UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NTT DOCOMO, INC.,

Petitioner,

-against-

ULTRA D.O.O.,

Respondent.

10 Civ. 3823 (RMB) (JCF)

DECISION & ORDER

I. Background

On February 1, 2008, NTT DoCoMo, Inc. ("DoCoMo" or "Petitioner"), a Japanese corporation, entered into a stock purchase agreement ("Agreement") with Ultra d.o.o. ("Ultra" or "Respondent"), a Slovenian limited liability company, pursuant to which Petitioner would sell, and Respondent would purchase, Petitioner's shares of common stock in Telargo, Inc. ("Telargo"), a Delaware corporation owned jointly by Petitioner and Respondent. (See Petition for Order Recognizing & Enforcing Arbitration Award and Supporting Memorandum of Law, dated May 10, 2010 ("Pet."), ¶¶ 1, 2, 6, 8 & Ex. A (Stock Purchase Agreement, dated Feb. 1, 2008 ("Agreement")) § 1.1; Brief in Opposition to Pet., dated July 20, 2010 ("Opp'n"), at 2.) The Agreement provided that Respondent would pay a total of $3,086,900 for Petitioner's shares, to be paid in three installments: $1,200,000 on March 31, 2008; $1,000,000 on December 31, 2008; and $886,900 on December 31, 2009. (Agreement § 1.2.)

On July 2, 2008, Petitioner, invoking the Agreement's arbitration clause, filed an arbitration request ("Request") with the International Chamber of Commerce's International Court of Arbitration in New York City, alleging that Respondent breached the Agreement by, among other things, "failing to make the first required installment payment and . . . repudiating its obligation to make the remaining two payments required" under the Agreement. (Pet. ¶ 12;

see Agreement § 4.10 ("Section 4.10"); Pet. Ex. A (Final Award, dated Jan. 26, 2010 ("Award")) ¶ 5; Opp'n at 3.) On September 8, 2008, Respondent answered the Request, "maintain[ing] that DoCoMo itself breached the Agreement, which breach justified Ultra's failure to make the payments contracted for under the Agreement." (Award ¶ 6; see Pet. ¶ 13; Opp'n at 3.)

On January 26, 2010, a three-member arbitral tribunal ("Tribunal") issued an award ("Award"), finding that Petitioner was entitled to (1) "an order of specific performance against Ultra to pay [$3,086,900] to DoCoMo in exchange for the Telargo shares at issue"; (2) "payment by Ultra of interest . . . at 4.25% on . . . $1,200,000 from March 31, 2008; plus 3.25% on . . . $1,000,000 from December 31, 2008; plus 3.25% on . . . $886,900 from December 31, 2009, with simple interest on all three sums to run until the award is paid"; (3) "reimbursement by Ultra of one-half of the amount paid as advance on costs of the arbitration, that is to say, [$125,000]"; and (4) "payment by Ultra of an additional sum of . . . $300,000 in partial reimbursement of DoCoMo's costs and attorneys' fees" incurred during the arbitration.[1] (Award ¶ 94.)

On May 10, 2010, Petitioner filed a motion to confirm the Award, pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 201, 203, 207, arguing that "[n]one of th[e] grounds" listed in Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") "is present in this case, nor is there any other basis for refusing to confirm the Award," and requesting an award of Petitioner's "costs [from] this [confirmation] proceeding, including reasonable attorneys' fees." (Pet. ¶¶ 22, 25(d)); see New York Convention art. V, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. On July 20, 2010, Respondent filed a

[1] Although Petitioner requested from the Tribunal $700,000 in attorneys' fees associated with the arbitration, the Tribunal found "$300,000 to be a reasonable sum," "tak[ing] into account the level of effort, reasonableness of the expenditures, and measure of success achieved by [Petitioner] on each issue." (Award ¶ 91.)

brief in opposition to Petitioner's motion, arguing that the Award's order of specific performance "violates a public policy" of the United States and should not be enforced. (Opp'n at 5 (citing New York Convention art. V(2)(b)).) On July 30, 2010, Petitioner filed a reply. (See Reply Brief in Support of Petition, dated July 30, 2010 ("Reply").)

