

Consent or Agreed Awards and the New York Convention—What Is the Status?

By Laura A. Kaster

In 2018, several developments coalesced to demonstrate a felt need among international disputants for an alternative to arbitrating cases to award. The final report of the Global Pound Conferences was issued reporting on the conferences held from 2016 to 2017 in 24 countries and obtaining over 4,000 responses to consistent questions about the needs and desires of the users of ADR. Among its many important conclusions was that users desire more streamlined and cost-effective dispute resolution and expect the process to be flexible enough to incorporate mediation. The Herbert Smith Freehills, PwC and IMI Report at 9 (2018), <https://www.globalpound.org>.

“[I]f a pending arbitration results in a settlement and that settlement is reflected in a consent award, is it enforceable under the New York Convention? The answer is pretty certainly yes.”

In a parallel development, UNCITRAL’s Working Group II, which had been discussing the possibility of an international instrument to improve enforcement of mediated settlements, concluded in June 2018 that it would recommend a new Singapore Convention—and a Model Law—that would permit enforcement of mediated settlements in signatory countries as an analog to the New York Convention.¹

The ability to enforce arbitral awards worldwide under the New York Convention has been the driving force behind the enormous growth of international arbitration and international arbitral tribunals and centers.

“[C]an a mediated settlement entered as a consent award be enforced under the New York Convention...[T]he answer is that if steps are taken carefully, a resulting arbitral consent award should be enforceable under the New York Convention.”

The eventual acceptance of the Singapore Convention promises significant changes in the future of ADR. But Conventions take time to be signed, adopted, and implemented. What is the status of the law now on

consent awards or awards that are based on a mediated settlement?

The question may have to be broken into parts. First, if a pending arbitration results in a settlement and that settlement is reflected in a consent award, is it enforceable under the New York Convention? The answer is pretty certainly yes. Two recent U.S. decisions are quite clear on this point and there is no basis in the New York Convention itself or in the rules of various arbitral bodies that could justify a distinction between an award and a consent award.

Second, can a *mediated* settlement entered as a consent award be enforced under the New York Convention? Here the answer may be a bit more nuanced and some procedures need to be observed to assure litigation is not generated. But again, the answer is that if steps are taken carefully, a resulting arbitral consent award should be enforceable under the New York Convention.² This is an important option that international practitioners and disputants desire.

Consent Awards in Pending Arbitrations

Two recent United States district court cases reject the contention that a consent award entered by an arbitral tribunal and reflecting the settlement by the parties during the pendency of an arbitration is not an “award” enforceable under the New York Convention.

In *Transocean Offshore Gulf of Guinea VII Ltd. v. Erin Energy Corp.*,³ an arbitration before the London Court of International Arbitration arose from a dispute over a contract for drilling equipment, personnel, and services in the waters off the coast of Nigeria. Before the arbitration hearing was held, the parties consented to the entry of an arbitral award by the tribunal.

In the subsequent district court proceeding in Texas, *Transocean* and *Indigo* argued that *Erin Energy* had not paid what it owed under the consent award and the legal costs award. They petitioned for confirmation of the awards under the New York Convention.

Erin Energy challenged the availability of summary enforcement of the consent award by asserting that the court lacked subject matter jurisdiction on the ground that consent awards are not subject to the Convention. *Erin Energy*’s argument was founded on the contention that a consent award is fundamentally different from other arbitral awards because an arbitral award represents the tribunal’s conclusions, not the parties’ agreement.⁴

Interestingly, Erin Energy cited the 2016 United Nations Commission on International Trade Law Secretariat Guide on the Convention, which states: “The Convention is silent on the question of its applicability to decisions that record the terms of a settlement between parties. During the Conference, the issue of the application of the Convention to such decisions was raised, but not decided upon. Reported case law does not address this issue.”

