UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARI LEE BAYME,

Petitioner,

-against-

GROUPARGENT SECURITIES, LLC, f/k/a MILBANK ROY SECURITIES, LLC,

Respondent

MEMORANDUM DECISION AND ORDER

10 Civ. 6213 (GBD)

GEORGE B. DANIELS, District Judge:

This action arises out of a Financial Industry Regulatory Authority, Inc. ("FINRA") arbitration proceeding between Petitioner Ari Lee Bayme ("Bayme") and GroupArgent Securities, LLC, formerly known as Milbank Roy Securities LLC ("MRS"). The arbitration panel dismissed Petitioner's claim without prejudice on the grounds that it had no jurisdiction to hear the dispute between Bayme and MRS because Bayme was not an employee of MRS. The arbitration panel found that Petitioner was employed by Milbank Roy Securities & Co., LLC, a separate corporation.

Petitioner filed a petition to vacate the arbitration award, alleging that under Section 10(a)(4) of the Federal Arbitration Act, the arbitrators exceeded their authority and manifestly disregarded the law. Specifically, Bayme contends the arbitration panel lacked the authority to determine the question of jurisdiction and manifestly disregarded the law when they (1) dismissed the arbitration for lack of jurisdiction, disregarding the FINRA director's preliminary determination regarding FINRA rules 13503 and 13203, see Pet. Mem. in Supp. at 8; Pet. to Vacate, 14, 19, and (2) because the panel disregarded "the motion to dismiss rule" under Rule

13504[1] of the FINRA Code, id. Pet. Mem. in Supp. at 10. MRS filed a cross-motion to confirm the arbitration award.

Petitioner's petition to vacate the arbitration award is DENIED. Respondent's motion to confirm the award is GRANTED.

BACKGROUND

Petitioner Bayme commenced an arbitration proceeding against MRS on May 5, 2009, seeking money damages arising out of claims for compensation and expenses incurred during his alleged employment. See Lax Decl., Ex. B. As a broker/dealer member of FINRA, MRS is obligated to arbitrate claims of employees who are considered "associated persons."[2] On May 8, 2009, FINRA notified MRS that they had been named as a party in the arbitration. The notification letter specified that MRS should raise all of its available defenses in the answer to the statement of claim. See Lax Decl., Ex. C. On June 3, 2009, counsel for MRS advised FINRA in a letter brief that the claimant was not employed by MRS and was instead an employee of Milbank Roy & Co., LLC ("MR"). It contended that FINRA lacked jurisdiction to hear the case since MR was not a FINRA member.

After the parties exchanged several letter briefs, the Director of FINRA issued a letter stating that "[t]he Director of FINRA Dispute Resolution is in receipt of your request to decline FINRA's arbitration forum. The Director has denied your request. Accordingly, the case will

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[1] Rule 13504 of the FINRA Code provides in relevant parts:

> Motions to Dismiss
> a) Motions to Dismiss Prior to Conclusion of Case in Chief
> (1) Motions to dismiss a claim prior to the conclusion of a party's case in chief are discouraged in arbitration.
> (2) Motions under this rule must be made in writing, and must be filed separately from the answer, and only after the answer is filed.

[2] All members are required to submit their business related claims to arbitration before a FINRA tribunal. See Rule 13200.

proceed in this forum." See Lax Decl., Ex. I. Subsequently, MRS executed a FINRA Arbitration Submission Agreement, see Lax Decl., Ex. F, and served its answer. The answer included, among others, a defense of lack of jurisdiction contending that Bayme was never employed by MRS. See Lax Decl., Ex. D. The tribunal was constituted and the parties began discovery. See Lax Decl., Ex. P.

In response to a discovery dispute, Bayme moved the tribunal to compel the production of certain documents. See id. On April 12, 2010, the chairman conducted a teleconference with the parties to discuss the motion to compel and the status of the case. See Lax Decl., Ex. Q. After conferring with the other two members of the tribunal, the chairman issued an order stating that there is an "apparent … issue of lack of jurisdiction," which is:

> [C]learly set forth in respondent's answer, concerns whether claimant was actually employed by a member of FINRA, which is required if FINRA is to hear the matter. Respondent has not moved to dismiss the matter on this basis. However, since the issue concerns whether any relief may be granted in the case, it is necessary to resolve it at the earliest possible time.

