UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADRIAN LISMORE,

Petitioner,

-against-

SOCIETE GENERALE ENERGY CORP. and SOCIETE GENERALE, S.A.,

Respondents.

ORDER DENYING PETITION TO VACATE ARBITRATION AWARD AND GRANTING CROSS-PETITION TO CONFIRM ARBITRATION AWARD

16 Civ. 8012 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

On October 13, 2016, petitioner Adrian Lismore ("Lismore") filed a petition seeking vacatur of an arbitration award, which denied various claims that Lismore asserted against his former employer, Societe Generale Energy Corporation ("Societe Generale"). On November 30, 2016, Societe Generale filed a cross-petition to confirm the award. For the reasons stated herein, Lismore's petition to vacate is denied and Societe Generale's petition to confirm is granted.

STANDARD OF REVIEW

A court's review of arbitral awards is "severely limited." *Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F. 3d 60, 71 (2d Cir. 2012) (internal quotation marks and citations omitted). The Second Circuit has "repeatedly recognized the strong deference appropriately due arbitral awards and the arbitral process, and has limited its review of arbitration awards in obeisance to that process. Therefore, in order to obtain vacatur of the decision of an arbitral panel under the FAA, a party must clear a high hurdle." *Id.* at 72 (internal quotation marks and citations omitted). The "showing required to avoid summary confirmation of an arbitration award is high, and the party arguing in favor of vacating an award

shoulders a heavy burden of proof." *1199 SEIU United Healthcare Workers E. v. Lily Pond Nursing Home*, 2008 WL 4443945, at *4 (S.D.N.Y. Sept. 29, 2008) (citing *D.H. Blair and Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006)).

Where bias is alleged, as it is here, "the court is under an obligation to scan the record to see if it demonstrates 'evident partiality' on the part of the arbitrators." *Saxis S. S. Co. v. Multifacs Int'l Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967). The evident partiality standard "may be met by inferences from objective facts inconsistent with impartiality." *Pitta v. Hotel Ass'n of N.Y. City, Inc.*, 806 F.2d 419, 423 n.2 (2d Cir. 1986). However, "the burden of proving evident partiality rests upon the party asserting bias." *Scandinavian Reinsurance Co.*, 668 F. 3d at 72. "Mere speculation of bias" is insufficient. *Ecoline, Inc. v. Local Union No. 12 of Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers, AFL-CIO*, 271 F. App'x 70, 72 (2d Cir. 2008).

Ultimately, "evident partiality within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration. Unlike a judge, who can be disqualified in any proceeding in which his impartiality *might* reasonably be questioned, an arbitrator is disqualified only when a reasonable person, considering all of the circumstances, would *have* to conclude that an arbitrator was partial to one side." *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) (emphasis in original). Thus, if a reasonable person could conclude that the arbitration panel was impartial, vacatur on the grounds of bias is improper.

DISCUSSION

Although the arbitration panel had three members, Lismore focuses his allegations of bias on Susan T. Mackenzie ("Mackenzie"), the chair of the panel. Having reviewed the record and the parties' submissions, I hold that Lismore has failed to demonstrate

evident partiality on the part of Mackenzie or any other panel member, such that a reasonable person would *have* to conclude that the panel was biased against Lismore. I also hold that Societe Generale did not procure the award through "undue means," and that Mackenzie did not improperly refuse to "hear evidence pertinent and material to the controversy." 9 U.S.C. § 10.

I. Mackenzie's Appointment to the Panel is Not Grounds for Vacatur

Lismore argues that because Mackenzie is a "repeat player" in the employment arbitration field, Mackenzie was inherently biased against Lismore because "only SocGen has the ability to give Mackenzie continuing business." This argument is entirely speculative. Lismore offers no evidence indicating that Mackenzie has any present or anticipated business relationship with Societe Generale. A generalized, policy-based grievance regarding arbitrators' hypothetical incentive to favor defendant employers is "exactly the type of speculation that has been repeatedly held not to support a finding of impermissible bias." *Van Buren v. Cargill, Inc.*, 2016 WL 231399, at *6 (W.D.N.Y. Jan. 19, 2016); *see also Pampano-Windy City Partners v. Bear, Stearns & Co.*, 698 F. Supp. 504, 517-18 (S.D.N.Y. 1988) ("An attack upon the mere payment of arbitrator fees is an attack upon arbitration itself, and as such the Court finds it without merit.").

Lismore also alleges that Mackenzie "concealed" from Lismore the number of times Mackenzie served as an arbitrator in matters involving Societe Generale. This too, is speculative. Mackenzie disclosed that she "served on a tripartite arbitration panel that issued an award in 2011 involving Societe Generale," Ex. 7, and Lismore provides no evidence to suggest that this disclosure was incomplete. Lismore further asserts that Mackenzie only disclosed matters involving Societe Generale that occurred within the last five years. The basis for this allegation appears to be the fact that Mackenzie disclosed that she had limited experience with members of the law firm representing Societe Generale, "but not in the past five years." *Id.* This

in no way suggests, let alone proves, that Mackenzie limited her disclosure with respect to Societe Generale to the past five years only. Lismore's allegation of incomplete disclosure fails. *See Nat'l Indem. Co. v. IRB Brasil Resseguros S.A.*, 164 F. Supp. 3d 457, 483 n.34 (S.D.N.Y. 2016) (incomplete disclosure claim unsupported by evidence was "pure speculation").

