YCA/N4C/US #544 May 16, 1979 US no. 44 YB IV

DUPLICATE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

In the Matter of the Application of :

MOLINO FRATELLI PARDINI, S.p.A., :

Petitioner, :

For a Judgment under Article 75 of the Civil Practice Law and Rules Vacating an Award of Arbitration and Directing a Rehearing :

- against - :

LOUIS DREYFUS CORPORATION, :

Respondent. :

- X

78 Civ. 3549
(WCC)

OPINION
AND ORDER

#48603

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CONNER, D. J.:

Molino Fratelli Pardini, S.p.A. ("Pardini") moves to vacate an arbitration award pursuant to Section 10 of the Federal Arbitration Act (the "Act"), 9 U.S.C. § 10. Louis Dreyfus Corporation ("Dreyfus") cross-moves to confirm the award pursuant to Section 9 of the Act. 9 U.S.C. § 9.

So far as is pertinent herein, the undisputed facts are as follows: On September 9, 1976, the parties entered into a contract wherein Dreyfus agreed to sell 20,000 long tons ("l.t.") of No. 1 Canadian Utility Wheat (later reduced to 19,000 l.t.) to Pardini at a price of $126 per metric ton ("m.t."), F.O.B. "one St. Lawrence port at Sellers' option." The contract incorporated the terms and conditions of NAEGA Contract No. 2, including its standard arbitration clause providing that:

> "Buyer and seller agree that any controversy or claim arising out of, in connection with or relating to this contract, or the interpretation, performance or breach thereof, shall be settled by arbitration in the City of New York before the American Arbitration Association or its successors, pursuant to the Grain Arbitration Rules of the American Arbitration Association, as the same may be in effect at the time of such arbitration proceeding, which rules are hereby deemed incorporated herein and made a part hereof, and under the laws of the State of New York. The arbitration award shall be final and binding on both parties and judgment upon such arbitration award may be entered in the Supreme Court of the State of New York or any other Court having Jurisdiction thereof. Buyer and seller hereby recognize and expressly consent to the jurisdiction over each of them of the American Arbitration Association or its successors, and of all the Courts in the State of New York. Buyer and seller agree that this contract shall be deemed to have been made in New York State and be deemed to be performed there, any reference herein or elsewhere to the contrary notwithstanding."

Pardini tendered the S.S. Aegis Eland to transport the wheat and on June 14, 1977, loading began at the Sorel Elevator in Canada. Loading was completed on June 15. During and after the loading, the master of the vessel complained to the elevator management that his vessel marks indicated that the elevator's loading tonnage figures were too high. The master ordered an independent survey to be conducted by Superintendent Company (Canada) Ltd. That survey certified that the ship contained less than the 19,000 l.t. the elevator claimed had been loaded. The master signed the elevator delivery certificate but noted thereon that he was not responsible for the weight. The ship sailed shortly thereafter.

Between June 16 and June 21, the parties and their agents exchanged numerous Telex messages. Dreyfus attempted, unsuccessfully, to intercept the ship and have her pull into a St. Lawrence port, where the amount of wheat on board the ship could be established. On June 21, Sorel Elevator, which had maintained up until that date that 19,000 l.t. had been loaded, advised Dreyfus that there had indeed been a shortage. The parties exchanged more Telex messages incorporating proposals for resolving the situation. At 1:30 P.M. on June 23, Pardini gave Dreyfus three hours to accept a proposal embracing a guarantee by Dreyfus to pay all expenses incurred in connection with the surveys and dead freight. Hearing nothing from Dreyfus, Pardini declared Dreyfus in default of the contract at 4:30 P.M.

Dreyfus protested Pardini's action. It presented documents for a quantity of 17,800 l.t. at the contract price of $126 per m.t. to the Bank of America. Sorel Elevator confirmed that the shipment was short by 932.4375 l.t. and issued Dreyfus a warehouse receipt for that amount.

