UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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MAYER ZEILER, FLOCKTEX INDUS., LTD., DE-LUX INDUS., and ACHIM DEITSCH TEXTILE INDUS.

Plaintiffs,

MEMORANDUM AND OPINION

04CV3602(SLT)(KAM)

-against-

JOSEPH DIETSCH, MORDECHAI DEITSCH, JACOB PINSON, RACHEL SANDMAN, DEITSCH PLASTIC CO., DEITSCH PLASTIC PARTNERS, DEITSCH INT'L SALES CORP., SHALVAH PARTNERSHIP, OLDE POINTE ASSOCIATED LIMITED PARTNERSHIP, ATC PARTNERSHIP, ESDEE REALTY, ORANGE INVESTMENT CO., WILLOWBROOK VENTURE CO., ANNASH, INC. and GREENDEER,

Defendants.
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TOWNES, U.S.D.J.

The instant action was filed by the plaintiffs in the Supreme Court of Kings County on August 4, 2004, seeking confirmation of certain arbitration awards and to vacate others. Defendants removed the action to this court, due to the diversity of citizenship of the parties, and filed their own motion to confirm one of the awards granted at a series of arbitrations. Based on the submission of the parties, and oral argument held on December 9, 2005, and for the reasons stated below, Plaintiffs' motion is GRANTED and Defendants' Cross-Motion is DENIED.

I. *Facts and Procedural History*

Plaintiff Mayer Zeiler ("Zeiler") and Defendants Joseph Deitsch ("Deitsch"), Mordechai Deitsch ("M. Dietsch"), Jacob Pinson ("Pinson") and Rachel Sandman ("Sandman") (collectively the "Individual Defendants") held interests as shareholders or partners in various businesses and real estate ventures both in the United States and in Israel. (Petition ¶ 1; Answer ¶ 1.) The Individual Defendants are all related and are all Orthodox Jews. In the late 1990s, Zeiler, the Individual Defendants and others decided to sever their business connections. (Petition ¶ 2; Answer ¶ 2.) To that end, they executed an agreement (the "September 1999 Agreement"[1]) which provided, *inter alia*: "we the undersigned accepted upon us Rabbi Moshe Tendler, Rabbi Moshe Bogomilski and Rabbi Shmuel Chaim Gurwitz as arbitrators relating to the claims between ourselves. We confirm that we accept upon ourselves to abide by the rulings of this Bais Din." (Petition at Ex. A.) A "Bais Din," also known as a "Beth Din," is a rabbinical tribunal that conducts religious arbitrations, in this case, according to Jewish law. (Petition at ¶ 2; Ex. A.)

According to Plaintiffs, Zeiler held interests in several Israeli companies, named as plaintiffs in this actions, including Flocktex Industries, Ltd., De-Lux Industries, Ltd., and Achim Deitsch Textile Industries, who were also parties to the September 1999 Agreement (the "Israeli Companies"). (Petition ¶ 3.) Plaintiffs also claim that defendant entities Deitsch Plastics Co.,

[1] The translation of the Agreement is dated September 22, 1999. However subsequent references to the Agreement in Plaintiffs' memoranda refer to it as the August 22, 1999 agreement. Plaintiff Zeiler's Affirmation originally referred to it as the September 22, 1999 agreement but every reference to September was manually stricken and replaced by "August." Plaintiff Zeiler did not initial these corrections. As such, the Court will refer to the agreement as the September 1999 agreement, as that is the date printed thereon.

Inc., Deitsch Plastic Partners, Deitsch International Sales Corp., and Annach Inc., American companies, were parties to the September 1999 Agreement, as were the jointly-held real estate entities of Shalvah Partnership, Olde Point Associates Limited Partnership, ATC Partnership, Esdee Realty, Orange Investment Company, Willowbrook Venture Company, Annash, Inc., and Greendeer (the "US Companies"). (Petition ¶ 3.)

