UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CONVERGIA NETWORKS, INC. and FUTURE ELECTRONICS INC.,

Plaintiffs,

06 Civ. 6191 (PKC)

-against-

MEMORANDUM AND ORDER

HUAWEI TECHNOLOGIES CO., LTD. and FUTUREWEI TECHNOLOGIES, INC.,

Defendants.

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P. KEVIN CASTEL, District Judge:

An arbitration between the parties to this action concluded with a finding that the defendants were in breach of contract. The arbitrators awarded direct damages for loss arising from the breach. Plaintiff Convergia Networks, Inc. ("Convergia") now moves for the partial vacatur of the Award. Defendants Huawei Technologies Co., Ltd. ("Huawei") and Futurewei Technologies, Inc. ("Futurewei") move to confirm the Award.

For the reasons explained below, Convergia's motion is denied and Huawei's motion is granted. The Award is confirmed.

Background

Convergia is a telecommunications company organized under the laws of Canada, with operations throughout North America and Latin America. (Mancini Dec. Ex. 6 at 1-2.) Huawei sells telecommunications infrastructure equipment and is organized under the laws of the People's Republic of China. (Mancini Dec. Ex. 6 at Ex. 1-2.) Futurewei is Huawei's American affiliate, with its principal place of business in the

state of Texas. (Mancini Dec. Ex. 6 at Ex. 1-2.) Plaintiff Future Electronics, Inc. ("Future Electronics"), a Canadian electronics distributor and Convergia client, elected not to pursue its claim in arbitration. (Mancini Dec. Ex. 1 at 1 n.1.)

On September 7, 2004, Convergia and Huawei entered into a contract pursuant to which Huawei was to provide Convergia with an Internet Protocol telecommunications network, along with supporting hardware, software, and peripherals. Convergia hoped that the agreement with Huawei would help Convergia to expand its business in countries throughout the Western Hemisphere. The planned network was known as a Next Generation Network system, and the contract is referred to as the NGN Agreement. Under the NGN Agreement, any dispute between the parties is to be heard by an arbitrator in New York City and is governed by New York law. (Mancini Dec. Ex. 6 at 30-31.)

By the summer of 2006, the relationship between the parties had soured. According to Convergia, Huawei failed to perform key obligations set forth in the NGN Agreement. (Complaint¶25-41.) Huawei attempted to terminate the NGN Agreement in July 2006, asserting that Convergia failed to comply with an "acceptance testing" provision of the NGN Agreement. (Complaint¶39.) Convergia maintained that there was no basis to terminate the NGN Agreement, and demanded full performance from Huawei. (Complaint¶19.) Convergia and Future Electronics commenced this action on August 15, 2006, by filing a complaint seeking to compel arbitration.

Shortly after this litigation began, the parties reached a post-dispute agreement to arbitrate. I ordered that this action be stayed, pending the outcome of the agreed-upon arbitration before a panel of the International Centre of Dispute Resolution

("ICDR"). Convergia filed a Claim and Demand for Arbitration (the "Claim and Demand") dated September 22, 2006, which explicitly sets forth three grounds for relief: breach of contract, fraudulent inducement of contract and declaratory judgment. (Mancini Dec. Ex. 9.)

The parties presented their cases to a panel of three arbitrators (the "Tribunal"). On September 12, 2007, the Tribunal issued a Partial Award on Agreed Terms, which set forth the rights and duties attendant to Convergia's migration of infrastructure equipment to a vendor other than Huawei. (Taube Dec. Ex. 13.) On December 14, 2007, the Tribunal issued a Final Award. (Taube Dec. Ex. 14.) It noted that the only two claims raised in the arbitration were for breach of contract and fraudulent inducement, and that no negligence was alleged by Convergia. (Taube Dec. Ex. 14 at 18.) The arbitrators concluded that Convergia failed to show evidence of knowingly false representations by Huawei, and therefore denied Convergia's fraudulent inducement claim. (Taube Dec. Ex. 14 at 15-16.) The Tribunal ruled in favor of Convergia on its breach of contract claim, concluding that "the fundamental core of the system" provided by Huawei "is not working, along with any enhanced services that were promised." (Taube Dec. Ex. 14 at 16.) It concluded that Section 8.26 of the NGN Agreement excluded an award of consequential damages, and rejected Convergia's argument that the consequential-damages clause is unenforceable. (Taube Dec. Ex. 14 at 17-18.) The Tribunal directed Huawei and Futurewei to pay Convergia in direct damages[1] and to pay its legal fees and costs. (Taube Dec. Ex. 14 at 26.)