For the reasons set forth below, Petitioner's motion to confirm the Award is granted.

II. Legal Standard

"Given the strong public policy in favor of international arbitration, review of arbitral awards under the New York Convention is very limited in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." Telenor Mobile Commc'ns AS v. Storm LLC, 584 F.3d 396, 405 (2d Cir. 2009) (quoting Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc., 403 F.3d 85, 90 (2d Cir. 2005)). "When a party applies to confirm an arbitral award under the New York Convention, '[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.'" Encyclopaedia, 403 F.3d at 90 (quoting 9 U.S.C. § 207). "The party opposing enforcement has the burden of proving the existence of one of these enumerated defenses," Europcar Italia, S.p.A. v. Maiellano Tours, Inc., 156 F.3d 310, 313 (2d Cir. 1998), and "[t]he burden is a heavy one, as the showing required to avoid summary confirmance is high," Zeiler v. Deitsch, 500 F.3d 157, 164 (2d Cir. 2007) (quoting Encyclopaedia, 403 F.3d at 90).

The public policy defense contained in "Article V(2)(b) [of the New York Convention] must be 'construed very narrowly' to encompass only those circumstances 'where enforcement would violate our most basic notions of morality and justice.'" Telenor, 584 F.3d at 411 (quoting Europcar, 156 F.3d at 315).

Although "[i]n federal practice, the general rule . . . is that each party bears its own attorneys' fees," "where a contract [entered into by the parties] authorizes an award of attorneys' fees, such an award becomes the rule rather than the exception." McGuire v. Russell Miller, Inc., 1 F.3d 1306, 1312–13 (2d Cir. 1993); see U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co., 369 F.3d 34, 74 (2d Cir. 2004); Fed. R. Civ. P. 54(d)(2)(B)(ii) (movant must "specify . . . the statute, rule, or other grounds entitling the movant to the award" of attorneys' fees).

III. Analysis

(1) Public Policy Exception

Petitioner argues, among other things, that "no public policy of the United States precludes . . . an arbitration panel from ordering a party to a stock purchase agreement to perform its purchase obligations under that agreement." (Reply at 4.) Respondent argues, among other things, that the Award of specific performance "violates a public policy of" the United States because "monetary damages would clearly be adequate and appropriate." (Opp'n at 5–6.)

The New York Convention provides that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them," except that "[r]ecognition and enforcement of an arbitral award may . . . be refused if the competent authority in the country where recognition and enforcement is sought finds that . . . [t]he recognition or enforcement of the award would be contrary to the public policy of that country." New York Convention arts. III, V. The exception is a narrow one and "[e]rroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention." Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 306 (5th Cir. 2004); see Europcar, 156 F.3d at 315–16. Even a "manifest disregard [of the law] . . . does not rise to the level . . . necessary to deny confirmation" under Article V(2)(b). M&C Corp. v. Erwin Behr GmbH & Co., 87 F.3d 844, 851 n.2 (6th Cir. 1996) (citing Int'l Standard Elec. Corp. v.

Bridas Sociedad Anonima Petrolera, 745 F. Supp. 172, 181 (S.D.N.Y. 1990)); see Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 20 (2d Cir. 1997). The defense attaches "only when the award violates some explicit public policy that is well-defined and dominant as is ascertained by reference to the laws and legal precedents and not from general consideration of supposed public interests." Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434, 1445 (11th Cir. 1998) (alterations and internal quotation marks omitted); see Slaney v. Int'l Amateur Athletic Fed'n, 244 F.3d 580, 593 (7th Cir. 2001).

Respondent fails to identify an "explicit," "well-defined," or "dominant" public policy, Indus. Risk Insurers, 141 F.3d at 1445, against the Tribunal's order of specific performance, which was grounded in New York case law (see Award ¶ 70 ("New York law grants specific performance of stock purchase agreements of closed corporations in the absence of 'public sales in the way of ordinary business' of such shares which could serve as a measure of damages." (citing Waddle v. Cabana, 220 N.Y. 18, 24 (1917); Balt. Realty Corp. v. Alman, 122 N.Y.S.2d 224 (App. Div. 1953))).) Respondent's conclusory invocation of "due process concerns" and "the threat of contempt proceedings" does not establish that "enforcement [of the Award] would violate our most basic notions of morality and justice." Telenor, 584 F.3d at 411 (internal quotation marks omitted); (Opp'n at 8). Accordingly, Respondent "has not met its burden of proving the applicability of . . . the [New York] Convention's enumerated defenses with respect to the propriety of specific performance as a remedy." Four Seasons Hotels & Resorts B.V. v. Consorcio Barr, S.A., 613 F. Supp. 2d 1362, 1369 (S.D. Fla. 2009).