Pursuant to an order of the Beth Din, a second agreement was reached between the parties (the "Shares Sale Agreement" or "June 10 Agreement") in furtherance of their effort to divide their respective interests and share holdings in the Israeli and US companies. (Zeiler Aff. Ex. E (July 6, 2000 Ruling); Ex. C (Shared Sale Agreement).) In the Shared Sale Agreement, the parties again agreed to arbitration: "this Agreement shall be governed and construed pursuant to Torah law, and the Beth Din shall have exclusive jurisdiction in connection herewith." (Zeiler Aff. Ex. C at 15). Additionally, the Shares Sale Agreement defined "Beth Din" as follows:

> 'Beth Din' shall mean a judicial tribunal governed by Halachic law, the members of which are Rabbi Moshe D. Tendler, Rabbi Shmuel C. Gurwitz and Rabbi Moshe Bogomilski, or any other tribunal governed by Halachic law upon which the Parties mutually agree.

(Zeiler Aff. Ex. C at 1.)

Together, the three arbitrators pronounced a series of rulings attempting to flesh out the numerous and complicated disputes between the parties, requiring, *inter alia*, monies and documents to be transferred between the parties. (*See* Petition Exs. F, H.) The parties dispute the extent to which the rulings were complied with. The record contains many correspondences from Abraham Roth ("Roth"), the accountant hired to oversee the accountants of Plaintiffs and Defendants in their exchange of assets and documents. These documents reflect both the

difficulties Roth had in obtaining swift cooperation of the parties and those that Plaintiffs had in securing certain documents from Defendants during the course of the nearly 5-year arbitration process. (*See*, *e.g.*, Roth Aff. Ex. B (asking Beth Din to apply pressure on both parties); Gurwitz Aff. Ex. F (letter from Plaintiffs' accountant contenting not all documents provided by Defendants); Zeiler Aff. Exs. H (February 10, 2003 letter from Zeiler to Beth Din to order Defendants to provide him with various documents, including life insurance policies, copies of certain tax returns and answers to certain questions); I (letter from Roth to Beth Din agreeing with February 10, 2004 Zeiler letter to Beth Din); Gurwitz Aff. Exs. G (letter from Roth to Gurwitz recommending Defendants submit various documents and provide him with answers to questions raised in his February 10, 2003 letter); H (letter from Roth to Gurwitz stating problems with both parties, namely, Defendants' failure to provide adequate response and Plaintiffs' lack of diligence in seeking out the requested information); J (April 2, 2004 letter from Roth to Gurwitz stating New Haven "basically responded to all requests for documents" but not addressing Defendants' proffer (if any) of answers to questions earlier raised by Zeiler).)

This process appears to be supported by numerous rulings of the Beth Din reiterating Plaintiffs' right to certain information. (*See* Zeiler Aff. Exs. B at 2; D at 2; E at 1; F at 2; G at 3; J at 1; K at 1.) The parties dispute whether these earlier rulings were complied with.

According to Defendants, the Shares Sale Agreement resolved "most of the issues in dispute." (Def. Mem. of Law at 2.) A document titled "Mutual Waiver Letter" was also executed by the parties on June 10, 2003, the date of the Shares Sale Agreement and, according to Defendants, is part of the Shared Sale Agreement. Pinson Decl. Ex A. The Mutual Waiver Letter requires that "[a]ny tax obligations that may be imposed by the US Internal Revenue

Service or by the Israeli Tax Authorities with regard to...the Israeli...or US Companies...shall be borne by the Parties in equal parts, *i.e.*, 1/6." (Pinson Decl. Ex. A at 2.) Defendants claim (and Plaintiffs do not dispute) that Zeiler failed to pay what Defendants allege to be his share of the tax obligations, totaling $794,145.16. (Def. Mem. of Law at 6.) This amount represented taxes allegedly paid by Defendants for tax years prior to 1998. (*Id.*) Zeiler responded to Defendants' demand by letter to the Beth Din, dated April 20, 2004, stating that Defendants failed to provide the requisite documentation to verify tax liability, as required by the Beth Din rulings. (Pinson Decl. Ex. E.) Rabbi Tendler, the Rabbi selected by Plaintiffs, resigned from the Beth Din days later, citing, *inter alia*, the other arbitrators' failure to enforce prior rulings. (Pl. Mem. of Law at 6, Zeiler Aff. Exs. L, M.) Defendants claim Rabbi Tendler resigned to protect Zeiler from an adverse ruling by the Beth Din that he owed Defendants the $794,145.16.

