DEIULEMAR COMPAGNIA DI NAVIGAZIONE v. TRANSOCEAN COAL COMPANY, INC., US: Dist. Court, SD New York 2004

(2004)
DEIULEMAR COMPAGNIA DI NAVIGAZIONE, S.p.A., Petitioner,
v.
TRANSOCEAN COAL COMPANY, INC. and ANKER TRADING S.A., Respondents.

03 Civ. 2038 (RCC).
United States District Court, S.D. New York.

November 29, 2004.

OPINION & ORDER

RICHARD CASEY, District Judge.

This case arises out of a contractual dispute between Deiulemar Compagnia Di Navigazione, S.p.A. ("Deiulemar" or "Petitioner"), an Italian shipowner and operator of a fleet of bulk cargo vessels, and two separate corporate entities within the Anker group of companies: Transocean Coal Company, Inc. ("Transocean"), an American coal-trading company, and Anker Trading S.A. ("Anker"), a Swiss coal-trading company and charterer of ocean transportation. On May 27, 1998, Deiulemar entered into contracts of affreightment with Transocean and Anker ("Respondents") to provide them with vessels to carry shipments of coal between the United States and Bulgaria. Following Respondents' alleged breach of these contracts, Deiulemar filed for arbitration in accordance with the contracts' identical arbitration clauses. Deiulemar now petitions the Court to confirm, recognize, and enforce the resulting arbitration award under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, Chapter Two of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 201-208, and Respondents cross-petition the Court to vacate the award. For the reasons set forth herein, the petition to confirm, recognize, and enforce the arbitration award is GRANTED and the cross-petition to vacate the arbitration award is DENIED.

I. BACKGROUND

The following facts are undisputed unless otherwise indicated.[1] Petitioner and Respondents entered two charter parties on May 27, 1998: (1) a contract of affreightment between Deiulemar and Transocean ("Transocean contract") and (2) a contract of affreightment between Deiulemar and Anker ("Anker contract"). (Mem. Supp. Pet., Ex. 1 (contracts of affreightment).) Under these two contracts, Petitioner was to provide vessels to carry several coal cargoes from the Mississippi River to Bourgas, Bulgaria—Transocean was to provide five cargos for carriage, four during the second half of 1998 and one during the first quarter of 1999, and Anker was to provide three cargos for carriage during the second half of 1998. (Id.; Mem. Opp. Pet., Aff. Respondents' Attorney Francis H. McNamara ("McNamara Aff.") ¶¶ 3-4.) Because Respondents' coal buyers were financially weak, Transocean was able to provide only two cargoes in 1998 and Anker was able to provide only one, resulting in the cancellation of three voyages under the Transocean contract and the cancellation of two voyages under the Anker contract. (McNamara Aff. ¶ 5.)

Deiulemar sought recovery for the five cancelled voyages. Clause 5, which is identical in both contracts of affreightment, sets forth the agreement to arbitrate all disputes arising under each charter party:

5. If any dispute or difference should arise under this Charter, same to be referred to three parties in the City of New York, one to be appointed by each of the parties hereto, the third by the two so chosen, and their decision, or that of any two of them, shall be final and binding, and this agreement may, for enforcing the same, be made a rule of Court. Said three parties to be shipping men.

