IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

VANQUISH WORLDWIDE, LLC, a Wyoming limited liability company, Petitioner, vs. UNITED SADAT TRANSPORTATION AND LOGISTICS COMPANY, an Afghanistan corporation, Respondent.	Case No. 15-CV-0135-SWS

ORDER ON PETITION TO VACATE AND CROSS-PETITION TO CONFIRM ARBITRATION AWARD

This matter comes before the Court on Petitioner Vanquish Worldwide, LLC's Petition to Vacate an Arbitration Award. Vanquish seeks to vacate an arbitrator's award of $6.5 million to Respondent United Sadat Transportation and Logistics Company (Sadat Transportation) in phase one of a bifurcated arbitration proceeding. In essence, Vanquish asserts the arbitrator wrongfully prevented Vanquish from putting on witnesses and presenting evidence, misapplied Wyoming law, and wrongfully made an award of damages in the liability phase of the arbitration. Sadat Transportation responded in opposition to the Petition (ECF No. 12), and also filed a counter-petition (ECF No. 14), seeking to confirm the first phase of the arbitration and the award of $6.5 million dollars.

FACTUAL BACKGROUND

In 2011, Vanquish, a Wyoming LLC, entered into a contract with the U.S. Government to transport cargo to and from military bases in Afghanistan. Under this

arrangement, Vanquish was a "prime" contractor. The U.S. Government required 51% of the labor to be performed by Afghan citizens or permanent resident aliens of Afghanistan. Thus, Vanquish entered into a subcontract with Sadat Transportation, an Afghan transport company. Under the subcontract, Vanquish was responsible for administering and managing the prime contract, and Sadat Transportation was responsible for actually carrying out the transports.

The U.S. Government set forth standards for transports in both the prime contract and a document called the Performance Work Statement. The Government would deduct payments for any deficient or failed missions. Disputes over deductions in payments could be challenged through a claims process. The U.S. Government awarded individual missions to contractors based upon an Order of Merit List (OML), ranking contractors' past performance.

Under the subcontract, Sadat Transportation agreed to perform the transports in accordance with these standards. Under Article 1.3.8, "[a]ll other deductions, back charges, fees, penalties, or reductions in [Vanquish] invoices by the [U.S. Government], due to [Sadat Transportation] deficiencies, will be charged to the [Sadat Transportation]." (Subcontract, ECF No. 2-1, p. 153). Vanquish would also reduce payment to Sadat Transportation for damages or thefts to government property, including fuel. If the U.S. Government delayed or withheld payment, Vanquish would not pay Sadat Transportation until it received payment. The parties agreed to submit any disputes arising out of the contract to arbitration in Cheyenne, Wyoming, to be governed by Wyoming law.

From September 2011 through March 2014, Sadat Transportation carried out thousands of transports. At some point, the U.S. Government's payments to Vanquish became inconsistent. Vanquish asserts payments were late, inaccurate, and deviated from the prime contract agreement. Consequently, Vanquish's payments to Sadat Transportation were inconsistent and incomplete. Vanquish asserts this was in part due to Sadat Transportation's failure to complete over 1,000 missions.

Vanquish argues under the subcontract, it was permitted to charge Sadat Transportation for failed missions, but elected not to exercise that right at the beginning of the relationship. Vanquish claims it warned Sadat Transportation that at some point, it would audit the contract and charge Sadat Transportation for these failed missions. Vanquish asserts it charged Sadat Transportation for failed missions for the first time in November 2012.

The relationship between the parties became contentious in late 2012 and into 2013. In March of 2013, the parties met in Dubai and signed an amendment to the subcontract, altering the reductions Vanquish could charge Sadat Transportation for. Notwithstanding the meeting and amendment, the parties continued to have contract disputes regarding payments. Vanquish asserts "it had to find a way to reconcile the amounts [Sadat Transportation] owed to it." (ECF No. 2, p. 10). Vanquish suspended payments to Sadat Transportation and used new payments from the U.S. Government to offset what Vanquish believed Sadat Transportation owed. Sadat Transportation asserts Vanquish misrepresented the sorts of reductions and deductions it was making.

Because of these disputes, in December 2013, Sadat Transportation invoked the subcontract's arbitration clause and filed an action with the International Chamber of Commerce's International Court of Arbitration. Sadat Transportation claimed Vanquish breached the subcontract, breached the implied warranty of good faith and fair dealing, converted Sadat Transportation's property, and unjustly enriched itself. Vanquish filed counterclaims for breach of the subcontract. The International Court of Arbitration appointed a single American arbitrator from a firm in San Francisco, Steven Smith (hereinafter the Tribunal).

