UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 11-cv-21784-UU

FEDERAL DEPOSIT INSURANCE CORP.
AS RECEIVER FOR REPUBLIC FEDERAL
BANK N.A.

Petitioner,

vs.

IIG CAPITAL, LLC

Respondent.

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ORDER ON MOTION TO CONFIRM AND ENFORCE INTERNATIONAL ARBITRATION AWARD

THIS CAUSE came before the Court upon petitioner Federal Deposit Insurance Corp. ("FDIC") Motion to Confirm and Enforce International Arbitration Award (the "Motion") (D.E. 24.) On August 29, 2011, respondent, IIG Capital LLC, ("IIG") filed a Memorandum of Law in Opposition to the Motion. (D.E. 33.) On September 12, 2011, FDIC filed a Reply Memorandum in Support of Motion to Confirm and Enforce International Arbitration Award. (D.E. 35.)

THE COURT has considered the Motion and the pertinent portions of the record and is otherwise fully advised in the premises.

I. Background

On August 3, 2007, IIG and Republic Federal Bank N.A. entered into a written agreement (the "Agreement"), which "contemplated performance by the parties in Ecuador of the commercial relationship established thereby." (D.E. 24.) The Agreement contained an arbitration clause whereby the parties agreed to resolve their disputes by means of final, binding, and mandatory arbitration according to the Rules of Arbitration of the ICC. (D.E. 24.) On or about

February 13, 2009, IIG commenced arbitration proceedings with the ICC in Miami, Florida, pursuant to the procedures set forth in Section 6 of the parties' Agreement. (D.E. 24.) IIG claimed it was "owed monies by Republic." (D.E. 24.) On or about April 20, 2009, Republic responded and counterclaimed, alleging, *inter alia*, that IIG had breached the Agreement.(D.E. 24.)

On or about June 30, 2009, Horacio Alberto Grigera Naon signed a statement of independence in accordance with the ICC Rules of Arbitration. On July 9, 2009, the Secretariat of the ICC informed the parties that the ICC's Court of International Arbitration had designated Mr. Grigera Naon as the sole arbitrator in the arbitration. On or about December 11, 2009, the FDIC was appointed as receiver of Republic Bank. On December 18, 2009, IIG and Mr. Grigera Naon were notified of FDIC's receivership. (D.E. 24)

On or about March 2, 2010, Jose I. Astigarraga, a shareholder of the law firm Astigarraga Davis appeared in the arbitration as additional counsel to Republic Bank. On March 8, 2010, the final arbitration hearing took place and lasted until March 12, 2010. At no time during the arbitration proceedings did either party object to "the continued service of Mr. Grigera Naon, on account of the appearance of Mr. Astigarraga."(D.E. 24.)

On September 2, 2010, the Arbitrator rendered an Award in FDIC's favor (the "Award"). The Award declared the parties' Agreement terminated and rejected the claims of IIG. The Award granted Republic monetary damages in the amount of $4,000,000, plus interest. The Award also required that IIG pay Republic for it's attorney's fees and costs and half of the cost of arbitration, totaling $948,560.30. The Award also required that "[u]pon payment of the total amount awarded" Republic "transfer to IIG, or to an entity designated by IIG, all rights that Republic has over the Assets and the shares that it has over a third company in which the parties

had jointly invested." (D.E. 24.)

IIG has not paid any portion of the Award. As a result, on May 17, 2011, FDIC, as receiver, filed its Petition to Confirm and Enforce International Arbitral Award (D.E.1.), seeking confirmation and enforcement of the Award pursuant to the New York and Panama Conventions and in accordance with Section 207 the Federal Arbitration Act ("FAA"). In response, IIG filed its Answer and Affirmative Defenses to FDIC's Petition on June 10, 2011 (D.E. 14.)

As its first Affirmative Defense, IIG argues that the Award should not be enforced because "the composition of the arbitral authority or the arbitral procedure was not in accordance with IIG's and Republic's [Agreement]." (D.E. 14.) Specifically, IIG contends that the Arbitrator violated Article 7, Section 3 of the ICC Rules of Arbitration when he failed to disclose certain "facts and circumstances" which were of such a nature as to call into question Grigera Naon's independence..." (D.E. 14.) The "facts and circumstances" which IIG alludes to include specifics regarding Grigera Naon and Jose Artigarraga's joint participation in several professional groups and educational programs related to the practice and study of international arbitration. (D.E. 14.)

As its Second Affirmative Defense, IIG claims enforcement of the Award should be denied as contrary to Public Policy. In support of this contention, IIG claims the arbitrator's alleged failure to disclose, "violated the due process right of IIG to be heard with respect to Grigera Naon's independence and impartiality and, concomitantly, his right or ability to continue as arbitrator." (D.E. 14.)