On July 4, 1977, the parties entered into an Act of Compromise. The arbitrators characterized its terms as follows:

> "[A] provisional price of $90.00 per metric ton and a tentative quantity (subject to survey at destination) [was established]. Further Dreyfus agreed to pay all costs for surveys ect. [sic] at loading and discharge, plus dead freight basis loading survey figures 1164 L.T. plus ship demurrage. Pardini agreed to establish a bank guarantee reflecting the dollar value of the difference between provisional price and contract price to be paid if Dreyfus should win in Arbitration."

Thereafter, Dreyfus served Pardini with a demand for arbitration of the "differences and disputes arising out of a contract which Louis Dreyfus Corporation entered into with you on September 9, 1976 . . . . " 1/

A panel of arbitrators heard the proofs and allegations of the parties at hearings held on January 30 and February 1, 1978, considered the 140 exhibits and six memoranda submitted by the parties, and unanimously awarded Dreyfus the sum of $648,172.51 plus interest. In the Award of Arbitrators, the arbitrators set forth their findings, basically the facts as set forth above, and the following conclusion.

"This Panel concluded that Pardini is not entitled to more than he claimed as of June 23, 1977 and Dreyfus is willing to adhere fully to these conditions. This Panel further notes that the results are not therefore different from what Pardini had previously offered to Dreyfus."

The arbitrators denied Pardini's application for modification of the Award.

Pardini's Contentions

Pardini alleges that the arbitrators exceeded their powers because:

(1) they gave a completely irrational construction to the provisions of the contract in that they found that the September 9 contract was breached when Dreyfus failed to deliver 19,000 l.t. of wheat but nevertheless directed Pardini to pay the full September 9 contract rate of $126 per m.t. for the short delivery;

(2) despite the express limitation of their powers, the arbitrators based the award not on the September 9 contract but on an offer of settlement Pardini made on June 23 which Dreyfus did not accept;

(3) the arbitrators required Pardini to pay at the contract rate despite the fact that shipping documents were not presented for payment prior to Pardini's declaration of default; and

(4) the arbitrators ignored that fraud was committed by Dreyfus in the presentation of documents.

Discussion

A. Jurisdiction and Applicable Law

Pardini originally commenced a proceeding in the Supreme Court of the State of New York for a judgment under Article 75 of

the Civil Practice Law and Rules to vacate the arbitration award and direct a rehearing. Dreyfus removed the proceeding to this Court, alleging that the Court has original jurisdiction pursuant to 9 U.S.C. § 203, "in that it involves an arbitration award between the parties within the provisions of 9 U.S.C. § 202." Petition for Removal ¶ 3.

The scope of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention") is set forth in Article I, as follows:

> "1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

Section 202 broadly restates the scope of the Convention Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G., 579 F.2d 691, 699 n.11 (2d Cir. 1978). It provides:

> "An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a 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. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States."

The applicability of the Convention to an award rendered in the United States is an open question in this Circuit. See Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G., supra; I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 426 n.2 (2d Cir. 1974). If the Convention werefound to be inapplicable to the award rendered herein, this action would be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-14, which the parties rely on in their briefs.[2/] The Act applies to "maritime transactions" and "commerce," defined to include "commerce among the several States or with foreign nations . . . . " 9 U.S.C. § 1.

As a practical matter, the result in this case would be the same whether the Court applied the provisions of the Convention or the Act to determine whether the award rendered in favor of Dreyfus should be vacated or confirmed. Section 208 of the Convention provides that the Federal Arbitration Act "applies to actions and proceedings brought under this chapter to the extent that [the Act] is not in conflict with this chapter or the Convention as ratified by the United States." See Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (Rakta), 508 F.2d 969, 973 (2d Cir.1974). The Court will rely on the provisions of the Act since, as the Second Circuit said in Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G., supra, 579 F.2d at 669 n.11,:

> "the Convention is no more liberal than 9 U.S.C. § 10 on the matter of vacating awards, and since -- for reasons developed infra -- we find none of appellant's contentions adequate under section 10, resort to the Convention would not alter the result. Cf. Parsons & Whittemore Overseas Co., supra, 508 F.2d at 977 (declining to decide whether a 9 U.S.C. § 10 ground for vacating arbitral awards, arbitrator's 'manifest disregard' of applicable law, is subsumed in the Convention's 'public policy' reservation, since result would be the same regardless)."