However, the *Transocean* district court rejected Erin Energy’s argument that the Convention’s silence meant that it was not intended to apply to consent awards. *Id.* The *Transocean* court relied heavily on the earlier decision in the Southern District of New York in *Albtelecom S.H.A v. UNIFI Commc’ns, Inc.*⁵ Both courts viewed any prohibition to enforcement of a settlement reached during the pendency of an arbitration to be counter to public policy. In *Albtelecom*, the court viewed the award entered by the arbitrator “mid-arbitration” with the parties’ consent as indistinguishable under the law from any other award. Both courts opined that any other rule would discourage resolution of disputes by settlement in arbitration because an enforceable award under the Convention would not result. *Transocean* specifically rejected the argument that enforcement under the New York Convention depends on the arbitral tribunal actually making its own findings:

No 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. As the *Albtelecom* court noted, this rule would dissuade parties from seeking arbitration in the first place or benefitting from the efficiencies it is meant to provide.⁶

These authorities are persuasive as to United States application, is it different elsewhere? For example, English law is clear on this point, providing that “An agreed award shall state that it is an award of the tribunal and shall have the same status and effect as any other award on the merits of the case.”⁷ And the UNCITRAL Model Law on Commercial Arbitration Article 30(2) provides that “[a]n award on agreed terms has the same status and effect as the award on the merits of the case.”⁸

French law appears to be silent on the issue,⁹ but that does not by itself suggest that consent awards will not be enforced.¹⁰ However, a French case has given some pause. In *Receivers of Viva Chemical (Europe) NV [Belgium] v. Allied Petrochemical Trading & Distribution LC [Isle of Man]*,¹¹ the Paris Court of Appeal annulled an enforcement order of the Parisian lower court. However, the French court did not rely on the fact that it was a consent award alone. It held that the enforcement of the award would be contrary to French international public policy.

On 28 September 2006, Viva Chemical purchased 3,400 tons of base oil from a company called Petroval. Viva Chemical never paid for the oil. Nevertheless, Viva sold the oil to Allied Petrochemical. On 22 May 2007, two days before Viva filed for bankruptcy, Allied Petrochemical and Viva jointly appointed a sole arbitrator who rendered an award by consent the following day, deciding that Allied Petrochemical was the owner of part of the oil. Allied then obtained an order of enforcement of the award by consent in the Paris First Instance Court. Viva’s receivers appealed the order on the ground that the award was fraudulent and would violate the principle of equality between creditors. The arbitration had been filed during the period—on the eve of bankruptcy—when transactions may be voided to protect creditors.

The Court of Appeal found not that consent awards are universally unenforceable but that in this case the award by consent had been made in the absence of a dispute between the parties and that the award was fraudulent and contrary to public policy. There is nothing extraordinary about the refusal to enforce the award in *Viva Chemical*. The UNCITRAL Model Law and most national arbitration acts permit voiding an award (whether or not by consent) on the grounds of public policy.¹² Indeed, the New York Convention itself provides:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:...(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Viva Chemical does not undercut the viability of consent awards obtained mid-arbitration; it does provide a nice transition for analyzing consent awards based on a mediated agreement. All awards are subject to public policy examination.

Consent Awards Based on a Mediated Agreement

There is no logical distinction between a settlement that was derived from the parties acting independently or a settlement that results from a mediation that the parties then bring to the arbitrators. The resulting consent awards are indistinguishable. The question of enforceability of mediated settlements (or any settlement for that matter) entered as a consent award arises when no arbitration is pending and the parties either ask the mediator to enter a consent award as an arbitrator (changing hats) or ask to convene an arbitration for the sole purpose of entering the mediated settlement as an award.

The problem derives from language in the New York Convention providing that “This Convention shall apply to the recognition and enforcement of arbitral awards . . . arising out of differences between persons, whether physical or legal.”¹³ Some scholars posit that if a settlement has

already been reached or mediated, there is no longer a “difference” between the parties and the Convention does not apply. Although there are sound arguments against this approach,¹⁴ no settling parties would want to have to litigate the issue. Particularly in light of the Singapore Convention’s direct resolution on enforcement of mediated settlements in the absence of an arbitral award, there is no need to subject parties to uncertainty. The most efficient approach is to initiate the arbitration *before* or at the same time as the mediation. This is the solution under the Singapore International Mediation Centre and Singapore International Arbitration Centre (SIAC) Arbitration-Mediation-Arbitration Protocol,¹⁵ and others, including the New Jersey statute that permits enforcement of mediated awards.¹⁶ Under this Arb-Med-Arb approach, whether the arbitrator appointed also acts as mediator (subject always to the express written consent of the parties), the resulting consent award should be enforceable under the New York Convention.

Conclusion

International disputants want solutions that include a mediation opportunity. They can have that now with an enforceable result. The Singapore Convention is coming but the future is already available.

