UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MICHAEL Z. MATTHEW,

Petitioner,

-v-

No. 09 Civ. 3851 (LTS)

PAPUA NEW GUINEA,

Respondent.

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MEMORANDUM ORDER

Before the Court is the Petition of Michael Z. Matthew ("Matthew") to Vacate the Final Award entered in the international arbitration proceeding entitled *International Centre for Dispute Resolution, International Arbitration Tribunal, In the Matter of the Arbitration between Re: 50 145 T 00332 06 Michael Z. Matthew v. Papua New Guinea*. Respondent Papua New Guinea ("PNG") cross moves to confirm the Interim Award, issued August 6, 2008, and the Final Award, issued January 16, 2009. Petitioner does not oppose the cross-motion to the extent it seeks confirmation of the Interim Award. The Court has jurisdiction of this action pursuant to 9 U.S.C. § 203. The Court has reviewed thoroughly the parties submissions.

BACKGROUND

Matthew and PNG entered into a Mandate (the "Mandate") dated January 1, 2004, which provided that Matthew would act as PNG's sole representative to seek North American investors for a proposed bond offering. Matthew's compensation was to be in the form of a commission following the successful completion of the bond offering. The Mandate did not contain a provision regarding compensation in the event the bond offering failed. The bond offering did not

occur. Matthew thereafter asserted claims for breach of contract or, in the alternative, compensation on the basis of quantum meruit. Following proceedings in New York State Court and this Court, the matter was referred to arbitration by the International Center for Dispute Resolution ("ICDR") through a Stipulation and Order dated March 25, 2008.

On August 6, 2008, the arbitrator issued an Interim Award which dismissed the breach of contract claim as precluded by the Statute of Frauds and preserved the quantum meruit claim. On August 29, 2008, the arbitrator issued a Scheduling Order directing the submission of sworn witness statements and any exhibits to be relied upon in support of Matthew's quantum meruit claim. On November 21, 2008, Matthew submitted his own affidavit and a set of exhibits. In his affidavit Matthew included quotes attributed to Respondent's Prime Minister, Michael T. Somare (the "Prime Minister"), regarding the compensation to which he was allegedly entitled. PNG moved for a final award and, on January 16, 2009, the arbitrator issued a Final Award dismissing Matthew's quantum meruit claim on the grounds that Matthew's evidentiary submission was insufficient to establish the "reasonable value of the services" performed, an essential element of a quantum meruit claim. Matthew now seeks an order vacating the award pursuant to §§ 10(a)(3) and 10(a)(4) of the Federal Arbitration Act ("FAA"), on the grounds that the arbitrator manifestly disregarded applicable law and committed misconduct by refusing to hear evidence pertinent and material to the controversy.

DISCUSSION

"The showing required to avoid summary confirmation of an arbitration award is high, . . . and a party moving to vacate the award has the burden of proof." Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997) (citation omitted). An award should be upheld as long as there is even a "barely colorable justification for the outcome reached." Landy Michaels Realty Corp. v. Local 32B-32J, Service Employees Int'l Union,

954 F.2d 794, 797 (2d Cir. 1992) (internal quotation marks and citation omitted).

Section 10 of the Federal Arbitration Act ("FAA") specifies narrow grounds for vacatur of an arbitration award. Citing subsection 10(a)(3) of the FAA, Matthew argues that the arbitrator's failure to consider live testimony by the Prime Minister constituted "misconduct in refusing to hear evidence pertinent and material to the controversy" and warrants vacatur of the Final Award. However, "'[e]very failure of an arbitrator to receive relevant evidence does not constitute misconduct requiring vacatur of an arbitrator's award.'" Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 375 U.S. App. D.C. 317, 481 F.3d 813, 818 (D.C. Cir. 2007) (quoting Hoteles Condado Beach, La Concha & Convention Ctr. v. Union De Tronquistas Local 901, 763 F.2d 34, 40 (1st Cir. 1985)) (alteration in original) (additional internal citation omitted). "Rather, a federal court may vacate an award only if the [arbitration] panel's 'refusal to hear pertinent and material evidence prejudices the rights of the parties to the arbitration proceedings.'" Lessin, 481 F.3d at 818 (quoting Hoteles Condado Beach, 763 F.2d at 40) (additional internal citations omitted). In other words, an arbitrator's erroneous refusal to hear "pertinent and material" evidence will only provide a basis for vacatur if the decision deprives a party of a fundamentally fair arbitration process. Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997) ("Courts have interpreted section 10(a)(3) to mean that except where fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review. . . . Federal courts do not superintend arbitration proceedings"). Interdigital Communs. Corp. v. Samsung Elecs. Co., 528 F. Supp. 2d 340, 351 (S.D.N.Y. 2007). Matthew also invokes section 10(a)(4) of the FAA, which provides for vacatur where, inter alia, "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)(4) (West 2006).

