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DOC #:
DATE FILED: 7/25/2012

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DIGITELCOM, LTD., *et al.*,

Plaintiffs,

-v-

TELE2 SVERIGE AB,

Defendant.

No. 12 Civ. 3082 (RJS)
MEMORANDUM AND ORDER

RICHARD J. SULLIVAN, District Judge:

Plaintiffs DigiTelCom, Ltd., TelCo, Inc., Katel LLC, and SoTel LLC, initiated this action on December 20, 2011 by filing a motion to vacate and/or modify an arbitration award (the "Award") granted in favor of Defendant Tele2 Sverige AB. On February 15, 2012, Defendant responded and filed a cross-motion to confirm the Award and impose attorneys' fees. The motions were fully submitted as of April 2, 2012. The Court heard oral argument on the instant motions on June 5, 2012. For the reasons set forth below, Plaintiffs' motion to vacate the Award is denied, Defendant's motion to confirm the Award is granted, and Defendant's motion for attorneys' fees is granted.

I. BACKGROUND[1]

This action arises out of dealings between telecommunications companies in Russia. Plaintiff DigiTelCom was a minority shareholder in two telecommunications companies, AO St. Petersburg Telecom ("SPT") and AO Oblcom ("Oblcom"), when Defendant became the majority shareholder in each. DigiTelCom disagreed with Defendant as to how SPT should expand wireless phone service in Russia, so the parties entered into a series of agreements: (1) the Share

[1] The facts are drawn from the parties' briefs. The parties dispute nearly everything about the purpose and operation of the agreements -- described below -- that form the basis of this action; however, this summary represents an attempt to provide a neutral description of the agreements.

Purchase Agreement, by which DigiTelCom would sell its stock in SPT and Oblcom to Defendant; (2) the CDMA License Agreement, which provided that SPT would attempt to transfer its license for a digital network called the CDMA network to DigiTelCom and further provided for DigiTelCom to operate the CDMA network upon fulfilling certain conditions set forth therein; and (3) the Roaming Agreement, which provided for DigiTelCom to use Tele2's roaming services.

In 2009, based on their belief that Defendant had breached the agreements in numerous ways, Plaintiffs initiated arbitration before the International Centre for Dispute Resolution (the "ICDR") pursuant to the identical arbitration clauses that appear in each of the three agreements. (*See* Decl. of Paul J. Yesawich, III, dated Dec. 16, 2011, Doc. No. 5 ("Yesawich Decl."), Ex. 30 ¶ 27.2; *Id.* Ex. 31 ¶ 18.2; *Id.* Ex. 32 ¶ 21.1.) The witness hearings took place over three days in April 2011. On September 28, 2011, the ICDR tribunal (the "Tribunal") issued the Award dismissing all of Plaintiffs' claims and awarding attorneys' fees and costs to Defendant.

II. LEGAL STANDARD

After the entry of an arbitration award, the Federal Arbitration Act ("FAA") permits a party to apply to the district court "for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9. Section 10 provides four instances in which the court may vacate an arbitral award:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where 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) where 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.

Id. § 10(a). In addition to these four statutory bases, a court may vacate an award "if [it] find[s] a panel has acted in manifest disregard of the law." *Porzig v. Dresdner, Kleinwort, Benson, N.A. LLC*, 497 F.3d 133, 139 (2d Cir. 2007).[2]

In evaluating whether an arbitration award is subject to vacatur, courts undertake a "very limited review." *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993). "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, B.V. v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997) (internal citations omitted). Moreover, "[t]he arbitrator's rationale for an award need not be explained, and the award should be confirmed if a ground for the arbitrator's decision can be inferred from the facts of the case." *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006) (internal quotation marks and citations omitted). Indeed, even where a reviewing court disagrees with an award on the merits, it need only find "a barely colorable justification for the outcome reached" to confirm the award. *Landy Michaels Realty Corp. v. Local 32B–32J, Serv. Emps. Int'l Union*, 954 F.2d 794, 797 (2d Cir. 1992) (internal quotation marks and citations omitted).