B. Scope of Review

The law is clear that the power of a district court to review an arbitration award is severely limited. See, e.g., South East Atlantic Shipping, Ltd. v. Garnac Grain Co., Inc., 356 F.2d 189, 191-92 (2d Cir. 1966); Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805, 808 (2d Cir.), cert. denied, 363 U.S. 843 (1960). The Court must grant an order confirming the award unless the award is vacated, modified or corrected pursuant to Sections 10 and 11 of the Act. 9 U.S.C. § 9. See generally Annotation, 20 ALR Fed. 295 (1974).

Pardini advances no claim under subsections (a), (b) or (c) of Section 10. Pardini relies only on subsection (d) which provides that an award may be vacated "[w]here 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." Courts have "consistently accorded the narrowest of readings to the Arbitration Act's authorization to vacate awards" on that ground. Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G., supra, 579 F.2d at 703. The sole issue before this Court is

whether or not the arbitrators exceeded their powers. Application of State Marine Corp. of Delaware, 127 F.Supp. 943, 944 (S.D.N.Y. 1954).

C. Analysis

Pardini first alleges that the arbitration award should be vacated because it is irrational. Pardini relies on the rule applied in New York State courts that an award may be vacated where the arbitrator's construction of the contract is completely irrational. See, e.g., Lentine v. Fundaro, 328 N.Y.S.2d 418, 422 (Ct. App. 1972).

Federal law governs the power of arbitrators under a contract subject to the Act. Marcy Lee Manufacturing Co. v. Cortley Fabrics Co., Inc., 354 F.2d 42, 43 (2d Cir. 1965)(per curiam). In Marcy Lee Manufacturing Co., supra, the court stated that the result of an action to vacate an arbitration award would be the same under federal law as under the New York rule that "as long as arbitrators remain within their jurisdiction and do not reach an irrational result, they may 'fashion the law to fit the facts before them' and their award will not be set aside because they erred in the determination or application of the law." 354 F.2d at 43 (citation omitted). In I/S Stavborg v. National Metal Converters, Inc., supra, 500 F.2d at 431, the court applied the holding of Marcy Lee Manufacturing Co. and held that a "clearly erroneous" interpretation of a contract by the arbitral majority was not "irrationally so." Therefore, only if the party seeking

to vacate an arbitration award can establish that the award is irrational, may the court grant vacatur.

The Court rejects Pardini's contention that the arbitration award is irrational because it conflicts with the express findings of the arbitrators. Pardini argues that the arbitrators could not rationally conclude both that Dreyfus failed to deliver the amount of wheat required under the contract and that Dreyfus is entitled to the contract price for the wheat actually delivered. Under Pardini's reading of the award, the shortage constituted a substantial breach of the contract, so that Pardini rightfully and effectively declared Dreyfus in default of the contract; Pardini's subsequent acceptance of the tendered wheat under the Act of Compromise did not obligate it to pay the contract price.

At the hearing, Dreyfus conceded that it had ultimately been determined that less than 19,000 l.t. of wheat had been loaded onto the S.S. Aegis Eland. But Dreyfus argued that the actions of Pardini and its agents on June 14 and thereafter constituted an acceptance of the short delivery at the contract price under the Uniform Commercial Code.

The arbitration award sets forth the arbitrators' findings, essentially the facts as stated above, and their ultimate conclusion. The arbitrators did not disclose their conclusions of law. Nor were they required to do so. See, e.g.,

Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G., supra, 579 F.2d at 704; Kurt Orban Co. v. Angeles Metal Systems, 573 F.2d 739, 740 (2d Cir. 1978); Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214-15 (2d Cir. 1972). Pardini's argument is based on the erroneous assumption that when the arbitrators found that Dreyfus failed to load 19,000 l.t. of wheat, they must also have concluded that the shortage amounted to a substantial breach of contract and that Pardini never accepted the short delivery. However, the wording of the award does not support Pardini's interpretation. The arbitrators, if they accepted Dreyfus' argument, as it appears they did, could have rationally concluded that Pardini was liable for the wheat tendered at the contract price, notwithstanding the short delivery.