Petitioner argues "[a]ny nondisclosure of such personal contacts or arbitrator bias is not a basis to deny enforcement of an international arbitral award under either the controlling New York or Panama Conventions." (D.E. 24) In essence, petitioner claims no violation of the ICC Rules of Arbitration occurred, and even if a violation occurred, it would not be enough to meet

the high standard required to vacate the Award. Petitioner claims Mr. Grigera Naon's professional contact with Jose Astigarraga did not trigger a duty to disclose under the ICC, nor does it evidence arbitrator impartiality or bias. Petitioner also argues IIG's public policy Affirmative Defense fails because respondent has failed to show "that any purported bias on the part of the arbitrator was so severe and pervasive that it would be a violation of United States public policy for this Court to confirm the Award." (D.E.24.)

IIG in response, contends that the arbitrator's failure to disclose his relationship with the FDIC's lawyer mandates rejection of the arbitration award or, at a minimum, requires that the parties be ordered to "plunge headlong into evidentiary fact-finding." *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331 (11th Cir. 2002) In support of this contention, IIG claims a violation of the New York Convention occurred because " the arbitration panel was not in accordance with the parties' agreement." And "[w]here the arbitrator fails to make required disclosures, he has not acted in accordance with the parties' agreement." (D.E. 33.)

II. Background of the New York Convention

In the instant Motion, FDIC seeks confirmation of the Award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (the "New York Convention"). The Federal Arbitration Act (the "FAA") codifies the New York Convention. The purpose of the New York Convention, and of the United States' accession to the convention, is to "encourage the recognition and enforcement of international arbitral awards," *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983), to "relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that [is] speedier and less costly than litigation." *Ultra-cashmere House Ltd. v. Meyer*, 664 F.2d 1176, 1179 (11th Cir. 1981). The Convention provides "businesses with a widely used system through which to obtain

domestic enforcement of international commercial arbitration awards...subject only to minimal standards of domestic judicial review for basic fairness and consistency with national public policy." *Industrial Risk Insurers v.M.A.N. Gutehoffnungshutte*, 141 F.3d 1434, 1440 (11th Cir. 1998) *citing,* G. Richard Shell, "Trade Legalism and International relations Theory: An Analysis of the World Trade Organization," 44 *Duke L.J.* 829, 888 (1995).

III. Standard

Notably, the FAA displays Congress's "liberal federal policy favoring arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 25, (1991) (internal quotation marks omitted). Consequently, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitrations." *Moses H. Cone Mem'l Hosp. V. Mercury Constr. Corp*. 460 U.S. 1, 24, (1983). Judicial review of arbitrator's decisions is limited as the court must "give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances." *DeBeers Centenary AG v. Hasson*, 751 F. Supp. 2d 1297 (S.D. Fla. 2010) *citing, Scott v. Prudential Sec., Inc*., 141 F.3d 1007, 1014 (11th Cir. 1998). The party seeking vacatur bears the burden of establishing grounds sufficient to vacate the arbitration award. *Id.*

Under the New York Convention, the Final Arbitration Award is entitled to be recognized and enforced unless the Court finds one of the grounds for refusal of recognition or enforcement of the award as specified in the Convention[1] is applicable. *See* 9 U.S.C.§ 207. Article V of the Convention lists the grounds upon which recognition and enforcement of the award may be refused. *See* 21 U.S.T. 2517, Art. V §1. IIG cites two of the seven listed grounds for refusal in

[1]The New York Convention is codified at chapter two of the Federal Arbitration Act ("FAA") 9 U.S.C. §§ 201-208.

support of its Motion in Opposition. (D.E. 33.) Specifically, IIG claims enforcement of the award should be denied due to violation of Art V §§ (1)(d) and 2(b).[2]

IV. Discussion

IIG argues enforcement of the award should be vacated due to a violation of Article V § 1(d), alleging that "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties..."(D.E. 33.) IIG claims § 1(d) was violated because Mr. Grigera Naon, as arbitrator, failed to disclose the "facts and circumstances surrounding his relationship with Jose Astigarraga, who served as additional counsel for FDIC. IIG claims this failure of disclosure constituted a violation of the International Chamber of Commerce[3] ("ICC") Rule of Arbitration, Article 7, which requires an arbitrator disclose "any facts or circumstances which might call into question the arbitrator's independence "in the eyes of the parties." (D.E. 33.) IIG contends Mr. Grigera Naon and Mr. Astigarraga maintained an "long time, ongoing, and substantial relationship" which, according to IIG, suggests impartiality and thus requires disclosure. (D.E. 33.) The basis for IIG's contention is the joint participation of Grigera Naon and Jose Astigarraga in several professional groups and educational programs related to the practice and study of international arbitration.(D.E. 14.)

IIG has failed to establish grounds sufficient to vacate the arbitration award. IIG does not provide facts which suggest Mr. Grigera Naon acted dependently or was biased in any way

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[2] Art V § 1(d) provides the enforcement of an arbitration award may be refused if "[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." Art V § 2(b) provides that the enforcement of an arbitration award may be refused if "[t]he recognition or enforcement of the award would be contrary to public policy of that country [where the enforcement is sought]."

