UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV11-303 PSG (PLAx)	Date	March 22, 2017
Title	Burton Way Hotels, Ltd. v. Four Seasons Hotels Limited		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): Order DENYING Motion to Void Arbitration Agreement

Before the Court is Plaintiffs Burton Way Hotels, Ltd., Burton Way Hotels, LLC, and A.C.C. Company's motion to void the parties' arbitration agreement. Dkt. # 519. The Court finds this matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); L.R. 7-15. After considering the arguments presented in the moving, opposing, and reply papers, the Court DENIES the motion.

I. Background

This motion arises out a long-standing dispute between Burton Way Hotels, Ltd., Burton Way Hotels, LLC, and A.C.C. Company (collectively, "Burton Way") (the ownership interests in the Four Seasons Los Angeles (the "FSLA") in Beverly Hills) and the FSLA's operator, Defendant Four Seasons Hotels Limited ("Four Seasons"). Because the factual circumstances of this case have been extensively discussed in this Court's previous orders, the Court will only recount the case's background as relevant to this motion.

On January 11, 2011, Burton Way filed this action against Four Seasons, alleging breach of contract and fraud on account of certain acts undertaken by Four Seasons in the course its managerial and operational duties that purportedly contravene the terms of the parties' Hotel Management Agreement and its 1998 Amendment. *See generally* Dkt. # 33, *First Amended Complaint*. After nearly two years of litigation, the action was referred to Magistrate Judge Gandhi ("Judge Gandhi") for mediation. Dkt. # 374. At the mediation conducted on February 7, 2013, the parties agreed to arbitrate their dispute. *See* Dkt. # 517, at 1. Subsequently, from February 2013 to June 2013, Judge Gandhi assisted the parties in negotiating the Arbitration Agreement. *Id*.

The Arbitration Agreement, executed on June 7, 2013, provides that "[t]he Dispute shall be determined by Arbitration in Los Angeles before a panel of three neutral arbitrators" and

"shall be administered by JAMS pursuant to this Arbitration Agreement." Dkt. #519–3, *Declaration of Oleg Stolyar in Support of Plaintiffs' Motion to Void Arbitration Agreement* ("Stolyar Decl.") Ex. 1 ("Arbitration Agreement") ¶ B. It further provides that any matters not addressed by the Arbitration Agreement "shall be governed by the California Arbitration Act (the "CAA")." *Id*. at Rule 4. The parties inserted Judge Gandhi into certain arbitration provisions, specifically concerning the processes for selecting and challenging arbitrators. For example, Rule 15, which governs the selection and replacement of arbitrators, provides that each party was to submit the names of six potential arbitrators to Judge Gandhi. *Id*. at Rule 15(a). If there were any matches on the parties' lists, Judge Gandhi would disclose those names to the parties and contact the potential arbitrators to determine their willingness and availability to serve as arbitrators. *Id*. The process was to be repeated until three arbitrators were selected. *Id*. Rule 15(a) further provides that "if, after sixty days, the Parties with the help of Judge Gandhi, are unable to select three Arbitrators, the effort to arbitrate will have failed, the Arbitration Agreement is null and void, and the Parties must reconvene with Judge Gandhi." *Id*. Disputes concerning the appointment of an arbitrator, "for cause" challenges to an arbitrator, and the continued ability of an arbitrator to serve were also to be resolved by Judge Gandhi. *Id*. at Rule 11(d), Rule 15(d)–(e).

In June 2013, the parties selected an Arbitration Panel (the "Panel") pursuant to the procedure set forth in Rule 15 and submitted their dispute to arbitration before JAMS. *Stolyar Decl*. ¶ 2. An 11-day arbitration hearing took place from April 22, 2014 to May 9, 2014. *See* Dkt. #437–1. On August 1, 2014, the Panel issued its Final Award in this dispute establishing Four Seasons as the prevailing party and finalized the fees and costs award to Four Seasons in the Corrected Final Award, issued on August 25, 2014. *See id*. This Court confirmed the Arbitration Award in its entirety, including the fees and costs portion, in its November 5, 2014 order. Dkt. # 478. Burton Way then filed an appeal to the Ninth Circuit.

On October 18, 2016, the Ninth Circuit issued its decision, affirming in part and reversing in part the Court's order confirming the Panel's award, and remanded the action for further proceedings consistent with its decision. Dkt. # 505.

On December 20, 2016, Burton Way sent a letter to Judge Gandhi indicating that, based on newly learned facts, he should recuse himself from the case "to avoid any potential appearance of impropriety in further proceedings between the Parties." Dkt. # 517–1. On January 17, 2017, Judge Gandhi found that Burton Way's assertions were meritless, but nonetheless voluntarily recused himself from the case to avoid "spawning collateral legal proceedings." *See* Dkt. # 517, at 3. Shortly thereafter, Burton Way filed this motion, arguing that Judge Gandhi's recusal renders the Arbitration Agreement null and void. Dkt. # 518 ("Mot.")