III. DISCUSSION

A. Plaintiffs' Motion to Vacate the Substantive Portion of the Award

Plaintiffs argue that the Tribunal "(1) rewrote the contracts in question, even though all parties -- including the Defendant -- agreed that Defendant had breached the contract in material

[2] Some courts have questioned whether, in light of the Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), "manifest disregard of the law" remains a proper basis for vacating an arbitration award. *See, e.g.*, *STMicroelectronics, N.V. v. Credit Suisse Sec. (USA) LLC*, 648 F.3d 68, 78 (2d Cir. 2011) (noting "skepticism about the validity of [the Second Circuit's] 'manifest disregard' doctrine in light of recent Supreme Court precedent" but finding that the respondent had nonetheless failed to meet it). In any event, as set forth below, Plaintiffs have fallen far short of establishing that the Tribunal disregarded applicable law in issuing the Award.

ways, and thus so imperfectly exercised their powers that an appropriate final award was not rendered; (2) manifestly disregarded the law regarding contract interpretation and the award of attorneys' fees; and (3) rendered a decision that was so inconsistent with the undisputed facts as to be irrational and which creates the strong inference of partiality or bias." (Pls.' Mem. 1.)

1. "Imperfectly Executed," 9 U.S.C. § 10(a)(4)

The Second Circuit has "consistently accorded the narrowest of readings to the FAA's authorization to vacate awards pursuant to § 10(a)(4) . . . focus[ing] on whether the arbitrators had the power based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue." *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 262 (2d Cir. 2003) (internal quotation marks and citations omitted). Thus, the appropriate question is "'whether the arbitrator[s] acted within the scope of [their] authority,' or whether the arbitral award is merely the 'arbitrator[s'] own brand of justice.'" *Id.* (quoting *Local 1199 v. Brooks Drug Co.*, 956 F.2d 22, 25 (2d Cir. 1992)) (alterations in original).

Plaintiffs' challenge to the Award amounts to little more than an assault on the Tribunal's factfinding and contractual interpretation rather than on its actual authority. Moreover, although Plaintiffs accuse the Tribunal of "rewriting" the contracts, in reality, the Tribunal merely interpreted them in terms that were unfavorable to Plaintiffs. Where an arbitration involves interpretation of a contract, "'as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' a court's conviction that the arbitrator has 'committed serious error' in resolving the disputed issue 'does not suffice to overturn his decision.'" *ReliaStar Life Ins. Co. of N.Y. v. EMC Nat. Life Co.*, 564 F.3d 81, 86 (2d Cir. 2009) (quoting *United Paperworkers Int'l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987)). As set forth in further detail below with respect to Plaintiffs' argument that the Tribunal acted in

manifest disregard of the law, the Court has little trouble concluding that the Tribunal was at least "arguably construing or applying" the agreements and that it acted within the scope of the authority accorded to it by the arbitration clauses. Thus, to the extent that Plaintiffs' argument even constitutes a proper challenge pursuant to § 10(a)(4), it must fail.

2. "Manifest Disregard of the Law"

In the context of contract interpretation, the Second Circuit has held that the heavy burden borne by the party moving to vacate an arbitration award "essentially bars review of whether an arbitrator misconstrued a contract." *T. Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010). Vacatur on the grounds of manifest disregard of the law is justified only by "some egregious impropriety on the part of the arbitrator[s]," which is "more than error or misunderstanding with respect to the law." *Id.* (internal quotation marks and citations omitted). Specifically, the Second Circuit has recognized three factors to consider in determining whether the arbitration panel acted in manifest diregard of the law:

> First, we must consider whether the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators. An arbitrator obviously cannot be said to disregard a law that is unclear or not clearly applicable. Thus, misapplication of an ambiguous law does not constitute manifest disregard.
>
> Second, . . . we must find that the law was in fact improperly applied, leading to an erroneous outcome. . . . Even where explanation for an award is deficient or non-existent, we will confirm it if a justifiable ground for the decision can be inferred from the facts of the case.
>
> Third, . . . we look to a subjective element, that is, the knowledge actually possessed by the arbitrators. In order to intentionally disregard the law, the arbitrator must have known of its existence, and its applicability to the problem before him.

