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INTERNATIONAL ARBITRATION REPORT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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In the Matter of the Arbitration of
Certain Controversies Between

CELULOSA DEL PACIFICO S.A., 95 Civ. 9586 (RPP)

Plaintiff/Petitioner, OPINION AND ORDER

- against -

A. AHLSTROM CORPORATION,

Defendant/Respondent.
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A P P E A R A N C E S

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ROBERT P. PATTERSON, JR., U.S.D.J.

On October 23, 1995, Petitioner Celulosa Del Pacifico S.A. ('Pacifico') brought a motion in Supreme Court, New York County, pursuant to §§ 7511(a) and (b)(iii) of the Civil Practice Law and Rules ('CPLR') to vacate an arbitral award in favor of Respondent A. Ahlstrom Corporation ('Ahlstrom') rendered on September 6, 1995. Pursuant to 9 U.S.C. § 205, Ahlstrom removed the state court petition to this Court on November 9, 1995, and on November 17, 1995, served notice of its cross petition to confirm the award under the New York Convention.

Pacifico's motion requests this Court to vacate the award as 'completely irrational,' 'contrary to public policy' and 'in manifest disregard of the law.' In support of its motion, Pacifico attaches a plethora of exhibits from the arbitral proceeding in an effort to persuade the Court to embark on a de novo review of the evidence and make findings of fact and conclusions of law at variance with the arbitral panel's determination.

Neither the law governing confirmation of arbitral awards nor the facts of this case support petitioner's motion. Indeed, were it not for the Second Circuit's desire to have the district courts clearly state the reasons for their decisions, this decision should have been made from the bench. Were it not for other prior motions awaiting decision, this opinion and order would have issued earlier. Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 (1974). Accordingly, the cross motion to confirm the arbitral award is granted.

Background

The controversy arises out of the determination by Pacifico, a Chilean corporation formed in 1988, to purchase from Ahlstrom, a Finnish manufacturer, a chemical recovery boiler, including a 'superheater,' as a component part of a $600 million pulp mill project to be constructed in an undeveloped region in the south of Chile. The project included not only a water

treatment facility to prepare, treat and recycle water to produce pulp, a fiber line for the processing of wood fibers, but also a recovery island which was a separate section, devoted to the recovery of by-products for their reuse in the fiber line operation, containing the recovery boiler, steam turbines, a system of separation tanks and a control facility. Pacifico determined not to have the mill built on a turnkey basis but rather to rely on its own personnel and two engineering consulting companies, H. A. Simons, Ltd. of Vancouver, Canada, and A. F. Industrins Processkonsitt A.B. of Stockholm, Sweden, to manage and coordinate the project. Accordingly, the other components of the project were supplied by vendors other than Ahlstrom. Arbitration Award dated September 6, 1995 (the "Award") at 5.

The purchase agreement (the "Purchase Agreement") for the boiler and superheater was entered into as of March 27, 1989 but negotiated for approximately one year. It required Ahlstrom to supply one complete chemical recovery boiler for approximately $28 million. Although the initial tenders from Ahlstrom offered Pacifico an option under which Ahlstrom would have been responsible for the erection of the boiler, Pacifico determined to have ECOL, a general contractor, undertake that responsibility, although Ahlstrom and the suppliers of control valves, instruments, automation, the precipitator, and the water treatment plant were each responsible for checking their respective equipment once the mechanical, electrical and

instrument installation was completed. Hammond Aff. ¶5, Ex. C, ¶¶ 2648-2666, Ex. E. The Purchase Agreement provided that the recovery boiler components were to be supplied f.o.b. Finland. Award at 12. Pacifico's expert admitted that the components supplied by Ahlstrom were in conformity with all contract specifications when shipped from Finland. Award at 22.

The Agreement defined "start up" to mean "the date on which the recovery boiler is demonstrated of being capable of operating on a continuous basis on black liquor at MCR (maximum continuous rating)" Agreement at P00166, which ultimately occurred in 1992. However, in September 1991, five months before "start up" but after delivery of the boiler components, the erection of the boiler, the chemical cleaning of the recovery boiler and three hydrostatic tests of the recovery apparatus, over 100 leaks and cracks were discovered in the recovery boiler superheater caused by caustic stress corrosion cracking.[1] Award at 16-17, 21.

After the discovery of the leaks the parties agreed that, to ensure that the recovery boiler achieved an early start up, Ahlstrom would provide a replacement superheater and other services, payment for which was to abide the outcome of investigations into the cause of the failure.

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[1] A large part of the hearing was devoted to Pacifico's claim that the cause of the damage to the superheater was that Ahlstrom had not properly chemically cleaned the recovery boiler, a service it was to perform under the Agreement, and Ahlstrom's claim that the damage was caused by excessive carry-over of out-of-spec boiler water. Award at 18.

