12TH CASE of Level 1 printed in FULL format.

Application of YORK HANNOVER HOLDING A.G., Plaintiff, v. AMERICAN ARBITRATION ASSOCIATION, Defendant, and MCDERMOTT INTERNATIONAL, INC., MCDERMOTT OVERSEAS INVESTMENT COMPANY N.V., MCDERMOTT INTERNATIONAL TRADING (HOLLAND 1) B.V., MCDERMOTT INTERNATIONAL TRADING (HOLLAND 2) B.V., MCDERMOTT INTERNATIONAL TRADING (HOLLAND 3) B.V., MCDERMOTT INTERNATIONAL TRADING (HOLLAND 4) B.V. and MCDERMOTT INTERNATIONAL TRADING (HOLLAND 5) B.V., Intervenors-Defendants. In re: Arbitration between York Hannover Holding, A.G. and McDermott International, Inc. et al.

92 Civ. 1643 (CSH)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1993 U.S. Dist. LEXIS 6192

May 7, 1993, Decided

May 11, 1993, Filed

JUDGES: [*1] HAIGHT, JR.

OPINIONBY: CHARLES S. HAIGHT, JR.

OPINION: MEMORANDUM OPINION AND ORDER

HAIGHT District Judge:

Following removal of this action from New York state court and denial of remand by order of this court dated June 22, 1992, this case is now before the court on Plaintiff's Petition to remove the arbitrators in an ongoing arbitral proceeding and Defendant-Intervenors' cross-motion for dismissal or summary judgment.

BACKGROUND

Petitioner York Hannover Holding (hereinafter "York") and Defendant-Intervenors McDermott International, Inc. et. al. (hereinafter "McDermott") were engaged in binding arbitration proceedings, pursuant to a contract between them. In accordance with the contract, the arbitration panel consisted of three arbitrators. Each party selected one arbitrator and the American Arbitration Association (hereinafter "AAA") selected a neutral chairman. Over one year into the arbitration, York's appointed arbitrator, Morton D. Weiner, resigned from the panel alleging that the chairman, Ralph Gant, was biased against York and had consistently ignored or blocked Weiner's input. After exhausting its remedies at the AAA, York now seeks judicial intervention in the ongoing arbitration, [*2] challenging the AAA's determination that Gant was not biased and requesting that the court order the AAA to remove the chairman or panel. York also contests the AAA's appointment of a replacement arbitrator for Weiner.

The underlying controversy involves a purchase agreement between York and McDermott whereby York was to purchase a McDermott German subsidiary. A dispute between the parties, involving approximately $ 60 million, over the monies owed under the agreement arose. Article 24 of the purchase agreement provides for binding and final arbitration in the event of a dispute arising under the agreement. The arbitration is to be governed by the Commercial Arbitration Rules of the American Arbitration Association, n1 which Rules are incorporated by reference into the contract. See Berman Aff., exh. 13 (Article 24 of the purchase agreement). The arbitration clause specifies that each party shall appoint one arbitrator and the two appointed arbitrators shall appoint a neutral third. In the event that the appointed arbitrators cannot agree, the AAA would appoint the neutral arbitrator.

n1 The pertinent Rules here are:
Rule 14. If the agreement of the parties . . . specifies a method of appointing an arbitrator, that . . . method shall be followed . . . . If no period of time [for appointment of an arbitrator] is specified in the agreement, the AAA shall notify the party to make the appointment. If within ten days thereafter

an arbitrator has not been appointed by a party, the AAA shall make the appointment.
Rule 19. [A] neutral arbitrator shall disclose to the AAA any circumstance likely to affect impartiality . . . . Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties . . . . Upon objection of a party to the continued service of a neutral arbitrator, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.
Rule 20. If for any reason an arbitrator should be unable to perform the duties of the office, the AAA may . . . declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules.

American Arbitration Association, Commercial Arbitration Rules, Rules 14, 19, 20 (1988.)

[*3]

The parties submitted their dispute to arbitration. Pursuant to the agreement, McDermott appointed Robert B. Davidson, Esq. and York appointed Morton D. Weiner as its arbitrator. The AAA appointed the neutral arbitrator, Ralph Gant, as Davidson and Weiner were unable to agree on a third. Procedural hearings commenced before the panel on June 18, 1990.