Id. (alterations in original). Moreover, "[u]nder the manifest disregard standard . . . the governing law must clearly apply to the facts of the case, *as those facts have been determined by the arbitrator*." *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 213 (2d Cir. 2002)

(emphasis in original). Thus, "[t]he arbitrator's factual findings and contractual interpretation are not subject to judicial challenge, particularly on [a court's] limited review of whether the arbitrator manifestly disregarded the law." *Id.* at 214.

Tellingly, Plaintiffs do not actually cite to a particular principle of law that the Tribunal is supposed to have ignored; instead, they merely dispute its factfinding and contractual interpretation. Even if the Court were empowered to undertake any kind of close review of those aspects of the Award, a brief review of the record demonstrates that Plaintiffs' assertions are undermined by the plain language of the contract. For example, Plaintiffs assert that DigiTelCom could "simply 'step into the shoes' of SPT and maintain and operate the CDMA Network as if it [were] its own, and commercialize the operation," and that "[n]o further agreement to do so was necessary." (Pls.' Mem. 6.) However, clause 2.3 of the CDMA agreement provides that "DigiTelCom shall not be entitled to establish a Commercial Service using the Existing CDMA Network without first reaching an appropriate commercial arrangement with Tele2 respecting such use . . . ." (Yesawich Decl., Ex. 31 ¶ 2.3.) The Court takes no position as to whether the Tribunal's interpretation of the contracts was "correct" under principles of contract law. Instead, this review serves merely to illustrate that there is, at a minimum, a "barely colorable justification" for the Award. Accordingly, the Court finds that Plaintiffs' disagreement with the Award is inadequate to establish a manifest disregard of the law, particularly where the 117-page Award is replete with citations to the record and is supported by what appear to be colorable interpretations of the agreements at issue.

3. "Evident Partiality," 9 U.S.C. § 10(a)(2)

A court will only find "evident partiality" under § 10 "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007)

(internal quotation marks and citations omitted). Thus, "[a]n arbitrator who knows of a material relationship with a party and fails to disclose it meets [the] 'evident partiality' standard." *Id.* Although "[a] conclusion of partiality can be inferred from objective facts inconsistent with impartiality[,] . . . a showing of evident partiality may not be based simply on speculation." *Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 72 (2d Cir. 2012) (internal quotation marks and citations omitted).

Nearly all of the cases dealing with § 10(a)(2) relate to undisclosed interests or relationships between the arbitrators and one of the parties. Here, Plaintiffs have alleged no relationship or interest that would even suggest bias or impartiality; instead, Plaintiffs ask the Court to infer partiality from the mere fact that -- according to Plaintiffs -- the Tribunal made errors in factfinding and contractual interpretation. Clearly, such rank speculation is not enough to establish grounds to vacate an arbitration award on "evident partiality" grounds.

B. Plaintiffs' Motion to Vacate the Fee Award

Plaintiffs contend that the fee award should be vacated on the grounds that the Tribunal manifestly disregarded the law because (1) the fees requested by Defendant, and awarded by the Tribunal, were unreasonable, and (2) Plaintiffs other than DigiTelCom -- namely, TelCo Inc., Katel LLC, and Sotel LLC -- were only involved with respect to the Roaming Agreement, which accounted for a very small portion of the dispute before the Tribunal, and thus, the Tribunal erred in holding all Plaintiffs jointly and severally liable for the award of attorneys' fees to Defendant.[3]

As an initial matter, Plaintiffs never presented their objection as to the amount and distribution of costs and fees to the Tribunal. Thus, even if Plaintiffs could establish that the

[3] The Court is in receipt of a letter from Plaintiffs, dated July 18, 2012, purporting to "clarify confusion apparent in the transcript" regarding whether the Tribunal's alleged error in failing to apportion fees was one of fact or of law, as well as a letter from Defendant, dated July 20, 2012, responding to Plaintiffs' letter. However, Plaintiffs' letter amounts to little more than a reiteration of the arguments that they have already articulated. For the reasons set forth herein, the arguments set forth in Plaintiffs' letter, as well as in their briefs, are unavailing.