Lismore's remaining allegation concerning Mackenzie's appointment – that Mackenzie "maneuvered herself into the powerful position of Chair so that she would be able to assure SocGen's victory in the arbitration" – is entirely conclusory and will not be credited.

II. The Record Does Not Reflect Evident Partiality

The gravamen of Lismore's petition is that Mackenzie, as chair of the panel, intentionally interfered with Lismore's case using a variety of tactics, such as disrupting examinations, guiding witnesses, restating witness testimony, and endorsing Societe Generale's disruptive and overzealous objections. Lismore points to various instances in which Mackenzie granted objections in Societe Generale's favor, clarified or summarized witness testimony in a manner that frustrated Lismore's counsel, or instructed Lismore's counsel to drop an issue and move on to the next line of examination.

Such conduct is not evidence of bias against Lismore, and mid-hearing rulings such as these are precisely the types of decision that should not be second guessed by a district court. "Arbitrators possess great latitude to determine the procedures governing their proceedings and to restrict or control evidentiary submissions, without the need to follow 'all the niceties observed by the federal courts.'" *Supreme Oil Co. v. Abondolo*, 568 F. Supp. 2d 401, 408 (S.D.N.Y. 2008) (quoting *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997)). Moreover, "evident partiality may not be shown by alleged procedural or evidentiary errors, by legitimate efforts to move the case along, or by failure to follow the rules of evidence."

Areca, Inc. v. Oppenheimer & Co., 960 F. Supp. 52, 56 (S.D.N.Y. 1997) (internal quotation marks and citation omitted). Lismore claims that Mackenzie's conduct prevented him from establishing a sufficient evidentiary record to support his case, but "an arbitrator's refusal to hear evidence does not automatically require the vacatur of an award." *GFI Sec. LLC v. Labandeira*, 2002 WL 460059, at *7 (S.D.N.Y. Mar. 26, 2002). Rather, arbitrators "must have enough evidence to make an informed decision, but 'they need not compromise the speed and efficiency that are the goals of arbitration by allowing the parties to present *every piece* of relevant evidence.'" *Id.* (quoting *Areca*, 960 F. Supp. at 55).

One of the most frequent objections made by Societe Generale's counsel was "asked and answered." Societe Generale's counsel explains that he made this objection because Lismore's counsel "often asked repetitive lines of questioning." Simon Decl. ¶ 170. Mackenzie sustained over half of these objections. This is not an indication of bias, but a reflection of Mackenzie's "legitimate efforts to move the case along," *Areca*, 960 F. Supp. at 56, which is well within her power and discretion as chair of the panel.

The hearing may not have gone as Lismore's counsel hoped it would, and it is clear from the record that she was not able to pursue every line of examination to the extent she wanted to. *See, e.g.*, Chaitham Decl. ¶¶ 58-62. A reasonable person may have disagreed with Mackenzie's rulings, and a different arbitrator might have taken a different approach to managing the hearing. However, it is simply not the case that the decisions Mackenzie made during the hearing "can only be explained" by a desire to tilt the arbitration against Lismore, for "it is well-established that § 10(b) requires 'a showing of something more than the mere 'appearance of bias' to vacate an arbitration award.'" *Konkar Mar. Enterprises, S.A. v. Compagnie Belge D'Affretement*, 668 F. Supp. 267, 275 (S.D.N.Y. 1987) (quoting *Morelite*

Construction Corp. v. New York City District Council Carpenters Benefit Funds, 748 F.2d 79, 83–84 (2d Cir. 1984)).

What Lismore perceived as a calculated conspiracy against him and his counsel, others might view as nothing more than an arbitrator's desire to efficiently manage the proceeding. Lismore has therefore not satisfied his burden to show that a "reasonable person, considering all of the circumstances, would *have* to conclude that an arbitrator was partial to one side." *Applied Indus.*, 492 F.3d at 137.

III. The Award Was Not Procured by Undue Means

Vacatur may also be warranted when the award was procured by "undue means." 9 U.S.C. § 10(a)(1). Lismore alleges that counsel for Societe Generale engaged in unethical conduct during the hearing by coaching witnesses and instructing them to engage in perjury. Lismore describes the "choreographed cacophony" of "I don't remembers" given by Societe Generale's witnesses as a "textbook example of knowing dishonesty" in violation of New York's Rules of Professional Responsibility.

