UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration Between:	08 Civ. 7338 (JSR)
GLOBAL INTERNATIONAL REINSURANCE COMPANY, LTD.,	MEMORANDUM ORDER
Petitioner/Cross-Respondent,	
-v-	
TIG INSURANCE COMPANY,	
Respondent/Cross-Petitioner.	

JED S. RAKOFF, U.S.D.J.

Global International Reinsurance Company, Ltd. ("Global") and TIG Insurance Company ("TIG") were parties to a reinsurance agreement, pursuant to which Global agreed to indemnify TIG for certain losses. Disagreements arose as to how certain losses should be allocated pursuant to that agreement, and, in an underlying arbitration proceeding, an arbitrator granted TIG's motion for partial summary judgment, finding that Global had released its right to audit and dispute claims reported to TIG prior to January 1, 2003. On August 18, 2008, Global petitioned the Court, pursuant to 9 U.S.C. § 10, to vacate in part the arbitrator's award, and on September 22, 2008, TIG cross-petitioned the Court to confirm the award pursuant to 9 U.S.C. § 9. After receiving briefs and hearing oral argument, the Court, by Order dated October 30, 2008, granted TIG's petition to confirm the award, and denied Global's petition to vacate the award. This Memorandum explains the reasons for that Order.

The pertinent facts are as follows. In 1998 Global agreed to reinsure TIG for certain losses pursuant to a Loss Reserve Reinsurance Agreement ("the LPT Agreement"), with an aggregate limit of $315 million. Declaration of Christopher P. Anton in Support of Petitioner's Petition to Vacate the Arbitration Award ("Anton Decl.") Ex. 1, Art. V. A sublimit capped Global's exposure for certain losses at $25 million. Id. Art. XII. In 1999, a dispute arose concerning the scope of the sublimit, and in 2000, Global demanded arbitration against TIG to resolve the dispute ("the LPT Arbitration"). On September 23, 2002, the LPT Arbitration panel ruled, consistent with TIG's interpretation, that the sublimit only applied to claims arising out of a particular business segment. Id. Ex. 12 at Ex. B ¶ 1. To ensure compliance with its ruling, the panel required that TIG use certain coding definitions when allocating losses to the sublimit. Id. The panel instructed the parties to "adjust the accounting for the LPT consistent with [its] rulings," and advised that "[a]ny disputes between the parties that may arise due to any adjustments to the accounting for the LPT that [the] ruling may render necessary" would be resolved during a second phase of the LPT Arbitration. Id. ¶ 2. Finally, the panel ordered that Global would have "the right to review and approve TIG's quarterly loss reports prior to reimbursing TIG for Covered Losses, and such approval shall not be unreasonable withheld. [Global] is to notify

TIG within seven days after receipt of a quarterly report if it does not approve. Silence will constitute approval." Id. ¶ 5.[1]

On May 13, 2004, the parties entered into a Settlement Agreement that dismissed with prejudice all claims raised but not resolved in the LPT Arbitration (including claims that were reserved for Phase II) and incorporated the panel's interpretation of the sublimit. Id. Ex. 2. ¶¶ 1-3. Paragraph 11 of the Settlement Agreement provided that "[n]othing in this Agreement shall be read to limit [Global's] right under the LPT to inspect records, or to expand [Global's] liability under the LPT," and preserved Global's right to dispute "any amount billed or underlying an amount billed," subject to the terms of the Settlement Agreement. Id. ¶ 11. Paragraph 14 of the Settlement Agreement provided that beginning with the 15 month period commencing on January 1, 2003, and for each 6 month period thereafter, TIG would review a statistically representative sample of claims to ensure that those claims were coded in a manner consistent with the September 23, 2002 Award. Id. ¶ 14.

In 2004, Global expressed a desire to amend the Settlement Agreement to permit Global to review the allocation of (1) pre-2003 losses; and (2) additional losses reported between January 1, 2003 and March 15, 2004 that had not previously been reviewed as part of the first post-settlement audit. Id. Ex. 9 at Ex. 24. After negotiations, the parties agreed that, as to audits of post-January

[1] On March 7, 2003, TIG submitted its Fourth Quarter 2002 Loss Report, Anton Decl. Ex. 9 at Ex. 12, and Global did not object to or otherwise respond to this Report within 7 days.