(Mem. Supp. Pet., Ex. 1, lines 43-46.) The contracts of affreightment say nothing more about arbitration than what appears in this clause. (See generally Mem. Supp. Pet., Ex. 1.) In December 1999, Deiulemar commenced arbitration against Transocean to recover alleged lost profits for the three cancelled voyages under the Transocean contract. (McNamara Aff. ¶ 6.) In accordance with Clause 5 of the contract, Deiulemar appointed Alexis Nichols ("Nichols") as an arbitrator, Transocean appointed Jack Berg ("Berg"), and Nichols and Berg appointed Ronald T. Carroll ("Carroll") in early 2000. (See id..) In May 2000, Deiulemar separately demanded arbitration against Anker to recover alleged lost profits for the two cancelled voyages under the Anker contract. (Id. ¶ 8.) Deiulemar and Anker nominated Nichols and Berg, respectively, who in turn selected Carroll as the third arbitrator. (Id.) Thereafter, the two arbitrations continued on a consolidated basis by agreement of the parties. (Id.) Transocean and Anker admitted that they had breached their respective contracts by not providing the balance of the required cargos, but denied that Deiulemar had suffered any damages as a consequence, arguing that damages were either fully mitigated (by Deiulemar employing their own fleet vessels) or avoided (because Deiulemar no longer needed to obtain vessels from the market of available ships). (See id. ¶¶ 9-10.) The three-member tribunal received pre-hearing briefs from both Petitioner and Respondents, which outlined the parties' views on many issues, including deductions from and mitigation of damages. (See id. ¶¶ 12-13; Reply Mem. Supp. Pet., Aff. Petitioner's Attorney Thomas L. Tisdale ("Tisdale Aff."), at Ex. 1-4 (arbitration briefs); Final Decision and Award issued February 28, 2003, Mem. Supp. Pet., Ex. 2 ("Arbitration Award") at 2.) Thereafter, a total of five hearings were held in New York in 2000 and 2001; witnesses testified and exhibits were introduced. (See Arbitration Award at 2.) In mid-2001, the parties submitted post-hearing and reply briefs, and the three arbitrators met multiple times in late 2001 and early 2002 in New York City to deliberate. (See id.) The Arbitration Award and Arbitration Dissent make clear that Berg strongly disagreed with Carroll and Nichols as to various issues, including whether the Second Circuit's decision in Adams v. Lindblad Travel, Inc., 730 F.2d 89 (2d Cir. 1984), applied to the dispute such that certain expenses should be deducted from damages awarded to Deiulemar. (Compare Arbitration Award at 12 (citing to Adams to bar deduction of fixed expenses from any calculation of Deiulemar's lost profits) with id. at App. B ("Arbitration Dissent") at 11-12 (contending that the majority misapplied Adams and that operating costs or alternatively mitigation should have been deducted from any calculation of Deiulemar's lost profits, resulting in no recovery for Deiulemar).)

"Following an extensive review of exhibits, transcripts, briefs and reply briefs, submitted by the parties together with lengthy deliberations among the panel, the panel majority, with Mr. Berg dissenting ... found in favor of Owner." (Arbitration Award at 11.) The panel's Final Decision and Award was issued on February 28, 2003, and Carroll and Nichols ("the Carroll-Nichols majority") awarded Deiulemar a total of $860,371.00—$330,663.00 plus $92,594.00 in interest ($423,257.00) against Transocean and $330,663.00 plus $106,451.00 in interest ($437,114.00) against Anker—plus post-award interest at 4.75% per year from March 30,

2003 until the earlier of the date of payment of the award or the date the award is reduced to judgment. (Id. at 18.) Berg drafted the concurrence and dissent in which he expressed concern with what he called "the panel majority's summary disregard of the evidentiary record and its totally incorrect and irresponsible computation of lost profit damages," and contended that the award was "grossly incorrect, illogical and beyond the pale of any legal and/or commercial measure of damages." (Arbitration Dissent at 1.) Although Berg did not contend in his dissenting opinion that he was excluded from any deliberations or that the procedures followed by the arbitral panel ran afoul of Clause 5 (see generally id.), Respondents now contend that Berg was excluded and that the Arbitration Award should be vacated as a result (see McNamara Aff. ¶¶ 24, 27-29, 34-35, 37-40, 42, 45).

Respondents present three grounds on which they argue the award should be vacated. The first two grounds stem from the alleged exclusion of Berg from deliberations and decisions, especially regarding the amount of damages awarded. First, Respondents argue that the Carroll-Nichols majority committed "misconduct" by this alleged exclusion such that the award should be vacated under the FAA and the New York Convention. Second, Respondents argue that the Carroll-Nichols majority "exceeded their powers" by this alleged exclusion such that the award should be vacated under the FAA and the New York Convention. Finally, Respondents argue that the Carroll-Nichols majority "manifestly disregarded" the explicit and clearly applicable principle of law that amounts earned in mitigation must be deducted from the alleged loss such that the award should be vacated under the judicially created manifest-disregard doctrine. The Court disregards Respondents' attempts to reargue their case outside the scope of these three grounds.[2]

II. DISCUSSION

A. Subject Matter Jurisdiction

As an initial matter, the Court possesses subject matter jurisdiction over this action under 9 U.S.C. § 203. Chapter Two of the FAA, 9 U.S.C. §§ 201-208, contains implementing legislation that incorporates the New York Convention, and provides in § 203 that an action falling under the New York Convention "shall be deemed to arise under the laws and treaties of the United States," and the district courts "shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." 9 U.S.C. §§ 201-203. Thus, the Court has subject matter jurisdiction if the award falls under the New York Convention.

