UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONTROLOTRON CORPORATION,

Petitioner

-v-

SIEMENS ENERGY & AUTOMATION, INC.,

Respondent.

MEMORANDUM DECISION AND ORDER
09 CV 03112 (GBD)

GEORGE B. DANIELS, District Judge:

Petitioner Controlotron Corporation ("Controlotron") brings this petition to vacate the "ORL Backlog claim" provision of the Award of Arbitration ("Award") dated February 6, 2009, pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10, on the ground that the arbitrator exceeded her powers. Respondent Siemens Energy & Automation, Inc. ("Siemens") cross-moves to confirm the Award. For the reasons stated below, Controlotron's motion to vacate is denied. Siemens's motion to confirm the arbitration award is granted.

BACKGROUND

Controlotron manufactures flow meters, sensors and other proprietary instrumentation designed to measure the flow of gases and liquid in pipes. Petition ¶ 5. On April 7, 2006, Controlotron and Siemens entered into an Asset Purchase Agreement ("Agreement") whereby Siemens agreed to purchase substantially all of the assets of Controlotron. Id. On May 1, 2006, the sale closed. Id. ¶ 6.

A. Agreement to Arbitrate

The Agreement provides that a portion of the purchase price will be held in escrow for the term of one or more Indemnification Periods. Id. ¶ 7; see Petition, Ex. B (Asset Purchase

Agreement) §§ 8.09(a), (e). The Agreement sets forth a procedure for Siemens to assert claims to the escrow and for Controlotron to dispute the claims. Petition ¶ 7; see Petition, Ex. B § 8.09(c). In particular, the Agreement provides for resolution of disputes through arbitration, see Petition, Ex. B § 8.09(d):

> (iii) Any such arbitration shall be held in New York County, State of New York, under the commercial arbitration rules then in effect of the American Arbitration Association. The arbitrator or arbitrators, as the case may be, shall set a limited time period and establish procedures designed to reduce the cost while allowing the parties an opportunity, adequate in the sole judgment of the arbitrator or majority of the three arbitrators, as the case may be, to obtain relevant information from the opposing parties about the subject matter of the dispute. The decision of the arbitrator or a majority of the three arbitrators, as the case may be, as to the validity and amount of any claim in such Officer's Certificate shall be final, binding, and conclusive upon the parties to this Agreement. Such decision shall be written and shall be supported by written findings of fact and conclusions which shall set forth the award, judgment, decree or order awarded by the arbitrator(s).
>
> (iv) Judgment upon any award rendered by the arbitrator(s) may be entered into any court having jurisdiction. The forgoing arbitration provisions shall apply to any dispute among the Indemnifying Parties and the Indemnified Party under this Article VIII, whether relating to claims upon the Escrow or to other indemnification obligations set forth herein and any right of Buyer to offset Losses against Earn Out Payments as set forth in this Section 8.09.

Petition, Ex. B § 8.09(d)(iii)-(iv).

B. Siemens's ORL Backlog Claim

Annexed to the Asset Purchase Agreement are a number of schedules prepared by Controlotron. Petition ¶ 13. The schedule entitled "Controlotron (as Seller) Purchase Order Backlog" lists over 300 separate items, each purporting to be an outstanding purchase order for one or more items manufactured by Controlotron. Id.; see Petition, Ex. I. Every line in the Backlog schedule, except for the Oil Refineries Ltd. ("ORL") line, lists the purchase order item number and item description. Petition ¶ 13. The ORL line lists "Blanket Order" for both the item number and item description, but was mistakenly included in this schedule by

Controlotron.[1] Petition ¶ 14.

On April 29, 2008, pursuant to the Agreement's claim procedure, Siemens asserted six separate claims for indemnification. Id. ¶¶ 9, 12; see Petition, Ex. C ("Siemens's Amended Officer's Certificate"). With respect to the ORL Backlog Claim, Siemens alleged that the mistaken inclusion of the ORL Blanket Order violated Controlotron's representation and warranty set forth in section 3.04 of the Agreement. Id. ¶ 15. On June 27, 2008, pursuant to the Agreement's claim procedure, Controlotron served an Arbitration Demand with the AAA as to all six claims. Petition ¶ 11; see Petition, Ex. D ("Objection Notice"); Petition, Ex. E ("Arbitration Demand"); Petition, Ex. F ("Statement of Nature of Dispute").

On September 23, 2008, the arbitrator conducted a preliminary conference with the parties. Id. ¶ 21. On September 29, 2008, the arbitrator issued a "Report of Preliminary Hearing and Scheduling Order," see Petition, Ex. H. The Order includes a provision that, "[b]y Agreement of the parties and Order of the Arbitrator," "[n]either party may amend or add claims or counterclaims, or join additional parties." Id. ¶ 2. The arbitration hearing was held for three days between January 7, 2009, and January 9, 2009. Id. ¶ 21. However, neither party requested transcripts of the proceedings. See Respondent's Opp. at 8.

On January 9, 2009, the arbitrator advised Siemens that the arbitrator did not believe the ORL entry constituted a breach of section 3.04 and allowed Siemens to amend its claim to state a violation of section 3.07. Petition ¶ 21. Controlotron objected. Id.

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[1] As Controlotron explained in its Petition: "ORL did not have an outstanding purchase order for $877,659.70. Rather, the 'Blanket Order' referred to is a letter of intent ('LOI') which ORL had provided to Controlotron on May 24, 2001. The reference to the 'Blanket Order' (letter of intent) in the Backlog schedule was a mistake since a letter of intent, as distinct from a purchase order, does not commit the customer to purchase any items." Id. ¶ 14.

On February 6, 2009, the arbitrator issued a written opinion pursuant to the Agreement, awarding Siemens funds in the escrow account in the amount of $582,080 and awarding Controlotron the balance remaining. Petition, Ex. A, at 3.

STANDARD OF REVIEW

"[C]onfirmation of an arbitration award is 'a summary proceeding that merely makes what is already a final arbitration award a judgment of the court.'" D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 110 (2d Cir. 2006) (quoting Florasynth, Inc. v. Pickholz, 750 F.2d 171, 176 (2d Cir. 1984)). An arbitration award is "subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993) (citing Barbier v. Shearson Lehman Hutton, Inc., 752 F. Supp. 151, 158 (S.D.N.Y. 1990), aff'd in part, rev'd in part, 948 F.2d 117 (2d Cir. 1991)); see also NYKCool A.B. v. Pac. Fruit Inc., 2010 U.S. Dist. LEXIS 125177, at *19-20 (S.D.N.Y. Nov. 24, 2010) (collecting recent Second Circuit cases noting that district courts should grant strong deference over conducting a de novo review). "[T]he award should be enforced, despite a court's disagreement with it on the merits, if there is a barely *colorable justification* for the outcome reached." Wallace v. Buttar, 378 F.3d 182, 190 (2d Cir. 2004) (citation and internal quotation marks omitted; emphasis added in Wallace).

A district court may vacate an arbitration award where: (1) "the award was procured by corruption, fraud, or undue means"; (2) "there was evident partiality or corruption in the arbitrators, or either of them"; (3) "the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and

material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced"; or (4) "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(1)-(4). Additionally, the Second Circuit "has long held that an arbitration award may be vacated if it exhibits a manifest disregard of the law." Wallace, 378 F.3d at 189 (quoting Goldman v. Architectural Iron Co., 306 F.3d 1214, 1216 (2d Cir. 2002)) (internal quotation marks omitted). However, "[a] party moving to vacate an arbitration award has the burden of proof, and the showing required to avoid confirmation is very high." D.H. Blair & Co. 462 F.3d at 111 (citing Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997)).

MOTION TO VACATE

Controlotron urges this Court to vacate the provision regarding the ORL Backlog Claim on the ground that the arbitrator exceeded her powers when: (1) "she denied the ORL Backlog claim which Siemens had asserted in its arbitration papers but then permitted an amendment of Siemens' ORL Backlog claim after the conclusion of testimony, notwithstanding the parties had previously agreed, and the arbitrator had ordered, that '[n]either party may amend or add claims or counterclaims'"; and (2) "she failed to make findings of fact and conclusions as required by the arbitration agreement between the parties and failed to resolve the matter submitted to her for determination." Petition ¶ 1.

The Second Circuit has "consistently accorded the narrowest of readings to the Arbitration Act's authorization to vacate awards [pursuant to § 10(a)(4)]." Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200, 220 (2d Cir. 2002) (quoting In re Andros Compania

Maritima, 579 F.2d 691, 703 (2d Cir. 1978)). "[The] inquiry under § 10(a)(4) thus focuses on whether the arbitrator[] had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrator [] correctly decided that issue." DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 824 (2d Cir. 1997); see also Hoeft, III v. MVL Group, Inc., 343 F.3d 57, 71 (2d Cir. 2003). "An arbitrator exceeds his powers when he 'rule[s] on issues not presented to [him] by the parties.'" Hoeft, III, 343 F.3d at 71 (quoting Fahnestock & Co. v. Waltman, 935 F.2d 512, 515 (2d Cir. 1991)) (citation and internal quotation marks omitted); see also Local 1199 v. Brooks Drug Co., 956 F.2d 22, 25 (2d Cir. 1992) ("The scope of authority of arbitrators generally depends on the intention of the parties to an arbitration, and is determined by the agreement or submission.") (internal quotation marks and citation omitted).