1, 2003 losses, TIG would list by value those claims at each audit stage. Id. As to pre-2003 losses, however, TIG contended that Global's position was "unreasonable," and reminded Global that the Settlement Agreement had released Global's right to audit such claims. Id. After subsequent conversations, TIG further informed Global that, in an effort to clarify paragraph 14 of the Settlement Agreement, all future audits would be limited to post-2003 claims, but that, "as a one off," the subsequent audit would include specifically enumerated pre-2003 claims, and that "[n]o other claims reported to TIG prior to 12/31/02 shall be subject to review in any future audit." Anton Decl. Ex. 9 at Ex. 25 (the "Thirkill e-mail"). Global agreed. Id. Ex. 9 at Ex. 26.

TIG proceeded to conduct audits pursuant to the Settlement Agreement, see, e.g., Anton Decl. Ex. 17 ¶¶ 6, 8, 9, and, in late 2005, Global sought an independent inspection and audit of TIG's records. Id. ¶ 19. In January 2006, Global took exception to $25.9 million of claims, and, in September 2006, TIG informed Global that (1) Global had forfeited its right to audit and dispute pre-2003 claims; (2) $19.5 million of the disputed claims had been released; and (3) TIG's decision to allow Global to review pre-2003 claims was merely a demonstration of TIG's "good faith." Id. Ex. 12 at Ex. L.

In October 2007, Global served a demand for arbitration on TIG, seeking damages for TIG's alleged breach of the LPT Agreement and the Settlement Agreement, and enforcement of Global's audit rights. Id. Ex. 3. In February 2008, TIG submitted a pre-discovery motion for partial summary judgment, seeking to bar Global from auditing or

challenging claims reported prior to January 1, 2003 and to place limits on Global's audit rights going forward. Id. Ex. 7. Counsel for TIG repeatedly stated that TIG's motion was not based on the Settlement Agreement, Id. Ex. 8 at 28, but instead on the Thirkill e-mail. Id. Ex. 6 at 23-28; Ex. 8 at 28, Ex. 9 at Ex. 26, Ex. 21 at 7-8. TIG's motion was accompanied by 31 exhibits, Anton Decl. Ex. 9, and Global's opposition to TIG's motion and cross-motion for an audit included 5 declarations, and 16 exhibits. Anton Decl. Exs. 12-17.

The Arbitrator heard four hours of oral argument on May 15, 2008, id. Ex. 21, and on May 21, 2008, the Arbitrator granted TIG's motion in part, holding that Global "has released its right to audit and dispute the allocation of losses reported to TIG prior to January 1, 2003, pursuant to the [LPT Agreement]." Id. Ex. 22. The Award further granted Global's Cross-Motion for an audit, but only with respect to post-2002 losses. Id.

On June 17, 2008, the Arbitrator issued a written clarification of the Award, providing in part that (1) the finding that Global had released its right to audit and dispute pre-2003 claims "was based on a reading of all of the operative documents and submissions;" and (2) the dismissal and release of pre-2003 claims applied to all claims, including those not subject to the sublimit. Id. Ex. 24. As to Global's release of its right to audit pre-2003 claims, the Arbitrator referred the parties "to the September 23, 2002 Order of the prior panel and the Settlement Agreement which incorporates by reference such Order." Id. The Arbitrator further stated: "There is no apparent limit on the extent of the dismissal and release

agreed to by Global. They both refer to all claims raised but not resolved in the prior arbitration. It is clear from a reading of all other documents that Global has given up its rights review [sic] or dispute any claims reported to TIG prior to January 1, 2003." Id. In other words, the Award was based, at least in part, on the LPT Agreement, even though TIG based its motion on the Thirkill e-mail alone.

Two months later, Global petitioned this Court to vacate the Award in part.

As an initial matter, the Court notes that the scope of its review in this action is narrowly limited. Banco de Suguros del Estado v. Mutual Marine Office, Inc., 344 F.3d 255, 260 (2d Cir. 2003); see Wallace v. Buttar, 378 F.3d 182, 189 (2d Cir. 2004) ("[a] motion to vacate filed in federal court is not an occasion for de novo review of an arbitral award"). Indeed, it is well-established in this Circuit that arbitration awards "should be enforced, despite a court's disagreement with it on the merits, if there is a 'barely colorable justification for the outcome reached.'" Banco de Surguros del Estado, 344 F.3d at 260 (citation and quotation omitted). Accordingly, Global bears the very "heavy burden" of showing that the Award at issue here "falls within a very narrow set of circumstances delineated by statute and case law." Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 388 (2d Cir. 2003).