Thereafter, the two remaining Rabbis determined that, under Jewish Law, they were empowered to continue the arbitration, and so they did, providing Plaintiffs with a May 7, 2004 ruling that they retained jurisdiction (the "May 7 Award"). (Gurwitz Aff. Ex. K.) Plaintiffs were also informed by letter from Rabbi Gurwitz that the arbitrators intended to hold a meeting on June 1, 2004. (Gurwitz Aff. Ex. L.) Plaintiffs did not appear on June 1, 2004, and Rabbis Gurwitz and Bogomilski rendered an award requiring Zeiler to pay the $794,145.16 (the "June 16 Award"). (Gurwitz Aff. Ex. U.)

On August 4, 2004, Plaintiffs filed in the Supreme Court of Kings County a Petition to vacate the May 7 and June 16 Awards and confirm the September 1999, July 3, 2000, July 6, 2000, June 24, 2001, May 14, 2002, March 4, 2003 and April 28, 2003 awards, collected at Exhibit F to the Petition, and the February 18, 2004 award, found at Exhibit H to the Petition.

The Petition was removed to this Court, on account of the diversity of the parties. In their motion to vacate and confirm certain awards, Plaintiffs argue that the awards rendered without Rabbi Tendler must be vacated pursuant to the Convention on the Recognition and Enforcement of Foregin Arbitral Awards (the "Convention"). In their cross-motion to confirm the June 16 Award, Defendants claim that, because the parties specified that Jewish law would govern their agreements, the remaining arbitrators' decision to continue without Rabbi Tendler should not be disturbed, as the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., permits parties to adopt whatever body of law they choose to govern all aspects of the arbitration. Defendants additionally argue that the awards Plaintiffs seek to confirm are not awards but "interim" orders that were either satisfied or incorporated into the Shares Sale Agreement.

II. *Discussion*

"There is a strong federal policy favoring arbitration as an alternative means of dispute resolution." *Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir. 2002) (citation omitted). Enacted pursuant to the Commerce Clause, the FAA establishes the standards under which both state and federal courts must determine, *inter alia*, whether to confirm or vacate a foreign arbitral award. Chapter 1 of the FAA contains its general provisions.

The Convention of the Recognition and Enforcement of Foreign Arbitral Awards was implemented by Chapter 2 of the Federal Arbitration Act and applies to nondomestic arbitration agreements and awards. 9 U.S.C. § 202. It provides that "within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply...for an order confirming the award," and vests the district courts of the United States with original jurisdiction

of disputes arising under the Convention. 9 U.S.C. §§ 203, 207. Not surprisingly, given the policy favoring arbitration, "[t]he power to review an arbitration award is limited under the Convention." *Le Societe Nationale Pour La Recherche, Le Transport, La Transformation et La Commercialisation Des Hydrocarbures v. Shaheen Natural Resources Co.*, 585 F. Supp. 57, 61 (S.D.N.Y. 1983).

The grounds for refusing to confirm an award are delineated in Article V of the Convention. 21 U.S.T. 2517 Art. V, *reprinted at* 9 U.S.C. § 201, et seq. The one relevant to determining whether this Court can confirm the decisions made without Rabbi Tendler allows the court to refuse enforcement of an award upon a showing that "[t]he 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." 21 U.S.T. 2517 at Art. V(1)(d) ("Section (1)(d)"). The burden of proving an award should be overturned lies on the party objecting to the awards' enforcement – in this case, the Plaintiffs – and the burden is "a heavy one." *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005).