II. Discussion

Burton Way's principal argument in support of its motion to void the Arbitration Agreement is that Judge Gandhi's role in the processes for selecting and challenging arbitrators makes him an integral part of the agreement such that his recusal renders the Arbitration Agreement "null and void." *Mot.* 1–2. The sole issue therefore before the Court is whether the Arbitration Agreement is rendered invalid on account Judge Gandhi's unavailability. The Court concludes that it is not.

In support of its argument, Burton Way relies on cases holding that "arbitration provisions will fail in their entirety" where an integral provision of the agreement fails. *See Alan v. Superior Court*, 111 Cal. App. 4th 228; *Reddam v. KPMG LLP*, 457 F.3d 1054 (9th Cir. 2006); *Newton v. Am. Debt Servs., Inc.*, No. C-11-3228 EMC, 2012 WL 3155719 (N.D. Cal. Aug. 2, 2012); *Carideo v. Dell, Inc.*, No. C06-1772 JLR, 2009 WL 3485933 (W.D. Wash. Oct. 26, 2009). What these cases more specifically examine, however, is whether the parties' selected forum is so integral to the arbitration clause that the Court may not appoint a substitute forum. *See Alan*, 111 Cal. App. 4th at 228 ("If an arbitration agreement designates an exclusive arbitral forum . . . and arbitration in that forum is not possible, courts may not compel arbitration in an alternate forum by appointing substitute arbitrators.").

Courts have generally held that the failure of a chosen forum will preclude arbitration "[o]nly if the choice of forum is an integral part of the agreement to arbitrate, rather than an 'ancillary logistical concern.'" *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000). In *Brown*, for example, the Eleventh Circuit held that, even though the arbitration agreement before it stated that claims would be resolved under the National Arbitration Forum ("NAF") Code of Procedure, a forum that was dissolved at the time, this fact alone was not enough to show that the choice of forum was an integral part of the arbitration agreement. *Id*. at 1222. Most courts, including the Ninth Circuit, have followed the *Brown* approach. In *Reddam v. KPMG LLP*, the Ninth Circuit similarly concluded that an arbitration agreement is enforceable even though the chosen arbitrator cannot or will not act, so long as choice-of-forum provision is not integral to the agreement. 457 F.3d 1054, 1061 (9th Cir. 2006), *overruled on other grounds as stated in Atlantic Nat'l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931 (9th Cir. 2010). On the facts before it, the Ninth Circuit concluded: "[W]e cannot agree that the customer agreement involved here became unenforceable between the parties when the NASD [the designated forum] bowed out. There is no evidence that naming of the NASD was so central to the arbitration agreement that the unavailability of that arbitrator brought the agreement to an end." *Id*. at 1061; *see also Adler v. Dell Inc.*, 2009 WL 4580739, at *3 (E.D. Mich. 2009) (holding that the unavailability of the NAF to hear the case did not make the agreement unenforceable because there was no evidence that the choice of the NAF as a forum was "as important a consideration

as the agreement to arbitrate itself."). Relying extensively on the guidance provided in *Reddam*, the Court in *Carideo v. Dell, Inc*., another case cited by Burton Way, found that the selection of NAF was integral to the arbitration agreement and therefore appointing a substitute arbitrator would be a wholesale revision of the arbitration agreement. *Carideo*, No. C06–1772JLR, 2009 WL 3485933 (W.D. Wash. Oct. 26, 2009). The Court distinguished the case before it from *Reddam* on grounds that the parties' selection of NAF was integral because the arbitration clause provided in clear and unambiguous language that disputes "shall be resolved exclusively and finally" by NAF. *Id*. at *4. Such language "specifically designating NAF 'as the exclusive arbitration forum'" persuaded the Court that the selection of NAF was integral to the arbitration clause. *Id*. at *4–5.

In light of this precedent, Burton Way's argument fails twofold. First, these cases involve the unavailability of an entire arbitral forum and its comprehensive rules and procedures (e.g. JAMS, NAF or NASD), so the question of whether an arbitral forum was integral to the parties' agreement is not even on point in this case. Here, the parties selected JAMS as the arbitral forum, and provided that JAMS, the Arbitration Agreement and the CAA will provide the rules and procedures governing the arbitration. *See generally Arbitration Agreement*. Judge Gandhi was neither the "arbitral forum," nor a specifically designated arbitrator, nor in any way central to deciding the dispute or choosing the applicable rules. Second, even if Judge Gandhi's role were somehow characterized as equivalent to an "arbitral forum," Burton Way has failed to demonstrate that his designation as such was integral.

As articulated by the Ninth Circuit in *Reddam*, "there is no evidence that naming of [Judge Gandhi] was so central" to the Arbitration Agreement that his unavailability brings the agreement to an end. *Reddam*, 457 F.3d 1061. "Something more direct is required before we, in effect, annihilate an arbitration agreement." *Id*. Although Burton Way argues in its motion that they "would not have agreed to enter into the Agreement absent Judge Gandhi's urging and role therein," *see Mot*. 7, nothing in the Arbitration Agreement suggests any intent by the parties not to arbitrate should Judge Gandhi become unavailable. Burton Way cites *Selby v. Deutsche Bank Trust Co. Americas*, as a case holding that a provision is integral to an arbitration agreement if the party seeking to invalidate that agreement would not have entered into that agreement absent that provision. *See Mot*. 8. As the other cases cited by Burton Way, *Selby* examined whether the parties' arbitration clause designating NAF as the forum was integral to the agreement. *Selby v. Deutsche Bank Trust Co. Americas*, No. 12CV01562 AJB BGS, 2013 WL 1315841, at *11 (S.D. Cal. Mar. 28, 2013). Holding that it was not, the Court noted that while the language of the agreement did state that arbitration "shall . . . be conducted by the [NAF]," and that "all aspects of any arbitration . . . shall be conducted under the NAF Code of Procedure," the agreement nonetheless did not include language that designated NAF as the "exclusive or sole forum for arbitration." *Id*. at 11. As part of its analysis, the Court noted that plaintiffs did not argue they

would not have entered into the underlying agreement absent NAF's availability nor did anything in the agreement suggest any intent by the parties not to arbitrate should NAF become unavailable. *Id*. Insofar as this observation constitutes a holding, Burton Way's reliance on it is undermined by the Court's subsequent citation to the Third Circuit's on-point discussion in *Khan v. Dell Inc*., which found NAF's designation as the arbitral forum not integral to the agreement and noted that "the parties must have unambiguously expressed their intent not to arbitrate their disputes in the event that the designated arbitral forum is unavailable." 669 F.3d 350, 354 (3d Cir. 2012). The Court therefore cannot agree with Burton Way that the Arbitration Agreement became unenforceable when Judge Gandhi recused himself. Despite the Arbitration Agreement using language such as "Judge Gandhi shall" and "Judge Gandhi will," *see Arbitration Agreement*, Rule 15(d)–(e), as noted by both *Selby* and *Khan*, such mandatory language is insufficient in the absence of an unambiguously expressed intent not to arbitrate should Judge Gandhi become unavailable.

Burton Way's argument that the provision in Rule 15(a) rendering the Arbitration Agreement null and void indicates such intent is not persuasive. *See Mot*. 8. The provision sets forth the procedures for selecting arbitrators after the execution of the Arbitration Agreement, and indicates, at most, the parties' intent to void the agreement if they are unable to agree on three arbitrators within sixty days of the selection process commencement. *See Arbitration Agreement*, Rule 15(a). The provision "with the help of Judge Gandhi" hardly constitutes an unambiguous expression that, should Judge Gandhi become unavailable to help in the selection of arbitrators, the entire agreement fails. Moreover, it is well established under California law that contract provisions are not construed as conditions precedent in the absence of language plainly requiring such construction. *See Rubin v. Fuchs*, 1 Cal.3d 50, 53 (1969); *JMR Constr. Corp. v. Envtl. Assessment & Remediation Mgmt., Inc*., 243 Cal. App. 4th 571, 594 (2015) ("stipulations in an agreement are not to be construed as conditions precedent unless such construction is required by clear, unambiguous language."). While Judge Gandhi's role is made clear in the Arbitration Agreement, there is no "clear, unambiguous language" indicating that Judge Gandhi's involvement is a condition precedent of the entire agreement. *Reddam*, 457 F.3d at 1061 (indicating that the parties' selection of a specific forum is not "exclusive of all other fora, unless the parties have expressly stated that it was."). Nor is there any language suggesting that his unavailability should render the arbitration unenforceable altogether; indeed, the Arbitration Agreement suggests the opposite. Specifically, Rule 4 of the Arbitration Agreement provides that "[a]ny matters not addressed by this Arbitration Agreement shall be governed by the California Arbitration Act." *Arbitration Agreement*, Rule 4. The parties thus expressly incorporated the CAA into their Arbitration Agreement, including section 1281.6, which provides in pertinent part:

> "In the absence of an agreed method [of appointing an arbitrator], *or if the agreed method fails or for any reason cannot be followed*, or when an arbitrator appointed fails to act and his or her successor has not been appointed, the court, on petition of a party to the arbitration agreement, shall appoint the arbitrator."

Cal. Code Civ. P. § 1281.6 ("§ 1281.6") (emphasis added). Four Seasons contends that § 1281.6 applies here with particular vigor where the unavailability of Judge Gandhi's assistance following a remand that requires a new panel of arbitrators is a "matter[ ] not addressed by this Arbitration Agreement." Dkt. # 537, at 12. Because the agreed upon method of selecting arbitrators cannot be followed to the extent that Judge Gandhi is no longer available to assist the parties, and Judge Gandhi's involvement was not integral so to void the entire agreement, § 1281.6 provides a workable alternative. *See Newton v. Am. Debt Servs., Inc*., No. C-11-3228 EMC, 2012 WL 3155719, at *7 (N.D. Cal. Aug. 2, 2012) (noting that courts have generally held that 9 U.S.C. § 5 – the federal counterpart to § 1281.6 – may be used as a substitute where an arbitrator selection provision was not central or integral to the agreement to arbitrate). Therefore, voiding the Arbitration Agreement on account of Judge Gandhi's unavailability is not warranted.

III. Conclusion

Based on the foregoing, Burton Way's motion to void the Arbitration Agreement is DENIED.

IT IS SO ORDERED.