These "narrow set of circumstances" are set forth, in part, by the Federal Arbitration Act ("FAA"), which provides that a court "must" confirm an arbitration award "unless" it is vacated "as

prescribed" in Sections 10 and 11 of the FAA. 9 U.S.C. § 9. Section 10(a)(3) of the FAA, in turn, permits vacatur in cases "where 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." 9 U.S.C. § 10(a)(3). In order to obtain relief under Section 10(a)(3), a party must demonstrate that the error complained of "was made in bad faith or was so gross as to amount to affirmative misconduct." Local 530 v. District Council No. 9, 99 Civ. 2703, 1999 WL 1006226, at *2 (S.D.N.Y. Nov. 5, 1999) (citations and quotations omitted).

Here, Global argues that it was denied a fundamentally fair hearing because the Arbitrator refused to hear evidence, disregarded the standards of summary judgment, and resolved material factual disputes without discovery or an evidentiary hearing, and that the Award accordingly must be vacated pursuant to Section 10(a)(3).[2]

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[2] At oral argument, counsel for Global expressly disavowed any reliance on the judicially-created "manifest disregard of the law" doctrine. See transcript, 10/15/08. Although the Court accordingly need not address that doctrine's application to the instant action, it nevertheless notes that the doctrine provides no basis for vacatur of the Award at issue here. Indeed, after oral argument was heard in this action, the Second Circuit clarified that the "manifest disregard" doctrine (as well as the FAA itself) serves "as a mechanism to enforce the parties' agreements to arbitrate rather than as judicial review of the arbitrator's decision." Stolt-Nielsen SA v. Animalfees International Corp., No. 06-3474-cv, slip op. at 18, 20 (2d Cir. Nov. 4, 2008) (holding that the "manifest disregard" doctrine remains a valid ground for vacating arbitration awards). Accordingly, pursuant to that doctrine, courts may vacate arbitration awards only where "the arbitrators knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless

It is well-established, however, that arbitrators have "great latitude to determine the procedures governing their proceedings and to restrict or control evidentiary proceedings." Supreme Oil Co., Inc. v. Abondolo, Nos. 07 Civ. 6479, 7537, 2008 WL 2925300, at *4 (S.D.N.Y. July 31, 2008). Accordingly, arbitrators may proceed "with only a summary hearing and with restricted inquiry into factual issues." Areca, Inc. v. Oppenheimer & Co., 960 F. Supp. 52, 55 (S.D.N.Y. 1997) (noting that "[a]lthough arbitrators must have before them enough evidence to make an informed decision, they need not compromise the speed and efficiency that are the goals of arbitration by allowing the parties to present every piece of relevant evidence") (citations and internal quotations omitted); see AT&T Corp. v. Tyco Telecoms (U.S.) Inc., 255 F. Supp. 2d 294, 303 (S.D.N.Y. 2003) (same); Sphere Drake Ins. Ltd. V. All American Life Ins. Co., No. 01 5226, 2004 WL 442640, at *2-3 (N.D. Ill. Mar. 8, 2004) (confirming arbitration award granting summary judgment based on pleadings and without discovery or an evidentiary hearing); Wise v. Wachovia Sec., LCC, 04 C 7438, 2005 WL 1563113, at *3 (N.D. Ill. May 4, 2005)

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willfully flouted the governing law by refusing to apply it." Id. (citation and quotation omitted) (alteration in original). Here, Global has failed to point to any "governing law" that the Arbitrator purportedly refused to apply, or to any clearly applicable substantive law that renders the Award improper. Indeed, as noted below, the Arbitrator acted well within his discretion when choosing to entertain TIG's summary judgment motion, interpreting the relevant contracts, and granting partial summary judgment on the basis of that interpretation. See Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 25 (2d Cir. 1997) ("[i]nterpretation of [a] contract term[] is within the province of the arbitrator and will not be overruled simply because we disagree with that interpretation").

(granting motion for summary judgment based on pleadings, discovery responses, affidavits, and "other materials," after hearing oral argument). As such, the Arbitrator acted well within his discretion when choosing to entertain TIG's motion for summary judgment.