Convergia filed this motion on March 15, 2008, asserting that the Award

[1] Pursuant to a Protective Order dated March 12, 2008, the Award's damages figure is confidential and under seal.

should be partially vacated. First, it contends that the Tribunal unlawfully omitted consideration of purported causes of action for gross negligence, willful and wanton misconduct and bad faith. Second, it contends that the Tribunal's denial of consequential damages was baseless and unsupported by the record. Third, it contends that the Tribunal erroneously failed to award costs for Convergia's own expenses in pursuing the arbitration. Huawei moves for confirmation of the arbitration award.

I. Review of the Award is Governed by the Federal Arbitration Act

The parties agree that their motions are governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 53 (the "New York Convention") as implemented by the Federal Arbitration Act ("FAA"), at 9 U.S.C. §§201-08. See generally Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 18-23 (2d Cir. 1997) (discussing FAA's applicability to the New York Convention), cert. denied, 522 U.S. 1111 (1998). An international arbitration award shall be confirmed unless the Court "finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207. "[T]he showing required to avoid summary confirmance is high." Yusuf Ahmed Alghanim, 126 F.3d at 23 (quotations omitted). "Confirmation under the Convention is a summary proceeding in nature, which is not intended to involve complex factual determinations, other than a determination of the limited statutory conditions for confirmation or grounds for refusal to confirm." Zeiler v. Deitsch, 500 F.3d 157, 169 (2d Cir. 2007). A court should avoid "evidentiary and legal review generally," Hall Street Associates, LLC v. Mattel, Inc., 128 S.Ct. 1396, 1404 (2008), and

may not "second guess an arbitrator's resolution of a contract dispute." John T. Brady & Co. v. Form-Eze Systems, Inc., 623 F.2d 261, 264 (2d Cir. 1980).

II. Convergia's Motion is Denied as to Its Purported "Extra-Contractual" Claims

As noted, Convergia's Claim and Demand for Arbitration sets forth three grounds for relief: breach of contract, fraudulent inducement of contract and declaratory judgment.[2] (Mancini Dec. Ex. 9.) Convergia argues that it also asserted separate causes of action for gross negligence, willful and wanton misconduct and bad faith, and that they were properly before the Tribunal because they were mentioned in briefs and letters submitted during the arbitration. For instance, Convergia notes that it referred to gross negligence in opposition to Huawei's motion to dismiss Convergia's fraudulent inducement claim, and that Huawei in turn addressed gross negligence in its reply. (Mancini Dec. Ex. 13 at 4 n.2; Ex. 14 at 3.) In addition, Convergia wrote to the Tribunal on August 31, 2007, asserting that it would be appropriate to award consequential damages caused by Huawei's bad faith. (Mancini Dec. Ex. 12.) Huawei wrote the Tribunal to refute Convergia's bad-faith argument. (Mancini Dec. Ex. 15.) Convergia also points to moments in the arbitration's evidentiary hearing when it orally referenced its purported "extra-contractual" theories or claims. (Supp. Mancini Dec. Exs. 1, 2.)

On the basis of these statements to the Tribunal, Convergia argues that three causes of action not set forth in the Claim and Demand–gross negligence, willful or wanton misconduct, and bad faith–were properly raised before the Tribunal, but not properly ruled upon. Convergia's position is without merit.

[2] The declaratory judgment claim sought a declaration that Convergia was not in breach of Section 5.2.4.4 of the NGN Agreement, which was the provision that Huawei cited in its attempt to terminate the Agreement. (Claim and Demand ¶¶ 32-35.)

As an initial matter, I note that the purported claims were not presented as stand-alone claims in the Claim and Demand. (Mancini Dec. Ex. 9.) Convergia never sought to amend the Claim and Demand, even though Article 4 of the ICDR Rules provided it the means to do so; indeed, in January 2007, Convergia explicitly declined to amend its claims. (Bull Dec. Ex. 2; Taube Dec. Ex. 9 at 3.) In addition, Article 30 of the ICDR Rules permits a party to request that the panel make an additional Award within 30 days of receipt of the Final Award, and allows a party to request a panel to rule on claims that were presented but omitted. (Bull Dec. Ex. 2.) Convergia made no such motion. It is also notable that Convergia, on occasion, orally indicated to the Tribunal that it sought relief only on counts of fraudulent inducement and breach of contract. (Bull Dec. Ex. 1 at 43.)