Language of the Agreement

"[A]s it is always the case in matters involving contract interpretation, it is the parties' intentions that control." *Mutual Marine Office, Inc. v. Ins. Corp. of Ireland*, 2005 WL 1398597, at *3 (S.D.N.Y. June 13, 2005). Therefore, though the FAA evinces a strong policy favoring arbitration, it is only insofar as the parties have agreed to arbitrate certain issues under certain agreed-upon conditions. *See Encyclopaedia*, 403 F.3d at 91 ("As the Supreme Court has said in

the related context of compelling arbitration under the...FAA, 'the federal policy is simply to ensure enforceability, *according to their terms*, of private agreements to arbitrate.'") (*quoting Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).

The Agreement states that it "shall be governed and construed pursuant to Torah law, and the Beth Din shall have exclusive jurisdiction in connection herewith." Zeiler Aff. Ex. C at 15. "Beth Din," in turn, is defined by the agreement to mean "a judicial tribunal governed by Halachic law, *the members of which are Rabbi Moshe D. Tendler, Rabbi Shmuel C. Gurwitz and Rabbi Moshe Bogomilski, or any other tribunal governed by Halachic law upon which the Parties mutually agree*." Zeiler Aff. Ex. C at 1 (emphasis added). This Court reads these clauses together to require the three specified Rabbis to preside over any arbitration between the parties, or for the Parties to agree on another tribunal. Nowhere in the agreement do the parties provide for the possibility of two out of three Rabbis electing, albeit under Jewish law, to resolve a dispute as to the make-up of the arbitration panel.

Defendants do not deny Article V's provision for denial of enforcement when the arbitral procedure was not in accordance with the agreement of the parties or explain why they believe it is not the starting point of the Court's analysis. Instead, they argue that "the language of the Convention is not as inflexible as the Court has initially believed." (Def. Sur-Reply at 6.) They believe that, because Article V reads "Recognition and enforcement of the award *may* be refused," the Court has discretion to confirm the award despite its finding that the arbitral authority was not in accordance with the parties' agreement. However, the language of the Convention is quite inflexible: "[t]he Court *shall* confirm the award unless it finds one of the

grounds for refusal or deferral of recognition of the award specified in the said Convention." 9 U.S.C. § 207 (emphasis added). This directive renders Defendants' argument meritless.

Defendants also argue at length about the parties' power under United States law to select the procedural rules governing their arbitration, which is not a complete picture of the dispute at hand. Defendants argue:

> The principal issue of law presented is whether an arbitral award should be enforced under the Federal Arbitration Act if two remaining members of a three-person panel decide, under the law chosen by the parties, that they may proceed to enter an award after the third member of the panel has resigned.[2]

(Def. Mem. of Law at 10.) However, the principal issue in deciding Plaintiffs' motion to vacate pursuant to section (1)(d) is whether the "composition of the arbitral authority...was not in accordance with the agreement of the parties." Defendants argue that because the panel consisted of three arbitrators for "many years of its deliberations" and because the remaining decisions were made pursuant to Halachic law, the composition of the arbitral authority was in accordance with the parties' agreement. (Def. Sur-Reply at 5-9.) This Court finds that it was not. The parties did not agree that two of the three Rabbis were empowered to arbitrate any disputes, and the decision of Rabbis Gurwitz and Bogomilsky to proceed without the parties'

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[2] Indeed, a great deal of the briefing by the parties focuses on the contours and reaches of choice-of-law provisions in cases where the court is being asked to compel or stay arbitration proceedings, or vacate awards rendered in the United States – cases not falling under the Convention. They do not deal with recognition or enforcement of foreign arbitral awards. *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (arbitrators permitted to award punitive damages when New York law (selected by the parties) did not permit punitive damages); *Volt*, 489 U.S. 468 (permitting California law to stay arbitration proceedings, under § 4 of the FAA, where parties specified application of California law). Defendants have not shown why the Court should first resort to cases brought under chapter 1 of FAA, rather than the Convention, which falls under chapter 2 of the FAA.

mutual agreement directly implicates section (1)(d). *See generally Encyclopaedia*, 403 F.3d at 88-92 (affirming district court's refusal to confirm arbitration award where procedure for appointing third arbitrator not followed). Therefore, the Court declines to confirm the May 7 and June 16 Awards.

