UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-20534-CV-WILLIAMS/TORRES

HISPASAT, S.A.,

Petitioner,

v.

BANTEL TELECOM, LLC,

Respondent.

_____/

REPORT AND RECOMMENDATION ON PETITION TO CONFIRM AND ENFORCE FOREIGN ARBITRAL AWARD

This matter is before the Court as a result of a Petition to Confirm and Enforce a Foreign Arbitral Award filed by HISPASAT, S.A. ("Petitioner") on February 10, 2017. [D.E. 1].[1] On April 3, 2017, BANTEL TELECOM, LLC ("Respondent") filed its Response, [D.E. 18], and Defendant's Reply followed on April 7. [D.E. 19]. Following a review of the materials submitted by the Parties, in addition to the relevant authorities construing issues raised by the Petition, Response and Reply, we hereby **RECOMMEND** that Petitioner's Motion be **GRANTED**.

[1] The Honorable Judge Kathleen M. Williams referred the matter to the undersigned on April 24, 2017. [D.E. 25].

I. FACTUAL BACKGROUND

This matter arises as a result of a contractual dispute between Petitioner, a Spanish satellite operator, and Respondent, a Florida company that contracted to use those satellites to transmit certain content throughout the United States and South America. [D.E. 1, ¶¶ 8-9]. To that end, the Parties signed an "Agreement for the Lease of Satellite Capacity in the Hispasat Satellite System" (the "Agreement"), by which Respondent purchased satellite capacity from Petitioner. *Id.*, ¶ 10. The Agreement contained an arbitration provision, which reads as follows:

> All disputes arising out of or in connection with the present Agreement, including the interpretation of same, shall be finally settled and decided under the Rules of Arbitration of the International Chamber of Commerce (ICC) by one (1) arbitrator appointed in accordance with the said Rules. This arbitration shall take place in Madrid, Spain and the proceedings shall be conducted in [the] Spanish language. The arbitrator appointed shall be completely fluent in Spanish and English. The procedural rules of the ICC (applicable in full force at the time the dispute is filed) shall be applied and the substantive laws of Spain shall govern.

[D.E. 5-1, ¶ 13.2].

Petitioner initiated the arbitration giving rise to the underlying claim on November 27, 2015, alleging that Respondent failed to make payments under the Agreement and a subsequent debt contract entered into by the Parties. [D.E. 18, ¶ 12-13]. Respondent submitted its answer to the request on February 4, 2016 and filed a counterclaim seeking damages against Petitioner under the same contract at issue. *Id.*, ¶ 80.

Initially, the Parties attempted to agree on an arbitrator to hear the matter, but those efforts failed. [D.E. 18, p. 4]. Per its own Rules, the ICC then began the process of appointing an arbitrator for the dispute, with a list of considerations to be made prior to that appointment:

> In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the Rules.

INTERNATIONAL CHAMBER OF COMMERCE: ARBITRATION RULES, Art. 13(1).[2] On January 21, 2016, the ICC appointed Mr. Josef Frohlingsdorf, a German national and resident of Madrid, Spain, to preside over the dispute. [D.E. 5-4, ¶ 75]. Respondent immediately took issue with Mr. Frohlingsdorf's appointment, stating that it violated the ICC Rules and the Parties' agreement to work together to choose an arbitrator. *Id.*, ¶ 79. When its efforts to have Mr. Frohlingsdorf recused from the proceedings failed, Respondent provided notice that it intended to withdraw from the arbitral proceedings, alleging bias and discrimination on the part of Frohlingsdorf. [D.E. 5-4, ¶ 122].