The Tribunal bifurcated the arbitration proceedings, with the first stage addressing liability, and the second addressing damages. The Tribunal set forth a procedural order for the first phase. ("First Procedural Order," ECF No. 2-1, pp. 359-363). The Tribunal ordered the parties to file written witness statements, leaving only cross-examination for the hearing. Each party was to notify the Tribunal which witnesses or experts offered by the other party it wished to cross-examine at the hearing. This was the only way a witness or expert would be called to testify. The parties were also to identify any witnesses who would testify in a language other than English.

At some point before the hearing, Sadat Transportation filed an unauthorized Motion for Partial Summary Judgment. (ECF No. 2-1, pp. 413-429). Sadat Transportation requested preliminary relief in the amount of $5,274,375.13. As an alternative to paying Sadat Transportation outright, Sadat Transportation requested the Tribunal require Vanquish to put the funds into a trust or escrow account. Under Article 28 of the ICC's arbitration rules, (which the parties agreed would govern arbitration under the

subcontract) the tribunal "may, at the request of a party, order any interim or conservatory measure it deems appropriate." (See Motion for Partial Summary Judgment, ECF No. 2-1, p. 425). Vanquish objected to the motion. The Tribunal deferred ruling on the motion.

TRIBUNAL'S AWARD

During the first phase, the Tribunal determined both parties were liable for breach of contract. The Tribunal held, under Article 1.3.8 of the subcontract, Vanquish was entitled to charge Sadat Transportation for any lost revenue resulting from Sadat Transportation's performance of transports. "The Tribunal generally agrees with Vanquish that non-payment for failed missions is a reduction under [the subcontract], and that the amount of a reduction to be borne by Sadat Transportation is not limited to the amount that Sadat Transportation would have earned." (Tribunal Order, ECF No. 2-1, p. 483). In other words, not only did Sadat Transportation stand to get paid nothing if it failed to comply with the mission standards, it could actually be required to pay Vanquish for the amount Vanquish expected to make on the mission. The Tribunal found Vanquish was entitled to charge Sadat Transportation for lost revenues on unpaid or failed missions only up until September 16, 2012, the effective date of the amendment.

The Tribunal found Vanquish had not waived its right to charge Sadat Transportation for lost revenues simply by failing to charge them at the time incurred, as the subcontract contained a "no waiver" clause. However, due to a lack of information, the Tribunal could not determine the amounts Vanquish was actually permitted to charge

Sadat Transportation. The Tribunal left the issue to be determined during the damages phase.

The Tribunal held Vanquish could not seek consequential damages for failed missions or deficient performance, limiting Vanquish's remedy to the specific damages provided for in Article 1.3.8 of the subcontract. The Tribunal provided two theories to support this holding. First, the Tribunal accepted Vanquish's interpretation of Article 1.3.8 as a liquidated damages clause. The Tribunal held Vanquish could not seek consequential damages in addition to the lost revenue damages because "where parties have agreed to a reasonable liquidated damages clause, they cannot separately recover additional damages for the same deficiencies in performance." (See Tribunal Order, ECF No. 2-1, p. 495). The Tribunal found Vanquish could not seek additional consequential damages for things such as lost demurrage, lower OML rankings, and suspensions resulting from deficient performance of missions.

Under an alternative theory, the Tribunal stated the amendment could be viewed as an exculpatory clause, relieving Sadat Transportation from liability for Vanquish's lost revenue due to failure to comply with the U.S. Government standards. The Tribunal held Vanquish could not circumvent this agreement by asserting a separate breach of contract claim based upon the same conduct.

The Tribunal found Vanquish could not charge Sadat Transportation for lost revenues after the amendment's effective date. The Tribunal held Vanquish breached the amendment because it charged Sadat Transportation for such lost revenue, and in some

instances stopped payments altogether, after the effective date of the amendment, September 16, 2012.

The Tribunal also found Vanquish breached the implied covenant of good faith and fair dealing based upon its accounting procedures, and also wrongfully withheld $4 million, purportedly justified by its fear the U.S. Government would charge it for missing fuel in the future. The Tribunal found Sadat Transportation sufficiently set forth a claim for fraud, evidenced by specific instances where Vanquish misled Sadat Transportation as to payments and deductions. The Tribunal stated "in many instances, [Vanquish's] conduct [was] [ ] designed to induce [Sadat Transportation] to continue to perform missions under the Subcontract despite [Vanquish's] attempts to avoid any payment for those services, generally on the undisclosed ground that payments might ultimately be due from [Sadat Transportation]. . . ." (ECF No. 2-1, p. 492).

Most highly contested is the Tribunal's finding that Vanquish converted $6.5 million from Sadat Transportation. The Tribunal based this holding upon Vanquish's responses to certain questions in the Post-Hearing briefing. In one response, Vanquish stated prior to the effective date of the amendment, it accrued $3,300,000 for reductions for failed missions as a result of the U.S. Government charges against its invoices. (See Vanquish Post-hearing Brief, ECF No. 2-1, p. 517). The Tribunal also asked, "Putting aside your claimed ability to offset amounts [Sadat Transportation] owes [Vanquish] against amounts [Vanquish] owes [Sadat Transportation], are there any amounts that you do not dispute are owed to [Sadat Transportation]?" Vanquish responded, "Yes, Vanquish has accounted for amounts that it owes [Sadat Transportation]. To date, that

amount is approximatively $6,500,000 without regard to any offsets for breach of contract or consequential damages." (See Vanquish Post-hearing Brief, ECF No. 2-1, p. 518). Vanquish arrived at this sum based upon completed missions paid for by the U.S. Government in March and June of 2013, and also January of 2014, as well as funds Vanquish recovered through claims proceedings. Vanquish justified it withheld these funds in part because of offsets it thought it was entitled to, and also in part because of its need to mitigate its damages for lowered OML rankings.

The Tribunal held this response constituted an admission of engaging in "self-help" not authorized by the subcontract. The Tribunal held Vanquish's actions constituted conversion under Wyoming law and ordered it to pay the funds to Sadat Transportation immediately. The Tribunal seemed to indicate it was making this ruling based upon Sadat Transportation's previous unauthorized Motion for Partial Summary Judgment.

Based upon the conversion and fraud findings and applicable Wyoming law, the Tribunal found Sadat Transportations would be able to pursue a claim for punitive damages under Wyoming law. The Tribunal noted:

"148 As explained further below, the Tribunal will consider Vanquish's continued unlawful withholding of these amounts in determining the appropriate amount, if any, of punitive damages. As a result of the Tribunal's finding with respect to [Sadat Transportation's] conversion claim, the Tribunal will make no further ruling with respect to [Sadat Transportation's] unauthorized Motion for Partial Summary Judgment." (ECF No. 2-1, pg. 489). After discussion the applicable Wyoming law concerning the standards for an award of punitive damages the Tribunal further explained:

"170 Accordingly, the Tribunal finds that the basis for the application of punitive damages is met. The appropriate amount of such damages, if any, will be determined in the damages phase of this arbitration, when the Tribunal will consider not only the behavior that forced [Sadat Transportation] to initiate arbitration, but also the extent to which Vanquish continues to unlawfully withhold monies found by the Tribunal to be due and owing to [Sadat Transportation] under the parties' Subcontract." (ECF No. 2-1 at 494).

The Tribunal found Sadat Transportation also breached the subcontract by failing missions or failing to complete missions in compliance with the relevant standards, as well as any failing to submit TMRS for completed missions. The Tribunal also found Sadat Transportation liable for theft of equipment. Again, the Tribunal left the damages for these breaches to be determined in the next phase.

Vanquish filed a Motion for Reconsideration of the Tribunal's award, which was denied August 18, 2015.

PROCEDURAL BACKGROUND

Vanquish filed the present Petition to Vacate the Arbitration Award August 13, 2015. Vanquish argues the Tribunal: (1) prevented it from presenting relevant evidence; (2) exceeded its authority; (3) disregarded the law; and (4) deprived it of a fair hearing. Vanquish bases its argument in large part on principles of fairness and "doing what's right." (Vanquish's Final Brief, ECF No. 29).

Sadat Transportation filed an Opposition to the Petition (ECF No. 12), as well as a Counter-Petition to Confirm Arbitration Award (ECF Nos. 13-14). Vanquish moved for

an evidentiary hearing, to which Sadat Transportation opposed and this Court denied. The Magistrate Judge set forth a scheduling order directing the parties to file final supplemental briefs in support of their arguments.

STANDARD OF REVIEW

In reviewing the Tribunal's award, this Court looks both to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter Convention), implemented through 9 U.S.C. §200-208, as well as the Federal Arbitration Act (FAA), found at 9 U.S.C. §§ 1-16. The Convention applies when "(1) there is a written agreement to arbitrate the matter; (2) the agreement provides for arbitration in a Convention signatory nation; (3) the agreement arises out of a commercial legal relationship; and (4) a party to the agreement is not an American citizen." *Freudensprung v. Offshore Technical Services, Inc.*, 379 F.3d 327, 339 (5th Cir. 2004); *accord Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982). In this case, all four requirements are established based upon the nature of the contract, the fact arbitration was conducted in the United States, and the citizenship of the parties.

Under the Convention, a district court must confirm an arbitration award unless one of the limited grounds for refusal specified in the Convention applies. *Admart AG v. Stephen and Mary Birch Foundation, Inc.*, 457 F.3d 302, 307 (3d Cir. 2006). Relevant to the present dispute, under Article V of the Convention, a district court may refuse to recognize or enforce an award if the objecting party presents proof that "[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." United Nations Commission on International Trade Law, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V.1.d. 3.

When the Convention applies, the FAA also applies to the extent that it does not conflict with the Convention or its implementing statutes. 9 U.S.C. § 208. Under the FAA, a district court's ability to review an arbitration award is "among the narrowest known to the law." *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10th Cir. 2001). When a party consents to arbitration, it gives up certain procedures and opportunities for review offered by the courtroom in exchange for simplicity, informality, and expedition of issues. *Id.* To fulfill these goals of arbitration contractually agreed to by the parties, courts must exercise caution when setting aside arbitration awards. *Id.*

"On application for an order confirming the arbitration award, the court 'must grant' the order 'unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11" of the FAA. *Hall Street Assoc., LLC v. Mattel, Inc.*, 552 U.S. 576, 587 (2008). The court may vacate an arbitration award only:

> (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.

9 U.S.C. § 10(a).

Bearing in mind that the parties to binding arbitration have contracted to use arbitration rather than litigation as a means of resolving disputes, and that arbitrators are generally selected for their expertise in a particular area, courts accord maximum deference to an arbitrator's decision. *Bowen*, 254 F.3d at 936. This deference is given to findings of fact: "[e]rrors in the arbitrator's ... findings of fact do not merit reversal." *Bowles Financial Group, Inc., v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1012 (10th Cir.1994). It is also given to legal conclusions: "[a]n arbitrator's erroneous interpretations or applications of law are not reversible." *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir.1995). Added to this extraordinarily deferential and narrow standard of review with regard to arbitration awards generally is the rule regarding arbitrators' interpretations of contracts: "Whether the arbitrators misconstrued a contract is not open to judicial review." *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 n. 4 (1956).

DISCUSSION

A. This Court may review the award notwithstanding provision of the contract between the parties seeking to prevent judicial review.

As a preliminary matter, the Court is unpersuaded by Sadat Transportation's argument that the parties contractually agreed the arbitration award could not be reviewed by this Court. The subcontract's clause pertaining to arbitration states "[i]t is agreed by both parties that the arbitrator's decision is final, and that no party may take any action, judicial or administrative, to overturn this decision." (See ECF No. 2- 1, p. 158). Sadat Transportation asserts this clause, as well as the Rules of Conciliation and Arbitration of

the International Chamber of Commerce, preclude review of the award. This argument fails for two reasons.

First, Sadat Transportation's argument ignores the second sentence following this sentence which provides "[p]ending any decision, appeal or judgement referred to in this provision or the settlement of any dispute arising under this Agreement, Subcontractor shall proceed diligently with the performance of this Agreement." Sadat Transportation's argument would render this sentence superfluous, which Wyoming law precludes. *See SOS Staffing Services, Inc. v. Fields*, 54 P.3d 761, 766 (Wyo. 2002). In addition, the contract provides and the parties agreed that the judgment may be entered in any court having jurisdiction thereof, which gives this Court the power to review the award.

In *Bowen v. Amoco Pipeline Co.*, the Tenth Circuit noted that parties to an agreement may contractually eliminate judicial review, so long as the intent to do so is clear and unequivocal. 254 F.3d at 931. However, the Tenth Circuit clarified this statement in *MATEC, Inc. v. Gorelick*, 427 F.3d 821, 830 (10th Cir. 2005), limiting contractual preclusion of judicial review to *appellate* review of the district court's confirmation or vacatur of an award. In its analysis, the *MATEC* court noted it would be fundamentally inconsistent to permit a district court to confirm an arbitration award, but deny it the ability to review such an award under 9 U.S.C. § 10. *Id.* at 829 (citing *Hoeft v. MVL Group, Inc.*, 343 F.3d 57, 64 (2d Cir. 2003)). Hence, the court limited its prior holding in *Bowen*. Parties cannot contractually eliminate a district court's ability to review and vacate an arbitration award.

In this case, the parties are asking this district court to either vacate or confirm the award. Thus, the subcontract's provision attempting to eliminate judicial review does not apply to this Court. As set forth in *MATEC*, Sadat Transportation cannot simply use this Court as a "rubber stamp on the arbitration award." 427 F.3d at 829. This Court must also retain the right to abrogate the award based upon the narrow parameters set forth in 9 U.S.C. § 10. *Id.* For each of these reasons Sadat Transportation's argument fails.

B. Vanquish's arguments based upon the "manifest disregard of Wyoming law" standard do not warrant vacating the award.

Vanquish asserts the Tribunal manifestly disregarded Wyoming contract and damages law by deciding Vanquish could not pursue counterclaims and by ordering Vanquish to pay $6.5 million. In *Hall Street Assoc., LLC v. Mattel, Inc.*, 552 U.S. 576, 584-85 (2008), the Supreme Court limited grounds for vacating arbitration awards to those set forth in § 10 of the FAA. It rejected any other judicially created grounds, including the "manifest disregard of law" standard. However, the *Hall Street* decision seemed to leave intact the "manifest disregard" standard when it is used under the auspices of one of the limited parameters of § 10 of the FAA. For example, some circuits used the standard as a means to determine whether an arbitrator exceeded its authority, which is appropriate under § 10(a)(4) of the FAA.

The Tenth Circuit has "decline[d] to decide whether the manifest disregard standard should be entirely jettisoned." *Abbott v. Law Office of Patrick J. Mulligan*, 440 F.App'x 612, 619 (10th Cir. 2011) (unpublished opinion). In other words, the Tenth Circuit has not decided whether it will apply the "manifest disregard" standard as part of

§ 10(a)(4), or to do away with it as a judicially created ground. Notwithstanding the Tenth Circuit's uncertainty, it has continued to evaluate awards under the "manifest disregard" standard. *See e.g. Abbott*; *Hicks v. Cadle Co.,* 355 F.App'x 186 (10th Cir. 2009). Following the Tenth Circuit's approach, this Court considers the merits of Vanquish's "manifest disregard of law" arguments as a subset under §10(a)(4).

Manifest disregard is substantially different from a misunderstanding or misapplication of the law. *ARW Exploration Corp.*, 45 F.3d at 1463. "An arbitrator's erroneous interpretations or applications of law are not reversible." *Id.* A "manifest disregard" is a "'willful inattentiveness to the governing law.'" *Id.* (quoting *Jenkins v. Prudential-Bache Sec. Inc.*, 847 F.2d 631, 634 (10th Cir. 1988)). The party seeking to vacate the award must demonstrate the arbitrator (1) knew the law, and then (2) **explicitly** disregarded it. *Dominion Video Satellite, Inc. v. Echostar Satellite LLC*, 430 F.3d 1269, 1274 (10th Cir. 2001). This standard is not met even if the arbitrator "got the law wrong," and perhaps even "really wrong" absent additional evidence of egregious intentional misconduct. *Abbott*, 440 F.App'x at *8. In short, the arbitrator must have ignored the law completely, and instead dispensed his own brand of justice. *See Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp*, 559 U.S. 662, 671 (2010).

Here, Vanquish first asserts the Tribunal manifestly disregarded Wyoming contract law by eliminating its ability to pursue counterclaims. In essence, Vanquish challenges the Tribunal's interpretation of the "liquidated damages" provision of the subcontract, Article 1.3.8. Vanquish argues the Tribunal is mistaken about the effect of a liquidated damages clause under Wyoming law. Vanquish argues the case *Dewey v.*

Wentland, 2002 WY 2, ¶ 40, 38 P.3d 402, 417 (Wyo. 2002) stands for the opposite legal conclusion reached by the Tribunal. Vanquish believes under Wyoming law, it may still seek consequential damages even when the contract contains a liquidated damages provision.

Vanquish fails to meet its burden under a theory of "manifest disregard." It has not shown the Tribunal was aware of the holding in *Dewey.*[1] It has not shown the Tribunal knew the holding in *Dewey* and then took it upon himself to explicitly disregard it, and instead implement his own brand of justice. The Tribunal's order demonstrates the Tribunal researched and relied upon Wyoming law. The Tribunal cited the case of *G.C.I., Inc. v. Haught*, 7 P.3d 906, 910 (Wyo. 2000), and found Wyoming law precluded additional damages when parties have fixed the damages for a particular breach.[2] Even if this interpretation of Wyoming law was a misinterpretation or misapplication of the law, that is insufficient to warrant vacating an award. *ARW Exploration Corp.*, 45 F.3d at

[1] *Dewey* held "remedies provided in a contract generally are not exclusive." A subsequently sought remedy is barred only when it is inconsistent with the remedy initially pursued. Arguably, in this case, the Tribunal could have applied this rule, finding it would be inconsistent to allow additional damages other than those contained in Article 1.3.8. There is room for interpretation in *Dewey,* and it cannot be concluded that the Tribunal willfully disregarded this case.

[2] In *Haught*, an individual contracted with a construction company to build a house. After moving in, there were a number of issues with the construction. The construction company sued the homeowner for monies due for the construction. The homeowner argued it did not have to pay the amount because of the poor construction. The parties reached a settlement, wherein the homeowner would place a sum of money in escrow and the construction company would make repairs at its own expense. If the work was completed, the construction company would be entitled to the amount in escrow. The construction was not completed and the homeowner filed suit for breach of the settlement agreement. One of the issues the Wyoming Supreme Court considered was whether the amount placed in escrow was intended to be liquidated damages. The court provided a detailed discussion of liquidated damages clauses. To determine whether a clause is a liquidated damages clause, the court noted the question is whether the provision is an agreement, made in advance of breach, fixing the damages therefor. The court found that nowhere in the parties' settlement agreement was it indicated this amount was intended to serve as damages. Therefore, the court found the amount in escrow was not intended to be liquidated damages. The homeowner was entitled to recover more than the amount in escrow.

1463. The Court finds the Tribunal did not willfully disregard Wyoming law, even if Vanquish believes he interpreted it incorrectly.

The same can be said of Vanquish's complaint that the Tribunal misinterpreted the amendment as an exculpatory clause. This Court affords great deference to the Tribunal's interpretation of the contract in question. *Solvay Pharm. Inc.*, 442 F.3d at 477. Vanquish merely asserts the Tribunal misinterpreted the amendment and misapplied Wyoming law. This does not rise to the level of "manifest disregard" and provides no grounds for vacating the award.

Vanquish also asserts the Tribunal manifestly disregarded Wyoming damages law by awarding $6.5 million to Sadat Transportation based upon conversion. Vanquish argues the Tribunal's holding violates the tenet of Wyoming law requiring a party prove damages to a reasonable degree of certainty. Like its arguments above, Vanquish simply states the Tribunal misinterpreted and misapplied Wyoming damages law. This argument is insufficient to state a "manifest disregard of the law" ground for vacating the award. However, this Court does conclude that the Tribunal's directing Vanquish to make this "damage" payment to Sadat Transportation, at the conclusion of the liability stage of the bifurcated proceeding, is in excess of the Tribunal's authority.

C. The Tribunal did not exceed its authority when it interpreted the amendment.

Vanquish asks this Court to vacate the Tribunal's decision that it could not assert any counterclaims, given the exculpatory nature of the amendment. First, Vanquish's argument fails (or more likely refuses) to understand the discussion of the amendment as an exculpatory clause was an **alternative** theory supporting the Tribunal's decision. As

discussed *supra*, Vanquish fails to establish grounds to vacate the award based upon the Tribunal's initial interpretation of the "liquidated damages" provision. Thus, discussing the viability of this alternative is unnecessary.

In any event, Vanquish's argument on this point is yet another challenge of the Tribunal's interpretation of the amendment and its application of Wyoming law. As stated above, this Court provides great deference to an arbitrator's interpretation of a contract. *Solvay Pharm. Inc.*, 442 F.3d at 477. Misinterpretation or misapplication of law is not the same as a "manifest disregard of law." *ARW Exploration Corp.*, 45 F.3d at 1463. Therefore, Vanquish's argument as to the Tribunal's interpretation of the amendment fails to provide grounds to vacate the award.

D. The Tribunal did not deny Vanquish a fair hearing.

Vanquish believes it was denied a fair hearing based upon various events during the hearing: (1) Sadat Transportation did not call and cross-examine two witnesses—whose direct testimony was offered by Vanquish; (2) certain witnesses unexpectedly testified in a foreign language, using an amateur translator; and (3) one witness testified via Skype. "[A] fundamentally fair [arbitration] hearing requires only notice, opportunity to be heard and to present relevant and material evidence and argument before the decision makers...." *Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1013 (10th Cir. 1994). It should not go unnoticed that Vanquish lodged no substantive complaints about these procedural rulings until after receiving the Tribunal's decision.

Vanquish was made aware of the hearing and the procedure, including the inability to call its own witnesses. Vanquish was able to file extensive briefing, and

present evidence before and during the hearing. It was given the opportunity to present direct testimony of its witnesses by written statement. It was given the opportunity to address issues that arose at the hearing in a post-hearing brief. Vanquish did not raise any issues at the hearing, when it discovered certain witnesses would not testify in English. It did not seek to call the two witnesses it expected to be cross-examined. Even in its final briefing, it did not ask the Tribunal for the opportunity to present additional evidence. Vanquish had forewarning that one witness it had identified for cross examination may not be able to obtain a visa to travel to the United States and ultimately didn't. In sum, Vanquish fails to demonstrate how these events constitute a denial of a fundamentally fair hearing.

E. The Tribunal did not prevent Vanquish from presenting evidence relating to Sadat Transportation's fraud claim.

9 U.S.C. § 10(a)(3) authorizes a district court to vacate an arbitration award where the arbitrator is guilty of misconduct in refusing to hear evidence pertinent and material to the controversy. Vanquish's claim that the Tribunal refused to hear evidence is unconventional to say the least, as Vanquish fails to assert or provide evidence it ever asked to present the relevant evidence. Vanquish simply takes issue with the procedure set forth by the Tribunal to present evidence, arguing the process shackled its ability to adapt to what it contends were evolving claims. Vanquish claims had its witnesses been able to testify on cross examination by Sadat Transportation, as expected, it could have clarified some accounting issues to negate any intent to defraud Sadat Transportation. Vanquish cites *Gulf Coast Indus. Workers Union v. Exxon Co., USA*, 70 F.3d 847, 850

(5th Cir. 1995) to support its assertion that misleading a party into believing it need not present evidence is the same as refusing evidence.

The Court does not find any misconduct on the part of the Tribunal. The testimony of Vanquish's two proposed witnesses could have been included in their initial written statements. Vanquish claims it did not include this particular testimony or evidence because there was no need until Sadat Transportation changed its fraud theory. After reviewing Sadat Transportation's initial Statement of the Case (ECF No. 2-1, pp.38-42, 70-71) and Sadat Transportation's Reply In Support of Statement of the Case (ECF No. 2-1, pp. 135-141), the Court, as was the Tribunal, is not convinced. The Statement of the Case included the same three theories of fraud and same facts supporting such theories as the later Reply. Sadat Transportation did not expand its fraud claim. Vanquish was on notice of the facts it needed to refute from the initial statement of the case. Vanquish cannot blame Sadat Transportation, let alone the Tribunal, for its failure to include this evidence in written witness statements. The Tribunal did not engage in any misconduct by refusing to hear evidence pertinent to the controversy.

Furthermore, once Vanquish learned Sadat Transportation did not intend to cross-examine these witnesses at the hearing, it "considered trying to call them" but did not make any effort to do so. (ECF No. 2, p. 14). Vanquish's closing brief asserted "Eric Barton's, Mathew Naugher's, and Cody Schlomer's now undisputed testimony disproves Sadat Transportation's conspiracy theory." (ECF No. 2-1, p. 503). Vanquish never argues to the Tribunal in its closing brief that it had further evidence to rebut Sadat Transportation's theory of fraud. To the contrary, Vanquish asserts the testimony of its

witnesses, combined with the failure of Sadat Transportation to cross-examine these witnesses, refuted any of the "thin strands of [Sadat Transportation's] case." (ECF No. 2-1, p. 508). For these reasons, the Court finds no misconduct on the part of the Tribunal relating to the presentation of evidence on the fraud issue.

F. The Tribunal exceeded its authority when ruling on damages during the liability phase.

Vanquish argues the Tribunal erred by misleading it to believe evidence of damages was unnecessary at the first phase, but then awarding $6.5 million in damages to Sadat Transportation. Although Vanquish's argument on this point seems to be couched in language regarding a "manifest disregard of law" and refusal of evidence, it seems Vanquish believes the Tribunal exceeded its authority when ruling on damages in the liability phase.

Sadat Transportation argues the Tribunal did not award damages—it simply required Vanquish to relinquish money of Sadat Transportation that Vanquish tortiously converted. The Court finds Sadat Transportation's argument to be an exercise in semantics and does not agree. It is apparent from the Tribunal's order that the $6.5 million reflected the amount the Tribunal found, based upon the contract, Vanquish had wrongly converted from Sadat Transportation. The award of that sum of money to Sadat Transportation cannot be viewed as anything other than damages for conversion. *See Ferguson v. Coronado Oil Co.*, 884 P.2d 971 (Wyo. 1994) (jury award of damages on conversion of monies owed under net profits agreement); *Cross v. Berg Lumber Co.*, 7 P.3d 922, 932-33 (Wyo. 2000) (noting several methods for computing conversion

damages); *ANR Prod. Co. v. Ker-McGee Corp.*, 893 p.2d 698 (1995) (discussing damages for conversion, as well as prejudgment interest therefor). While as noted above the factual and legal findings of the Tribunal are not subject to vacatur, an award of these conversion damages to one party, at this point in the bifurcated proceedings, is in excess of the Tribunal's authority.

When an arbitrator exceeds the scope of his authority in issuing only a part of an award, the Court can vacate only that portion, leaving the remainder in force. *See Hicks v. Cadle Co.*, 355 F.App'x 186, *10-11 (10th Cir. 2009) (unpublished opinion) (reversing a district court's vacatur of part of an arbitration award based upon district court's interpretation of state law, not because the district court vacated only part of an award); *see also Comedy Club, Inc. v. Improv West Assoc.*, 553 F.3d 1277, 1288 (9th Cir. 2009) ("If an arbitrator exceeded the scope of his authority in issuing an award and that award is divisible, we may vacate part of the award and leave the remainder in force."). In this case the Tribunal's award of conversion damages to Sadat Transportation is divisible and therefore subject to vacatur.

For this reason, the Court hereby vacates **only that** provision of the Tribunal's award directing payment of $6.5 million to Sadat Transportation. While the Tribunal certainly properly found the funds to be wrongfully withheld, directing payment to Sadat Transportation at this stage in the proceedings exceeded his authority under the bifurcated proceedings. Certainly the Tribunal has the authority to direct payment of this amount into an escrow or trust account, or take another interim measure it finds necessary to conserve property or monies at issue. Under Article 28 of the ICC, the Tribunal "may, at

the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party." Applying this provision courts have found it to be within the authority of an arbitrator to order for the deposit of monies into a jointly-held escrow account. *E.g. Konker Maritime Enterprises, S.A. v. Compagnie Beilge D'Affretement*, 668 F. Supp. 267 (S.D.N.Y. 1987); *T.I.M.E.–DC, Inc. v. Management–Labor Welfare & Pension Funds*, 756 F.2d 939, 947 (2d Cir. 1985); *Trustees of Plumbers and Pipefitters Nat. Pension Fund v. Mar-Len, Inc.*, 30 F.3d 621, 626, n. 12 (5th Cir. 1994). Whether the Tribunal determines that such a requirement is necessary, will be up to his discretion.

Vanquish also takes issue with the Tribunal's inclusion of a provision by which it may increase the punitive damages, if any, against Vanquish for the delay in the delivery of the $6.5 million to Sadat Transportation. Briefly, the Court finds no viable grounds to vacate the Tribunal's determination concerning the potential award of punitive damages. Punitive damages have not been awarded and the Tribunal has simply and appropriately advised Vanquish that if punitive damages are awarded it will consider Vanquish's fraud and conversion and the intentional withholding of monies indisputably owed to Sadat Transportation. Frankly, the Court reads this portion of the Tribunal's order as a point of encouragement to Vanquish to make those payments to Sadat Transportation now. Nevertheless, at this point the Tribunal has not awarded any punitive damages, but properly advised the parties of the factors it would consider if any such award is made. Thus, Vanquish's assertion that punitive damages can only be awarded when

compensatory damages are awarded is premature. It should also be noted that this argument also challenges the Tribunal's interpretation of Wyoming law and the availability of punitive damages. Even if the Tribunal was "really wrong" when it interpreted Wyoming's laws on punitive damages, Vanquish fails to satisfy the "manifest disregard" standard for vacating an award. *Abbott*, 440 F.App'x at 622. However, the portion of the award requiring payment of this amount at this time to Sadat Transportation will be vacated at this time in accordance with the Court's ruling.

THEREFORE, it is HEREBY ORDERED

a) **the Tribunal's award for the first phase of arbitration is VACATED to the extent it requires the payment of $6.5 million to Sadat Transportation at this time;**

b) **the Tribunal's award for the first phase of arbitration is CONFIRMED in all other aspects.**

Dated this 19th day of January, 2016.

Scott W. Skavdahl
United States District Judge