Matthew's principal focus is, however, on the doctrine of "manifest disregard of the

law," a narrow doctrine derived from the specific grounds for vacatur that are enumerated in section 10 of the FAA. See Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 95 (2d Cir. 2008), cert. granted on other grounds, 129 S. Ct. 2793, 174 L. Ed. 2d 289 (2009). See also DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 821 (2d Cir. 1997). A determination that an arbitrator acted in manifest disregard of the law must be supported by a finding that the arbitrator refused to apply or ignored an explicit and well defined governing legal principle that was clearly applicable to the case. See Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 184 F. Supp. 2d 271, 274 (S.D.N.Y. 2002), aff'd, 333 F.3d 383 (2d Cir. 2003). Under the three-part test applied in the Second Circuit, manifest disregard may only be found where "the arbitrator knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it." Stolt-Nielsen SA, 548 F.3d at 95. An arbitrator's refusal or neglect to apply a governing legal principle "'clearly means more than error or misunderstanding with respect to the law.'" Hoeft v. MVL Group, Inc., 343 F.3d 57, 69 (2d Cir. 2003) (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986)). A federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law. On the contrary, the award "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 Seguros del Estado v. Mutual Marine Office, Inc., 344 F.3d 255, 260 (2d Cir. 2003) (emphasis added; citation and quotation marks omitted); see also Hoeft, 343 F.3d at 70-71 (confirming award and stating that it "is of no consequence" that arbitrator's decision did not apply the "clear majority view" of a certain principle of accounting law). Wallace v. Buttar, 378 F.3d 182, 189-190 (2d Cir. 2004). Courts will not find manifest disregard "where an arbitral award contains more than one plausible reading . . . if at least one of the readings yields a legally correct

justification for the outcome." Duferco, 333 F.3d at 390.

Petitioner has failed to sustain his heavy burden of establishing grounds for vacatur of the Final Award. Petitioner argues principally that the Final Award manifestly disregards the law because the arbitrator disregarded the material standards for issuing what the arbitrator himself characterized as the equivalent of a directed verdict in a non-jury case. The Petitioner further claims that, in failing to conduct an evidentiary hearing, that the arbitrator exceeded his authority and committed misconduct.

While it is true that the arbitrator analogized PNG's request to a "directed verdict in a non-jury case for failure to prove one essential element of the claim," the Court notes that this specific standard as applied by courts in civil litigation was not required to be utilized nor is any "directed verdict" standard defined by the International Arbitration Rules issued by the ICDR. Furthermore, as the arbitrator did not elaborate on what he meant by the remark, there is no clear identification or flouting of an applicable legal principle. Misapplication of the law is not, in any event, grounds for the requisite finding of manifest disregard. Duferco, 333 F.3d at 390. Accordingly, any perceived error in the arbitrator's application of a "directed verdict" standard does not suffice to establish that the arbitrator acted in manifest disregard of the law.

The arbitrator's decision to dismiss Petitioner's quantum meruit claim was based upon Matthew's evidentiary submissions, which the arbitrator found to be insufficient to maintain such a claim under applicable law. The arbitrator's written Final Award clearly reflects careful attention to the governing substantive law and the parties' arguments concerning the impact of that law, as well as close attention to Petitioner's evidentiary proffers. The arbitrator found that the statements attributed to the Prime Minister were indistinguishable from the damages relating to the unenforceable contract claim which was dismissed in the Interim Award, evidence of which was not

admissible to establish the value of Petitioner's services. In light of this legal principle, and upon his further finding that Petitioner's proffers were entitled to no weight, the arbitrator found no evidentiary basis for the issuance of an award under a theory of quantum meruit. The Final Award thus provides a colorable justification for the award in Respondent's favor. Wallace, 378 F.3d at 190.

Petitioner's argument that the arbitrator committed misconduct by refusing to hear evidence pertinent and material to the controversy also fails. As an initial matter, ICDR Rules Art. 16.1 permit the arbitrator to "conduct the arbitration in whatever manner [he] considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case." Evidence may be presented in the form of written witness statements. Id. at Art. 20.5. There is no rule requiring that an oral hearing be held.

As noted above, the arbitrator in the subject proceeding issued a Scheduling Order requiring the submission of any and all evidence to be used in Petitioner's direct case and received an affidavit and evidentiary submissions from Matthew. The Final Award makes it clear that Matthew made a detailed written proffer as to the anticipated substance of the Prime Minister's testimony and also tendered other evidence upon which Matthew intended to rely. Even if the Prime Minister had appeared and testified in accordance with Matthew's proffers, the arbitrator would not have reached a different conclusion, as he had determined that the Prime Minister's valuation testimony was so intimately tied to the unenforceable contract claim that it could not be viewed as establishing the reasonable value of the services performed even if admitted as expert opinion or lay testimony. The arbitrator's actions here were thus quite unlike those found to constitute misconduct in Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16 (2d Cir. 1997), a decision relied upon by Matthew. In Tempo Shain, the Second Circuit found that an arbitral panel had made unwarranted assumptions that the

testimony of a temporarily unavailable witness, who was the only person who could have testified as to certain communications, would have been cumulative. In the instant matter the arbitrator carefully considered the statements attributed to the Prime Minister by Matthew and deemed them to be insufficient to issue an award under a theory of quantum meruit. Accordingly, there was no denial of fundamental fairness. Interdigital Communs. Corp., 528 F. Supp. 2d at 351, quoting Transit Cas. Co. v. Trenwick Reins. Co., 659 F. Supp. 1346, 1354 (S.D.N.Y. 1987).

The Court finds that Petitioner has failed to demonstrate that the award was in manifest disregard of the law or that the arbitrator exceeded his authority, rendered an ambiguous or indefinite award, or committed misconduct. Accordingly, the petition to vacate the final award is denied and the cross-motion to confirm the Interim and Final Arbitration Awards is granted.

CONCLUSION

For the foregoing reasons, and for substantially the reasons articulated in Respondent's submissions, Petitioner's motion for vacatur of the Final Award is denied and Respondent's cross-motion for confirmation of the Interim and Final Awards is granted. This Order resolves docket entries no. 1 and 8. The Clerk of Court is directed to enter judgment confirming the award and close this case.

In light of the disposition of Petitioner's motion and Respondent's cross-motion, the conference scheduled for December 10, 2009, is canceled.

SO ORDERED.

Dated: New York, New York
December 9, 2009

LAURA TAYLOR SWAIN
United States District Judge