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INTERNATIONAL ARBITRATION REPORT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF THE ARBITRATION BETWEEN FITZROY ENGINEERING, LTD., Petitioner,	Judge Ann Claire Williams
v.	No. 94 C 2029
FLAME ENGINEERING, INC., Respondent.	

MEMORANDUM OPINION AND ORDER

Fitzroy Engineering Limited ("Fitzroy") has petitioned for an order confirming an award entered by a New Zealand arbitrator against Flame Engineering, Inc. ("Flame") (formerly Basic Environmental Engineering, Inc.).

This Court has jurisdiction to confirm foreign arbitral awards under 9 U.S.C. § 207. Flame opposes confirmation on the grounds that recognition of the award would be contrary to public policy and that it was unable to properly present its case to the arbitrator. For the reasons stated below, the petition is granted. The foreign arbitral award is confirmed.

BACKGROUND

Petitioner Fitzroy is a New Zealand corporation with its principal place of business in New Plymouth, New Zealand. Respondent Basic is an Illinois corporation based out of Glen Ellyn, Illinois. On July 24, 1990, Fitzroy contracted with Auckland International Airport ("AIA") to be the general contractor for the construction and installation of a refuse incinerator system at Auckland International Airport in Auckland, New Zealand. (Matthews 7/12/94 Aff. P. 2). The incinerator system was to be, and currently is, operated by Waste Resources, as part of a joint venture between Waste Management, New Zealand, and AIA. (John Basic Aff. P. 23). Fitzroy's contract, however, was with AIA only.

On January 11, 1991, Flame entered into a subcontract with Fitzroy to provide and install the incinerator. (Matthews 7/12/94 Aff. P. 5; John Basic Aff. P. 10). As part of the subcontract, Fitzroy and Flame agreed to refer any disputes arising in connection with their agreement to arbitration. (Subcontract P. 14.1). The agreement was to be "governed and interpreted under the laws of New Zealand". (Subcontract at 1).

Between March 1991 and March 1993, disputes arose between the parties concerning Flame's performance and alleged breaches of the subcontract. (Matthews 4/1/94 Aff. P. 5). The disputes centered around "how the incinerator was being constructed, whether modifications which were required during the course of construction were appropriate, whether certain delays which were occurring were the responsibility of one entity or another, and whether the manner in which tests were performed on the incinerator were [sic]appropriate." (Flame Response at 2).

The parties' attempts to settle their disputes failed, and on April 15, 1993, Fitzroy served written notice on Flame requesting the appointment of an arbitrator. After consulting with a Florida attorney, Patrick O'Hara, Flame engaged the New Zealand firm of Bell Gully Buddle Weir, Auckland ("Bell Gully") to represent it at the arbitration proceedings and any preceding settlement negotiations with Fitzroy. Bell Gully had previously assured O'Hara and Flame that it had no clients whose interests conflicted with Flame's. (O'Hara Aff. P. 15).

John Basic, Flame's president and sole shareholder, and O'Hara subsequently travelled to New Zealand to bring Flame's new counsel, Bell Gully's Ralph Simpson, up to speed on the case. As part of this process, Simpson allegedly learned that Waste Resources, a joint venture involving Waste Management, was the intended operator of the AIA incinerator system. (O'Hara Aff. P. 21). Simpson was also allegedly advised that both Basic and O'Hara believed that AIA's and possibly Waste Resource's misuse of the incinerator was responsible for many of the flaws in the system, and that Simpson should consider a "wrongful use" defense in the settlement

negotiations and arbitration to follow.

According to O'Hara, Simpson resisted their advice:

> When John Basic and I pressed this issue, Ralph Simpson encouraged and or led John Basic and me to believe that the subject of wrong use was a avenue that could not be pursued and that going against [AIA] or Waste Management, New Zealand or Waste Resources was not proper and that this action could only be pursued against Fitzroy. (O'Hara Aff. P. 22).

