the protection of trade secrets and

strategic information deemed confidential by either of the parties. After obtaining a favorable award, the Decapolis Group sought to confirm the award in Texas and Mangesh Energy filed a motion to dismiss the petition on jurisdictional grounds. Mangesh Energy further filed a motion to seal the petition based on the confidentiality agreement in the underlying contract. In a four-page decision, the Court summarily denied the motion to dismiss the petition and then considered the motion to seal the proceedings. In reaching its decision to seal the arbitration award, the Court noted that the underlying contract contained a confidentiality clause and that the award contained "extensive" findings of fact and conclusions of law. The Court weighed the need to protect this sensitive business and strategic information against the "minimal" value of that information to the general public.

This recent success in protecting the confidentiality of an arbitration award hinges on the court's interpretation of the contract's expansive language of the confidentiality provision and the Court's willingness to allow the parties to maintain those confidences in spite of the enforcement proceeding. This case reflects a thoughtful approach to enforcement proceedings and can serve as a model for how parties may preserve the confidentiality they bargained for through the inclusion of an arbitration clause, without any strategic setbacks.

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