UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of October, two thousand eight.

PRESENT: HONORABLE CHESTER J. STRAUB,
HONORABLE REENA RAGGI,
HONORABLE JANE R. ROTH,[1]
Circuit Judges.

SOLÉ RESORT, S.A. DE C.V.,
Petitioner-Appellant,
v. No. 07-1284-cv

ALLURE RESORT MANAGEMENT, LLC,
Respondent-Appellee.

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[1] The Honorable Jane R. Roth, of the United States Court of Appeals for the Third Circuit, sitting by designation.

APPEARING FOR APPELLANT: KENNETH I. SCHACTER, Bingham McCutchen LLP, New York, New York.

APPEARING FOR APPELLEE: ALAN S. LOEWINSON, Loewinson Flegle Deary, Dallas, Texas.

Appeal from the United States District Court for the Southern District of New York (Jed S. Rakoff, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the amended judgment of the district court, entered on March 19, 2007, is AFFIRMED.

Solé Resort, S.A. de C.V. ("Solé") appeals from a judgment of the district court affirming an arbitration award to Allure Resorts Management, LLC ("Allure") of approximately $2 million in lost profits caused by Solé's breach of a hotel-management-services agreement. Solé submits that the arbitrators manifestly disregarded well-settled Delaware law[2] by awarding lost-profits damages (1) that were not proved with reasonable certainty and (2) reached beyond the term of the relevant contract. We assume the parties' familiarity with the facts and the record of prior proceedings, which we reference only as necessary to explain our decision.

1. Standard of Review

The Federal Arbitration Act ("FAA") provides for an arbitration award to be vacated

[2] The parties agree that the contract at issue is governed by Delaware law.

> (1) where the award was procured by corruption, fraud, or undue means;
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> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
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> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or 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; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). Solé has not challenged the award in this case on any of these grounds.

Instead, it invokes "an additional ground not prescribed in the statute: manifest disregard of the law," which this court has inferred from Supreme Court precedents. Hoeft v. MVL Group, Inc., 343 F.3d 57, 64 (2d Cir. 2003). The continued viability of a manifest-disregard standard distinct from the grounds identified in 9 U.S.C. § 10(a) has been called into question by the Supreme Court's recent decision in Hall Street Associates, LLC v. Mattel, Inc., 128 S. Ct. 1396, 1404, 1406 (2008) (holding that FAA provisions, 9 U.S.C. §§ 10(a) and 11, are "exclusive" means for vacating or modifying arbitration awards). While that issue is presently under consideration in another case pending before this court, see Stolt-Nielsen S.A. v. AnimalFeeds International Corp., No. 06-3474 (argued May 30, 2008), we need not await its resolution to decide this appeal because Solé has, in any event, failed to demonstrate manifest disregard of the law.

On de novo review of a manifest-disregard claim, see GMS Group, LLC v.

Benderson, 326 F.3d 75, 77 (2d Cir. 2003), we will vacate an arbitration award only if we conclude that "(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators . . . [was] well defined, explicit, and clearly applicable." DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 821 (2d Cir. 1997) (internal quotation marks omitted) (alterations in original). We review the evidentiary record only to ensure a colorable basis for the panel's award. See Wallace v. Buttar, 378 F.3d 182, 193 (2d Cir. 2004).

2. Reasonable Certainty

Solé's reasonable-certainty challenge has two components. First, it contends that the arbitration panel misapplied Delaware law when it awarded "lost profits" to Allure, a business that had never earned a profit. Second, it faults the panel's use of a speculative projection to calculate lost profits and its failure to deduct from that figure all costs that Allure would have incurred in performing the managerial contract. Neither argument has merit.

Contrary to Solé's claim, there is no well-defined Delaware rule that categorically precludes an award of lost profits to a firm without a profit record. The cases cited by Solé reference a general rule that new businesses are typically unable to establish such losses with the requisite certainty. See Re v. Gannett Co., 480 A.2d 662, 668 (Del. Super. Ct. 1984) (referring to "general rule"); see also Amaysing Techs. Corp. v. Cyberair Commc'ns, Inc.,

No. Civ. A. 19890, 2004 WL 1192602, at *4 (Del. Ch. May 28, 2004) (grounding determination in case's factual circumstances); Callahan v. Rafail, No. Civ. A. 99C-02-024, 2001 WL 283012, at *2 (Del. Super. Ct. Mar. 16, 2001) (same); Bennett Mach. Co. v. Benson, C.A. No. 95-04-027, 1997 WL 1737100, at *1-2 (Del. Ct. Comm. Pl. 1997) (same); In re Heizer Corp., Civ. A. No. 7949, 1990 WL 70994, at *3 (Del. Ch. May 25, 1990) (same). As these cases implicitly recognize, however, that general rule presupposes exceptions. Indeed, that point is made explicitly in True North Composites, LLC v. Trinity Indus., Inc., 191 F. Supp. 2d 484 (D. Del. 2002), rev'd in part on other grounds, 65 Fed. App'x 266 (Fed Cir. 2003), relied on by the arbitration panel. "'[R]ecovery for lost profits is not denied merely because a business is newly established.'" Id. at 524 (quoting Mobile Diagnostics, Inc. v. Lindell Radiology, P.A., 1985 WL 189018, at *4 (Del. Super. Ct. July 29, 1985)); see also Restatement (Second) of Contracts § 352, cmt. b & illus. 6 (1981) (recognizing circumstances under which new business may recover lost profits).

As for Solé's challenge to the panel's calculation of lost profits, we identify colorable evidentiary support for this determination. Specifically, the panel relied on a revenue projection that Solé's own representatives had approved and whose assumptions were reviewed by an Allure expert. As an added precaution, the panel adjusted those figures downward by 10% to temper any undue optimism reflected therein.

Like its determination of Allure's future revenues, the panel's calculation of Allure's

anticipated costs has a colorable basis in the record, originating in Allure's 2003 budgeted costs and expenses. Using that figure as a baseline, the panel projected a reduction in costs to approximately 25% for the years 2004-2006 and 5% per annum thereafter (through October 30, 2012). Implicit in these calculations is an assumption that, but for Solé's breach, Allure would have obtained other managerial contracts that would have enabled it to defray its overall costs. That conclusion can be inferred from (1) testimony by an Allure executive that the company actively sought other managerial contracts and would have obtained them had Solé not breached the agreement; and (2) testimony concerning the amount of time Allure executives and employees would have spent managing the hotel at issue relative to others. Although Solé urges a different conclusion, our task is not to reassess the evidentiary record, but only to ensure against manifest disregard of the law, see Wallace v. Buttar, 378 F.3d at 193, which we do not find in this case.

3. Damages Beyond December 31, 2004

For similar reasons, we reject Solé's contention that Allure should not have been awarded damages beyond December 31, 2004, the date on which the contract would have allowed Solé to terminate the agreement if Allure did not then own or manage at least three hotels. Because Allure adduced some evidence based on industry experience and the circumstances of other negotiations to support an inference that Solé's breach impaired Allure's efforts to secure other managerial contracts, there was at least a colorable basis for

the panel to find that, but for Solé's breach, the relevant condition for early termination would not have come about.

Thus, even if the manifest-disregard standard were to survive Hall Street Associates, it affords Solé no relief from the arbitration award challenged in this case. The judgment of the district court is AFFIRMED.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

By: _____