In accordance with their agreement, the parties proceeded to arbitration. (Matthews 4/1/94 Aff. P. 6). David E. Hollands was appointed as the sole arbitrator. (Matthews 4/1/94 Aff. P. 7). According to O'Hara, Hollands was an engineer who had worked on an earlier incinerator project at Auckland International Airport, but was not hired by Flame to work on the AIA-Fitzroy project. In his affidavit, O'Hara suggests that Hollands might have held a grudge against Flame as a result. (O'Hara Aff. P. 25).

In a letter dated December 2, 1993, Flame advised Hollands that it would not be appearing at the arbitration hearing. (Hollands Aff. P. 4). No reason was given. On December 9, 1993, Hollands ordered Flame to explain its failure to appear and to provide him with additional information and documents related to the parties' dispute. (Hollands Aff. P. 5). When Basic failed to comply with these mandates, Fitzroy applied for the entry of a default judgment in its favor. A hearing was held on December 22, 1993, and when Flame failed to appear, the arbitrator struck Flame's defense and entered an award in favor of Fitzroy, pursuant to the applicable New Zealand procedural rule, Rule 277 of the High Court Rules. (Hollands Aff. PP. 6-7).[1] Fitzroy was awarded a total

[1] Rule 277 of the New Zealand High Court Rules provides, in pertinent part:

> 1. Where a party makes default in complying with any order made on any interlocutory application, the Court may, subject to any express provision of these rules, make such order as it thinks fit.
>
> 2. In particular, but without limiting the generality of sub-clause (1), the Court may:
>
> (a) . . .
>
> (b) If the party in default is a defendant, order that his defence be struck out and that judgment be sealed accordingly.

of NZ$ 2,057,286.08, NZ$ 1,957,286.08 in damages and NZ$ 100,000.00 fixed costs. (Hollands Aff. P. 15).

On March 31, 1994, Fitzroy filed the instant petition to confirm the award. In late April or May 1994, before Flame had responded to the petition, Peggy Basic, John Basic's wife and a former accounting supervisor at Flame, discovered that Bell Gully was listed as a solicitor for Waste Management in the company's 1992 and 1993 annual report. Ralph Simpson never informed Flame that his law firm also represented Waste Management, a partner in the Waste Resources joint venture that was to operate the AIA incinerator. On June 22, 1994, Flame responded to Fitzroy's petition for confirmation, arguing that its attorney's apparent conflict of interest undermined the validity of the arbitration award, warranting a denial of the petition.

DISCUSSION

In 1970, the United States acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 ("Convention"), 330 U.N. Treaty Ser. 38. 3 U.S.T. 2517, T.I.A.S. No. 6997.[2]

"The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15, 41 L. Ed. 2d 270, 94 S. Ct. 2449 (1974). The United States implemented the Convention shortly after accession through passage of Chapter Two of the United States Arbitration Act, 9 U.S.C. § 201 et seq. The operative section, 9 U.S.C. § 207, provides as follows:

> Within three years after an arbitral award falling under the Convention

[2] The United States has agreed to "apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State." (Convention, Article XVI n. 57). As New Zealand acceded to the Convention in April 1983, the Convention clearly applies to the arbitration award at issue here.

is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

Consistent with the Convention's aim of liberalizing the procedures for enforcing foreign arbitral awards, "recognition and enforcement may be refused only in certain narrowly prescribed situations." La Societe Nationale Pour La Recherche, etc. v. Shaheen Natural Resources Co., 585 F. Supp. 57, 61 (S.D.N.Y. 1983). Article V of the Convention enumerates seven grounds for refusal of recognition and enforcement of a foreign arbitration award.[1] The

[1] Article V
1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority of the country where recognition and enforcement is sought finds that:

burden of proving that any one of these defenses to enforcement applies rests squarely on the shoulders of the party opposing enforcement. Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 973 (2d Cir. 1974); Imperial Ethiopian Gov't v. Baruch-Foster Corp., 535 F.2d 334, 336 (5th Cir. 1976). Absent "a convincing showing" that one of these narrow exceptions applies, the arbitration award will be confirmed. Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co., 415 F. Supp. 133, 136 (D.N.J. 1976).

Plane opposes confirmation of the foreign arbitral award at issue here on two of the enumerated grounds. The court will address each in turn.