(2) Attorneys' Fees and Costs

Petitioner argues that the Agreement, "which provides for arbitration and for enforcement of the Award" and provides that "'[t]he prevailing [p]arty shall be entitled to recover reasonable attorneys' fees,'" requires the Court to "include [in its judgment] an award of [costs and]

reasonable attorneys' fees incurred by DoCoMo in this confirmation proceeding." (Reply at 7 (quoting Section 4.10).)[2] Respondent does not appear to address Petitioner's claim for costs and reasonable attorneys' fees associated with this proceeding. (See Pet. ¶ 25(d).)

Section 4.10 of the Agreement "provide[s] the requisite 'grounds entitling [Petitioner]' to fees." Universal Computer Servs., Inc. v. Dealer Servs., Inc., No. 02 Civ. 6563, 2003 WL 21685567, at *3 (E.D.N.Y. July 18, 2003) (quoting Fed. R. Civ. P. 54(d)(2)(B)(ii)). Section 4.10, entitled "Arbitration," provides, in relevant part, that an arbitral "award shall be final and binding upon the Parties and may be entered into any court having jurisdiction thereof for its enforcement. The prevailing Party shall be entitled to recover reasonable attorneys' fees." Courts construing (similar) contractual language that, like Section 4.10, places no temporal limit on the award of attorneys' fees have regularly granted court costs and reasonable attorneys' fees in confirmation proceedings. See In re Arbitration Before N.Y. Stock Exch., Inc., No. 04 Civ. 488, 2004 WL 2072460, at *15 (S.D.N.Y. Sept. 8, 2004) ("Although the identified clause is less than felicitously phrased, when [it is] read in conjunction with [other contractual language]," "[i]n view of [its] broad nature . . . [,] and in the absence of any suggestion" that it does not apply on these facts, the conclusion follows that "[Respondent] shall pay reasonable attorneys' fees . . . in an amount to be determined."); In re Matter of Arbitration Between Carina Int'l Shipping Co. & Adam Mar. Corp., 961 F. Supp. 559, 569 (S.D.N.Y. 1997); Elite Inc. v. Texaco Panama Inc., 777 F. Supp. 289, 292 (S.D.N.Y. 1991); Teamsters Local 814 Welfare Fund v. Dahill Moving & Storage Co., 545 F. Supp. 2d 260, 265 & n.8 (E.D.N.Y. 2008); Universal Computer, 2003 WL 21685567, at *3; Feitshans v. Kahn, No. 06 Civ. 2125, 2006 WL 3096028, at *2 (S.D.N.Y. Nov. 1, 2006) (attorneys' fees awarded for confirmation proceeding even where the broadly worded "agreements d[id] not provide for attorneys' fees in connection with arbitration").

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[2] See footnote 1 above.

IV. Conclusion and Order

For the reasons set forth above, Petitioner's motion to confirm the Award [#1] is granted. Costs and reasonable attorneys' fees for this proceeding are awarded to Petitioner under Section 4.10 of the Agreement. See, e.g., N.Y. Stock Exch., 2004 WL 2072460, at *15. The matter is referred to Magistrate Judge James C. Francis IV to determine the amount of costs and attorneys' fees which should be paid to Petitioner.

The parties are expected to perform their obligations under this Order and the Award. Should the parties not be able to accomplish this on their own, Petitioner is "entitled to move for any post-judgment relief allowable under the Federal Rules of Civil Procedure or other applicable . . . law." Data Mountain Solutions, Inc. v. Giordano, 680 F. Supp. 2d 110, 132 (D.D.C. 2010).

Dated: New York, New York
October 12, 2010

RICHARD M. BERMAN, U.S.D.J.