The immediate controversy concerns York's allegation of bias in the arbitral panel. York bases its allegation on the resignation of Weiner, on December 4, 1991, who resigned from the panel on the grounds that Gant was biased against York and that Weiner "could not get a fair hearing [with Gant] for [his] point of view." Weiner Aff., para. 12. Upon Weiner's resignation, York decided that it "could not in good conscience proceed with the arbitration presided over by Mr. Gant." Memo. Supp. Pet., p. 10. York requested that the AAA investigate the charges of bias. Both parties submitted material to the AAA regarding the alleged bias and on January 16, 1992 an administrative conference on the issue was held. After the hearing, both sides were given additional time to submit "any new information" on the issue of disqualifying Gant, and **[*4]** both parties did submit additional material. See Lowenfeld Aff., exh. A (January 16, 1991 letter from AAA to the parties).

On February 3, 1992, the AAA reaffirmed the appointment of Gant "after carefully considering the contentions and submissions of the Parties." See id. at exh. F (February 3, 1992 letter ruling of the AAA). York alleges that the AAA failed to investigate the claim of bias and that

the due process accorded York Hannover by the AAA in merely treating this case as the usual resignation of an arbitrator simply to be replaced by a new arbitrator is superficial and completely misses the issue of whether this panel can treat [York] in a fair and even handed manner.

Lacher Aff., paras. 9-10; see also Lowenfeld Aff., para. 10 ("the AAA has ignored the serious allegation raised by Mr. Weiner's resignation, and reduced the case to a mere successor arbitrator proceeding.")

Immediately after Weiner's resignation, the AAA directed York to appoint a successor to Weiner pursuant to Commercial Arbitration Rules 14 and 20. See supra, n.1. The AAA extended the deadline by its January 16, 1992 letter to the parties, giving York one week from that date **[*5]** to appoint a replacement arbitrator. See Lowenfeld Aff., para. 4. York however failed to appoint an arbitrator by the deadline, arguing that it should be allowed to wait for a determination regarding Gant's disqualification before appointing a new arbitrator. See Lowenfeld Aff., paras. 5-7. The AAA apparently considered and rejected that argument at the January 16, 1992 administrative conference, and on January 27, 1992 it appointed a replacement arbitrator for Weiner. See Memo. Int.-Def. Opp. Appl. Replace, pp. 10-11.

York petitions this court to compel the AAA to remove the panel based on Gant's bias and the AAA's improper appointment of York's arbitrator. Defendant opposes York's application and moves to dismiss the action as premature or in the alternative for summary judgment.

DISCUSSION

Applicable Law

The McDermott companies are organized under the laws of the Republic of Panama, the Netherlands Antilles and the Netherlands. York is a corporation organized under the laws of Switzerland. Both parties suggest, and the court agrees, that the Convention on the **Recognition and Enforcement of Foreign Arbitral Awards**, as enacted in the United States **[*6]** in *9 U.S.C. §§ 201-208*, applies to this case. n2 Pursuant to *9 U.S.C. § 208* the Federal Arbitration Act, *9 U.S.C. §§ 1-15* (1988), applies to all cases within the Convention to the extent that its provisions do not contradict the Convention or *9 U.S.C. §§ 201-207*.

n2 *9 U.S.C. § 202* (1988) provides that the Convention will apply to "an arbitration agreement or arbitral award arising out of a legal relationship . . . which is considered as commercial . . .

[If] an agreement or award arising out of such a relationship . . . is entirely between citizens of the United States [it] shall be decreed not to fall under the Convention." If the arbitration involves parties domiciled outside the "enforcing jurisdiction" it is within the Convention. See *Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983).*

The [*7] Court's Power to Intervene in an Ongoing Arbitration Proceeding

"Under the Federal Arbitration Act, the court's power to deal with bias is limited to setting aside the award after it has been rendered." *Dover Steamship Co. v. Rotterdamsche Kolen Centrale, 143 F. Supp. 738, 742 (S.D.N.Y. 1956)* (emphasis in original); see also *9 U.S.C. § 10*(b) (1988) (listing "evident partiality" of an arbitrator as a ground for vacating a final arbitration award); *Michaels v. Mariforum Shipping, 624 F.2d 411, 414 n.4 (2d Cir. 1980)* (stating in dictum that "it is well established that a district court cannot entertain an attack upon the qualifications or partiality or arbitrators until after the conclusion of the arbitration and the rendition of an award"); *Marc Rich & Co. v. Transmarine Seaways Corp., 443 F. Supp. 386, 387-88 n.3 (S.D.N.Y. 1978)* ("no section of the (Federal Arbitration] Act . . . provides for judicial scrutiny of an arbitrator's qualifications in any proceeding other than an action to confirm or vacate an award"); *Catz American Co. v. Pearl Grange Fruit Exchange, Inc., 292 F. Supp. 549, 551 (S.D.N.Y. 1968)* **[*8]** (the petitioners "could not properly have brought the issue of partiality [of an arbitrator] before this court until after the arbitration and rendition of an award.") Similarly, where the applicable rules of arbitration require that an independent panel or board handle and determine complaints of arbitrator bias or impartiality, the decision of that panel "will generally be reviewable by a district court only after an award has been made." *Sanko S.S. Co. v. Cook Industries, Inc., 495 F.2d 1260, 1264 n.4 (2d Cir. 1973);* see also *San Carlo Opera Co. v. Conley, 72 F. Supp. 825, 833 (D.N.Y. 1946)*, aff'd *163 F.2d 310 (2d Cir. 1947)* (where petitioner challenges an arbitrator's neutrality and the Arbitration Association decides against him, he should proceed in the arbitration but preserves his right to complain of bias in court after an award has been issued); American Arbitration Association, Commercial Arbitration Rules, Rule 19 (1988) ("upon objection of a party to the continued service of a neutral arbitrator, the AAA shall determine whether the arbitrator should be disqualified . . . which **[*9]** [determination] shall be conclusive.")

While the court generally does not have jurisdiction to intervene in an ongoing arbitration proceeding, it may have such power "where intervention has been sought under the general equity powers of [the] court." *65 A.L.R.2d 755, 756 (1959).* At least one federal court has dealt with the issue of whether it is ever appropriate for an arbitration proceeding to be subject to judicial scrutiny before a final award is rendered. In *Aerojet-General Corp. v. American Arbitration Ass'n, 478 F.2d 248 (9th Cir. 1973)*, the court recognized its power "in the most extreme cases" to intervene in an arbitration proceeding before a final award is rendered where the alleged defect in the proceeding will cause "severe irreparable injury." See Aerojet-General at 251-52. Under New York law, it is clear that a court has the equitable power to intervene before a final arbitration award is made. See *Astoria Medical Group v. Health Insurance Plan of Greater New York, 11 N.Y.2d 128, 132 (1962)* ("courts have an inherent power to disqualify an arbitrator before an award has **[*10]** been rendered"); *Belanger v. State Farm Mutual Auto Ins. Co., 74 A.D.2d 938, 426 N.Y.S.2d 140, 141* (3d Dep't 1980) ("where a party to an arbitration proceeding becomes aware of the . . . probable partiality of an arbitrator, there would appear to be no reason why the court should not exercise its equitable jurisdiction . . . at any time during the proceeding, rather than require the party to wait for the award, and then move to vacate.")

It is not necessarily inappropriate for this court to consider New York state decisions on the issue of exercising equitable jurisdiction. See Michaels at 413 n.3 ("the instant case arises under the Federal Arbitration Act and is therefore governed by federal law. Nevertheless, in view of the relative paucity of precedents on the [issue of what constitutes a 'final' award] and the similarity of language with regard to judicial review between the federal Act and the corresponding provisions in the New York statute . . . we have looked to New York State decisions, as well.") However, for the reasons stated below, this court does not find sufficient bias and it is therefore unnecessary to decide whether in a proper case of bias **[*11]** the court's equitable powers can or should be exercised. See *Pompano-Windy City Partners v. Bear, Stearns & Co., 698 F. Supp. 504, 519 n.12 (S.D.N.Y. 1988)* (declining to decide whether the court had jurisdiction to intervene where it found insufficient bias.)