Endnotes

1. See Masucci and Ravala, the Singapore Convention: A First Look in this issue, *supra* at ____, citing the Singapore Convention and Model Law, forthcoming on UNCITRAL’s website, as well as an official record of the United Nations upon formal adoption by the General Assembly. In the interim, see UNCITRAL, 51st Sess. UN Doc A/CN.9/942 and UN Doc A/CN.9/943.
2. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, <http://www.newyorkconvention.org/english>, and 9 U.S.C. § 201-08.
3. 2018 WL 1251924, at *1–2 (S.D. Tex. Mar. 12, 2018).
4. *Id.* at *2.
5. 2017 WL 2364365 (S.D.N.Y. May 30, 2017). See also Kaster, *Albtelcom Sh.A v. Unifi Communications, Inc.*, 2017 WL 2364365

- (S.D.N.Y. May 30, 2017)—*Enforcing Consent Awards Under the New York Convention*, NY Dispute Resolution Lawyer (Vol 10 Fall 2017).
6. *Transocean Offshore Gulf of Guinea VII Ltd. v. Erin Energy Corp.*, No. CV H-17-2623, 2018 WL 1251924, at *4 (S.D. Tex. Mar. 12, 2018).
7. Arbitration Act of 1996 c.23 § 51 (Eng.).
8. http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf.
9. Yaraslau Kryvoi & Dmitry Davydenko, *Consent Awards in International Arbitration: From Settlement to Enforcement*, 40 Brook. J. Int’l L 852 (2015).
10. *Id.*
11. Cour d’appel [CA] [regional court of appeal], Paris 1e ch. (section C), 9 Apr. 2009, case no. 07/17769. Reported in Mealey’s International Arbitration Report, Vol. 24, # 8 (August 2009).
12. UNCITRAL Model Law on Arbitration, note 8 *supra*, art. 34(2)(b) (ii). (“An arbitral award may be set aside by the court [in the seat of arbitration] only if: . . . the court finds that . . . the award is in conflict with the public policy of this State.”); see also Gary Born, *International Commercial Arbitration* 256-67 (2009).
13. Article I(1) of the New York Convention, <http://www.newyorkconvention.org/english>.
14. See Edna Sussman, *The New York Convention Through a Mediation Prism*, 15 Disp. Resol. 10 at 12 n. 162 (2009) (arguing that the Convention does not specify a difference has to exist at the time of the appointment of the arbitrator).
15. See Aziah Hussin, *SIAC-SIMC’s Arb-Med-Arb Protocol*, *supra* at ____.
16. New Jersey International Arbitration, Mediation and Conciliation Act, N.J.S.A. 2A:23E-1 et seq. (2017).

© Laura A. Kaster 2019. Laura A. Kaster is a co-editor in chief of this journal and a Fellow in the College of Commercial Arbitrators, on the CEDR International Panel and a mediator at the Global Mediation Exchange Center. She is on the Tech List of the Silicon Valley Arbitration and Mediation Center, an AAA arbitrator and master mediator, and an arbitrator and mediator for CPR Panel of Distinguished Neutrals. She is a full-time neutral working in the New York area.

Dispute Resolution Section Diversity Scholarships

Beginning in 2018, the Dispute Resolution Section of the New York State Bar Association (“DRS”) will award a maximum of 5 mediation training scholarships and 5 arbitration training scholarships each year, to encourage greater opportunities for minorities and women in the field of dispute resolution.

The scholarships give recipients the following benefits:

Enrollment at no charge in either (1) three-day Mediation Training offered annually by DRS and the Supreme Court, NY County/Nassau County, or, subject to DRS approval, other mediation training offered outside the NY Metropolitan Area) or (2) the three-day Arbitration Training offered annually by DRS and the American Arbitration Association | Free one-year membership in the DRS (and the NY State Bar Association if recipient is not a member), entitling recipients to a host of benefits including | Opportunity to join and become active in one or more Section committees | Discounted registration fees for DRS programs and events | Receiving the DRS publication “The Dispute Resolution Lawyer;” | Guidance and advice from an experienced neutral to be assigned to the recipient.

Any attorney with genuine financial need may apply to the NYSBA for tuition assistance to attend programs. Contact Kristina Gagnon at kmgagnon@nysba.org for more information.