THE
NATIONAL LAW REVIEW

Can a Settlement Agreement Be Converted to an Arbitration Award That is Enforceable Under the New York Convention?

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Alert!

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Friday, October 11, 2019

Here is an interesting scenario: the parties to a cross-border commercial relationship have a dispute; they have an agreement to arbitrate; arbitration is contemplated (or perhaps even commenced); the parties settle before there are any significant arbitral proceedings; they engage an arbitrator to render an award that comprises the settlement terms; and such an award is issued “on consent”. Later, one party seeks to confirm and/or enforce the award in the United States. But -- spoiler alert -- that settlement agreement/arbitral award might not be confirmed or enforced under the New York Convention.

Here is another: disputing parties to a cross-border commercial contract commence an arbitration; they engage in the process to some extent; they negotiate a settlement during the pendency of the arbitration; they jointly ask the arbitrator to issue an arbitral award "on consent" that reflects the settlement terms; and that award is issued. In such a case, the award is likely to be confirmed and/or enforced by a U.S. court because the parties actually engaged in arbitrating a dispute.

What is the difference? A settled dispute that is taken to arbitration in order to convert a settlement contract into an award is likely to be treated differently by a court than a dispute in arbitration that is settled and results in an award on consent that reflects the settlement terms.

Albtelecom SH.A v. *UNIFI Communs., Inc.*, 2017 U.S. Dist. LEXIS 82154 (S.D.N.Y. May 30, 2017), exemplifies the latter case. The parties commenced an arbitration but reached a settlement agreement during the pendency of the proceeding. Instead of dismissing the arbitration, the parties jointly requested that the arbitrator issue a "Consent Award" that reflected their agreement terms, and the parties reviewed and approved the draft award. *Id*. at *4-5. The award was issued and the arbitral proceeding was closed.

Later, UNIFI failed to comply with the terms of the settlement agreement/consent award, and Albtelecom sought to confirm and in effect to enforce the award in the U.S. under the New York Convention. UNIFI objected that the terms of the New York Convention did not apply to a "consent award." The Court disagreed:

> [T]he Court agrees that . . . the Award was properly entered. The face of the Award reflects full participation by both parties in the arbitration process, which had proceeded for more than three years as of the date on which the Award was entered. The Award reflects consent to the terms and the text of the Award, by both parties. It reflects due care by arbitrator Knoll. And the parties' consent to the Award – their stipulation to its terms – provides a sound basis for its entry.

*Id. a*t *12.

Similarly, in *Transocean Offshore Gulf of Guinea VII Ltd.* v. *Erin Energy Corp.*, Docket No. H-17-2623, 2018 U.S. Dist. LEXIS 39494 (S.D. Tex. Mar. 12, 2018), the court confirmed a "consent award" over the objection of one of the parties. There, the parties had commenced and participated in an arbitration before the London Court of International Arbitration, but before an oral hearing, the parties consented to the entry of an arbitral award. *Id*. at *3. The court held that, where "[t]he parties in this case did not dismiss the arbitration . . . [and] opted to continue the arbitration proceedings even after they came to their own agreement," the tribunal's approval of the settlement, while not findings of fact or law, was "an award that bound the parties, within [the tribunal's] power." *Id*. at *12.

But timing matters. Here is a recent "Type A" case. In *Castro* v. *Tri Marine Fish Co. LLC*, 921 F.3d 766 (9th Cir. 2019), the plaintiff was a dockhand who was hurt while working for TriMarine, and his employment agreement required arbitration in American Samoa. But the parties reached a settlement agreement before commencing an arbitration. However, just before the agreement was signed, the

employer brought in an arbitrator to review the document with Mr. Castro and have him sign a joint motion to dismiss. The arbitrator then signed a one page order recognizing the terms of the settlement. Other than a brief meeting in the lobby of an office building, Mr. Castro had never met or interacted with the arbitrator.

Later, the company sought to have the "award" confirmed in order to avoid paying for additional medical expenses related to the workplace injury. The trial court confirmed the award as a foreign arbitral award, but the Ninth Circuit reversed. While acknowledging a long line of decisions confirming consent awards, the Court of Appeals held that in the circumstances of Mr. Castro's case, the purported arbitral order was not an arbitration award at all and could not be confirmed as such. The court pointed out (i) that the employment contract's arbitration procedures were not followed, and (ii) that there was "no outstanding dispute to arbitrate" when an arbitrator was engaged. The Court in effect distinguished *Albtelecom* or *Transocean Offshore* because the "timing here was backwards – Castro and Tri Marine settled and then sought to arbitrate" -- and that was categorically different from the "common practice of reducing settlements reached *during* arbitration into arbitral awards." *See Castro,* 921 F.3d at 776.

TriMarine had also argued to the Court of Appeals that it could have commenced an arbitration, immediately stayed it, and then acted no differently than it actually had, and ended up with the same award. The Ninth Circuit acknowledged that that might be so, but it held that "the modicum of formality required for a proceeding to constitute arbitration is no empty ritual," and it refused to confirm the "award" in question.

The court recognized that normally "when it looks, swims, and quacks like an arbitral award, it typically is," but noted that the *Castro* case was a bit different in a critical respect. Consequently, all disputants should be on notice not to put the cart before the horse. Consenting to a settlement before engaging in arbitration is likely to close the door to the issuance of an enforceable award comprising the settlement terms.