Pardini's second ground for vacatur is that the contract provides that the arbitrators have power to grant "any remedy or relief which they deem just and equitable and within the scope of the agreement of the parties,"[3/] and that the arbitrators exceeded this power when they based the arbitration award not on the agreement but on Pardini's settlement offer of June 23, 1977.

It is true that an arbitrator "does not sit to dispense his own brand of industrial justice . . .", United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960), and that a court may overturn an arbitrator's interpretation if "it fails 'to draw its essence' from the agreement." Local 771, I.A.T.S.E. v. RKO General, Inc., 546 F.2d 1107, 1113 (2d Cir. 1977) citing United Steelworkers v. Enterprise Wheel & Car Corp., supra, 363 U.S. at 597.[4/]

The Court is not convinced that an arbitration award based on Pardini's settlement offer would necessarily "fail[] to draw its essence" from the September 9 contract. Cf. Federal Commerce & Navigation Co., Ltd. v. Kanematsu-Gosho, Ltd., 457 F.2d 387, 390 (2d Cir. 1972)("To modify the award . . . would deny the power of the arbitrators to compromise the dispute in a manner which to them seemed appropriate and fair, as their knowledge of commercial practices qualifies them to do.") However, that question need not be decided since Pardini has failed to establish that the arbitrators drew their conclusion from the June 23 settlement offer. The contract incorporated a broad arbitration clause and Dreyfus' demand for arbitration gave Pardini notice that Dreyfus intended to submit for the arbitrators' consideration, "the differences and disputes arising out of a contract which Louis Dreyfus Corporation entered into with you on September 9, 1976, ..." At the hearing, both sides presented evidence of the parties' actions from the time the contract was entered into up until the time of the arbitration hearing. Pardini would have this Court conclude that the arbitrators based their conclusion solely on the settlement offer without any reliance on the agreement or the evidence adduced at the hearing. Pardini relies on the statement in the arbitration award that "Pardini is not entitled to more than he claimed as of June 23, 1977." The arbitrators' use of the words "not entitled to" appears to rebut Pardini's assertion that they awarded Dreyfus the contract price regardless of what it was "entitled to" under the agreement

between the parties and the applicable law. This Court concludes that this statement does not establish that the arbitrators attempted to "dispense [their] own brand of industrial justice." As the Supreme Court stated in United Steelworkers v. Enterprise Wheel & Car Corp., supra, 363 U.S. at 598:

> "A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions . . . . Moreover, we see no reason to assume that this arbitrator has abused the trust the parties confided in him and has not stayed within the areas marked out for his consideration. It is not apparent that he went beyond the submission." (footnote omitted).

As to Pardini's third and fourth contentions, I note that Pardini presented evidence in support of its allegations that Dreyfus committed fraud in the presentation of documents and that the documents were not timely presented at the hearings. Pardini also raised these allegations in its letter to the Panel requesting them to reconsider the award. Pardini's claims reduce to the proposition that the arbitrators made erroneous findings of fact or misconstrued the contract. See I/S Stavborg v. National Metal Converters, Inc., supra, 500 F.2d at 431. The Court is bound by the arbitrators factual findings. South East Atlantic Shipping, Ltd. v. Garnac Grain Co., Inc., supra, 356 F.2d at 191-92. "The courts are in agreement that arbitrators do not exceed their powers by misconstruing a contract." National

Railroad Passenger Corp. v. Chesapeake & Ohio Railway Co., 551 F.2d 136, 142 (7th Cir. 1977). See also Office of Supply, Government of Republic of Korea v. New York Navigation Co., 469 F.2d 377, 379 (2d Cir. 1972); Orion Shipping & Trading Co. v. Eastern States Petroleum Corp., 312 F.2d 299, 300 (2d Cir. 1963); Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., supra. The courts have repeatedly noted that:

> "Overly technical judicial review of arbitration awards would frustrate the basic purposes of arbitration: to resolve disputes speedily and to avoid the expense and delay of extended court proceedings. Saxis S.S.Co. v. Multifacs International Traders, Inc., 375 F.2d 577, 582 (2d Cir. 1967)." Federal Commerce Navigation Co., Ltd. v. Kanematsu-Gosho, Ltd., supra, 457 F.2d at 389-90.

