FIAT S.p.A.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FIAT S.p.A.,

Petitioner,

-against-

THE MINISTRY OF FINANCE AND PLANNING OF THE REPUBLIC OF SURINAME, SURINAME RICE EXPORT COMPANY N.V., ONYX DEVELOPMENT CORPORATION, PEDRO E. MARTINEZ AND ALVARO N. SARDI,

Respondents.

THE MINISTRY OF FINANCE AND PLANNING OF THE REPUBLIC OF SURINAME AND SURINAME RICE EXPORT COMPANY, N. V.,

Cross-Petitioners,

-against-

FIAT, S.p.A. and ONYX DEVELOPMENT CORPORATION,

Respondents.

88 CIV. 6639 (SWK)

MEMORANDUM OPINION AND ORDER

65009

SHIRLEY WOHL KRAM, U.S.D.J.

This dispute arises from arbitration proceedings commenced between the Ministry of Finance and Planning of the Republic of Suriname ("Suriname") and Onyx Development Corporation, Inc. ("ONYX"). That conflict involved allegations by Suriname and ONYX that each breached provisions of various purchase contracts. The arbitration panel rejected the claims of Onyx and granted those of Suriname as against Onyx, FIAT S.p.A. ("FIAT") and two individual defendants.[1] FIAT and ONYX now move to vacate the award on the ground that the Arbitration Panel exceeded its authority in granting relief against FIAT. ONYX also claims that the award should be vacated because it was not timely entered. Suriname cross-petitions to confirm the Arbiter's final award.

Background

The underlying transaction in this case is a countertrade program between Suriname, ONYX and FIAT. The program was initiated by various agreements, including a letter of intent, Frame Agreement, and Supply Contract between Suriname and FIAT, as well as an Escrow Account Agreement between Suriname, FIAT, ONYX, and Banco Unione de Credito. Under the May 15, 1985 Frame Agreement ("Frame Agreement"), Suriname would purchase agricultural equipment and automobiles from FIAT. In exchange, Suriname would pay for the equipment through proceeds it received through selling raw materials such as shrimp and rice to FIAT. FIAT was to "buy directly or indirectly various products ... from Suriname." The parties subsequently stipulated that "FIAT has appointed ONYX to accept deliveries of cargo rice from the Supplier..." See June 27, 1986 Rice Addendum ("Addendum 2"), Attached as Exhibit 4 to Cross-Petition for Order Confirming Final Award ("Suriname Cross-

[1] Suriname does not attempt to enforce the award as against the two individual defendants, Pedro E. Martinez and Alvaro N. Sardi.

Petition"). Under the countertrade program, ONYX would open an escrow account into which it would deposit payments for the materials purchased from Suriname. These funds would serve as payment by Suriname in purchasing the agricultural equipment from FIAT.

ONYX and Suriname subsequently entered into a Shrimp Purchase Agreement ("SPA"), under which Suriname was to sell Onyx at least 600,000 pounds of frozen shrimp, or enough shrimp to yield at least four million dollars. ONYX's payment would be deposited into the escrow account established pursuant to the May 15, 1985 Escrow Account Agreement ("Escrow Agreement"). See SPA, attached as Exhibit 2 to Suriname Cross-Petition. On June 20, 1985, the parties executed a Rice Addendum to the SPA after Suriname discovered that it could not supply the necessary shrimp under the SPA. The Rice Addendum provided that Suriname supply ONYX with 25,000 metric tons of rice over five years, with the purchase price payable into the escrow account used in the SPA. See June 20, 1985 Rice Addendum ("Addendum 1"), attached as Exhibit 3 to Suriname Cross-Petition. A June 27, 1986 addendum re-affirmed the agreement, under which Onyx deposited its payments into the escrow account. See Addendum 2. The parties included in Addendum 1 a clause stating that "[a]ll of the terms of the Shrimp Purchase Agreement dated May 15, 1985 and addendum dated June 20, 1985 shall remain in full force and effect and shall apply to this Rice Agreement except to the extent they are inconsistent with it." Addendum 2 at Article 14.

