The Enforcement of Consent Awards in International Commercial Arbitration

Kaitlyn Carr
I. INTRODUCTION

International arbitration is no different than litigation in national courts in the sense that parties often arrive at a settlement during the proceedings. Some studies report that 30 percent of all administered arbitrations settle.

Parties to an international arbitration may request the tribunal to embody the terms of their settlement in an arbitral award known as a consent award. Although many of these settlement agreements are recorded as consent awards to ensure their finality, their enforceability raises many legal questions. In particular, the enforcement of consent awards as arbitral awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) is often debated. This paper discusses the arguments against the enforcement of consent awards as arbitral awards under the New York Convention, as well as the counterarguments supporting the recognition and enforcement of consent awards as arbitral awards under the Convention.

II. THE ENFORCEMENT OF CONSENT AWARDS AS ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION

Consent awards rarely face problems with enforcement because both parties have agreed to the terms of the settlement. However, uncertainty about whether consent awards qualify as arbitral awards creates an enforcement issue. There is currently no internationally accepted definition of the term “award”. The closest the New York Convention comes to a definition is in Article I(2) it states, “[t]he
term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted”.

During the negotiations of the Convention, drafters considered the application of the Convention to decisions that record the terms of a settlement agreement, but the issue was not decided. Therefore, scholars and practitioners continue to debate whether consent awards are enforceable as arbitral awards under the Convention.

A. Consent Awards Do Not Qualify as Arbitral Awards and Should Not Be Enforceable Under the New York Convention

Consent awards are different than “normal” arbitration awards and should not be enforceable under the New York Convention because the arbitral tribunal may lack jurisdiction to render consent awards, there may not be a genuine dispute between the parties, and consent awards may include illegal terms.

1. The Tribunal Does Not Have Jurisdiction

First, the enforcement of consent awards can be challenged on the grounds that the tribunal does not have the power to render consent awards. When a settlement agreement is reached, the mandate of the tribunal is revoked and the jurisdiction and powers conferred upon the tribunal by the parties are terminated. In other words, when a tribunal is deprived of its judicial authority, it cannot issue a genuine arbitral award. Some scholars believe that without an express provision allowing arbitrators to issue consent awards, arbitrators risk overstepping
their mandate.\textsuperscript{14} This is particularly relevant if the settlement agreement covers issues outside of the arbitration agreement, because then the tribunal will have no jurisdiction to render an award on these matters, jeopardizing judicial enforcement of the award.\textsuperscript{15}

The Saint Petersburg Commercial Court recently addressed this jurisdictional issue in \textit{Latvijas Tilti v. Vozrojdenie} when it refused to enforce a consent award rendered by the International Commercial Arbitration Court (“ICAC”).\textsuperscript{16} After a dispute between two construction companies was referred to the ICAC, the parties reached a settlement agreement and asked the tribunal to record the terms as a consent award.\textsuperscript{17} The tribunal found that some of the terms of the agreement related to issues outside of the arbitral proceedings, so the tribunal rendered an award only on the terms related to the claims submitted to the tribunal and it did not include the other terms of the settlement agreement.\textsuperscript{18} When one of the parties did not perform on the agreement, the other party submitted a request for enforcement of the award to the Saint Petersburg Commercial Court.\textsuperscript{19} The Court refused to enforce the consent award because, in the Court’s opinion, “the arbitral tribunal may not record a settlement agreement in part: if it objects to the terms of the settlement, the tribunal should either continue the arbitral proceedings or discuss with the parties an amendment to the terms of the agreement.”\textsuperscript{20} The tribunal may have had the power to render a consent award, but it overstepped its
mandate when it chose to include only certain parts of the parties’ settlement agreement in the consent award.

Consequently, enforcement of consent awards under the Convention may be challenged because of the limitations on a tribunal’s jurisdiction to issue consent awards.