Pardini's motion to vacate the arbitration award is denied. Dreyfus' motion to confirm the award is granted.

Dreyfus should submit judgment on notice.

William P. Conner
United States District Judge

Dated: New York, New York
May 16, 1979

FOOTNOTES

1. In the demand for arbitration, Dreyfus summarized its claim as follows:

"This arbitration arises from a dispute concerning a shipment of wheat loaded on board of the vessel 'Aegis Eland' at Sorel, Quebec, in June, 1977.

"The Buyer, Molino Fratelli Pardini S.P.A., only paid at the price of $90 per metric ton, rather than at the contractual price of $126 per metric ton.

"The arbitrators will be asked to award to sellers damages in the amount of $648,172.51 together with interest and the cost of this arbitration."

2. The Court also has jurisdiction of this action pursuant to 28 U.S.C. § 1332. Pardini is a foreign corporation doing business in Italy, Verified Petition of Molino Fratelli Pardini, S.p.A. at ¶ 2; Louis Dreyfus Corporation is a United States citizen, id. at ¶ 3; and more than $10,000 is in controversy.

Although diversity of citizenship is not asserted as a basis for jurisdiction in the petition for removal, the citizenship of the parties plainly appears on the face of Pardini's Verified Petition. Cf. Nixon v. Callaghan, 392 F.Supp. 1081, 1084-85 (S.D.N.Y. 1975). Since Pardini has not contested the removal, it has waived any defects in the petition. See 14 Wright & Miller, Federal Practice & Procedure, § 3721 at 543-45. See also Woodward v. D. H. Overmeyer Co., Inc., 428 F.2d 880 (1970)(Party will be held to have waived provision that in a diversity action only a defendant who is not a citizen of the state in which the action is brought may remove the action to federal court, see 28 U.S.C. § 1441, where he does not promptly move for remand).

3. See Section 35 of the Grain Arbitration Rules of the Americ Arbitration Association, incorporated by reference into the contract between the parties.

4. Pardini relies on several New York State inferior court decisions wherein vacatur of arbitration awards was granted. In those cases, the arbitrators went beyond the questions submitted for their determination or implied a new provision into the collective bargaining agreement between the parties in disregard of an express provision in the agreement. See e.g., Civil Service Employees Ass'n, Inc. v. Bixby, 43 A.D.2d 651, 349 N.Y.S.2d 825 (App.Div. 1973); County of Ontario v. Civil Service Employees Association, Inc., 76 Misc.2d 365, 351 N.Y.S.2d 101 (Sup.Ct. 1973), aff'd mem., 361 N.Y.S. 2d 1021 (App.Div. 1974).

Those cases rely on National Cash Register Co. v. Wilson, 8 N.Y.2d 381, 208 N.Y.S.2d 951 (1960), where the Court of Appeals stated that arbitrators exceed their powers "only if they [give] a completely irrational construction to the provisions in dispute and, in effect, [make] a new contract for the parties." I have already concluded that the award in this case is not irrational.

Arbitration awards may be vacated under Section 10 if they are in "manifest disregard" of the law. I/S Stavborg v. National Metal Converters, Inc., supra. Pardini does not allege that the award is in disregard of the law. An award may also be vacated if the arbitrators base the award on a subject matter not within the agreement to submit to arbitration. See Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (Rakta), supra, 508 F.2d at 976. Pardini does not appear to allege that the arbitrators exceeded the scope of the submission, which I note, is very broad. See note 1, supra.