Alleged Bias of the Neutral Arbitrator

9 U.S.C. § 207 provides that a court must confirm an arbitral award covered by the Convention on the **Recognition and Enforcement of Foreign Arbitral Awards** "unless it finds one of the grounds . . . specified in the said convention." Article V of the Convention states the grounds upon which recognition and enforce-

ment of an arbitral award may be refused. n3 *9 U.S.C. § 10* states the grounds upon which an arbitral award may be vacated under the Federal Arbitration Act, which applies only to the extent that it does not contradict the Convention. See *9 U.S.C. § 208* (1988). *9 U.S.C. § 10*(b) states that an arbitral award may be vacated for "evident partiality or corruption" of an arbitrator. n4 While there is no actual **[*12]** arbitration award here to be set aside, the standards applied by courts to determine if there is "evident partiality" are instructive in analyzing claims of arbitrator bias. See Pompano-Windy City Partners at 516.

n3 Those grounds are: (1) incapacity of the parties; (2) lack of notice to appear or inability to present a case; (3) award beyond the scope of the arbitration agreement; (4) composition of panel or procedure was not in accord with arbitration agreement; (5) award not final or set aside in the rendering jurisdiction; (6) subject matter not arbitrable; (7) enforcement would be contrary to public policy in the enforcing state. See Convention on the **Recognition and Enforcement of Foreign Arbitral Awards,** 21 U.S.T. 2517, Art. V(1)(a)-(e), (2)(a)-(b).

n4 It is not clear whether the "evident partiality or corruption" ground applies to cases governed by the Convention. Article V of the Convention states that recognition may be refused "only if" a party proves a ground specified in Article V(1), which does not include any reference to impartiality or bias of an arbitrator. See *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier, 508 F.2d 969, 977 (2d Cir. 1974)* ("both the legislative history of Article V . . . and the statute enacted to implement the United States' accession to the Convention [*9 U.S.C. §§ 201-208*] are strong authority for treating as exclusive the bases set forth in the Convention for vacating an award.") An award rendered by a panel that was tainted with bias or impartiality may conceivably be set aside under the Convention as violative of public policy and thus within Article V(2)(b). It is not necessary for this court to determine however whether allegations of bias fall within Article V of the Convention as the court declines to find that sufficient partiality has been shown. See *Andros Compania Maritima v. Marc Rich & Co., 579 F.2d 691, 699 n.11 (2d Cir. 1978)* (where allegations of bias are insufficient under § 10 of the Federal Arbitration Act there is no reason to consider whether the alleged bias would come within the very narrowly construed public policy ground of the Convention); Parsons at 977 (refusing to decide whether the "manifest disregard" ground judicially implied in § 10 of the Federal Arbitration Act applies to arbitrations governed by the Convention because the ground had not been sufficiently proven); *Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instr. Co., 415 F. Supp. 133, 140 (D.N.J. 1976)* (declining to decide whether the defense of fraud in *9 U.S.C. § 10*(a), as either subsumed in the Convention through *9 U.S.C. § 208* or within Article V(2)(b)'s public policy defense, may be asserted in cases governed by the Convention because fraud had not been proven.)

[*13]

In the Second Circuit a party must show more than the "partiality." The challenging party must show that a "reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Morelite Construction Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984).* A finding of partiality or bias is generally confined to situations where an arbitrator has had a relationship or dealings with a party in the proceeding. See *P.T. Reasuransi Umum Indonesia v. Evanston Ins. Co., 1992 U.S. Dist. LEXIS 19753, *5* (S.D.N.Y. 1992); *Reichman v. Creative Real Estate Consultants, Inc., 476 F. Supp. 1276, 1284 (S.D.N.Y. 1979).* A party may show bias by "'inferences from objective facts inconsistent with partiality.'" Pompano-Windy City Partners at 516 (quoting *Pitta v. Hotel Ass'n of New York City, Inc., 806 F.2d 419, 423 (2d Cir. 1986)).* The alleged bias must be "'direct and definite; mere speculation is not enough.'" Id. (quoting *Sofia Shipping Co. v. Amoco Transport Co., 628 F. Supp. 116, 119 (S.D.N.Y. 1986)).*