The New York Convention applies to awards "not considered domestic awards in the State where their recognition and enforcement are sought." 9 U.S.C. § 201; Art. I, 330 U.N.T.S. at 38. Although the Convention itself does not define whether an award is nondomestic, the FAA does. See Yusuf Ahmed Alghanim & Sons v. Toys "R" Us. Inc., 126 F.3d 15, 18-19 (2d Cir. 1997). Section 202 of Chapter Two of the FAA provides:

> An agreement or award arising out of [a legal] relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

9 U.S.C. § 202 (emphasis added). In Toys "R" Us, the Second Circuit, applying § 202, held that an arbitration award rendered in the United States to resolve a dispute involving two nondomestic parties, one United States corporation, and a contract for the ocean carriage of cargo to be performed in part in international waters and foreign ports was a nondomestic

award to which the New York Convention applied. 126 F.3d at 19. The Court is presented here with an arbitration award rendered in the United States to resolve a dispute involving two nondomestic parties, one United States corporation, and a contract for the ocean carriage of cargo to be performed in part in international waters and foreign ports. The award was rendered in New York; involved an Italian company, a Swiss company, and an American company; and arose from a dispute involving contracts for vessels to carry shipments of coal between the United States and Bulgaria. Therefore, it is a nondomestic award to which the New York Convention applies, and the Court has subject matter jurisdiction under 9 U.S.C. § 203.

B. Standard of Review

There are both statutory and nonstatutory avenues of review available to a district court when faced with an arbitration award such as the one presented here. The FAA sets out the statutory grounds upon which a federal district court may confirm or vacate an arbitration award. The implementing legislation of Chapter Two of the FAA, 9 U.S.C. §§ 201-208, incorporates Chapter One of the FAA, 9 U.S.C. §§ 1-16, to the extent that the Chapter One provisions do not conflict with the New York Convention or Chapter Two itself. See 9 U.S.C. § 208; Toys "R" Us, 126 F.3d at 20-23. Section 9 of FAA Chapter One allows Deiulemar to petition this Court for an order confirming the arbitration award, which the Court must grant "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." See 9 U.S.C. § 9; see also Hoeft v. MVL Group, Inc., 343 F.3d 57, 63 (2d Cir. 2003) ("Arbitration awards are not self-enforcing."). Section 10(a) of the FAA allows a federal district court to vacate an arbitration award that was made in its district in only four situations, including:

(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 was not made.
9 U.S.C. § 10(a) (emphasis added).

Additionally, a petition to vacate an arbitration award can be based on the nonstatutory, judicially created ground of "manifest disregard of the law" by the arbitrators. See Hoeft, 343 F.3d at 64-65 ("The Supreme Court has supplemented the FAA with an additional ground not prescribed in the statute: manifest disregard of the law. . . . The fact that the manifest disregard standard is a product of common law, rather than statute, makes it no less essential to the judicial review of arbitration awards."); Toys "R" Us, 126 F.3d at 23 (noting that district courts have authority under the New York Convention to set aside nondomestic arbitration awards rendered in the United States on the basis of "manifest disregard of the law" by the arbitrators); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986) (noting that "manifest disregard of the law" by arbitrators "is a judicially-created ground for vacating [an] arbitration award . . . introduced by the Supreme Court in Wilko v. Swan, 346 U.S. 427, 436-37 . . . (1953)").

Whatever ground of review is relied upon, judicially created or statutory, judicial review of arbitration awards is very limited—federal courts are required to give arbitrators' decisions considerable deference and may not review awards for factual or legal errors:

[A]rbitration panel determinations are generally accorded great deference under the FAA. Judicial review of arbitration awards is necessarily narrowly limited. Undue judicial intervention would inevitably judicialize the arbitration process, thus defeating the objective of providing an alternative to judicial dispute resolution.
Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 19 (2d Cir. 1997) (internal citations omitted); see also Banco de Seguros del Estado v. Mutual Marine Office, Inc., 344 F.3d 255, 260 (2d Cir. 2003) (discussing how arbitration awards should be confirmed if there is even a "barely colorable" justification for the outcome reached); Hoeft, 343 F.3d at 64 (noting that the limited statutory and nonstatutory standards "represent a floor for judicial review of arbitration awards below which parties cannot require courts to go, no matter how clear the parties' intentions"); GMS Group, LLC v. Benderson, 326 F.3d 75, 81 (2d Cir. 2003) (noting that judicial review of arbitration awards is "severely limited"); Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997) (noting that arbitration awards are subject to very limited review and are not reviewed for errors made in law or fact); Merrill Lynch, 808 F.2d at 933 (describing judicial review under the manifest-disregard standard as "extremely limited"); see generally New York Convention, arts. III, V, 330 U.N.T.S. at 38 (establishing the presumption of enforceability of arbitration awards under the Convention). The burden of proof rests upon the party defending against enforcement of the arbitration award. Willemijn Houdstermaatschappij, 103 F.3d at 12 ("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." (internal citations omitted)).