I. Public Policy

Plane first contends that, in light of the apparent conflict of interest of its New Zealand counsel, confirmation of the arbitration award should be denied under the public policy exception contained in Article 5(2)(b) of the Convention. This exception or defense to enforcement provides that, "recognition and enforcement of an Arbitral Award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that . . . the recognition or enforcement of the award would be contrary to public policy of that country." (Convention, Art. 5(2)(b)).

The Convention's public policy defense has been very narrowly construed to give effect to the Convention's goal of encouraging the timely and efficient enforcement of awards. Waterside Ocean Navigation Co. v. International Navigation Ltd., 737 F.2d 150, 152 (2d Cir. 1984) (citing Parsons, 508 F. 2d at 974); see also Hewlett-Packard, Inc. v. Berg, No. 93-10128-JLT, 1994 U.S. Dist. LEXIS 16214, at *11 (D.Mass. Nov. 7, 1994); La

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Societe Nationale, 585 F. Supp. at 63. As the Second Circuit explained in Parsons, 508 F.2d at 973, "an expansive construction of this defense would vitiate the Convention's basic effort to remove preexisting obstacles to enforcement." Therefore, to prevail on a defense based on an alleged violation of public policy, the respondent must demonstrate circumstances which offend "the forum state's most basic notions of morality and justice." Id.

Flame asserts that Bell Gully "sat on both sides of the legal issue that it was then litigating" for Flame. (Flame Brief in Support of Defense at 7). This alleged dual representation purportedly "gutted what was perceived by Flame and Pat O'Hara to be the critical and focal point of Flame's defense against the Fitzroy claim," namely the alleged misuse of the incinerator system by Auckland and/or Waste Management. (Id. at 7). Finding that Flame has failed to convincingly show how the potential conflict of interest it has identified would render recognition of the arbitration award violative of this nation's "most basic notions of morality and justice," the court holds the asserted public policy defense inapplicable.

In so holding, the court by no means suggests that conflicts of interest, whether they are held by an arbitrator, or as is alleged here, the attorney for one of the parties to an arbitration proceeding, can never give rise to a public policy based defense. The notion that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome" lies at the heart of this nation's due process jurisprudence. In re Murchison, 349 U.S. 133, 136, 99 L. Ed. 942, 75 S. Ct. 623 (1955). To prevail on such a defense, however, the respondent must convincingly show that a clear, direct conflict existed that could have affected the outcome of the proceeding.

Two prior cases in which courts have rejected public policy defenses to enforcement of foreign arbitration awards based on somewhat analogous claims are instructive. In Transmarine Seaways Corp. v. Marc Rich & Co. A.G., 480 F. Supp. 352 (S.D.N.Y. 1979), the court rejected a public policy defense to

confirmation of an arbitration award where the respondent had alleged that one of the arbitrators on the panel was biased. The court held that in the absence of "direct financial or professional relationships between an arbitrator and a party" no conflict would be found. Id. at 357.

Although the arbitrator had no financial interest in the party for which he allegedly had shown bias, the arbitrator's employer "represented another company, which in turn asserted a claim" against the respondent. Id. at 358. The Court held that under these circumstances the alleged conflict was simply too tenuous to satisfy the challenging party's burden of showing that confirmation of the award would violate public policy. Id.

Similarly, in Imperial Ethiopian, 535 F.2d at 335, the party opposing enforcement of the arbitrator's award claimed that the president of the arbitration panel had a material connection with the prevailing party, the Ethiopian government. The president had served for four years as a draftsman and member of a code commission drafting a civil code for the Ethiopian government some fifteen to twenty years earlier. Id. at 337. The court affirmed the district court's confirmation of the award, noting that the respondent had "brought forward nothing to show that its claim of a disqualifying connection between Professor David and the Ethiopian government had any semblance of substance or that it was even asserted in good faith." 535 F.2d at 337. The court found that the claims "never achieved any more dignity than that of a conclusory statement in an unverified answer." Id.