Tribunal's award and distribution of attorneys' fees violated established principles of law, they have not demonstrated that the Tribunal was *aware* of that law and *consciously* flouted it. *See T. Co. Metals, LLC*, 592 F.3d at 339. Although Plaintiffs insist that they "had no opportunity to question [Defendant's] fee submission" during the arbitration (Pls.' Reply 12), Plaintiffs offer no reason why they could not have submitted a letter to the Tribunal or found some other way to make their objection known. For arbitration to serve its purpose as a relatively fast, inexpensive, and final method of resolving disputes, parties must present arguments in the first instance to the arbitration panel. Accordingly, Plaintiffs' objection is deemed waived. *See Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998) ("[I]f [a party] failed to raise [an] issue . . . to the arbitrators, the issue is forfeited.").

In any event, Plaintiffs cannot establish that the Tribunal's fee award was made in manifest disregard of the law. Plaintiffs argue that "there was absolutely no inquiry into the reasonableness of the fees and expenses incurred," and "the fees sought by [Defendant] were approximately three times (3x) the fees incurred by DigiTelCom." (Pls.' Mem. 30.) Although Plaintiffs provide authority for the general proposition that courts should scrutinize fee and cost requests, the cases they cite do not arise from arbitration. Moreover, the Tribunal awarded costs and fees pursuant to Article 31 of the ICDR International Arbitration Rules, which provides merely that "[t]he tribunal shall fix the costs of arbitration in its award," which may include legal fees, and that it "may apportion such costs among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case." There is nothing to suggest that the Tribunal's award was even inconsistent with the ICDR rules, much less that it constituted a "manifest disregard of the law."

Likewise, with respect to the apportionment of the fee award, Plaintiffs cite to cases reviewing district courts' awards of attorneys' fees and appeal to equity, arguing that the Plaintiffs other than DigiTelCom were not signatories to the CDMA Agreement and thus could not have agreed to pay the costs of a dispute arising out of that agreement. However, Plaintiffs have not explained why the Tribunal's decision to hold Plaintiffs jointly and severally liable for the costs of the arbitration evinces a manifest disregard of the applicable law. Even if Second Circuit case law regarding apportionment of fees, and not the ICDR rules, were applicable here, it is difficult to see how the Tribunal's decision was made in manifest disregard of the law. The Second Circuit has held that "[a] district court may hold the responsible parties jointly and severally liable for the fee award, so long as the court make[s] every effort to achieve the most fair and sensible solution that is possible." *Sinkov v. Americor, Inc.*, 419 F. App'x 86, 93 (2d Cir. 2011) (internal quotation marks and citations omitted). However, "[a]lthough apportionment may in some cases be a more equitable resolution, there is no rule in this circuit that requires it whenever possible." *Id.* Thus, even in the context of a federal appellate court's closer review of a district court's ruling, the decision as to whether to apportion fees based on responsibility is considered to be a matter for the trial court's discretion. As such, it can hardly be said that the Tribunal's decision not to do so constituted a conscious and manifest disregard of well-established law to the contrary, or that it would be appropriate for this Court to second-guess the Tribunal's decision.

C. Defendant's Motion to Confirm the Award

An arbitration award should be confirmed unless it is vacated, modified, or corrected. *D.H. Blair & Co.*, 462 F.3d at 110. Thus, "[d]ue to the parallel natures of a motion to vacate and a motion to confirm an arbitration award, denying the former implies granting the latter." *L'Objet, LLC v. Ltd.*, No. 11 Civ. 3856 (LBS), 2011 WL 4528297, at *3 (S.D.N.Y. Sept. 29,

2011). For the reasons stated above, Plaintiffs have failed to make a case for vacating the Award and, thus, have not established a valid defense to confirmation and enforcement of the Award. Accordingly, Defendant's motion to confirm the Award is granted.

D. Attorneys' Fees

Finally, Defendant requests that the Court impose attorneys' fees pursuant to 28 U.S.C. § 1927, which provides that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." "To impose sanctions, a court must find clear evidence that (1) the offending party's claims were entirely meritless and (2) the party acted for improper purposes." *U.S. Ship Mgmt., Inc. v. Maersk Line, Ltd.*, No. 04 Civ. 2504 (LAP) (JCF), 2004 WL 2823038, at *9 (S.D.N.Y. Dec. 1, 2004) (internal citations omitted). Both conclusions must be supported by specific factual findings; however, "bad faith may be inferred only if actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." *Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 143 (2d Cir. 2012) (internal quotation marks and citations omitted). Defendant contends that sanctions are appropriate in this case because Plaintiffs, *inter alia*, misrepresented the facts and the record and possibly engaged in judge-shopping, which Plaintiffs strenuously deny.