C. Statutory Grounds of Misconduct and Exceeding of Powers

1. Arbitrator Misconduct

Section 10(a)(3) of Chapter 1 of the FAA allows a district court to vacate an arbitration award only in the limited circumstance "[w]here 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." 9 U.S.C. § 10(a)(3) (emphasis added); see also Tempo Shain, 120 F.3d at 19 (noting that a federal court may "vacate an arbitration award only in limited circumstances as proscribed by section 10(a) of the Act, 9 U.S.C. § 10(a)"). "Misconduct typically arises where there is proof of either bad faith or gross error on the part of the arbitrator." Bisnoff v. King, 154 F. Supp. 2d 630, 637 (S.D.N.Y. 2001) (quotations and citations omitted).

The Second Circuit has "interpreted section 10(a)(3) to mean that except where fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review." Tempo Shain, 120 F.3d at 20 (emphasis added); see also Polin v. Kellwood Co., 103 F.Supp. 2d 238, 262 (S.D.N.Y. 2000) (holding that a party's disagreement with an arbitral panel's assessment of evidence and its conclusions is insufficient to vacate an arbitration award under § 10(a)(3) and the provision's fundamental-fairness requirement). "A fundamentally unfair proceeding may result if the arbitrators fail to give each of the parties to the dispute an adequate opportunity to present its evidence and argument." Bisnoff, 154 F. Supp. 2d at 637 (quotations and citations omitted). But while an arbitrator must grant the parties a fundamentally fair hearing, Tempo Shain, 120 F.3d at 20, arbitrators "need not follow all the niceties observed by the federal courts," Bell Aerospace Co. Div. of Textron v. Local 516, 500 F.2d 921, 923 (2d Cir. 1974).

Respondents do not allege that the arbitral panel denied them an adequate opportunity to present evidence and argue. Rather, Respondents argue that it was misconduct for Carroll and Nichols to "exclude" Berg from deliberations in light of the arbitration clause, which required that a three-member panel hear the arbitration. Respondents fail to point to any evidence, however, that they were denied "fundamental fairness" in the arbitral proceeding, or to any precedent that applies 9 U.S.C. § 10(a)(3) in the way that they ask the Court to apply it.[3] Even if there was evidence that Carroll and Nichols excluded Berg, the dissenter, from the drafting of the majority opinion, the Court cannot say that such exclusion was fundamentally unfair, and Respondents provide the Court with nothing to refute that Carroll and Nichols had at least a "barely colorable justification for the outcome reached." See Banco de Seguros del Estado, 344 F.3d at 260. As a result, the Court finds that there was not arbitrator misconduct sufficient to vacate an arbitration award under § 10(a)(3).

2. Arbitrators Exceeding Their Powers

Section 10(a)(4) of Chapter 1 of the FAA allows a district court to vacate an arbitration award "[w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made." 9 U.S.C. § 10(a)(4) (emphasis added). Section 10(a)(4) of the FAA focuses on whether arbitrators had the power, based on the arbitration agreement, to reach certain issues, not on whether those issues were correctly decided. Hoeft, 343 F.3d at 71; DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 824 (2d Cir. 1997). Where an arbitrator acts in accordance with a broad agreement to arbitrate, that arbitrator possesses the discretion to order any remedy deemed appropriate, so long as the remedy does not exceed the powers granted by the parties' agreement. Banco de Seguros del Estado, 344 F.3d at 262 (noting further that if the arbitration award disposes of the issue submitted to arbitration by the parties, correctly or not, the arbitrator will be deemed to have acted within the scope of his or her authority). Where the parties have agreed to submit their disputes to an arbitral panel selected according to specific, bargained-for guidelines, failure to adhere to those guidelines may affect the legitimacy of the entire arbitration proceeding, see Encyclopaedia Universalis, S.A. v. Encyclopaedia Britannica, Inc., No. 03 Civ. 4363 (SAS), 2003 WL 22881820, *1 (Dec. 4, 2003) ("the arbitrators' exercise of powers exceeding their mandate may subvert the parties' agreement"), but the Second Circuit has "consistently accorded the narrowest of readings" to the FAA's grounds to vacate awards under § 10(a)(4), Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 220 (2d Cir. 2000).