In addition to these procedural issues, it is also significant that Convergia's agreement with Huawei is governed by New York law. (Mancini Dec. Ex. 6 at 30.) It is not clear that New York recognizes the causes of action that Convergia purports to have asserted. Bad faith may arise in the performance of a duty, including a contractual duty, but that does not render bad faith a separate cause of action.[3] See, e.g., Acquista v. New York Life Insurance Co., 285 A.D.2d 73, 81-82 (1st Dep't 2001) (bad faith is not a distinct tort claim, but rather, may be considered in awarding consequential damages). Similarly, willful or wanton misconduct is frequently written into contracts as a standard governing a party's conduct, but Convergia cites no support for the proposition that New

[3] Indeed, when Convergia wrote the Tribunal about the purported acts of bad faith, it appeared to be in the context of its claimed entitlement to consequential damages arising out of the fraudulent inducement claim – not an explicit assertion that bad faith was its own freestanding cause of action. (Mancini Dec. Ex. 12 at 3.) Similarly, its oral representations concerning willful misconduct and bad faith apparently were related to the fraudulent inducement claim. (Mancini Supp. Dec. Ex. 1 at 71-72 ("The evidence will demonstrate that even until today Huawei has engaged in willful misconduct and bad faith. Huawei fraudulently induced my client to enter the NGN agreement . . . .").)

York recognizes a cause of action for willful or wanton misconduct. See, e.g., Abbatiello v. Monsanto Co., 522 F. Supp. 2d 524, 543 (S.D.N.Y. 2007) (willful and wanton misconduct may support a punitive damages award if alleged as a component of an appropriate tort). Finally, for reasons explained at greater length in Alitalia Linee Aeree Italiane, S.p.A. v. Airline Tariff Publishing Co., __ F. Supp. 2d __, 2008 WL 4195736 (S.D.N.Y. Sept. 5, 2008), New York does not allow a tort claim to exist alongside a contract claim unless a duty arises from circumstances extraneous to the contract. Id. (citing Clark-Fitzpatrick, Inc. v. Long Island R.R., 70 N.Y.2d 382, 389 (1987)). Since the duties alleged here appear to arise from a contractual obligation, it is probable that no stand-alone claim for gross negligence would survive scrutiny. Of course, the simple answer is that the three claims do not appear to have been asserted as stand-alone causes of action, and the Tribunal was not required to reach them.

That is not to say that bad faith, willful misconduct and gross negligence were wholly irrelevant to the arbitration. Convergia apparently raised the defendants' culpability and degree of fault in context of the fraudulent inducement claim and as a means for avoidance of the limit on consequential damages on the contract claim. (Mancini Dec. Ex. 12.) There is no reason to assume that the Tribunal ignored Convergia's arguments, even if they were not accepted as a basis to avoid the NGN Agreement's limitation on liability.[4]

Convergia's citations to the FAA provide no basis for vacatur. Pursuant to

[4] To the extent that Convergia contends that its purported causes of action were properly pleaded before the Tribunal, I note that matters of procedure are best left to the arbitrators themselves. See Stroh Container Co. v. Delphi Industries, Inc., 783 F.2d 743, 849 (8th Cir. 1986) (courts should "accord even greater deference to the arbitrator's decisions on procedural matters than those bearing on substantive grounds."); Commercial Risk Reinsurance Co. v. Security Insurance Co., 526 F. Supp. 2d 424, 430 (S.D.N.Y. 2007) (noting "deference due to [arbitrators'] rulings on such procedural matters"); Kruse v. Sand Brothers & Co., 226 F. Supp. 2d 484, 488 (S.D.N.Y. 2002) ("great deference [is] given to [an] arbitrator's decision to control order, procedure and presentation of evidence").

9 U.S.C.§10(a)(4), an award may be vacated if the arbitrators "exceeded their powers" or executed them in a way that did not provide for "a mutual, final, and definite award . . . ." The Second Circuit has "consistently accorded the narrowest of readings to the Arbitration Act's authorization to vacate awards [pursuant to§10(a)(4)]." Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 220 (2d Cir. 2002) (alteration in original; quotation marks omitted). Classic (though not exclusive) examples of arbitrators exceeding their powers include a determination of the rights of a corporation clearly not party to the arbitration, see, e.g., Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama, S.A., 312 F.2d 299, 300-01 (2d Cir. 1963), or a damages award for events not governed by the arbitration agreement. See, e.g., Matter of Arbitration Between Melun Industries, Inc. and Strange, 898 F. Supp. 990, 993-94 (S.D.N.Y. 1990). Based on the record before me, there is no basis to conclude that the arbitrators "exceeded their powers" by failing to "state reasons" for rejecting the purported extra-contractual claims.