[*14] Bias is not established by showing that an arbitrator consistently agrees with the arguments of one side and repeatedly finds in their favor. See *Bell Aerospace Co. v. International Union, United Auto., 500 F.2d 921, 923 (2d Cir. 1974);* see also *Fairchild & Co. v. Richmond, 516 F. Supp. 1305, 1313 (D.D.C. 1981)* ("the mere fact that arbitrators are persuaded by one party's arguments and choose to agree with them is not of itself sufficient to raise a question as to the evident partiality of the arbitrators.")

York bases its allegation that the arbitral panel was biased primarily, if not exclusively, on its party-appointed arbitrator's allegation that Gant was biased. In fact, prior to Weiner's resignation York had not made any complaints or allegations of arbitrator bias. Because the allegation of bias against Gant was initiated by a fellow arbitrator, and not one of the parties to the arbitration, York claims this case is one of first impression. Specifically, York charges Gant with:

1. Repeated failure to afford claimant's attorneys equal time to make their presentations.

2. Failure to consult with his fellow **[*15]** arbitrators before reaching decisions on procedural motions.

3. Attention only to the lawyer-member of the panel (a party-appointed arbitrator), not to the businessman-member of the panel . . . .

4. Failure to take account of any record differences among the arbitrators.

5. Issuance without the knowledge or consent of Mr. Weiner of a critical order . . . as a Panel Order

Mem. Supp. Pet., p. 9 (emphasis in original). York alleges that these charges taken together demonstrate that Gant "substantially departed" from the standards of conduct expected of arbitrators as specified in the Arbitration Act, the AAA Rules and the Canons of Ethics for Arbitrators. See Mem. Supp. Pet., p. 10.

Petitioner cites no authority, however, and this court has found none, to support the proposition that a violation of those rules and canons constitutes bias or any other ground to review an arbitral award. Even assuming that York's allegations are true, they do not make a showing of bias or partiality under the case law as detailed above.

As to its claim that the AAA improperly handled the complaint of bias, York fails to explain why the procedure followed by the AAA, which was **[*16]** in accordance with Rule 19 of the Commercial Arbitration Rules, was insufficient. York does claim that a "evidentiary hearing" should have been conducted but does not explain what additional evidence it would have, or could have, submitted.

The AAA Rules clearly outline the procedure to be followed when the AAA receives information regarding arbitrator bias from any source, which would include a co-panelist. If a party objects to the continued service of an arbitrator it shall submit its claim to the AAA and the AAA will determine whether the arbitrator should be disqualified, and that determination shall be "conclusive." See American Arbitration Association, Commercial Arbitration Rules, Rule 20 (1988). York has pursued arbitration before the AAA, and the AAA Rules were incorporated by reference into the purchase agreement between York and McDermott. York is therefore bound by those Rules. At this point in the process, the court must defer to the decision of the AAA.

Replacement of Arbitrator Weiner

Again, York is bound by the AAA Commercial Arbitration Rules. York offers no persuasive reason for its non-compliance with the AAA's direction, under Rules **[*17]** 14 and 20, to appoint a new arbitrator. York's argument against complying with the direction was considered by the AAA and rejected. The AAA is responsible for interpreting the AAA Rules and the parties are not free to simply ignore interpretations they do not agree with. See American Arbitration Association, Commercial Arbitration Rules, Rule 52 (1988) (AAA Rules that do not relate to an arbitrator's powers and duties "shall be interpreted and applied by the AAA.") In fact, York could have appointed a new arbitrator without affecting its complaint of bias or its ability to stay the arbitral proceedings pending a suit on the claim.

York is not free to disregard the Rules it agreed to operate under and expect this court to relieve it of the consequences of doing so. The replacement arbitrator appointed by the AAA should remain on the panel.

For all of the foregoing reasons, York's petition is denied. McDermott's cross-motion is denied as moot.

It is so ordered.

Dated: New York, New York
May 7, 1993

CHARLES S. HAIGHT, JR.

U.S.D.J.