Respondents do not argue that the Carroll-Nichols majority "exceeded its powers" by ruling on issues not presented to them by the parties. Cf. Hoeft, 343 F.3d at 71; DiRussa, 121 F.3d at 824. Rather, Respondents argue that the Carroll-Nichols majority exceeded its powers by allegedly excluding Berg from certain deliberations, which they claim ran afoul of the arbitration clause requiring that three arbitrators be appointed and that "their decision, or that of any two of them, shall be final and binding." If the panel was "improperly composed" and therefore without authority to enter an award, the resulting award might by definition be beyond the panel's powers. See Encyclopaedia Universalis, 2003 WL 22881820, *11 (adopting the "rather tautological argument.. . [that b]ecause the arbitral panel was improperly composed, it had no power to bind the parties; [and that therefore] any assertion of such power, by definition, exceeded its mandate"). But this is not an instance in which a panel was composed of only two arbitrators when the parties agreed that there must be three. See Szuts v. Dean Witter Reynolds, Inc., 931 F.2d 830, 832 (11th Cir. 1991) (finding that

panel composed of two arbitrators was improperly constituted and exceeded its power when parties' agreement required arbitration before a board of at least three arbitrators), quoted with approval in Encyclopaedia Universalis, S.A., 2003 WL 22881820, *11. This panel was composed of three arbitrators, in accordance with the arbitration clause, and the panel adhered to the specific, bargained-for guidelines set out in the clause, which required only that any dispute under the charter be "referred to three [shipping men] in the City of New York, one to be appointed by each of the parties hereto, the third by the two so chosen, and their decision, or that of any two of them, shall be final and binding, and this agreement may, for enforcing the same, be made a rule of Court." (See Mem. Supp. Pet., Ex. 1, lines 43-46.) The panel was not "improperly composed," and given the barrenness of the parties' arbitration clause—lacking any agreement about how to arbitrate or what arbitration guidelines to follow—the Court finds that the Carroll-Nichols majority did not exceed its powers within the meaning of 9 U.S.C. § 10(a)(4).

D. Judicially Created Ground of Manifest Disregard of the Law

Respondents seek to vacate the award on the ground that the arbitral panel rendered the award in "manifest disregard" of the governing law. Specifically, Respondents contend that the Carroll-Nichols majority "manifestly disregarded" the principle of law that amounts earned in mitigation must be deducted from the alleged loss, which, according to Respondents, clearly applied to the parties' dispute.

The manifest-disregard ground for vacating an arbitration award stems from somewhat unclear United States Supreme Court dicta in Wilko v. Swan, 346 U.S. 427 (1953), that "the interpretations of the law by the arbitrators, in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." See 346 U.S. at 436-37. The Second Circuit has held that district courts have the authority to set aside nondomestic arbitration awards that are rendered in the United States on the basis of "manifest disregard of the law." See Toys "R" Us, 126 F.3d at 23 (noting that the New York Convention "specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law"). Because this award was rendered in the United States, the Court may examine the merits of Respondents' argument.

Vacating an award on the ground of manifest disregard of the law is very limited, Greenberg v. Bear, Stearns & Co., 220 F.3d 22, 27 (2d Cir. 2000), and requires more than a showing that the arbitrator made an error or misstated the applicable law, Carte Blanche (Sing.) Pte., Ltd. v. Carte Blanche Int'l, Ltd., 888 F.2d 260, 265 (2d Cir. 1989). Manifest disregard is "a doctrine of last resort—its use limited only to those exceedingly rare instances where some egregious impropriety on the part of arbitrators is apparent, but where none of the provisions of the [Federal Arbitration Act] apply." Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 389 (2d Cir. 2003).

A party seeking the vacate on arbitration award on the basis of manifest disregard of the law bears the "heavy burden" of demonstrating that the arbitrators manifestly disregarded the law and must satisfy two prongs: (1) that the arbitrator knew of a governing legal principle but nevertheless refused to apply it (or ignored it altogether) and (2) that the law not applied (or ignored) by the arbitrator was (a) well defined, (b) explicit, and (c) clearly applicable to the case. See Banco de Seguros del Estado, 344 F.3d at 260 (setting out the two prongs) (citing Greenberg, 220 F.3d at 28 (same)); GMS Group, 326 F.3d at 81 (noting that the party

challenging the award bears a "heavy burden" and that both of the two prongs must be met before an arbitration award will be disturbed); Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 202 (2d Cir. 1998) (setting out the two prongs) (citing DiRussa, 121 F.3d at 821); Merrill Lynch, 808 F.2d at 933 ("The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable"); Sidarma Societa Italiana Di Armamento SpA, Venice v. Holt Marine Indus., Inc., 515 F.Supp. 1302, 1309 (S.D.N.Y. 1981) (noting that the party seeking vacatur must show that the arbitrators "deliberately disregarded what they knew to be the law in order to reach the result they did"), aff'd mem., 681 F.2d 802 (2d Cir. 1981). The first prong of the manifest-disregard test is subjective and the second is objective:

A manifest disregard claim involves both objective and subjective components. While the objective component looks to whether the governing law was well defined, the subjective component focuses on the substance of the arbitrator's decision-making process: whether the arbitrator was aware of the governing law and whether he consciously decided to ignore it. Hoeft, 343 F.3d at 67; see also Westerbeke, 304 F.3d at 209.