Confirmation of Remaining Awards

Defendants also seek to prevent enforcement of various rulings of the Beth Din by arguing that they do not constitute "awards" but, rather, are "discovery orders, "directives," superceded by the July 2003 Agreement, or already complied with. (Def. Mem. of Law at 21-22.) Just as Plaintiff's burden in preventing confirmation of those rulings made only by Rabbis Gurwitz and Bogomilski was "a heavy one," *Encyclopaedia*, 403 F.3d at 90, Defendants now bear the heavy burden "to prove that one of the seven defenses under the New York Convention apply." *Id.*

However, in stating their objection to the awards' confirmation, Defendants make no reference to the enumerated list of grounds for refusing to confirm an arbitration award under the Convention. Instead, they argue that 9 U.S.C. § 207 (permitting arbitrators to summon witnesses), and 9 U.S.C. § 10(d) (providing grounds for vacatur where arbitrators "imperfectly executed [their powers] that a mutual, final, and definite award...was not made") support a finding that the awards Plaintiffs seek to have confirmed are not in fact awards. (Def. Sur-Reply at 4.) Defendants argument is unpersuasive, as it fails to indicate how §§ 207 and 10(d) relate to any of the enumerated grounds for refusing to confirm an award under the Convention. Defendants have not argued that the arbitrators "so imperfectly executed their powers" as § 10(d)

requires, and rely on inapposite cases. *See generally Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 20 (S.D.N.Y. 1997) (permitting courts to apply "manifest disregard of the law" standard to set aside award rendered in the United States and falling under the Convention but finding no manifest disregard); *E.B. Michaels v. Mariform Shipping, S.A.*, 624 F.2d 411 (2d Cir. 1980) (dismissing petition labeled "Interim Decision" under § 10(d) of the FAA because "a mutual, final, and definite award upon the subject matter was not made," but not dealing with the Convention); *Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F. Supp. 1 (S.D.N.Y. 1973) (refusing to invoke §10(d) in a case not arising under the Convention because possibility of future award "does not mean that present award at the present time is not 'final' and 'definite'").

Furthermore, this Court does not have the power to investigate the merits of (and Defendants' compliance with) each of the awards at the confirmation stage. *See Am. Nursing Home v. Local 144 Hotel, Hospital, Nursing Home and Allied Servs. Union*, 1992 WL 47553, *2 (S.D.N.Y. Mar. 4, 1992) ("The issues of compliance and confirmation are distinct from each other....This is because the confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court....*Confirmation, therefore, is not a novel inquest into the merits of the award or compliance with it; in the absence of unique, statutorily prescribed circumstances, confirmation is appropriate*.") (emphasis added). Therefore, having failed to cite to any of the statutorily prescribed grounds for vacating or refusing to confirm the remaining rewards under the Convention, Defendants' motion is denied.

III. *Conclusion*

Plaintiffs' motion to vacate the May 7 and June 16 Awards is granted. It is clear from the face of the Shares Sale Agreement that the parties defined the Beth Din to include all three Rabbis, or, should that arrangement fail, another tribunal chosen by the parties. A Beth Din upon which the parties have not mutually agreed is not one in accordance with the agreement of the parties. Therefore section (1)(d) of the Convention prohibits this Court's confirmation of those awards. The remaining rewards (of September 1999; July 3, 2000; July 6, 2000; June 24, 2001; May 14, 2003; March 4, 2003; and April 29, 3003; February 18, 2004) are hereby confirmed. The Clerk of the Court is directed to close the case.

SO ORDERED.

S/
SANDRA L. TOWNES
UNITED STATES DISTRICT JUDGE

Dated: March 16, 2006
Brooklyn, NY