See Lax Decl., Ex. S (emphasis added). Petitioner contends that at the pre-hearing telephone conference on April 12, 2010, "Respondent's counsel orally raised a motion to dismiss Petitioner's claims for lack of jurisdiction," which would violate FINRA Rule 13504(a)(2)'s requirement that all motions to dismiss made prior to the close of the case-in-chief be in writing. The parties submitted letter briefs on this issue and the full tribunal held a hearing.

At the hearing, Bayme's counsel was present but stated that they were present "out of respect for the panel," and that they would "not participate in [the] hearing," because if they did so it "would [be] a violation of the FINRA rules." See Hearing Tr. (Apr. 20, 2010) at 6. The arbitration panel disagreed and proceeded to hear argument and sworn testimony to determine whether Petitioner was employed by MR or MRS. It heard testimony from Maurice Watkins, the

head of MR. Also present was Pierre-Georges Roy.[3] The Panel examined documents such as Petitioner's pay stubs and tax forms. Petitioner's attorneys did not examine Respondent's witnesses. After hearing the testimony and examining the documents, the Panel determined that Bayme was not employed by MRS, but by MR, which was not a member of FINRA. Consequently, the tribunal determined that it had no jurisdiction to hear the matter and issued an award dismissing the case without prejudice to Petitioner's right to make his claim in a proper forum against the appropriate entity. See Lax Decl., Ex. A (Award).

STANDARD OF REVIEW

This dispute is governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., and the Court has subject matter jurisdiction because: (1) there is a written arbitration agreement in the form of a submission agreement, Lax Decl., Ex. F; (2) the parties are diverse, and (3) the underlying transaction involves interstate commerce. See ACEquip Ltd. v. Am. Eng'g Corp., 315 F.3d 151, 154 (2d Cir. 2003). "The showing required to avoid summary confirmation of an arbitration award is high, . . . and a party moving to vacate the award has the burden of proof." Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997) (citation omitted). An award should be upheld as long as there is even a "barely colorable justification for the outcome reached." Wallace v. Buttar, 378 F.3d 182, 190 (2d Cir. 2004) (internal quotation marks and citation omitted). "A party petitioning a federal court to vacate an arbitral award bears the heavy burden of showing that the award falls within a very narrow set of circumstances delineated by statute and case law." See Bradley v. Merrill Lynch & Co., Inc., 344

[3] Although the Panel's decision indicated that "Maurice Watkins and Pierre-Georges Roy testified on behalf of Respondent and were not cross-examined by [Petitioner's] representatives," the record does not indicate that Roy gave any substantive testimony. See Lax Decl., Ex. A at 3.

F. App'x. 689, 690 (2d Cir. 2009) (citing to Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 388 (2d Cir.2003)).

In First Option of Chicago Inc. v. Kaplan, 514 U.S. 938 (1995) the Supreme Court held that the question of arbitrability[4] is resolved by courts rather than arbitrators, unless the parties have explicitly agreed otherwise. See id. at 943 ("Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute . . . so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter.") (internal citations omitted); T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 344 (2d Cir. 2010). If Bayme and MRS have agreed to submit the arbitrability question itself to arbitration, this Court's standard for reviewing the panel's decision is the same as reviewing any other matter that the parties have agreed to arbitrate, giving considerable leeway to the arbitrators and setting aside the award only in very narrow circumstances. See id., at 943. Whether the parties agreed to submit the issue to the arbitrators is generally governed by state-law contract principles. T.C. Metals, 592 F.3d at 344 (internal quotation marks omitted). The question of arbitrability "is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." T.C. Metals, 592 F.3d at 344 (internal quotation marks omitted).