Both the SPA and the June 1986 addenda refer to and appear to be based upon a "Frame Agreement dated May 15, 1985" between Suriname and FIAT. The June 1986 Addenda also refer to a binding Escrow Account Agreement between Suriname, Onyx, FIAT and Banco Unione de Credito. It is clear, therefore, that these agreements were part of the countertrade program among Suriname, ONYX, and FIAT. Additionally, Mr. Alvaro Bardi, a consultant to ONYX, signed the agreements for ONYX. ONYX Memorandum in Support of Cross-Petition to Vacate Final Award at 4. Mr. Bardi also signed the letter of intent on February 14, 1985 on behalf of FIAT, see Letter of Intent, attached as Exhibit G to Suriname Notice of Motion to Confirm Final Award ("Suriname Notice of Motion"), and he testified that he represented both FIAT and ONYX during the time of the countertrade agreement. Transcript of Arbitration Proceedings at 987-88, 1014 ("Tr."). The evidence shows, furthermore, that correspondence sent by people affiliated with the agreement were signed "ONYX/FIAT". See Correspondence, attached as Sub-Exhibits 13, 15-18, 21, 23 to Exhibit P of Affidavit of Robert J. Morrow in Support of Motion to Confirm Final Award ("Exhibit P").

ONYX initiated the arbitration proceeding in 1987, pursuant to the rules of the American Arbitration Association and an arbitration clause in the SPA, alleging that Suriname breached the SPA and Rice Addenda to that agreement through failure to supply

shrimp and rice in accordance with those agreements.[2] See ONYX Arbitration Demand, attached as Exhibit 2 to Affirmation of Henry Weisburg in Support of Motion to Vacate. Suriname counterclaimed, asserting that ONYX failed to pay in accordance with the SPA, the Rice Addenda and a Rice Agency Agreement dated October 21, 1986.

On June 3, 1988 the Arbitration Panel issued a partial/final award, rejecting ONYX's claims and demanding that ONYX deposit $6.9 million in escrow as stipulated in the contract. See Partial/Final Award of Arbitration Panel ("Partial/Final Award"), attached as Exhibit D to Morrow Affidavit. ONYX allegedly failed to deposit the funds, see Affidavit of Robert J. Morrow in Support of Suriname's Cross-Petition to Confirm the Final Award, attached to Suriname Notice of Motion, at ¶ 9 ("Morrow Affidavit"), even after this Court confirmed the Partial/Final Award. See In the Matter of the Arbitration between The Ministry of Finance and Planning of the Republic of Suriname and Suriname Rice Export Company, N.V. and ONYX Development Corporation, 88-4034, slip op. at 2 (S.D.N.Y. June 24, 1988) (MGC). In their final opinion the Arbitration Panel stated, "the claim of ONYX Development Corp., Inc., FIAT S.p.A., Dr. Alvaro Sardi, and Mr. Pedro Martinez, hereinafter jointly and severally referred to as CLAIMANTS ... is denied in its entirety." The arbitrators further held that ONYX, FIAT, Sardi, and Martinez were jointly and severally liable for $8,116,578 in damages to Suriname. See Final Award of Arbitrators ("Final Award"), attached as Exhibit 1 to Suriname Cross-Petition.

FIAT claims that since no claims were submitted by or against FIAT, FIAT did not sign the arbitration agreement under which the case was decided, and it was not a party to the arbitration proceeding, it could not be bound under the arbitrators' decision. The Arbitration Panel exceeded its authority, FIAT claims, in resolving a dispute not submitted to it. Memorandum in Support of FIAT's Motion to Vacate the Final Award at 12-14 ("FIAT Memorandum"). FIAT further argues that the Arbitration Panel violated due process in deciding FIAT's liabilities, even though FIAT received no notice of the arbitration's commencement or proceeding. According to FIAT, this failure to provide notice deprived FIAT of an opportunity to choose arbitrators. Having received no copy of the Final Award, FIAT asserts that the Arbitration Panel did not consider FIAT a party to the proceeding. FIAT Memorandum at 13-15.[3]

[2] The arbitration clause in the SPA states:

"Any controversy or claims arising out of this contract shall be settled in arbitration in New York in accordance with the commercial arbitration rules of the American Arbitration Association and judgment upon the award returned by the arbitration may be entered in any court having jurisdiction thereof."