[3]The Agreement between IIG and Republic Bank provides that in the case of any dispute between the parties, they agree to "submit...to the decision of a single arbitrator designated under the Arbitration Rules and regulations of the International Chamber of Commerce[...]"(D.E. 14.)

because of his relation to Mr. Astigarraga. Although IIG has established that both Mr. Grigera Naon and Mr. Astigarraga are active in the cultivation of the practice and study of the highly specialized, niche area of the law of international arbitration, the mere fact that the arbitrator and counsel for petitioner are both founding "members of ICC's Latin American Arbitration Group, jointly participated in "the 2007 Miami International Arbitration Conference", and "an October 2008 conference regarding the management of business disputes and legal risk in Latin America" is insufficient to suggest bias and trigger a disclosure requirement. Nor does the fact that Mr. Grigera Naon and Mr. Astigarraga both participated in the "Washington College of Law's International Commercial Arbitration Program" suggest lack of impartiality. "These particulars reveal nothing beyond the kind of professional interactions that one would expect of successful lawyers active in the specialized area..." *See Midwest Generation EME v. Continuum Chem. Corp*., 768 F. Supp. 2d 939, 949 (N.D. Ill. 2010) (holding that "given their nature", "professional interactions" were not required to be disclosed.")

IIG next argues enforcement of the award should be denied pursuant to Article V § 2(b) as contrary to public policy because the alleged failure to disclose prevented IIG from exercising its due process rights. The Court finds the argument to be without merit. To the contrary, the Court finds public policy weighs in favor of enforcement of the final arbitration award.

The Eleventh Circuit has held "that domestic arbitral awards are unenforceable on grounds that they are violative of public policy only when the award violates some "explicit public policy" that is "well-defined and dominant ... [and is] ascertained 'by reference to the laws and legal precedents and not from general consideration of supposed public interests.' "*Industrial Risk Insurers* v..... 141 F.3d 1434 (11th Cir.1998) *citing, Drummond Coal Co. v. United Mine Workers, District* 20, 748 F.2d 1495, 1499 (11th Cir.1984) (*quoting W.R. Grace & Co. v. Local*

Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 766, 103 S.Ct. 2177, 2183, 76 L.Ed.2d 298 (1983)). The Eleventh Circuit applies the same standard to international arbitration awards. *See Industrial Risk Insurers*.....(*stating,"*We believe that rule applies with equal force in the context of international arbitral awards.") *See also Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir.1974) (holding that "the Convention's public policy defense should be construed narrowly" and applies where enforcement of the award "would violate the forum state's most basic notions of morality and justice").

IIG has not alleged any facts which suggest IIG's due process rights were violated. This court does not take allegations of due process violations lightly. However, in the realm of international arbitration, there also exists a countervailing public policy–namely, the interest in receiving reciprocal treatment from foreign courts. *Parsons and Whittemore*, *supra*,, thus advised that federal courts "invoke the public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States." 508 F.2d at 974

Indeed, the international arbitration community is a relatively small, tight-knit community where it can only be expected that prominent practitioners will, at some point, cross paths in their day to day practice. To disqualify an otherwise qualified arbitrator because he and a party to the litigation share membership in a professional association, would, in effect, disqualify the majority of arbitrators practicing in the field of international arbitration. It would be "disruptive of the resolution of [international] disputes by arbitration in this City to disqualify an arbitrator simply because a party to an arbitration proclaims, in circumstances such as these, "the appearance of bias." *See Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co. A.G.*, 480 F. Supp. 352,

1979 A.M.C. 1496 (S.D. N.Y. 1979) (where the Court refused to disqualify an arbitrator whose partiality was questioned had no financial interest in the victorious party.) Absent a showing of pecuniary interest on the part of the arbitrator or some other fact to suggest bias, the due process challenge that concurrent membership in professional societies and educational endeavors is indicative of partiality, fails both to establish arbitrator impropriety and to overcome the strong public policy preference for international arbitration.[4]

V. Conclusion

For the reasons herein stated, this Court finds that the Award is enforceable. Accordingly, it is hereby

ORDERED AND ADJUDGED that Petitioner FDIC's Motion to Confirm and Enforce International Arbitration Award is hereby GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this _26th_ day of September, 2011.

UNITED STATES DISTRICT JUDGE

copies provided: counsel of record

[4] *See Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co. A. G.*, 480 F. Supp. 352, 1979 A.M.C. 1496 (S.D. N.Y. 1979), where it appeared that an arbitrator whose partiality was questioned had no financial interest in the victorious party. Neither he nor his company derived any income from such party, but the sole complaint was that such arbitrator's company represented another company, which in turn asserted a claim (entirely unrelated to those at bar) against the unsuccessful party. The court held that this was far too tenuous a relationship to require the disqualification of an experienced and respected maritime arbitrator under the public policy provision of Article V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, on the grounds of appearance of bias, particularly where there was no challenge to the arbitrator's personal integrity.