2. There is a Lack of Dispute Between the Parties

Second, a court may refuse to enforce a consent award because it lacks the fundamental characteristic of an actual dispute between the parties. Article I of the New York Convention states that “[t]his Convention shall apply to the recognition and enforcement of arbitral awards … arising out of differences between persons, whether physical or legal.” Article II requires the parties to submit “to arbitration all or any differences which have arisen or which may arise between them.” There is no “difference” between the parties to resolve if the parties appoint an arbitrator after a settlement just to record the terms of the parties’ agreement as a consent award; the parties would be submitting their agreement to the tribunal rather than their differences. Lack of genuine dispute within the jurisdiction of the tribunal may cause the award to be set aside by a court in the seat of arbitration, or domestic courts may refuse to recognize and enforce the award. Therefore, a consent award arguably does not meet a necessary precondition of international enforceability under the Convention when
the tribunal is appointed merely to deliver the consent award. Instead, a settlement agreement that is concluded before the start of arbitral proceedings should have the status of a contract, not of an arbitral award.26

This issue is of particular importance in the enforcement of consent awards resulting from mediation. When a formal settlement agreement is reached through mediation, the mediator and the parties can agree to appoint the mediator as arbitrator to formalize the settlement in the shape of a consent award.27 As in arbitration, parties to an international dispute may want to embody the terms of their settlement agreement resulting from mediation in the form of a consent award to increase enforceability and to avoid the necessity and expense of suing on the settlement when one of the parties fails to perform.28 As previously stated, Article II(1) of the Convention requires parties to submit their disputes to arbitration for determination. Thus, if the parties resolve the dispute in mediation before the start of arbitration proceedings, the arbitral award is not justified because the arbitral tribunal did not resolve it.29 Mediated settlements reached before the commencement of arbitral proceedings should arguably not be enforced as arbitral awards because an arbitrator cannot be appointed when there is no dispute to be resolved by arbitration.30
In conclusion, the international enforcement of consent awards under the Convention, particularly those rendered before the start of arbitration proceedings, may be challenged due to the lack of an actual dispute between the parties.

3. Consent Awards May Contain Illegal Terms

Third, since consent awards are drafted by the parties and not by a neutral arbitrator, some scholars claim that consent awards should be outside the scope of the Convention because they are more likely to serve an illegal or fraudulent purpose. A settlement agreement is misused by the parties to facilitate illegal activities such as bribery, corruption, tax evasion, or money laundering. It is the responsibility of the arbitrator(s) to ensure that a consent award is not used as a cover for illegality; otherwise, the arbitrator(s) may become liable for criminal proceedings. Determining whether a settlement serves an illegal purpose can be difficult because the tribunal must consider domestic and transnational public policy, the law of the seat of the arbitration, the substantive law of the transaction, and the law of the jurisdictions where enforcement is likely to be sought.

Some argue that arbitration is used to facilitate illegal activities through consent awards because consent awards are not subjected to the same level of scrutiny as final arbitral awards. As the use of arbitration to solve cross-border disputes increases, criminal gangs are hijacking the system to launder money. Some arbitral institutions have safeguards in place to prevent illegal and fraudulent
activities from infiltrating the arbitration process. In the International Chamber of Commerce (“ICC”), for example, the ICC Court and the Secretary of the Court review every arbitration provision, subjecting them to strict scrutiny. However, the ICC does not require this scrutiny of consent awards, increasing the risk of misuse of the arbitral process. Ad hoc arbitrations are even more vulnerable to this scam because they are more flexible and are not administered by the main global arbitral institutions.

Consequently, scholars argue that consent awards should not fall within the notion of an arbitral award enforced under the Convention because they are susceptible to being used as a cover for illegal activities.

B. Consent Awards Do Qualify as Arbitral Awards and Should Be Enforceable Under the New York Convention

Although the arguments against consent awards qualifying as arbitral awards and enforcing them under the New York Convention are convincing, the counterarguments are as equally persuasive. Scholars believe that consent awards should be recognized and enforced as arbitral awards under the Convention for the following reasons: many sets of arbitration rules and national laws explicitly empower a tribunal to record settlements as consent awards; the purpose of a consent award is to resolve disputes between parties; and tribunals are under no obligation to render consent awards if they suspect illegality.
1. Arbitration Rules and National Laws Empower Tribunals to Record Settlements as Consent Awards

First, even though the Convention does not mention the enforceability of consent awards, most arbitration rules and national laws grant a tribunal the power to record a settlement as a consent award.\textsuperscript{40} For example, the ICC Rules of Arbitration, the American Arbitration Association Rules, and the London Court of International Arbitration Rules, among others, give tribunals the jurisdiction to embody the terms of a settlement into a consent award.\textsuperscript{41}

Article 30 of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (“UNCITRAL Model Law”) also provides that a tribunal may record a parties’ settlement in the form of an arbitral award and that “[s]uch an award has the same status and effect as any other award on the merits of the case.”\textsuperscript{42} Additionally, many national laws expressly allow tribunals to endorse a parties’ settlement agreement through the issuance of a consent award.\textsuperscript{43} For example, section 1053 of the German Code of Civil Procedure provides that if “the parties settle the dispute, the arbitral tribunal shall … record the settlement in the form of an arbitral award on agreed terms … Such an award has the same effect as any other award on the merits of the case.”\textsuperscript{44} Consequently, consent awards should arguably be recognized and enforced “as any other award” because arbitration rules and national laws grant tribunals the jurisdiction to issue consent awards.\textsuperscript{45}
German courts have consistently upheld the view that tribunals are empowered to issue consent awards and that awards on agreed terms qualify as arbitral awards. In one case, the Federal Court of Justice stated that a consent award was enforceable under the general principles applicable to the enforcement of arbitral awards. In another case, the Higher Regional Court of Frankfurt declared that a settlement agreement recorded by a tribunal in the form of a consent award was enforceable under the UNCITRAL Model Law. In a separate opinion, the same Court declared settlement agreements recorded by tribunals in the form of consent awards enforceable as arbitral awards if they fulfill the formal requirements stated in Article 30 of the UNCITRAL Model Law.

In conclusion, without clarity from the Convention regarding the enforceability of consent awards, advocates may look to the rules of arbitral institutions and national laws to confirm that tribunals have the jurisdiction to issue consent awards.

2. The Purpose of Consent Awards is to Resolve Disputes

Second, supporters believe consent awards should qualify as arbitral awards and be enforceable under the Convention because their purpose is to resolve differences between the parties. The role of tribunals is to preside over a process aimed at settling a dispute, so whether it is resolved through a decision of the tribunal or an agreement between the parties should not make much difference.
In other words, because a consent award finally settles the issues that it seeks to resolve and puts an end to the arbitration, it should qualify as an arbitral award.\textsuperscript{50} Consent awards should not be refused enforcement based on the technicality of whether arbitration proceedings have started. Moreover, consent awards resulting from mediation should be internationally enforceable because many jurisdictions expressly provide that mediated settlement agreements are enforceable in the same way as arbitral awards and do not require the commencement of arbitration proceedings.\textsuperscript{51} For example, in India, any settlement agreement, whether it is reached through mediation or through other means, is binding upon the parties and has the same status and effect as an arbitral award.\textsuperscript{52}

Therefore, scholars assert that consent awards, including those resulting from mediation, should be recognized and enforced as arbitral awards under the Convention regardless of whether arbitration proceedings have started.

3. **Tribunals May Refuse to Record Consent Awards With Illegal Terms**

Third, some argue that the concern over consent awards containing illegal terms is misplaced. Article V(2) of the New York Convention states that “[r]ecognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of
the award would be contrary to the public policy of that country.”53 Thus, any court of the territory where enforcement is sought under the Convention would scrutinize the award for legality. According to one scholar, “[t]his would be the case irrespective of whether the tribunal had an opportunity to ascertain the legality of the subject matter of the dispute or if it had ignored the issue altogether.”54 Furthermore, the discretion over whether to render a consent award is granted to a tribunal by nearly all major arbitration rules.55 So, if the settlement agreement is illegal, tribunals are under no obligation to issue an award by consent.56

The ICC Rules of Arbitration provide an example of this modern trend. The 1988 ICC Rules required arbitrators to accept the parties’ request to issue a consent award, but the 2012 Rules provide that the tribunal’s sanction of an award by consent is subject to the arbitrators’ discretion.57 So, even if a settlement agreement is drafted by the parties instead of a neutral arbitrator, if the arbitrators suspect that the terms of the settlement are advancing an illegal purpose, the arbitrators may refuse to issue the award.