SPA at Art. 12. This clause applies to Addendum 2, pursuant to Article 14 of that agreement.

[3] Because the Court decides today that the arbitration panel exceeded its authority under 9 U.S.C. §§ 10, 11, it does not consider FIAT's due process claims.

Surinam counters that FIAT and ONYX were partners, joint venturers or principal and agent, and that FIAT may therefore be bound by the decision. Morrow Affidavit at ¶ 3. Suriname claims that ONYX and FIAT were so intertwined in the countertrade program as to make them virtually the same for the purpose of arbitration. This is so, according to Suriname, especially since Sardi represented both firms. Memorandum in Support of Suriname's Motion to Confirm the Final Award at 22-23 ("Suriname Memorandum"). Suriname also states that this Court cannot challenge the Arbitration Panel's determination that FIAT is related enough to ONYX to assume ONYX's liability. Id. at 29-30. As to FIAT's claims, Suriname asserts that FIAT had notice of the arbitration proceedings because Sardi represented FIAT as well as ONYX and testified at the proceedings. Id. at 32-33. Suriname also argues that it could collaterally estop FIAT from defending against any separate action against it to collect the damages, since FIAT was in privity with ONYX. Suriname defends the Arbitration Panel's inclusion of FIAT in the Final Award on the grounds that ONYX had refused to pay the damages previously. Finally, Suriname argues that the Court must hold an evidentiary hearing as to Suriname's claim of privity before it vacates the Arbitrator's award against FIAT. Id. at 37-38.

Discussion

The Federal Arbitration Act ("Act"), 9 U.S.C. § 1 et. seq., and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), 21 U.S.T. 2517, T.I.A.S. No. 6997

define the scope of the arbitrator's authority where an award is granted and enforced in the United States between foreign adversaries. See Bergesen v. Joseph Muller Corp., 710 F.2d 928, 933-34 (2d Cir. 1983); 9 U.S.C. § 208. "[T]he ... Federal Arbitration Act, 9 U.S.C. §§ 1-14, applies to the enforcement of foreign awards except to the extent to which the latter may conflict with the Convention."[4] Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L' Industrie Du Papier, 508 F.2d 969, 973 (2d Cir. 1974). In this case FIAT applies for relief under both laws, and the relief available under both laws is virtually identical.

In deciding a motion to confirm an arbitration award, this Court's review is limited to examining whether "the arbitrator's award falls within the four corners of the dispute as submitted to him." Orion Shipping and Trading Co. v. Eastern States Petroleum Corp., 312 F.2d 299, 300 (2d Cir. 1963), cert. denied, 373 U.S. 949 (1963). "The erroneous application of rules of law is not a ground for vacating an arbitrator's award ... nor is the fact that an arbitrator erroneously decided the facts." Siegel v. Titan

[4] 9 U.S.C. § 208 provides for the residual application of the Federal Arbitration Act, as long as it does not conflict with the Convention, as follows:

> Chapter 1 [9 U.S.C.§§ 1 et seq.] applies to actions and proceedings brought under this chapter [9 U.S.C. §§ 201 et seq.] to the extent that chapter is not in conflict with this chapter [9 U.S.C. §§ 201 et seq.] or the Convention as ratified by the United States.