Ahlstrom billed Pacifico for $3.5 million which Ahlstrom expended in the replacement and repairs and $2,874,863 for an alleged wrongful call on Ahlstrom's letter of credit provided under the Purchase Agreement. Award at 15. Pacifico refused to pay. In December 1992, Pacifico resorted to arbitration pursuant to the terms of the Agreement which called for arbitration in New York pursuant to the rules of the International Chamber of Commerce ("ICC"). The ICC transmitted the file to the arbitrators in June 1993. Award at 2.

After extensive prehearing activities, the panel held fifteen days of evidentiary hearings and received two hundred and seventy exhibits and the hearing and post hearing briefs. A lengthy closing argument was held on March 2, 1995, after final briefs were submitted. Award at 4. The transcript of the proceeding comprises 3,937 pages. Id. On September 6, 1995, the panel comprised of distinguished attorneys, rendered the award, a 26-page majority opinion and a nine page dissent.

Pacifico's motion is based principally on the majority's determination that certain warranties in the Agreement did not cover the failure of the superheater before it was placed in service. These warranties are:

> [§ 10.1.1] In addition to any conditions or warranties which are implied by law the Vendor warrants that the Goods shall be free from defects or deficiencies in materials, workmanship and design for a period of 24 months after start-up of the plant, but not later than 36 months after the last main shipment unless a longer warranty period has been agreed upon and is so recorded elsewhere in this Purchase Agreement.
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> * * *
>
> [§ 10.1.6] The Vendor, at its sole cost and expense, shall promptly repair or replace as directed by the Purchaser all defects or deficiencies in the Goods discovered on or before 24 months after start-up of the plant. . . .

Pacifico argues that it was "absurd" for the arbitrators to find these warranties applied only to the period after start-up and not to the period before start-up. Comparing the warranty to the type a consumer receives from an electronic retailer, it argued that the warranty also had to apply to the pre-start-up period. It argues that such a warranty has to be implied and must be implied by law. It did not, however, advance an implied warranty theory in its terms of reference or in its post-hearing briefs.

The warranty here, however, was not a retailer's warranty of a consumer product but a warranty in an agreement between industrial companies which was negotiated at length by those companies. Pacifico undertook to construct the boiler and superheater from Ahlstrom's components and components supplied by other vendors. Under such circumstances, it is entirely reasonable to find, as the majority arbitrators did, that under the agreement reached by the parties, Ahlstrom's warranty of life of its components would not start until the components of the recovery unit had been properly assembled, the recovery unit tested and put into service. It was Ahlstrom's contention that

the superheater failed during testing because Pacifico neglected to follow Ahlstrom's guidelines and instructions and not from any action by Ahlstrom. Petitioner's Mem. at 6. The majority arbitrators concluded that Pacifico had not carried its burden of establishing that Ahlstrom's actions were the cause of the superheater's failure. Award at 19-20. Under the facts of this case, the majority opinion appears to be a well-grounded interpretation of the contract and consistent with the evidence presented. The award is not in the least absurd or irrational. Nor is it contrary to the public policy of this forum.

It is well settled that 'the question of interpretation of the . . . agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.' United Steel Workers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960).

Pacific and Ahlstrom are both non-U.S. parties. The award is governed by the New York Convention. 9 U.S.C. § 202 (1988); Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983). The grounds upon which a party may oppose confirmation are limited to those set out in Article V of the Convention. Andros Compania Maritima, S.A. v. Marc Rich & Co. A.G., 579 F.2d 691, 699 (2d Cir. 1978); Fotochrome, Inc. v. Copal Co., Ltd., 517 F.2d 512, 518 (2d Cir. 1975). The only

conceivable ground set out in Article V would be that in Section 2(b), 'The recognition of the award would be contrary to public policy of (the forum state).' This provision 'is to be construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice.' Fotochrome, Inc. v. Copal Co., Ltd., 517 F.2d 512, 516 (2d Cir. 1975); Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974); Andros Compania Maritima, S.A. v. Marc Rich & Co. A.G., 579 F.2d 691, 699, n.11 (2d Cir. 1978). Review of the award and the record underlying the award reveals no basis whatsoever for finding a violation of basic notions of morality and justice.

The petitioner's motion is denied and the cross motion is granted. The Arbitral Award of September 5, 1995 is hereby confirmed. Enter judgment.

IT IS SO ORDERED.

Dated: New York, New York
March 6, 1996

Robert P. Patterson, Jr.
U.S.D.J.

Sent by Barry H. Garfinkel 08.03.96

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