Despite this withdrawal, a Final Hearing took place on July 27, 2016. Respondent followed through with its promise and did not appear. *Id.*, ¶ 154. Frohlingsdorf nevertheless addressed the arguments raised in Respondent's initial answer to the Request for Arbitration, including its claims concerning its obligations

[2] Accessible at: https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_13.

under the Agreement and its failure to make repayments as called for by the subsequent debt contract. *Id.*, ¶¶ 209 – 269. Frohlingsdorf ultimately found Respondent's claims were meritless, held that Bantel defaulted on its debt obligation, and entered the following award: (1) $874,000.00 in unpaid invoices; (2) late payment interest in the amount of $46,513.56; (3) $504,000.00 in damages for indemnification for the termination of the Agreement; and (4) legal interest in the amount of $1,424,513.56, running from the initiation of the arbitration and continuing until the date actual payment was made. *Id.*, ¶¶ 270 – 300.

Petitioner now moves for enforcement of that award. [D.E. 1]. Respondent, in response, challenges the award at issue under Article V, subsection (1)(b) and (d) of the New York Convention. [D.E. 18, p. 3]. Specifically, Respondent contends that Frohlingsdorf's appointment as arbitrator by the ICC violated its own rules and the Parties' Agreement. *Id.*, p. 3-4. For the reasons stated below, we find that the Petition should be granted.

II. LEGAL STANDARD

Two chapters of Title 9 to the United States Code are relevant to this case: Chapter 1, which contains the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 – 16, and Chapter 2, which contains the Convention Act, 99 U.S.C. §§ 201 – 208.[3] Congress enacted the FAA to combat widespread hostility to arbitration, and the statute

[3] The Convention Act implements the Convention on the Recognition and Enforcement of the Foreign Arbitral Awards. *See* 9 U.S.C. § 201 ("The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.").For purposes of this Report, the Court will refer to the latter as the "New York Convention."

"reflects the overarching principle that arbitration is a matter of contract." *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2308-09 (2013). Consistent with the FAA, courts must "rigorously enforce" arbitration agreements according to their terms, including provisions that specify "with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted." *Id*. at 2309 (internal citations omitted).

The Convention Act empowers a federal district court to recognize an action falling under the New York Convention. *See* 9 U.S.C. § 203. The Act mandates that a court "shall confirm [an] award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in [the New York] Convention." 9 U.S.C. § 207. Respondent challenges the arbitral award here under Article V of the New York Convention, which enumerates seven defenses to enforcement of any such award and reads as follows:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> > (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
> >
> > (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
> >
> > (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it

> contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> (d) The 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, or;
>
> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

New York Convention, art. V. Despite these protections, it is well-accepted that the Convention manifests a general pro-enforcement bias. *Parsons v. Whittemore Overseas Co. v. Societe Generale de L'Industries du Papier*, 508 F.3d 969, 973 (2d Cir. 1974). As such, the party opposing confirmation bears the heavy burden of proving the applicability of the Convention's enumerated defenses. *Ministry of Defense v. Gould, Inc.*, 969 F.2d 764, 770 (9th Cir. 1992).

III. ANALYSIS

Respondent first argues that the composition of the arbitral authority was not in accordance with the Parties' Agreement and violated Article V(1)(d) of the New

York Convention. We reject this argument outright. The Agreement requires that any dispute arising between the Parties should be resolved in binding arbitration taking place in Madrid, Spain. Those provisions were satisfied. The Agreement also stated that the proceedings would be conducted in the Spanish language, and that the ICC would appoint the sole arbitrator in accordance with its own Rules. No such violation of these provisions occurred.

Nor does the record establish that the ICC violated its own Rules when it appointed Frohlingsdorf. Although Respondent takes issue with that appointment based solely on Frohlingsdorf's residence in Madrid, this argument entirely ignores that residence was but one factor to be considered by the ICC in making its appointment. In our view, the other factors contributing to the decision – namely, the arbitrator's nationality, availability, and ability to conduct the arbitration – weighed heavily in favor of Frohlingsdorf's appointment. *See* INTERNATIONAL CHAMBER OF COMMERCE: ARBITRATION RULES, Art. 13(1).