A. Amendment of ORL Backlog Claim

The arbitrator did not exceed her powers by allowing Siemens to amend its ORL Backlog Claim. The arbitrator had the power to permit Siemens's amendment. The arbitration provisions of the Agreement provide that "the commercial arbitration rules then in effect of the American Arbitration Association" will apply. Controlotron has not identified any language in the Agreement that provides for a specific, bargained-for guideline governing amendments. The American Arbitration Association ("AAA") Rule governing amendments, Rule 6, was thus applicable.

Rule 6 provides that "[a]fter the arbitrator is appointed . . ., no new or different claim may be submitted except with the arbitrator's consent." Controlotron has not identified an interpretation of Rule 6 by the AAA that restricts when the arbitrator may permit amendments.

See York Research Corp. v. Landgarten, 927 F.2d 119, 123 (2d Cir. 1991) ("Given the parties' designation of the AAA as the supervisory authority regarding the resolution of disputes under the agreement, the AAA's view of the meaning of its rules is of considerable significance."); Hanover A.G. v. Am. Arbitration Ass'n., 1993 U.S. Dist. LEXIS 6192, at *17 (S.D.N.Y. May 11, 1993) ("The AAA is responsible for interpreting the AAA Rules and the parties are not free to simply ignore interpretations they do not agree with."). The Scheduling Order, even assuming that it could have altered the arbitrator's authority, is entirely consistent with Rule 6. Paragraph 2 provides that "[n]either party may amend or add claims or counterclaims, or join additional parties." Paragraph 11, however, provides that "all deadlines stated herein will be strictly enforced, except with the permission of the Arbitrator, good cause having been shown." Petition, Ex. H. The arbitrator thus acted within the scope of her authority. Therefore, Controlotron is not entitled to vacatur pursuant to 9 U.S.C. § 10(d).

Furthermore, even if the arbitrator had acted improperly by allowing Siemens to amend its claim so late in the arbitration process, vacatur would not be the appropriate relief. "Resolution of the procedural matters arising out of arbitration are generally left to the arbitrator." International Longshoremen's Asso. v. West Gulf Maritime Asso., 605 F. Supp. 723, 727 (S.D.N.Y. 1985) (citing John Wiley & Sons v. Livingston, 376 U.S. 543 (1964)). "An arbitrator's ruling on procedural issues will not be overturned under 9 U.S.C. § 10(c) unless it had the effect of denying the parties a fundamentally fair hearing, or was otherwise an unreasonable decision that prejudiced the rights of a party." Id. (citing Bell Aerospace Co. v. Local 516, 500 F.2d 921 (2d Cir. 1974); Dan River, Inc. v. Cal-Togs, Inc., 451 F. Supp. 497 (S.D.N.Y. 1978)).

Here, Controlotron does not allege the substantial consequences necessary for procedural rulings to warrant vacatur pursuant to 9 U.S.C. § 10(c). The arbitrator allowed Siemens to amend its claim prior to summation, but the arbitrator also allowed Controlotron to amend its defense. Controlotron never alleges facts suggesting that it was prejudiced by the amendment. Controlotron also never alleges that the amendment was not permissible under the claims procedure set forth in the Agreement. Therefore, Controlotron is not entitled to vacatur pursuant to 9 U.S.C. § 10(c).

B. Arbitrator's Ruling on the ORL Backlog Claim

The arbitrator had the power to determine Siemens's entitlement to indemnification for the ORL Backlog Claim. Siemens asserted six separate claims for indemnification, including a claim for the ORL Backlog. See Petition, Ex. C. The parties agreed that disputed claims for indemnification would be submitted to an arbitrator to decide "the validity and amount" of the claim. See Petition, Ex. B, 8.09(d)(iii). Consistent with that agreement, Controlotron's demand for arbitration states that "[t]he gist of the dispute to be arbitrated involves a claim by the Respondent that it is entitled to indemnification for certain items involved in the sale of the assets of the Claimant," and that "Claimant disputes the amount of the Respondent's claim." Petition, Ex. F ¶¶ 2, 5.