Therefore, supporters claim that consent awards should be recognized and enforced as arbitral awards under the Convention because the concern regarding their illegality is easily overcome.
III. PROPOSED SOLUTION

Enforceability of consent awards as arbitral awards under the New York Convention depends on the tribunal’s jurisdiction to render consent awards, whether a genuine dispute is submitted to the tribunal, and the potential inclusion of illegal terms in the consent award. The uncertainty regarding enforcement prompted an UNCITRAL Working Group to consider the enforceability of settlement agreements in international commercial disputes.\(^5\)\(^8\) One of the proposed solutions is the development of a new convention – modeled on the New York Convention – to provide for the international enforcement of mediated settlement agreements.\(^5\)\(^9\) A convention may clarify the jurisdictional issues, resolve the genuine dispute problem, and provide for scrutiny of settlement terms.

IV. CONCLUSION

The question of enforcing consent awards as arbitral awards under the New York Convention is sufficiently uncertain, and because settlement agreements are useful to dispute resolution, the uncertainty should be quelled. In my view, the best way to eliminate the uncertainty is through the development of a convention for the international enforcement of mediated settlement agreements.

---

withdrawn before a final award is rendered); But see CHRISTOPHER R. DRAHOZAL AND RICHARD W. NAIMARK (eds.), TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 257 (Kluwer Law International, 2005) (stating that the percentage of consent awards per year from 1998-2003 averaged only seven percent).

3 Kryvoi and Davydenko at 828.

4 Id. at 829.

5 Id. at 850.


7 BLACKABY et al. at 502.


11 Kryvoi and Davydenko at 851.

12 BLACKABY et al., at 513.

13 DI PIETRO at 145 (stating “the activity carried out by the arbitral tribunal with [regard to] consent award[s] is totally deprived of any jurisdictional character and content. As there is no actual judicial activity, there cannot be a genuine arbitral award.”).


15 New York Convention art V(1)(c).

16 Sekulovic.

17 Id.

18 Id.

19 Id.

20 Id.

21 DI PIETRO.

22 New York Convention art I.

23 New York Convention art II.

24 Kryvoi and Davydenko at 854.

25 Id. at 831.

26 Id. at 867.
29 Chern at 287.
30 Kryvoi and Davydenko at 866-67.
31 Id. at 855; See also Di Pietro.
32 Chern at 289; See also Kryvoi and Davydenko at 831.
33 Chern at 289.
34 Kryvoi and Davydenko at 860.
36 Id.
37 Id.
38 Id.
39 Id.
40 Kryvoi and Davydenko at 832.
41 See International Chamber of Commerce, Rules of Arbitration, art 32 (2012) (stating “[i]f the parties reach a settlement after the file has been transmitted to the arbitral tribunal in accordance with Article 16, the settlement shall be recorded in the form of an award made by consent of the parties, if so requested by the parties and if the arbitral tribunal agrees to do so”); American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, rule 43 (2013) (stating “[i]f the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a “consent award.”’’); London Court of International Arbitration, Arbitration Rules, rule 26.9 (2014) (stating “[i]n the event of any final settlement of the parties' dispute, the Arbitral Tribunal may decide to make an award recording the settlement if the parties jointly so request in writing a Consent Award”).
43 Kryvoi and Davydenko at 841.
44 Bürgerliches Gesetzbuch [BGB] [Civil Code] art 1053 (Ger.).
45 Kryvoi and Davydenko, above n 2, 852.
46 Bundesgerichtshof [BGH] [Federal Court of Justice], III ZB 55/99, Nov. 2, 2000.
47 Rechtsprechung der Oberlandesgerichte in Zivilsachen [OLGZ] [Higher Regional Court of Frankfurt], 3 Sch 01/99, June 28, 1999.
48 Rechtsprechung der Oberlandesgericht in Zivilsachen [OLGZ] [Higher Regional Court of Frankfurt], 20 Sch 01/02, March 14, 2003.
49 Di Pietro.
51 See International Conciliation and Arbitration Act 1993 (Bermuda) sec. 20, 48 (stating that in Bermuda, parties may appoint a mediator and any resulting settlement shall enjoy the status of a consent award and be enforced in an identical manner as a judgment – it is not necessary for arbitration proceedings to commence before the appointment of a mediator).
See *Arbitration and Conciliation Act 1996* (India) sec. 73–4 (“The settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30.”).

New York Convention art. V(2).

Di Pietro.

Kryvov and Davydenko at 839.

Di Pietro.

Kryvov and Davydenko at 839; Cf International Chamber of Commerce, *Conciliation and Amended Arbitration Rules*, art. 17 (1988); ICC Rules art. 32.


Id. at 3.