It is somewhat revealing that Respondent fails to rely on any authority that would support its position here. Additionally, the Response does not cite to any evidence in the record demonstrating that Frohlingsdorf's residence actually impacted his decision in favor of Petitioner or otherwise rendered the arbitral proceedings invalid.[4] We will not disturb the award based solely on Respondent's conclusory statements, and if we were to overturn the award based *solely* on Bantel's

[4] As an added consideration, Respondent provides no explanation as to how Frohlingsdorf's residence in Madrid affected his ability to preside over a relatively straightforward breach of contract dispute.

objection to the arbitrator's residence in Madrid, it would completely eviscerate the "pro-enforcement" bias of the New York Convention and the FAA. *See Italian Colors*, 133 S. Ct. at 2308-09. As such, Respondent's challenge to enforcement of the award under Article V(1)(d) of the New York Convention is without merit.

Respondent's challenge under Article V(1)(b) must also fail. To succeed on such a challenge, Respondent must show that the arbitration was conducted in violation of this country's standards of due process of law. *Parsons*, 508 F.2d at 975 ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and a meaningful manner.") (internal quotations omitted). Respondent claims that its challenge to Frohlingsdorf – and his subsequent decision not to recuse himself – resulted in their being "unable to present [their] case." But these arguments cannot satisfy the requirements that would support setting aside the award.

First, Respondent's argument is belied by the fact that Bantel initially participated in the proceedings, filing an answer with the ICC and pursuing a counterclaim against Petitioner. Such initial participation significantly undercuts its argument that the proceedings ran afoul of Article V(1)(b). *See Four Seasons Hotels and Resorts B.V. v. Consorcio Barr, S.A.*, 613 F. Supp. 2d 1362, 1369-70 (S.D. Fla. 2009) (party's initial participation and subsequent voluntary withdrawal from the proceedings did not implicate Article V(1)(b), as adequate notice and opportunity to participate had been afforded the withdrawing party). Second, Respondent forgets that its claimed "inability to participate" came about as a result of Respondent's own

actions, and not those of the arbitrator; when the company challenged Frohlinsdorf's appointment, and when that request was denied, it withdrew on its own accord. We need not say whether Respondent's actions constituted sound legal judgment in the face of the Agreement's arbitration provisions, but we cannot ratify that strategic decision by subsequently vacating an otherwise valid arbitral award. To do so would render the FAA meaningless.

In sum, "[f]ederal courts do not superintend arbitral proceedings. Our review is restricted to determining whether the procedure was fundamentally unfair." *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1999). We see no merit to the arguments raised by Respondent that challenges enforcement of the award, and a careful review of the record establishes that all matters associated with the arbitration were in accordance with ICC Rules, the FAA and the New York Convention. Accordingly, the award should be affirmed.

IV. CONCLUSION

Based on the foregoing, we hereby **RECOMMEND** that the Petition to Confirm and Enforce the Foreign Arbitral Award be **GRANTED**. Pursuant to Local Magistrate Rule 4(b) and Fed. R. Civ. P. 73, the parties have fourteen (14) days from service of this Report and Recommendation within which to file written objections, if any, with the Honorable Kathleen M. Williams, United States District Judge. Failure to timely file objections shall bar the parties from *de novo* determination by the District Judge of any factual or legal issue covered in the Report *and* shall bar the parties from challenging on appeal the District Judge's Order based on any

unobjected-to factual or legal conclusions included in the Report. 28 U.S.C. § 636(b)(1); 11th Cir. Rule 3-1; *see, e.g., Patton v. Rowell,* 2017 WL 443634 (11th Cir. Feb. 2, 2017); *Cooley v. Commissioner of Social Security,* 2016 WL 7321208 (11th Cir. Dec. 16, 2016).

DONE AND ORDERED in Chambers at Miami, Florida this 2nd day of August, 2017.

/s/ Edwin G. Torres
EDWIN G. TORRES
United States Magistrate Judge