Though not nearly as marginal as the allegations of bias raised in Imperial Ethiopian, Flame's allegations regarding conflict of interest fall short for similar reasons. As an initial matter, the court notes that Flame has submitted no evidence whatsoever suggesting that Bell Gully ever represented the Waste Resources joint venture or even Waste Management with respect to the AIA incinerator project. Moreover, Waste Management's connection to the parties' underlying dispute is a tenuous one. Fitzroy's general contract was with AIA, not Waste Management or Waste Resources. Waste Management was simply a partner in the joint venture that operated the

incinerator installed by Fitzroy and Flame.

Additionally, Flame's claim that Waste Management and Fitzroy were involved in settlement negotiations that may have adversely affected Flame's defenses against Fitzroy finds no support in the record. In an affidavit submitted supporting confirmation of the arbitration award, John Matthews, Fitzroy's Managing Director, testified that although Fitzroy engaged in negotiations with AIA concerning liability for perceived design and manufacture deficiencies in Flame's subcontract work, these negotiations did not involve Waste Management. (Matthews 7/12/94 Aff. PP. 7-8). Indeed, according to Matthews, neither Waste Management nor Waste Resources ever asserted any claims against Fitzroy at all. (Id. P. 8). Matthews further testified in his affidavit that Fitzroy was never involved in any discussions with Ralph Simpson, nor any other attorney from Bell Gully, in conjunction with their representation of Waste Management. (Id. P. 9).

Flame does not offer any evidence contradicting Matthew's testimony. Critically, Flame also fails to explain how its New Zealand counsel's alleged conflict of interest led to Flame's failure to appear before the New Zealand arbitrator. Flame does not offer any evidence indicating that it failed to appear on the advice of Bell Gully or even that Bell Gully's conduct influenced its decision not to appear. On the contrary, Flame's only evidence supporting its assertion that Bell Gully's possible representation of Waste Management may have compromised Flame's legal representation consists of John Basic's and O'Hara's testimony that Ralph Simpson of Bell Gully steered them away from certain defenses. The Convention's narrow public policy defense requires significantly more. Flame has fallen well short of the required convincing showing that recognition of the disputed arbitration award would amount to a "violation of [this nation's] most basic notions of morality and justice." Parsons, 508 F.2d at 974.

II. Inability to Present the Case

Article 5(1)(b) of the Convention provides a defense against enforcement of a foreign arbitration award where "the party against whom the award is

invoked was not given proper notice of the appointment of the Arbitrator or of the Arbitration proceedings or was otherwise unable to present his case." Article 5(1)(b) "essentially sanctions the application of the forum state's standards of due process." Parsons, 508 F.2d at 975. The exception arising from an inability to present one's case "should be narrowly construed for the same reasons" courts narrowly construe the public policy exception. Biotronik, 415 F. Supp. at 139; Parsons, 508 F.2d at 976.

Flame contends that it was "otherwise unable" to present its case because of Bell Gully's apparent conflict of interest. As Flame readily concedes, its argument here mirrors its argument in favor of the public policy defense. Both defenses suffer from similar flaws in that Flame has failed to convincingly show: 1) that an actual conflict existed and 2) that the conflict affected the outcome of the arbitration proceedings. Having received proper notice of the pending arbitration proceedings, Flame failed to appear to present its case. As noted above, Flame has failed to show that it did not appear at Bell Gully's urging or even that Bell Gully's counsel had anything to do with Flame's failure to appear. A party cannot fail to appear at a proceeding, offer no satisfactory explanation for its absence, and then expect to prevent enforcement of the resulting award on the grounds that it was unable to present its case. Accord Geotech Lizenz AG v. Evergreen Systems, Inc., 697 F. Supp. 1248, 1253 (N.D.N.Y. 1988); Biotronik, 415 F. Supp. at 140. Flame's Article 5(1)(b) defense falls short as well.

CONCLUSION

For the reasons stated above, Fitzroy's petition for an order confirming its foreign arbitral award is granted. Counsel for petitioner is directed to submit an appropriate order with accompanying authority for its request for costs and interest.

ENTER:

Ann Claire Williams, Judge
United States District Court

Dated: December 2, 1994