Moreover, it is well-established that "[w]hen a contract is not ambiguous, the court 'should assign the plain and ordinary meaning to each term and interpret the contract without the aid of extrinsic evidence,'" Pereira v. National Union Fire Insurance Co., 525 F. Supp. 2d 370, 375 (S.D.N.Y. 2007) (citation omitted), and that arbitrators have broad discretion in matters concerning contract interpretation. See Yusuf Amhed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir. 1997) (noting that the Second Circuit generally refuses "to second guess an arbitrator's resolution of a contract dispute"); Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 216 n.10 (2d Cir. 2002) (courts are required to confirm arbitration awards despite "serious reservations about the soundness of the arbitrator's reading of th[e] contract"); see also United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987) (an arbitrator "may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract").

Thus, in considering TIG's motion for summary judgment, the Arbitrator acted well within his discretion when he determined that the relevant contracts were clear on their face. Accordingly, as the gatekeeper of evidence, the Arbitrator was entitled to determine that

testimony concerning the contracts (above and beyond the five declarations and 47 exhibits previously submitted by the parties) was unnecessary to resolve the issue of contractual interpretation. See GFI Sec. LLC v. Labandiera, 01 Civ. 793, 2002 U.S. Dist. LEXIS 4932, at *20 (S.D.N.Y. Mar. 26, 2002) (noting that arbitrators only need to have "enough evidence to make an informed decision"). Indeed, as the Supreme Court has observed, "the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable." Alexander v. Gardner-Denver Co., 415 U.S. 36, 57-58 (1974).

At oral argument Global relied heavily on the Second Circuit's decision of Tempo Shain, in which an arbitration panel's award was vacated based on the panel's refusal to permit one witness to testify. That witness, however, was to provide "crucial testimony concerning the negotiations and dealings between the parties," 120 F.3d at 17: testimony, in other words, that was essential to resolving the underlying dispute. The Second Circuit thus held that the panel failed to give the petitioner "an adequate opportunity to present its evidence and argument" and "excluded evidence plainly 'pertinent and material to the controversy.'" Id. at 20. Here, by contrast, the Arbitrator had before him all operative documents relevant to Global's alleged release of its audit rights, including the LPT Agreement, the Settlement Agreement, and the Thirkill e-mail,

the Arbitrator's Award "was based on a reading of all of [these] operative documents," and the Arbitrator concluded that "[i]t is clear from a reading of all other documents submitted that Global has given up its rights [to] review or dispute any claims reported to TIG prior to January 1, 2003." Anton Decl. Ex. 24. Because extrinsic evidence is irrelevant to the interpretation of a contract that is clear on its face, an evidentiary hearing in this action would have centered on irrelevant, inconsequential evidence that, unlike the testimony at issue in Tempo Shain, would have been neither "pertinent" nor "material." Thus, as already noted, the Arbitrator acted well within his discretion when he decided TIG's motion for partial summary judgment without conducting an evidentiary hearing. As such, Tempo Shain is neither applicable nor controlling to the instant dispute.

Global further contends that the Arbitrator disregarded the proper standards for summary judgment, thus rendering the Award fundamentally unfair. The Arbitrator did not detail the standard he used when ruling on TIG's motion: but he was not required to do so. See First Riverside Investors v. Oppenheimer & Co., 99 Civ. 9313, 1999 WL 1225260, at *2 (S.D.N.Y. Dec. 22, 1999). Consequently, the allegation that the Arbitrator disregarded the proper standards for summary judgment has no express basis in the record. Moreover, to the extent that the Arbitrator did, in fact, apply an informal variation on summary judgment procedures, as Global alleges, he acted well within his discretion. "Arbitration proceedings are not constrained by formal rules of evidence or procedure," GFI Sec. LLC,

2002 U.S. Dist. LEXIS 4932, at *19 (citation omitted), and there is thus no requirement that arbitrators follow all of the "niceties" of federal courts. Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997). Indeed, here the Settlement Agreement itself explicitly provided that the Arbitrator "shall be relieved of all judicial formality and shall not be bound by the strict rules of law." Anton Decl. Ex. 2 ¶ 21. Although the summary judgment procedures allegedly employed here "might not be as extensive as [those employed] in the federal courts," nevertheless, the parties, by agreeing to arbitrate, "'trade[d] [such] procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (citation omitted). By permitting Global to fully brief the issues and to submit all evidence that Global deemed relevant, and by hearing four hours of oral argument and reviewing all contracts relevant to Global's alleged release of its audit rights, the Arbitrator afforded Global exactly what it was entitled to: "an adequate opportunity to present its evidence and argument." Tempo Shain, 120 F.3d at 20.