Respondents fail to meet the heavy burden of showing, under prong one, that the arbitrators appreciated the existence of an applicable legal principle that they then decided to completely ignore or refuse to apply that principle. Respondents specifically contend that the Carroll-Nichols majority "expressly disregarded" the principle "that revenue earned in mitigation must be applied to reduce any alleged losses" (the "Liberty Navigation rule"). (Mem. Opp. Pet. at 12, citing Liberty Navigation & Trading Co. v. Kinoshita & Co., Ltd., 285 F.2d 343, 346 (2d Cir. 1960).) Respondents argue that, by "ignoring that principle," the Carroll-Nichols majority awarded damages to Deiulemar "under the rubric of lost profits [that] were far in excess of the profits Deiulemar would have made had the two contracts at issue been fully performed." (Id.) There is no question that the Carroll-Nichols majority knew of the legal principle that Respondents claim was governing, namely, that mitigation of damages by Deiulemar had to be taken into account, but knowing is not enough; "there must also be a showing of intent." See Westerbeke, 304 F.3d at 217 ("A party seeking vacatur must ... demonstrate that the arbitrator knew of the relevant principle, appreciated that this principle controlled the outcome of the disputed issues, and nonetheless willfully flouted the governing law by refusing to apply it.").

The Carroll-Nichols majority neither "refused to apply" the legal principle nor did they "ignore" it. Respondents themselves admit that the majority, aware of the Liberty Navigation rule, "determined that mitigation was irrelevant to its calculation of Deiulemar's damages, holding that Deiulemar `need not introduce evidence of mitigation.'" (Mem. Opp. Pet. at 12, quoting Arbitration Award at 14.) It is noteworthy that the cases cited by Respondents to the Court concerning lost profits and mitigation are the same cases that they briefed, and Petitioner distinguished, during the arbitration. Indeed, the Carroll-Nichols majority cites to Liberty Navigation, 285 F.2d 343, a case that Respondents deem particularly "relevant," indicating that the arbitral panel considered the applicability of the cases presented by Respondents to the facts at hand and found either that they were inapposite or did not represent the current state of the law. (See Mem. Opp. Pet. at 15.) The award here indicates that the arbitrators received conflicting evidence and arguments and adopted one point of view, namely the view based on Adams and other cases that supported the majority's damages calculation. Receiving conflicting evidence and arguments and adopting one point of view is precisely what arbitrators are hired to do. See Hoeft, 343 F.3d at 70; see also Duferco Int'l Steel Trading, 333 F.3d at 389 (noting that "arbitrators are hired by parties to

reach a result that conforms to . . . the arbitrator's notions of fairness"). And rejecting one interpretation of the law in favor of another is quite different from willfully flouting the law. See Westerbeke, 304 F.3d at 217. Respondents have not shown that the Carroll-Nichols majority appreciated that the Liberty Navigation rule controlled the damages issue yet nevertheless intentionally ignored it. Therefore, Respondents fail on the first (subjective) prong of the manifest-disregard test.