9 U.S.C. § 208.

Industrial Corp., 779 F.2d 891, 892-93 (2d Cir. 1985) (quoting Wilko v. Swan, 346 U.S. 427, 436-37 (1953)); see Orion, supra, 312 F.2d at 300 (Court would not consider claim that arbitrator improperly calculated damages in contravention of law and facts). However, "an arbitrator's award ... will not be confirmed if it is demonstrated that the arbitrator acted in 'manifest disregard of the law'." Siegel, supra, 779 F.2d at 892-93 (Court upheld confirmation of award and refused to remand to determine whether arbitrator acted in manifest disregard of the law, even though basis of decision was unclear, because enough evidence existed in the record "to suggest that the arbitrators correctly applied [the relevant standard]").

Under 9 U.S.C. § 10, this Court may vacate the arbitration award if 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." Under 9 U.S.C. § 11, vacatur may be granted if the arbitrators "have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted." Under the Convention, enforcement may be refused upon proof that "[t]he 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 ..." Article V(1)(c). Since the Convention, as supplemented by the Federal Arbitration Act, applies to arbitration awards rendered in the United States involving foreign interests,

Article V(1)(c) shall apply to FIAT's first claim here.

It is usually not within the discretion of the arbitration panel to determine whether a non-signatory to an arbitration agreement should be bound by the arbitrators when that issue is not before the panel. Orion, supra, 312 F.2d at 301. The plaintiff in Orion had contracted with defendant Eastern States to transport oil, an obligation that was guaranteed by the defendant's parent corporation, Eastern American. Following an alleged breach of the contract, the parties submitted the dispute to arbitration, pursuant to an agreement signed by Eastern States, but not Eastern American. The arbitrators found Eastern American liable on the guarantee, even though it had not submitted to the arbitration. The Second Circuit held that "[t]he arbitrator exceeded his powers in determining the obligations of a corporation which was clearly not a party to the arbitration proceeding ..." Orion, supra, 312 F.2d at 300.

Nevertheless, authority also exists to support the proposition that "any issue that is 'inextricably tied up with the merits of the underlying dispute' may properly be decided by the arbitrator." DiGhello v. Busconi, 673 F. Supp. 85, 87 (D. Conn. 1987), (quoting McAllister Bros. v. A & S Transportation Co., 621 F.2d 519, 522-23 (2d Cir. 1980)), aff'd mem., 849 F.2d 1467 (2d Cir. 1988). Suriname relies on DiGhello for the proposition that the district court must confirm the arbitrator's award where the arbitrator has found that the parties are "clearly intertwined." 673 F. Supp. at 89-90. In that case DiGhello had been a signatory to the

arbitration agreement, and the arbitrators awarded damages against four non-signatory corporations. According to the Court, the arbitrators had found that the four corporations "'executed or directly benefited' from the parties' agreements, that they were 'clearly owned, dominated and controlled' by DiGhello, and that they were DiGhello's 'alter egos.'" Id. at 89. More importantly, the Court found that the arbitration agreement itself purported to bind not only DiGhello, but also any entities owned by DiGhello. Id. at 88.[5]

DiGhello is distinguishable from the present case, in that there is no evidence here that the arbitration clause at issue here was intended to be binding on FIAT. The arbitration panel in DiGhello did not exceed its authority in affording relief against four non-signatory corporations that were nevertheless covered by the arbitration agreement. In the present case, the arbitration panel exceeded its authority when it purported to bind a non-signatory who was not expressly covered by the arbitration agreement. Nor is the relationship between ONYX and FIAT as close as that between DiGhello and his four subsidiaries. Although ONYX and FIAT clearly benefitted from each other's transactions and some connection between the two existed, the relationship here is not nearly as intertwined as that in DiGhello. 673 F. Supp. at 89-90.

[5] The arbitration panel also found that the arbitration agreement applied to "all entities owned or controlled by the parties hereto," that the corporations were considered by DiGhello to be respondents, and that DiGhello admitted acting through the four corporations. DiGhello, supra, 673 F. Supp. at 89.