As to vacating an arbitration award, the FAA allows parties to petition the district court for an order vacating an arbitration award "where the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). In this circuit, courts have "consistently accorded the narrowest of reading to

[4] Courts use the term "arbitrability" somewhat inconsistently. Sometimes it is used to describe the preliminary question of whether an arbitral tribunal has the authority to decide if a dispute should be submitted to arbitration. See First Option of Chicago Inc. v. Kaplan , 514 U.S. 938, 944-45 (1995). See also Laurence Shore, Defining "Arbitrability," N.Y.L.J. June 15, 2009. The term is used also to describe "whether specific classes of disputes are barred from arbitration because of national legislation or judicial authority." See Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983). See also Laurence Shore, Defining "Arbitrability," N.Y.L.J. June 15, 2009.

the FAA's authorization to vacate awards pursuant to § 10(a)(4)." See T.Co Metals, 592 at 342 (citing to Banco de Seguros del Estado v. Mut. Marine Office, Inc., 344 F.3d 255, 262 (2d Cir.2003)). This Court's power under § 10(a)(4) is strictly limited "in order to facilitate the purpose underlying arbitration: to provide parties with efficient dispute resolution, thereby obviating the need for protracted litigation." T.Co Metals, 592 F.3d at 342 (citations omitted).

A court may vacate an arbitration award when the arbitration panel manifestly disregards the law. This Court must find that the arbitrator refused to apply or ignored an explicit and well defined governing legal principle that was clearly applicable to the case. See Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 184 F.Supp.2d 271, 274 (S.D.N.Y.2002), aff'd, 333 F.3d 383 (2d Cir. 2003). The Second Circuit applies a three-part test: (1) the "arbitrator knew of the relevant [legal] principle, (2) appreciated that the principle controlled the outcome of the disputed issue, and (3) nonetheless willfully flouted the governing law by refusing to apply it." See Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 95 (2d Cir. 2008), overruled on other grounds, Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 130 S.Ct. 1758 (2010). An arbitrator's refusal or neglect to apply a governing legal principle "clearly means more than error or misunderstanding with respect to the law." Hoeft v. MVL Group. Inc., 343 F.3d 57, 69 (2d Cir. 2003) (citation omitted). A federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law. See Wallace v. Buttar, 378 F.3d 182, 190 (2d Cir. 2004). On the contrary, the 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." See Banco de Seguros del Estado v. Mutual Marine Office. Inc., 344 F.3d 255, 260 (2d Cir. 2003)(citation and quotation marks omitted).

ARBITRABILITY

Here, the FINRA arbitration tribunal acted pursuant to a Uniform Submission Agreement, which both parties signed.[5] See Lax Decl., Ex. F. The language of the submission agreement is broad and provides that the party is "submit[ting] the present matter in controversy, as set forth in the attached statement of claim, answers, cross claims and all related counterclaims … to arbitration in accordance with the Constitution, By-Laws, Rules, Regulation and/or rules of the sponsoring organization." See id. The language in this agreement, which encompasses essentially any and all claims that the parties could bring, is substantially similar to an agreement that requires "any and all" disputes to be submitted to the arbitrator, which has been held to evidence clear and unmistakable intent to submit the arbitrability question to arbitration. See Rafferty v. Xinhau Finance Ltd., 11 Civ. 133 (CM), 2011 WL 335312, at *5 (S.D.N.Y. Jan. 31, 2011) (citing Pain Webber Inc. v. Bybyk, 81 F.3d 1198, 1199-1200 (2d Cir. 1996). Also, the defense of lack of jurisdiction is one that could be raised in an answer, further evidencing the parties' intent that such arbitrability questions be submitted to the arbitrator, and not a court. See FINRA Rule 12303 ("Respondent(s) must directly serve . . . an answer specifying the relevant facts and available defenses to the claim.")(emphasis added). Because the language of the agreement evidences an unmistakable intent to submit the question of arbitrability to the arbitrator, the arbitration panel had the authority to rule on the question of its jurisdiction over the claim.

MANIFEST DISREGARD OF THE LAW

Having determined that the arbitration agreement gave the arbitration panel the authority to consider the issue of arbitrability, its decision is reviewed under a highly deferential standard.

[5] Under FINRA Rule 13000, "The FINRA Submission Agreement is a document that parties must sign at the outset of an arbitration in which they agree to submit to arbitration under the Code." FINRA Rule 13000.

T.Co Metals, LLC, 592 F.3d at 344. In support of his motion to vacate the arbitration award, Bayme contends that the panel manifestly disregarded the law when it (1) dismissed the arbitration for lack of jurisdiction, ignoring the ruling of the FINRA Director, and (2) disregarded "the motion to dismiss rule" under Rule 13504 of the FINRA Code.

Neither of these arguments support a finding that the panel sufficiently disregarded the law to vacate the award. The Director's decision to send the claim to the arbitration panel is not necessarily dispositive of the question of jurisdiction. Under FINRA rules, the Director has administrative duties, which allow him to "delegate his duties when it is appropriate." See FINRA Rule 13103[6], 13203. Rule 13203 allows the Director of FINRA to refuse the processing of claims that might pose a threat to the arbitrators' "health and safety," or weed out early on the disputes who's "subject matter is inappropriate" in light of the purposes of FINRA and the intent of the Code. See FINRA Rule 13203.[7] The Director's letter does not indicate he was definitively ruling on the issue of jurisdiction. See Lax Decl., Ex. I. Rather, the letter merely notifies the parties that the Director was submitting the case to the tribunal for further resolution. See Lax Decl., Ex. I. At a minimum, because there is a "barely colorable justification for the outcome reached," the panel's jurisdiction decision should not be vacated. See Wallace v. Buttar, 378 F.3d 182, 190 (2d Cir. 2004) (internal quotation marks and citation omitted).

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[6] Rule 13103 "Director of Dispute Resolution,"
(a) . . . The Director may delegate his or her duties when it is appropriate, unless the Code provides otherwise.

[7] Rule 13203 Denial of FINRA Forum
(a) The Director may decline to permit the use of the FINRA arbitration forum if the Director determines that, given the purposes of FINRA and the intent of the Code, the subject matter of the dispute is inappropriate, or that accepting the matter would pose a risk to the health or safety of arbitrators, staff, or parties or their representatives. Only the Director or the President of FINRA Dispute Resolution may exercise the Director's authority under this rule.
(b) Disputes that arise out of transactions in a readily identifiable market may be referred to the arbitration forum for that market, if the claimant agrees.

Similarly, the Panel did not manifestly disregard FINA rule 13504 when it dismissed Petitioner's complaint for lack of subject matter jurisdiction. The Panel held a hearing allowing both sides to argue and submit testimonial and documentary evidence. Respondent did not make a formal written motion to dismiss. Though Respondent first raised the issue of jurisdiction in its answer, it was the Panel that scheduled a hearing to explore the issue. In fact, in its letter raising the jurisdictional question, the Chairman of the panel explicitly noted that "Respondent has not moved to dismiss the matter on this basis." See Lax Aff. Ex. Q. It is axiomatic that a body may raise the issue of its own subject matter jurisdiction sua sponte. See, e.g., United Food & Commerical Workers Union, Local 919 v. Centermark Properties Meriden Square, Inc., 30 F.3d 298, 301 (2d Cir. 1994) ("a challenge to subject matter jurisdiction cannot be waived and may be raised sua sponte"). Further, the Rule does not define a motion to dismiss. See Rule 13504. Therefore, the Panel's conclusion that Respondent's actions did not constitute a "motion to dismiss" that would fall under Rule 13504 does not manifestly disregard FINRA rules. With a "barely colorable justification for the outcome," vacatur on this ground is not appropriate. Wallace, 378 F.3d at 190; Duferco Intern. Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 385 (2d Cir. 2003) ("Any plausible reading of an award that fits within the law will sustain it.").

Despite Petitioner's procedural objections, the Panel's determination that Petitioner was an employee of MR and not MRS is supported by the record. At the hearing, the head of MR testified that Petitioner was never an employee of MRS. See Lax Decl. Ex. E. at 20:9-14. Also, Respondent submitted all of Petitioner's pay stubs, which clearly indicate he was paid by MR. See id. Ex. K. It submitted New York State tax forms, which also indicated he was employed by MR. See id. Petitioner declined to submit any evidence in opposition, or otherwise participate in

the hearing. There was more than a "barely colorable justification" to support the Panel's decision to dismiss the claim because Petitioner was not an employee of MRS. The Panel's final determination that it lacked jurisdiction because Petitioner was employed by MR, a non-FINRA member, should not be vacated.

CONCLUSION

The petition to vacate the arbitration award is DENIED. The motion to confirm the arbitration award is GRANTED.

Dated: July 18, 2011
New York, New York

SO ORDERED:

GEORGE B. DANIELS
United States District Judge