Respondents fare no better on prong two, failing to meet the heavy burden of showing that the law in question was well-defined, explicit, and clearly applicable to the case. "As long as there is more than one reasonable interpretation of the governing law, the law is not well-defined, explicit, and clearly applicable, and an arbitrator cannot be said to have manifestly disregarded the law in rejecting either party's interpretation." Hoeft, 343 F.3d at 71 (holding that arbitrator did not manifestly disregard the law by following a minority interpretation of it); see also GMS Group, 326 F.3d at 82-83 (holding that arbitrator did not manifestly disregard the law in rejecting one party's proffered explanation of the applicability of certain rules to the facts of that case); Goldman v. Architectural Iron Co., 306 F.3d 1214, 1217 (2d Cir. 2000) (holding that "even if . . . the arbitrator erred in resolving the conflicting precedent . . ., the arbitral decision cannot be said to have exhibited a manifest disregard of the law"). First, Respondents' challenges fail to the extent that they focus on the arbitrators' factual findings rather than on their application of the law. See Shanghai Foodstuffs Imports & Export Corp. v. Int'l Chemical, Inc., No. 99 Civ. 3320 (RCC), 2004 WL 213019, at *3 (S.D.N.Y. 2004) (finding that challenges that "focus[ed] on the arbitrators' factual findings and not on their application of the law" failed to meet the stringent manifest-disregard standard, which does not permit for review of factual findings by arbitrators). Second, there is more than one reasonable interpretation of the governing law, that is, the Carroll-Nichols majority followed a legitimate interpretation of the law by finding that they need not consider evidence of mitigation in determining damages in this case. See, e.g., Indu Craft, Inc. v. Bank of Baroda, 47 F.3d 490, 495-96 (2d Cir. 1995) (noting that fixed costs should be included in the calculation of lost profits only when the breach ends an ongoing business); Katz Communication Agency, Inc. v. Evening New Ass'n, 705 F.2d 20 (2d Cir. 1983) (requiring that charterers carry their burden to prove that certain items be deducted in mitigation of damages); Adams, 30 F.2d at 92-93 (noting that fixed costs should not be included in plaintiff's gross profits when plaintiff is an ongoing business whose fixed costs are not affected by defendant's breach of contract).[4] Therefore, Respondents fail on the second (objective) prong of the manifest-disregard test.

Because there is at least a "barely colorable justification for the outcome reached" by the Carroll-Nichols majority and their decision is "supportable," the arbitration award will not be vacated under the manifest-disregard doctrine. See Banco de Seguros del Estado, 344 F.3d at 260; Hoeft, 343 F.3d at 71; Duferco Int'l Steel Trading, 333 F.3d at 391 ("[E]ven a `barely colorable' justification for the outcome reached will save an arbitral award."); Toys "R" Us, 126 F.3d at 25.

III. CONCLUSION

For the foregoing reasons, the petition to confirm the Arbitration Award is GRANTED and the cross-petition to vacate the Arbitration Award is DENIED. Respondents request that, because the Carroll-Nichols majority rendered separate damage awards against Transocean and Anker, judgment be entered separately against Respondents. This request is granted. Petitioner is granted judgment against Respondent Transocean in the amount of $330,663.00

plus $92,594.00 in interest (calculated at 7.40% per year from January 10, 1999 through the February 28, 2003 award), for a total sum of $423,257.00, plus post-award interest at 4.75% per year from March 30, 2003 until the date of judgment, in accordance with the Arbitration Award. Petitioner is granted judgment against Respondent Anker in the amount of $330,663.00 plus $106,451.00 in interest (calculated at 7.40% per year from October 25, 1998 through the February 28, 2003 award), for a total sum of $437,114.00, plus post-award interest at 4.75% per year from March 30, 2003 until the date of judgment, in accordance with the Arbitration Award. The Clerk of the Court is directed to close this case and remove it from the Court's active docket.

So Ordered.

[1] The parties submitted affidavits of the three arbitrators to the Court in conjunction with their various memoranda on this petition to enforce and cross-petition to vacate. The Court refuses to consider the arbitrators' affidavits to the extent that they reveal the arbitrators' decision-making processes or otherwise purport to discredit or clarify the award, and further refuses to "hold a hearing to resolve conflicts between the evidence of the arbitrators regarding the status of their deliberations on July 17, 2002, and the activities of the majority thereafter" as Respondents' counsel suggests. (See Reply Mem. Opp. Pet., Aff. Respondents' Attorney Francis H. McNamara ¶ 3.) Although the statutes pertaining to this arbitration do not expressly take a position on the issue of admissibility of evidence regarding an award, it is well established that arbitrators may not be questioned regarding the arbitral decision-making process — and that district courts should not rely on such testimony in determining whether to uphold or vacate an arbitration award—in the absence of clear evidence of impropriety. See Rubens v. Mason, 387 F.3d 183, 191 (2d Cir. 2004) (holding that the district court's reliance on an arbitrator's affidavit, submitted in conjunction with motion papers to the Court, "violated well-settled law that testimony revealing the deliberative thought processes of judges, juries or arbitrators is inadmissible" because that affidavit "revealed the deliberative thought processes of the decision-maker in the underlying arbitration"); Hoeft v. MVL Group, Inc., 343 F.3d 57, 68 (2d Cir. 2003) ("Permitting depositions of arbitrators regarding their mental processes would make arbitration only the starting point in the dispute resolution process and deprive arbitration awards of the last word on their authors' intentions. . . .If the parties to an arbitration agreement want to know the arbitrator's reasoning, they may request that he include it in his award . . . Once an arbitrator issues an award . . . his role is complete and, like a judge or a jury, he may not be required to answer questions about why he reached a particular result."); Andros Compania Maritima, S.A. v. Marc Rich & Co., 579 F.2d 691, 702 (2d Cir. 1978) ("any questioning of arbitrators should be . . . limited to situations where clear evidence of impropriety has been presented"); Brownko Int'l, Inc. v. Ogden Steel Co., 585 F.Supp. 1432, 1435 (S.D.N.Y. 1983) ("an arbitrator cannot be examined for the purpose of impeaching his award"). Because the Court sees no clear evidence of impropriety here, it will refer only to the Arbitration Award and Arbitration Dissent as evidence of the arbitrators' deliberations and reasoning. See Hoeft, 343 F.3d at 68.