Convergia also fails to set forth a viable theory as to why the Award should be vacated under 9 U.S.C.§10(a)(3), which permits vacatur when "the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." Section 10(a)(3) takes effect when evidence central to a party's claims is improperly excluded by the arbitrators. From Convergia's own submissions, it is self-evident that Convergia submitted extensive evidence to the Tribunal. (Mem. in Support of Plaintiffs' Motion at 17-23 (summarizing evidence presented).) Section 10(a)(3) does not permit a reviewing court to reconstruct the arbitrators' thinking or the appropriate amount of weight to afford certain evidence. See, e.g., Kruse Brothers, 226 F. Supp. 2d

at 488 ("Case law dealing with arbitrator misconduct in the consideration of evidence has focused exclusively on the arbitrators' *refusal* to hear evidence, not their affirmative consideration of evidence."). The Tribunal did not violate Section 10(a)(3) when it failed to discuss this evidence in response to Convergia's purported extra-contractual claims, or to issue an Award granting Convergia relief as to these claims.

III. Convergia's Motion to Partially Vacate the Arbitrators' Damages Award is Denied

As to the damages set forth in the Award, Convergia contends that the Award should be partially vacated since it did not fully account for the consequential damages that it contends is owed under New York law. Convergia asserts that vacatur is warranted under Section 10(a)(3), as well as under an extra-statutory doctrine that has permitted vacatur of an award made in "manifest disregard" of the law. As with the purported extra-contractual claims, Convergia's citation to Section 10(a)(3) is unavailing, as 10(a)(3) concerns the exclusion of evidence rather than the weight afforded to the evidence presented in arbitration.

In addition, the Supreme Court recently cast doubt on the viability of the judge-made manifest disregard standard, Hall Street, 128 S.Ct. at 1403-04, and made clear that an award can be vacated pursuant only to the criteria set forth in the FAA. In light of Hall Street, at least one court in this District has observed that the narrow manifest disregard standard "is no longer good law." Robert Lewis Rosen Associates, Ltd. v. Webb, 566 F. Supp. 2d 228, 233 (S.D.N.Y. 2008). Even if the manifest disregard standard were still viable, it applies "only to those exceedingly rare instances when some egregious impropriety on the arbitrators is apparent," Duferco Int'l Steel Trading v. T.

Klaveness Shipping A/S, 333 F.3d 383, 389 (2d Cir. 2003), and requires "a barely colorable justification for the outcome reached" by the arbitrators. Banco de Seguros del Estado v. Mutual Marine Officer, Inc., 344 F.3d 255, 260 (2d Cir. 2003). Here, the arbitrators concluded that the parties expressed a clear contractual intent to exclude all but direct damages. (Taube Dec. Ex. 14 at 18.) While New York law allows the avoidance of a contractual limit on consequential damages in certain circumstances, the arbitrators implicitly concluded that those circumstances were not met.[5]

IV. Convergia's Motion to Vacate the Arbitrators' Ruling on Costs is Denied

Convergia contends that the Tribunal erred in declining to award Convergia costs that Convergia asserts it directly bore itself. The NGN Agreement provides that "each Party to the proceedings shall pay its own costs in connection with the proceedings. . . ." (Mancini Dec. Ex. 9 at § 8.22(vi).) Additionally, ICDR Rule 31 permits the arbitrators to allocate costs as they deem reasonable. (Bull Dec. Ex. 2.) I decline Convergia's invitation to reassess the merits of the arbitrators' interpretation of the NGN Agreement as it pertains to Convergia's direct costs. Westerbeke Corp., 304 F.3d at 214 (arbitrators' fact-findings and contractual interpretations are not subject to judicial challenge).

[5] Between sophisticated parties to a commercial contract, New York would allow the avoidance of a limit on consequential damages in narrow circumstances, such as proof of gross negligence or reckless indifference that "smack[s] of intentional wrongdoing." Alitalia, __ F. Supp. 2d at __, 2008 WL 4185736, at *8 (citing Sommer v. Federal Signal Corp., 79 N.Y.2d 540, 554 (1992)).

Conclusion

Plaintiffs' Motion for partial vacatur of the arbitration award is denied. Defendants' Motion to confirm the Final Award of December 14, 2007, and Partial Award of September 12, 2007 is granted.

Pursuant to 9 U.S.C. § 207, I confirm the Final Award and Partial Award in their entirety. The Clerk is directed to enter Judgment in this action.

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
October 29, 2008