The arbitrator resolved solely the issues presented, as demonstrated by her written findings of facts and conclusions. The arbitrator determined that Siemens's claim for indemnification was not valid pursuant to the §3.04 warranty. The §3.04 warranty provides that "Controlotron audited financial statements for 2004 and 2003, and unaudited balance sheet and income statements for 2005, present fairly in all material respects the assets, liabilities (including

all reserves) and the financial position of [Controlotron] of the dates thereof, and the results of operations of [Controlotron] for the respective periods covered thereby ended (sic)." Petition, Ex. A, at 2 (alternation in original and internal quotation marks omitted). The arbitrator found, based on the evidence presented, that "unfilled orders were not reflected in any way in the financial statements, nor should they have been." Id. at 3. The arbitrator concluded that listing the ORL Claim as an open purchase order did not constitute a breach of the §3.04 warranty. Id.

However, the arbitrator determined, based on the same facts, that Siemens's claim for indemnification was valid pursuant to the §3.07 warranty. Therefore, the arbitrator determined that Siemens was entitled to escrow funds. The §3.04 warranty provides that: "Each Material Contract [the term includes listed open orders in excess of $25,000] ... is in full force and effect. ... To [Controlotron's] Knowledge, no other party to any Material Contract is in breach thereof or default thereunder and no Seller has received any notice of termination, cancellation, breach or default under any Material Contract to which it is a party." Id. The arbitrator concluded that listing the ORL Claim as an open purchase order constituted a breach of the §3.07 warranty. The arbitrator found that, even though the arrangement with ORL was a letter of intent and thus not an order, it was a breach to "list it as an open order." Id.

The arbitrator's written decision does not address Controlotron's scrivener's error defense. That does not, however, demonstrate the arbitrator's failure to comply with her obligation to issue a decision with "written findings of fact and conclusions." If the arbitrator interpreted the §3.07 warranty to impose strict liability for incorrect information regarding certain contracts - including whether a contract even existed, Controlotron's defense would have been reasonably deemed irrelevant. The issue presented and decided by the arbitrator was the

validity and amount of the indemnification claim, not whether Siemens had knowledge of Controlotron's mistake. The arbitrator was not required to specifically address the merits or inadequacies of every argument and/or defense made by each party.

Finally, the arbitrator's decision contained sufficient references to the facts, law, and the governing contract to support her decision. "'Findings of fact' and 'conclusions of law' are familiar terms in legal parlance with reasonably plain meanings. . . . [T]he touchstone is simply whether enough facts are found and enough legal principles stated so that a reviewing tribunal can ascertain the reasons for the ultimate determination." New Elliott Corp. v. MAN Gutehoffnungshutte AG, 969 F. Supp. 13, 15 (S.D.N.Y. 1997) (citing Reich v. Newspapers of New England, 44 F.3d 1060, 1079 (1st Cir. 1995); Armstrong v. Commodity Futures Trading Commission, 12 F.3d 401, 403 (3d Cir. 1993)). Here, the issue submitted did not require extensive factual analysis. The arbitrator identified the relevant facts – namely, the contractual provision, where the ORL Backlog claim was listed, and where the ORL Backlog claim should have been listed – underlying her conclusion in her written decision. The arbitrator was not required to submit a statement of the facts of the case summarizing all of the evidence presented. The written decision provides a colorable justification for awarding escrow funds to Siemens, and thus "the court is forbidden to substitute its own interpretation even if convinced that the arbitrator's interpretation was not only wrong, but plainly wrong." Local 1199, Hosp. & Health Care Emples. Union v. Brooks Drug Co., 956 F.2d 22, 25 (2d Cir, 1992) (quoting Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991)).

Controlotron has thus failed to articulate a legal basis for this Court to avoid confirmation. Therefore, vacatur is not warranted under the FAA or the case law. Accordingly,

this Court must grant Siemens's motion for an order confirming the Award. See 9 U.S.C. § 9 ("the court must grant such an order unless the award is vacated, modified, or corrected").

CONCLUSION

Petitioner's motion to vacate the arbitration award is DENIED. Siemens's motion to confirm the arbitration award is GRANTED. The February 6, 2009 Award of Arbitration is confirmed in its entirety.

Dated: New York, New York
December 23, 2010

SO ORDERED:

George B. Daniels

GEORGE B. DANIELS
United States District Judge