[2] Many of the specific arguments set forth in Respondents affidavits and memorandum of law do not assist the Court in determining whether the arbitration majority committed misconduct, exceeded their powers, or manifestly disregarded the law. Issues such as whether the voyage duration should have been calculated by the panel at 40.25 or 33.00 days, whether 51,749 or 53,000 metric tons of cargo would have been loaded had the voyages not been cancelled, and whether the freight rate should have been calculated at $8.50 or $7.50 were all the subject of extensive briefing before and after the arbitration hearings. (See Reply Mem.

Supp. Pet., Aff. Petitioner's Attorney Thomas L. Tisdale ("Tisdale Aff."), at Ex. 1-4 (arbitration briefs).) It is well established that it is not a district court's function to agree or disagree with arbitrators' reasoning, and the Court sees no reason to revisit issues that were raised to and considered by the arbitral panel unless they assist with the Court's determination of whether the arbitration award should be vacated under the limited avenues permitted by the FAA, the New York Convention, and the manifest-disregard doctrine. See supra Part I.B (discussing the limited role of the Court in reviewing arbitration awards).

[3] The Court does not, for example, find Respondents' contention that the Carroll-Nichols majority committed "misconduct" and "exceeded their powers" by violating Rule 9 of the Society of Maritime Arbitrators (SMA) Code of Ethics—which states that "[n]o discussion on the merits of the case is permitted at any time between Arbitrators unless all three are present"—to be persuasive. The New York Convention allows a court to deem an arbitration award unenforceable only if "[t]he composition of the arbitral panel or the panel's procedures violated either the parties' agreement or the law of the arbitral forum." New York Convention, art. V(1)(d), 330 U.N.T.S. at 38 (emphasis added). There is no mention of the SMA Code of Ethics in the arbitration clause or elsewhere in the parties' agreements (see generally Mem. Supp. Pet., Ex. 1), the parties have presented no evidence that the arbitrators stipulated that the SMA Code of Ethics applied to the arbitration, and Respondents have not shown that the law of the arbitral forum requires arbitrators to adhere to the SMA Code of Ethics absent an agreement or stipulation so requiring.

[4] The Court refuses to analyze the law on this point further. The conclusion that arbitrators did not act in manifest disregard of the law may be reached here "without extensively analyzing the arbitrators' decision and without commentary on the propriety of the [law at issue] . . . [because e]ven a cursory review of the record reveals that the arbitration panel engaged in a considered and detailed analysis of [the law at issue's] application to this case." See Merrill Lynch, 808 F.2d at 937-38 (Meskill, J., concurring) (emphasis added) (noting that for a district court to hold that "arbitrators must have ignored the [law] because their discussion was contrary to a clearly dictated legal result. . . proves too much" and that the manifest-disregard standard "was adopted to insulate arbitration decisions" from inquiry into the arbitration decision of the merits).

That Respondents believe the Carroll-Nichols majority's decision and award were mistaken is insufficient to avoid judicial confirmation of the award. At most, the Carroll-Nichols majority misapplied the law (see Arbitration Dissent at 12 (arguing that the majority "misapplied" the Adams case and misconstrued other maritime arbitration decisions)), but misapplication does not equate with disregard, and neither the FAA, the New York Convention, nor Supreme Court precedent permits a district court to vacate an arbitration award merely because the arbitrators arguably got the decision wrong. See United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987) ("[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced that he committed serious error does not suffice to overturn his decision. . . . [Courts] do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts."); Burchell v. Marsh, 58 U.S. 344 (1855) ("If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation."); Merrill Lynch, 808 F.2d at 933-34 (noting that manifest disregard "clearly

means more than error or misunderstanding with respect to the law" and a district court is "not at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it"); Siegel v. Titan Indus. Corp., 779 F.2d 891, 892 (2d Cir. 1985) (per curiam) (noting that the manifest-disregard test requires "something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law" (internal quotation marks and citation omitted)).