UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PK TIME GROUP, LLC,

Petitioner,

v.

CINETTE ROBERT and INTERNATIONAL CENTER FOR DISPUTE RESOLUTION,

Respondents.

12 Civ. 8200 (PAC)

MEMORANDUM ORDER

Petitioner PK Time Group, LLC ("PK Time") seeks the removal of the members of an arbitration panel in an ongoing commercial arbitration with Respondent Cinette Robert ("Robert").[1] Robert moves to dismiss the petition on the grounds that, inter alia, such interlocutory appeals are prohibited. For the reasons below, Robert's motion to dismiss is GRANTED.

BACKGROUND

A. Facts[2]

Robert (a Swiss national) is the former owner of the Swiss watch manufacturer Dubey & Schaldenbrand Watches. In 1998, PK Time (a Delaware limited liability company) and Robert entered into an Exclusive Distribution Agreement (the "Agreement") pursuant to which PK Time agreed to be sole distributor of Robert's watches in North America. Robert subsequently sold the watch manufacturer in an alleged breach of PK Time's right of first refusal. PK Time demanded arbitration in December 2009 to recover damages. Pursuant to the terms of the Agreement, the arbitration was administered by the International Centre for Dispute Resolution ("IDCR"), a division of the American Arbitration Association. The IDCR empanelled a tribunal

[1] Respondent International Center for Dispute Resolution was dismissed from this action by way of a stipulation with Petitioner. (ECF No. 10.)

[2] All facts taken from PK Time's Verified Petition unless otherwise noted.

of three arbitrators (the "Arbitrators"), who bifurcated the arbitration to be held in New York City. In the liability phase, the Arbitrators issued a partial award, finding Robert in breach of the Agreement. PK Time does not challenge this determination.[3]

Prior to the hearing on damages, the Arbitrators considered both parties' demands for discovery. Robert objected to some of the items requested by PK Time, the Arbitrators sustained the objections, and struck nine of the fifteen items sought by PK Time. On March 27, 2012, the Arbitrators held a hearing on damages. Though the hearing was initially expected to last only one day, at the afternoon session, the Arbitrators ruled that the parties would need more time to present their cases. A second hearing date was scheduled for September 7, 2012, in London. At some point after the conclusion of the March 27, 2012 hearing, PK Time claims it learned that two of the three Arbitrators spoke at an "International Dispute Resolution" conference in London on February 24, 2012, at which Robert's expert witness also spoke. The conference was also sponsored by the accounting firm Navigant, which employed Robert's expert witness.

On May 2, 2012, PK Time applied to the IDCR to remove the Arbitrators on the basis of partiality and misconduct, arguing that they were biased in favor of Robert. The IDCR rejected the application and directed the parties to proceed to a final hearing on September 7, 2012. On August 23, 2012, PK Time filed an ex parte petition in the Supreme Court of New York, Nassau County, seeking a stay of the arbitration proceedings. The court entered a temporary restraining order and transferred the case to the Supreme Court of New York, New York County. The action was subsequently removed to this Court.

[3] PK Time's acceptance of this partial award on liability gives it arguments of the Arbitrators' bias and partiality on procedural matters a hollow ring.

B. The Agreement

The Agreement states, in relevant part, that "[t]he construction, interpretation and performance of this Agreement and all transactions under it shall be governed in accordance with the laws of the State of New York, United States, including any rules and regulations issued by any competent agency in the United States." (ECF No. 12, at 9.) The Agreement continues:

> Any disputes, claims or controversies arising ou[t] of or relating to any provision of this Agreement or the validity, construction or performance of this Agreement, or the breach thereof, shall be resolved by arbitration conducted under the Commercial Arbitration Rules of the American Arbitration Association ("AAA") as such may be amended from time to time, which rules and procedures are incorporated into and made part of the Agreement by reference. . . .
>
> The parties hereby consent to the jurisdiction of only the courts of New York or of the United States and agree that the court of the State of New York shall have jurisdiction for the purpose of enforcing the arbitration agreement and proceeding to entry of judgment on any award. (Id.)