Moreover, to the extent that Global argues that the Arbitrator ignored relevant evidence, the Second Circuit has made clear that it "does not recognize manifest disregard of the evidence as proper ground for vacating an arbitrator's award," and that "if a ground for the arbitrator's decision can be inferred from the facts of the case, the award should be confirmed." Wallace, 378 F.3d at 192-93 (noting that courts may not "conduct an independent review of the factual

record presented to the arbitral panel to achieve the 'correct' result"). Global nevertheless devoted much of its oral argument here not to the procedure employed by the Arbitrator, but instead to how certain pieces of evidence should have been viewed. The record, however, presents far more than a "colorable justification for the outcome reached" by the Arbitrator, Banco de Surguros del Estado, 344 F.3d at 260, and for that reason alone, the Award must be confirmed.[3]

Finally, in its memoranda of law, Global argues that the Arbitrator exceeded his authority by deciding matters that were outside the scope of TIG's motion for summary judgment, and that the Award accordingly should be vacated pursuant to Section 10(a)(4) of the FAA. Global's argument in this respect is, to be frank, frivolous.

The Second Circuit has "consistently accorded the narrowest of readings" to Section 10(a)(4). Banco de Seguros del Estado, 344 F.3d at 262. Accordingly, when considering challenges under Section 10(a)(4), courts focus on "whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to

[3] Indeed, the record indicates, inter alia, that Global accepted TIG's pre-2003 cumulative loss report without objection, a second phase of the LPT Arbitration was scheduled to address "all remaining issues," including issues relating to loss reporting, auditing, and inaccuracies in TIG's allocation of claims to the sublimit, the Settlement Agreement resolved all issues "raised but not resolved" in the LPT Arbitration, Paragraph 14 of the Settlement Agreement provided for only post-2003 audits, Global asked for a "change" to the Agreement so that Global could audit pre-2003 claims, and the parties later agreed to permit an audit of only select pre-2003 claims, and no more. Because multiple grounds for the Award can easily be inferred from these facts, the Award must be confirmed.

reach a certain issue, not whether the arbitrators correctly decided that issue." Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 220 (2d Cir. 2002) (emphasis added). Here, the Settlement Agreement gave the Arbitrator broad authority to resolve "[a]ny dispute, controversy or claim as to amounts due under the LPT or this Agreement, or arising in any way out of or relating to this Agreement or the LPT." Anton Decl. Ex. 2 ¶ 16. Thus, it was well within the Arbitrator's authority to consider all the evidence presented (including the Settlement Agreement, which Global itself submitted and discussed at length in its opposition papers, see id. Ex. 11 at 29-37), and rule on TIG's summary judgment motion based on that evidence.

Global nevertheless argues that, notwithstanding the Arbitrator's broad authority, the Arbitrator exceeded that authority by considering the Settlement Agreement when ruling on TIG's summary judgment motion even though TIG did not base its motion on the Settlement Agreement, and by ignoring the "clear terms" of the Thirkill e-mail. As to the first argument, Global relies upon In re Fahnestock, in which the Second Circuit noted that arbitrators exceed their authority when deciding "issues not presented to them by the parties." 935 F.2d 512, 515 (2d Cir. 1991). Here, however, as already noted, the parties' Settlement Agreement gave the arbitrator authority to resolve "any dispute" arising from or relating to the Settlement or LPT Agreements, and the issue that was before the Arbitrator, i.e., whether Global had released its right to audit and challenge pre-2003 claims, was the very issue that the Arbitrator

decided.[4] As to the second argument, Global is essentially asking the Court to re-examine the merits of the underlying dispute, an examination that is not permitted pursuant to Section 10(a)(4). See Westerbeke, 304 F.3d at 220.

For all of the foregoing reasons, the Court, by Order dated October 30, 2008, granted TIG's petition to confirm the award, and denied Global's petition to vacate the award. That Order is hereby reconfirmed and the Clerk of the Court is directed to enter final judgment accordingly.

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
January 20, 2009

[4] To the extent that Global contends that In re Fahnestock restricts arbitrator's to deciding specific issues as framed in a party's motion, this contention is directly contrary to more recent caselaw that emphasizes that an arbitrator's authority to decide an issue is determined by either the parties' submissions or the arbitration agreement. See Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 220 (2d Cir. 2002).