In this case, the arbitration proceeding was not the proper forum for deciding whether an arbitrator may afford relief against a non-signatory who is not covered by an arbitration agreement. Orion, supra, 312 F.2d at 301. The proper forum would have been before the Court on a motion to compel arbitration. This Court vacates the award as against FIAT because the determination as to whether to afford relief against FIAT, a non-party to the arbitration clause, was not the arbitrator's to make.

The Court turns next to ONYX's motion to vacate the arbitrator's award. ONYX argues initially that because the award against FIAT exceeded the arbitrator's authority and was irrational, the whole award should be vacated. ONYX also argues that the arbitrators were biased in awarding relief against ONYX. ONYX provides no evidence as to the latter claim, which is accordingly dismissed.[6] As to ONYX's assertion that the whole award should be vacated, this Court may enforce "that part of the award which contains decisions or matters submitted to arbitration" where "the decisions on matters submitted to arbitration can be separated from those not so submitted..." Convention, Article V(1)(c); see Orion, 312 F.2d at 300. In this case the award against ONYX is separable from that against FIAT because ONYX was a party to the arbitration agreement, actually participated in the arbitration and

[6] ONYX merely argues in its memorandum that the arbitrators were biased against FIAT, and that "[t]o render an award against FIAT, a non-party, ... the Panel had to render an award against Onyx." See Onyx's Memorandum in Support of Cross Petition to Vacate Arbitration Award at 10.

the panel's award with regard to Onyx results from issues properly submitted to arbitration.

ONYX next argues that the award was untimely, since the arbitrators issued the award more than thirty days after the hearings should have been closed.[7] The facts in the present case show the arbitrators to have closed the hearings on August 18 and to have issued the award on September 19. ONYX claims that the hearings should have been closed on July 19, the date of oral arguments. Even if the hearing was properly closed on August 18, Onyx alternatively contends that the September 19 award was still made thirty-two days after August 18, and therefore, it should be vacated as violative of AAA Rule 41.

Whether or not the arbitrators should have closed the hearings on July 19, however, is a matter of interpretation for the arbitrators. Svoboda v. Haggy, 655 F. Supp. 1329, 1332 (S.D.N.Y. 1987). Under AAA Rule 53, the arbitrators "shall interpret and apply these Rules insofar as they relate to the Arbitrator's powers and duties." In the present circumstances, the Court will not question this interpretation unless a party proves that it was prejudiced by the lateness of the decision. See McMahon v. RMS Electronics, Inc., 695 F. Supp. 1557 (S.D.N.Y. 1988) (arbitrator's award, even if untimely, will not be vacated where the party requesting vacatur is not prejudiced by the late award); Svoboda, supra, 655 F. Supp. at 1332. In Meat Rock Lodge No. 2120 v. Geometric Tool Company, the Court held that "[it] should always be within a court's discretion to uphold a late award if no objection to the delay has been made prior to the rendition of the award or there is no showing that actual harm to the losing party was caused by the delay." 406 F.2d 284, 286 (2d Cir. 1968). This Court finds that the arbitrators did not exceed their authority by closing the hearings on this complex arbitration when they did. Furthermore, Onyx has not demonstrated any prejudice by virtue of the two-day delay.

[7] Rule 41 of the Commercial Arbitration Rules of the American Arbitration Association ("AAA") states that "[t]he award shall be made promptly and ... no later than thirty days from the date of closing the hearings, or if oral hearings have been waived, from the date of transmitting the final statements to the arbitrator." According to AAA Rule 35, "[t]he time limit within which the Arbitrator is required to make the award shall commence to run ... upon the closing of the hearings."

Conclusion

For the foregoing reasons, ONYX's petition to vacate the arbitrators' award is denied, and Suriname's petition to confirm the award as against ONYX is granted. FIAT's motion to vacate the award is granted; and Suriname's petition to confirm as against FIAT is denied.

SO ORDERED.

SHIRLEY WOHL KRAM
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
October 11, 1989