C. The Parties' Arguments

PK Time seeks removal of the Arbitrators, changes in the arbitration procedures, and reversal of certain arbitration rulings. PK Time contends that the Arbitrators acted with partiality and bias by applying differing discovery standards, which resulted in limited discovery for PK Time and more expansive discovery for Robert. PK Time further argues that the convening of the arbitration in England and certain statements made during the proceedings demonstrate the Arbitrators bias and hostility against PK Time.

Robert argues the petition should be dismissed because (i) the Federal Arbitration Act, 9 U.S.C. § 10 (the "FAA"), bars interlocutory intervention in the arbitration process; (ii) the IDCR's decision not to remove the Arbitrators is conclusive; and (iii) PK Time has failed to state a claim for relief because the facts alleged do not show bias.

DISCUSSION

I. THE FEDERAL ARBITRATION ACT PROHIBITS PRE-AWARD CHALLENGES TO ARBITRATORS

"In the Second Circuit, it is well established that a district court cannot entertain an attack upon the . . . partiality of arbitrators until after the conclusion of the arbitration and the rendition of an award." CRC Inc. v. Computer Sci. Corp., No. 10 Civ. 4981 (HB), 2010 WL 4058152, at *5 (S.D.N.Y. Oct. 14, 2010) (internal quotations omitted). The Second Circuit has clearly and unequivocally construed the FAA to "not provide for pre-award removal of an arbitrator." Aviall, Inc. v. Ryder Sys., Inc., 110 F.3d 892, 895 (2d Cir. 1997); see Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Holt Cargo Sys., Inc., No. 99 Civ. 3699 (RCC), 2000 WL 328802, at *2 (S.D.N.Y. Mar. 28, 2000). Thus, in order to pursue its argument that the Arbitrators were biased against it, PK Time "must proceed with arbitration and raise any objections in a motion to vacate the award." Diemaco v. Colt's Mfg. Co., 11 F. Supp. 2d 228, 234 (D. Conn. 1998).

There is no good reason to create an exception to this bright-line rule. Certainly, PK Time does not cite one. As Robert highlights, the Supreme Court in Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S.Ct. 1758 (2010), reviewed a "partial award" under the FAA, which dealt with the "threshold matter" of whether class arbitration was proper. Id. at 1765. Nothing in the Stolt-Nielsen opinion countenanced the kind of interlocutory challenge to arbitrators on the basis of partiality that PK Time seeks to advance here.

PK Time does not directly contest that the Court's review of its arbitration with Robert is governed by the FAA. See 9 U.S.C. §§ 202, 203 (implementing the New York Convention); Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 18–19 (2d Cir. 1997). Rather, seemingly aware that the FAA categorically prohibits the pre-award relief it seeks, PK Time instead argues (perfunctorily) that pursuant to the parties' choice of law provision in the

Agreement, New York law, not the FAA, should control whether the Court may hear a pre-award challenge to the Arbitrators on the grounds of their purported bias.[4]

The general choice of law provisions in the Agreement here, however, merely set forth the law governing the "rights and duties of the parties"; they do not control the procedural rules that govern the arbitration itself. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63–64 (1995). The Court will not construe a general choice of law provision like the one included in the Agreement to require the incorporation of (conflicting) New York procedural law into an action otherwise governed by the FAA. See Security Ins. Co. of Hartford v. TIG Ins. Co., 360 F.3d 322, 327 (2d Cir. 2004); InterChem Asia 2000 PTE. Ltd. v. Oceana Petrochemicals AG, 373 F. Supp. 2d 340, 346–47 (S.D.N.Y. 2005); cf. Aviall, 110 F.3d at 897 (noting that contract at issue included choice of law provision requiring the application of New York law).

II. PK TIME HAS FAILED TO MEET ITS BURDEN UNDER NEW YORK LAW

But even if New York law did apply here, and the Court were to consider PK Time's challenge, the "extraordinary relief" of removing the Arbitrators before an award is made is available only where the Arbitrators' "bias [is] clearly apparent based upon established facts, not merely supported by unproved and disputed assertions." Bronx-Lebanon Hosp. Cntr. v. Signature Med. Mgmt. Grp., LLC, 775 N.Y.S.2d 279, 280 (1st Dep't 2004) (citations omitted). PK Time is miles away from sustaining its burden. PK Time argues that the Arbitrators exhibited partial behavior favoring Robert because, in sum and substance, the Arbitrators: (i) did not adhere to their initial directions regarding the length and schedule of the hearing, (ii) issued

[4] Under New York law, "the courts have inherent power to disqualify an arbitrator before an award has been rendered." Bronx-Lebanon Hosp. Cntr. v. Signature Med. Mgmt. Grp., LLC, 775 N.Y.S.2d 279, 280 (1st Dep't 2004) (quoting Astoria Med. Grp. v. Health Ins. Plan of Greater New York, 182 N.E.2d 85, 86 (N.Y. 1962)).

discovery rulings that were unreasonable and detrimental to PK Time, and (iii) blamed PK Time for causing delays at the March 27, 2012 hearing. Additionally, PK Time alleges bias because two of the Arbitrators appeared at a conference at which Robert's expert witness also spoke.

PK Time's assertions are wholly insufficient. New York law is clear that courts should intervene to remove arbitrators only where "there exists a real possibility that injustice will result." Id. (quoting Lipshutz v. Gutwirth, 106 N.E.2d 8, 11 (N.Y. 1952)); see Nationwide Mut. Ins. Co. v. Michaels, 828 N.Y.S.2d 739, 739–40 (4th Dep't 2006). The actions PK Time alleges constitute misconduct were clearly just standard procedural rulings, well within the discretion of the Arbitrators in the control of the proceedings. See Sobel v. Charles Schwab & Co., 828 N.Y.S.2d 720, 721 (3rd Dep't 2007) ("Procedural matters regarding pleadings, disclosure and the manner in which the hearing is conducted are generally left to the discretion of the arbitrator.").

Finally, PK Time is clearly speculating about any interaction between the Arbitrators and Robert's expert witness; this is not sufficient to "warrant disqualification of the arbitrator on the ground of the appearance of bias or partiality." Henry Quentzel Plumbing Supply Co. v. Quentzel, 598 N.Y.S.2d 23, 24 (2d Dep't 1993). A party's undisclosed relationship with an arbitrator that is "peripheral, superficial or insignificant" does not warrant the vacating of an award, Cross Properties, Inc. v. Gimbel Bros., Inc., 225 N.Y.S.2d 1014, 1016 (1st Dep't) aff'd, 187 N.E.2d 129 (N.Y. 1962), because "if the courts were to disqualify every arbitrator who has had professional contacts with a party or witness, it would be difficult to maintain the arbitration system." Henry Quentzel, 598 N.Y.S.2d at 24. Furthermore, PK Time has provided no evidence, beyond its "speculative claims of prejudice and remote and speculative allegations of partiality," to support its allegations of bias. Fleury v. Amedore Homes, Inc., 967 N.Y.S.2d 179, 181 (3rd Dep't 2013). PK Time has not established that there exists even the appearance of bias

or partiality on behalf of the Arbitrators, and so interlocutory relief to remove the Arbitrators is not warranted.[5]

CONCLUSION

For the foregoing reasons, PK Time's petition is DENIED and Robert's motion to dismiss is GRANTED. The Clerk of the Court is directed to terminate the motion at docket entry 6 and close this case.

Dated: New York, New York
July 23, 2013

SO ORDERED

PAUL A. CROTTY
United States District Judge

[5] The Court thus need not address Robert's remaining arguments in favor of dismissal.