Sanctions must not be imposed lightly. At the same time, where parties agree to arbitration as an efficient and lower-cost alternative to litigation, both the parties and the system itself have a strong interest in the finality of those arbitration awards. Thus, although courts should be careful not to chill parties' good-faith challenges to arbitration awards where there are serious questions of the tribunal's impartiality or authority, litigants must be discouraged from defeating the purpose of arbitration by bringing such petitions based on nothing more than

dissatisfaction with the tribunal's conclusions. For this reason, "sanctions are peculiarly appropriate in the context of a challenge to an arbitration award which appears to be a largely dilatory effort." *Manning v. Smith Barney, Harris Upham & Co.*, 822 F. Supp. 1081, 1083-84 (S.D.N.Y. 1993); *see also B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 913-14 (11th Cir. 2006) (suggesting that "[w]hen a party who loses an arbitration award assumes a never-say-die attitude and drags the dispute through the court system without an objectively reasonable belief it will prevail, the promise of arbitration is broken" and that in such a case sanctions may be appropriate).

As discussed above, Plaintiffs' representation of what facts were undisputed and, particularly, its selective quoting of the agreement in question, are disingenuous at best. Plaintiffs challenge the Tribunal's factfinding and contractual interpretation, repeatedly characterizing facts as "undisputed" and "essentially stipulated" (*see* Pls.' Mem. 6-10), though it appears that all of the issues that Plaintiffs represent as undisputed were, and are, plainly disputed by Defendant. *See Enmon*, 675 F.3d at 145-46 (affirming district court's imposition of sanctions for frivolous opposition to a petition to confirm arbitration based on misrepresentations of the record and arbitral proceedings). Moreover, as noted above, Plaintiffs do not cite any particular principle of law that the Tribunal is supposed to have ignored or any reason beyond pure speculation to conclude that the Tribunal was not fair and impartial. *See Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 708 (2d Cir. 1985) (affirming district court's imposition of sanctions where attorney raised "arguments which were not only inappropriate upon a motion to confirm but were also without merit"). Citing virtually no relevant authority, Plaintiffs merely identify the standard for vacating an arbitration award at the outset of their papers and then proceed to attack the Tribunal's findings, as well as its integrity, by suggesting that it was biased

without providing any basis whatsoever for such an accusation. This kind of petition serves only to cause the parties to incur unnecessary expense and delay the implementation of the Award. *See Matter of U.S. Offshore, Inc. (Seabulk Offshore, Ltd.)*, 753 F. Supp. 86, 92 (S.D.N.Y. 1990) (granting attorneys' fees under Rule 11 where party's arguments "appear[ed] to have been motivated by a desire to forestall complying with the award . . . and . . . in the main [were] not warranted by existing law or a good faith argument to extend, modify or reverse existing law").

Accordingly, Defendant's motion for attorneys' fees is granted.

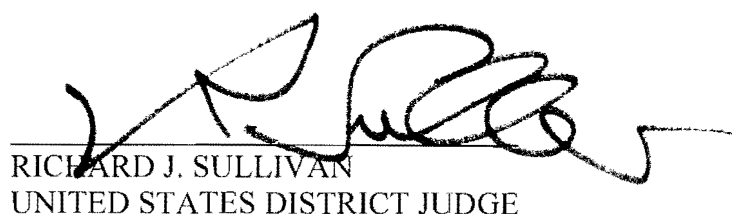
IV. CONCLUSION

For the foregoing reasons, Plaintiffs' motion to vacate the Award is denied, Defendant's motion to confirm the Award is granted, and Defendant's motion for attorneys' fees is granted. The Clerk of the Court is respectfully directed to terminate the motions located at Doc. Nos. 1, 12, and 13.

Defendant may apply for reasonable fees and costs incurred in connection with these motions no later than August 6, 2012. Plaintiffs' response shall be submitted by August 20, 2012. Defendant's reply shall by submitted no later than August 27, 2012.

SO ORDERED.

Dated: July 25, 2012
New York, New York



RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE