UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MATTHEW CHARLES MITCHELL, Petitioner, v. DAVID TILLETT, et al., Respondents.	Case No. 15-cv-04044-VC **ORDER GRANTING MOTION TO DISMISS** Re: Dkt. No. 55

Unlike the Federal Arbitration Act, the New York Convention contains no exemption clause. *Compare* 9 U.S.C. § 1 *with* 9 U.S.C. § 202. Accordingly, a sailor's employment contract falls outside the FAA, but may fall within the Convention. *See Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1154-55 (9th Cir. 2008). That's the case here. The New York Convention applies to any arbitral award arising out of a legal relationship that is both commercial and non-domestic. 9 U.S.C. § 202; *Ministry of Def. of Islamic Republic of Iran v. Gould Inc.*, 887 F.2d 1357, 1362 (9th Cir. 1989). The arbitral ruling Mitchell seeks to vacate arose out of his work as a sailor for Oracle Team USA at the America's Cup yacht race – work reflecting a legal relationship of a commercial nature. Mitchell is a New Zealand national who was participating in an international competition, which also makes his legal relationship non-domestic. *See Balen v. Holland Am. Line Inc.*, 583 F.3d 647, 655 (9th Cir. 2009). This suffices to bring the award within the ambit of the New York Convention.

Mitchell notes that the *Rogers* decision stemmed from a petition to compel rather than a petition to vacate. This is true, but immaterial. *Rogers* didn't turn on procedural distinctions; it turned on the fact that the FAA contains an exemption clause, while the New York Convention

doesn't. *Rogers*, 547 F.3d at 1155.

Mitchell also objects that the award against him arose from a "sporting" rather than commercial relationship. But the two aren't mutually exclusive. Mitchell participated in a sporting event, and he did so under an employment contract that required his adherence to the event's rules. Resp. (Dkt. 61) at 13. Mitchell argues that the award against him didn't "arise[e] out of" the commercial aspect of any legal relationship, as the award dealt only with a noncommercial inquiry into possible cheating. *See* 9 U.S.C. § 202. In Mitchell's words, the arbitration had "more criminal than civil elements." Resp. (Dkt. 61) at 14. But again, the subject of the award was a direct function of Mitchell's work as a regatta participant. The award arose out of an alleged breach of the rules he agreed to follow in the course of his employment.

The issue then is whether Mitchell's petition to vacate is proper under the New York Convention. Unlike the FAA, the New York Convention doesn't provide specifically for vacatur. This leaves open the question of whether the Convention allows for vacatur at all – and if so, under what rules. The Ninth Circuit has yet to address this question, but a number of courts have imported the FAA's vacatur provisions into the Convention by way of the Convention's conditions for non-enforcement. *See, e.g.*, *Immersion Corp. v. Sony Computer Entm't Am. LLC*, No. 16-CV-00857-RMW, 2016 WL 2914415, at *3 (N.D. Cal. May 19, 2016); *LaPine v. Kyocera Corp.*, No. C 07-06132 MHP, 2008 WL 2168914, at *5-6 (N.D. Cal. May 23, 2008). As the argument goes, the Convention permits non-enforcement of an arbitral award set aside under domestic law, and the FAA is that domestic law. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V.1(e), June 10, 1958, 21 U.S.T. 2517; 9 U.S.C. § 10. This argument is persuasive – but of course only to the extent that the FAA supplies domestic arbitration law. Here, it doesn't. *See* 9 U.S.C. § 1. The FAA's exemption clause ensures that state arbitration law applies, along with state rules for vacatur. In Mitchell's case, this could mean the law of New York, the legal seat of arbitration under the America's Cup Protocol. Or it could mean the law of California, the state selected in the choice-of-law clause in Mitchell's employment agreement. The respondents argue that the "residual" clause, which

incorporates the FAA into the Convention "to the extent [it] is not in conflict," sweeps the FAA's vacatur provisions into the Convention. *See* 9 U.S.C. § 208. But if state arbitration law supplies the rules for vacatur, the FAA's overlapping provisions do conflict, and the residual clause has no effect.

Ultimately, though, there's no need to decide whether to import the FAA's vacatur rules or which state law applies, as Mitchell can't identify any interpretation of the Convention that would make his petition timely. The FAA bars vacatur petitions filed more than three months from the date of the arbitral award. 9 U.S.C. § 12. In New York, the limitation is 90 days. N.Y. C.P.L.R. 7511(a). In California, the limitation is 100 days. Cal. Civ. Proc. Code § 1288. And if this Court were to abandon all statutory alternatives and simply read into the Convention an equitable vacatur remedy, as Mitchell seems to suggest, laches would impose a limitation of its own. Under every conceivable approach, Mitchell's petition to vacate – filed two years after the award against him – is barred. This is incurable on amendment, and the petition is therefore dismissed with prejudice.

IT IS SO ORDERED.

Dated: October 28, 2016

VINCE CHHABRIA
United States District Judge