Lismore believes this "corporate amnesia" was coordinated by Societe Generale's counsel, but offers no actual evidence suggesting that Societe Generale's witnesses engaged in perjury, let alone that they were instructed to do so by counsel. Lismore may have found certain testimony to be not credible, but Lismore's incredulity is not evidence of perjury, particularly given that the testimony concerned events that took place over five years ago. "An arbitration award will only be vacated if clear and convincing evidence shows that the award was procured by undue means." *1199 SEIU*, 2008 WL 4443945, at *6. Lismore has failed to meet this standard.

IV. The Panel Did Not Deprive Lismore of a Fundamentally Fair Process by Refusing to Consider Pertinent and Material Evidence

Vacatur may be warranted "where the arbitrators were guilty of misconduct in refusing … to hear evidence pertinent and material to the controversy." 9 U.S.C. § 10(a)(3). "An arbitrator's erroneous refusal to hear pertinent and material evidence will only provide a basis for vacatur if the decision deprives a party of a fundamentally fair arbitration process." *Matthew v. Papua New Guinea*, 2009 WL 4788155, at *2 (S.D.N.Y. Dec. 9, 2009). This grounds for vacatur "applies only in the 'very rare instances when an arbitrator's procedural aberrations rise to the level of affirmative misconduct.'" *Supreme Oil Co. v. Abondolo*, 568 F. Supp. 2d 401, 406 (S.D N.Y. 2008) (quoting *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. at 40–41, n. 10 (1987)).

Lismore identifies three instances in which he was allegedly deprived of presenting pertinent evidence as a result of the panel's discovery rulings. First, the panel refused to compel Societe Generale to produce notes allegedly taken by Societe Generale employees who attended a meeting at which issues related to Lismore's claims were discussed. Second, the panel erred by accepting Societe Generale's representation that a tape recording of a meeting did not exist because according to Lismore, "it is incredible that SocGen did not keep the tape." Third, the panel improperly denied Lismore's request that Societe Generale produce a particular expense report.

These types of discovery rulings are well within the discretion of the panel It is "well settled that procedural questions that arise during arbitration, such as which witnesses to hear and which evidence to receive or exclude, are left to the sound discretion of the arbitrator and should not be second-guessed by the courts." *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 545 (2d Cir. 2016). Lismore must do more than

demonstrate that the panel got a discovery decision wrong; he must show that the decision deprived him of a "fundamentally fair arbitration process." *Matthew v. Papua New Guinea*, 2009 WL 4788155, at *2 (S.D.N.Y. Dec. 9, 2009). The panel justified these discovery rulings in well-reasoned, written orders. In some instances, the panel stated that the discovery sought was cumulative; in other instances the panel found it irrelevant, or held that the request was untimely. These explanations demonstrate that the panel's rulings did not result in a fundamentally unfair process.

Finally, Lismore argues that he was denied material evidence because the panel "refused to recognize" that Societe Generale waived the attorney-client privilege when Societe Generale's counsel briefly referred to the "advice of counsel" during his opening statement. *See* Tr. 30. Lismore argued to the panel in a written submission that this amounted to an invocation of an "advice of counsel" defense, such that all documents concerning that advice became discoverable The panel disagreed.

It would be improper for this court to review the panel's legal judgment concerning privilege waiver. *See Abu Dhabi Inv. Auth. v. Citigroup, Inc.*, 2013 WL 789642, at *8 (S.D.N.Y. Mar. 4, 2013) (a "tribunal's judgment with respect to privilege is a legal judgment, which is not reviewable by this Court for error—even if the error is serious.") But even if this Court were to disagree with the panel's ruling, the ruling does not amount to legal error warranting vacatur. *See TiVo Inc. v. Goldwasser*, 560 F. App'x 15, 17 (2d Cir. 2014) ("Vacating an award for manifest disregard of the law requires a showing that the governing law alleged to have been ignored by the arbitrators was well defined, explicit, and clearly applicable, and that the arbitrator knew about the existence of a clearly governing legal principle but decided to ignore it or pay no attention to it."). Here, it was entirely reasonable for the panel to conclude

that counsel's brief reference to the "advice of counsel" was inadvertent, and that Societe Generale did not intend to invoke the advice of counsel as an affirmative defense (*i.e.*, that the company's conduct was justified because it was based on the advice of counsel). *See Aristocrat Leisure Ltd V. Deutsche Bank Trust Co. Ams* , 727 F. Supp. 2d 256, 274 (S.D.N.Y. 2010) ("Testimony by [the party asserting privilege] that they consulted with attorneys … does not, in and of itself, place the content of those communication at issue."). Lismore's disagreement with the panel's ruling is not grounds for vacatur.

CONCLUSION

For the foregoing reasons, Lismore's petition to vacate the arbitration award is denied, and Societe Generale's cross-petition to confirm the arbitration award is granted. The oral argument currently scheduled for March 2, 2017 is cancelled. The clerk shall terminate all motions and mark the case closed.

SO ORDERED.

Dated: February 13 2017
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge