UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
In the Matter of the Arbitration Between

UNITED MEDIA HOLDINGS, NV, et al,

Petitioner,

16 Civ. 5926 (PKC)

-against-

MEMORANDUM
AND ORDER

FORBES MEDIA, LLC,

Respondent.
----------x

P. KEVIN CASTEL, U.S.D.J.:

United Media Holdings, NV and TriLado Enterprises, Inc. bring this petition to vacate an arbitration award (the "Award") issued in favor of respondent Forbes Media, LLC ("Forbes"). Forbes opposes the petition. According to petitioners, the Award must be vacated because, among other things, the Arbitrator inappropriately denied petitioners' requests for adjournments, the Award was fraudulently procured, and both the arbitration and the Award violated Executive Order 13660. For its part, Forbes argues that the petition should be denied because the Arbitrator acted reasonably and neither the arbitration nor the Award violated the Executive Order because they were authorized by the Office of Foreign Asset Control.

BACKGROUND

A. Overview.

Petitioners' predecessor and Forbes were parties to the Forbes Foreign Language License Agreement (the "License Agreement") originally entered into on October 21, 2009 and amended several times thereafter. (Award at 1; Pet. ¶ 9.) It granted certain rights to publish a

Ukrainian edition of Forbes magazine, maintain a website, and perform other activities in the Ukraine involving the Forbes name, content, and Ukrainian trademarks owned by Forbes. (Award at 1.) Petitioners obtained these rights in 2013 by acquiring the rights to a license agreement from a predecessor. (Award at 2.) On March 7, 2014, Forbes sent a written notice terminating the License Agreement citing violations of provisions of the License Agreement related to editorial independence. (See Forbes' Am. Answering Statement and Countercl., Marks Decl. Ex. 32 at 25 ¶ 33.) From March to September of that year the parties entered into a mutually agreed upon standstill, but on September 16, 2014 Forbes reactivated its termination notice. (See Pet'rs' Mem. in Opp'n to Forbes' Request for Emergency Interim Measures, Berezin Decl. Ex. 4 at 6.) The following day, on September 17, 2014, petitioners filed a demand for arbitration arguing that the termination notices were inadequate and sent in bad faith. (Arbitration Demand, Marks Decl. Ex. 30; Award at 2.) The Licensing Agreement contained a broad arbitration provision providing that any disputes should be resolved through binding arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association (the "AAA"). (License Agreement, Berezin Decl. Ex. 3 § 32.) The place of arbitration was designated as New York, New York. (Id.)

James B. Kobak, Jr. was appointed as the sole arbitrator (the "Arbitrator") under AAA rules and a merits hearing was scheduled to begin February 1, 2016. (Pet. ¶ 10; Order dated January 27, 2016 ("January 27 Order"), Berezin Decl. Ex. 5.) During the course of the arbitration, the Arbitrator issued three orders: one denying a request for emergency injunctive relief dated August 19, 2015; one concerning scheduling matters dated January 27, 2016; and one granting in part and denying in part a request for preliminary injunctive relief dated February 5, 2016. (Award at 2.) Merits hearings were held on February 3, 2016 and on March 3 and 4,

2016 during which exhibits were received into evidence and the Arbitrator heard testimony from six witnesses. (See Feb. Hearing Tr., Marks Decl. Ex. 8; Mar. Hearing Tr., Berezin Decl. Ex. 28.) Petitioners called two witnesses and Forbes called four witnesses. (Id.) Following the merits hearings, the parties submitted post-hearing briefs. On April 20, 2016, the Arbitrator issued a twelve page Award denying the relief sought by petitioners.

B. OFAC Blocking and Subsequent Grants of Licenses.

On July 30, 2015, several months into the arbitration, Sergey Kurchenko ("Kurchenko), a Ukrainian national and beneficial owner of the petitioners, was placed on a list of "specially designated nationals" ("SDN"s) which is maintained by the United States Office of Foreign Asset Control ("OFAC") pursuant to Executive Order 13660 ("EO 13660"). (Pet. ¶¶ 3, 12; Jul. 30, 2015 Update to the SDN List, Marks Decl. Ex. 33.) According to EO 13660, "United States persons"[1] are not permitted to engage in certain defined conduct with an SDN, or entities controlled by an SDN, absent a license from OFAC. (Pet. ¶ 13.) On August 6, 2015, Forbes sent a notice to petitioners terminating the License Agreement because, in their view, any further use of the website and trademarks under the License Agreement would violate EO 13660. (Award at 3; Pet'rs' Mem. in Opp'n to Forbes' Request for Emergency Interim Measures, Berezin Decl. Ex. 4 at 8.) On August 10, 2015 Forbes filed a Request for Emergency Measures with the Arbitrator seeking to enjoin performance of the License Agreement because continued performance would violate EO 13660. (See Marks Decl. Ex. 27.) After a telephone conference, the Arbitrator denied Forbes' request for emergency injunctive relief finding that it was unlikely

[1] For purposes of EO 13660, the term "U.S. person" refers to "any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States." 31 C.F.R. § 589.312.

that EO 13660 applied to the License Agreement. (Order dated August 19, 2015 ("August 19 Order"), Marks Decl. Ex. 24.)

On October 26, 2015, Forbes, through their expert, Richard Newcomb, reached out to OFAC to request a meeting and to ask OFAC to take certain actions to halt petitioners' use of the Forbes trademark. (Letter from Richard Newcomb to OFAC dated October 26, 2015 ("October 26 Letter"), Berezin Decl. Ex. 30.) The letter and its attachments explained the License Agreement as well as the circumstances and the history of the arbitration up to that point, including the Arbitrator's August 19 Order. (Id.) In the letter, Newcomb laid out Forbes' position that: (1) as of July 30, 2015 the License Agreement and petitioners' interest in it constituted blocked property; (2) Forbes' continued performance under the License Agreement was prohibited by U.S. sanctions law; (3) the arbitration proceedings themselves were covered by EO 13660 such that U.S. persons were prohibited from "engaging in any transactions with respect to the [a]rbitration" absent OFAC authorization; (4) the Arbitrator's August 19 Order was null and void under EO 13660 because the Arbitrator did not have authority to opine on the scope of EO 13660 without a license from OFAC; (5) it was nevertheless in Forbes' and OFAC's interest to have the arbitration continue so that the Arbitrator could issue a final award enjoining petitioners' use of the Forbes trademark which Forbes could then enforce against petitioners; (6) the August 19 Order "incorrectly interpret[ed]" EO 13660 and in particular the effect of the blocking order on the License Agreement. (Id.) The October 26 Letter also requested that OFAC issue a "directive license" authorizing and compelling the Arbitrator to (1) conduct the arbitration proceedings, (2) revoke the August 19 Order, and (3) issue an order enjoining petitioners' use of the Forbes trademark. (Id.) In addition, Forbes requested a license from OFAC authorizing its counsel to represent Forbes in the arbitration proceedings. (Id.)

Petitioners complain that Forbes did not alert the Arbitrator or petitioners that it believed the arbitration itself was covered by EO 13660 such that any U.S. person would need an OFAC license to participate, or that it believed the Arbitrator's August 19 Order was null and void under EO 13660. Forbes did, however, notify petitioners in November 2015 that it believed EO 13660 qualified as a force majeure and therefore the License Agreement would terminate as of November 28, 2015. (Award at 3.)

Having received no response to the October 26 Letter, Forbes sent a second letter to OFAC, dated December 18, 2015, renewing their request for a directive license compelling the Arbitrator to vacate the August 19 Order and issue a new order enjoining petitioners' use of the Forbes trademark. (Letter from Richard Newcomb to OFAC dated December 18, 2015 ("December 18 Letter"), Berezin Decl. Ex. 31.) This letter also explained that arbitration hearings were scheduled for February 1-4, 2016 such that time was "definitely of the essence." (Id.)

Petitioners were represented throughout the arbitration by Fox Rothschild LLP. (Arbitration Demand, Berezin Decl. Ex. 9.) However, on January 19, 2016, Fox Rothschild notified the Arbitrator that they were withdrawing from the matter. (Letter from Mitchell Berns to Arbitrator dated January 19, 2016, Berezin Decl. Ex. 15.) Although petitioners now claim that their counsel withdrew because they needed an OFAC license to continue their representation, (Pet. ¶ 19), no reasons were provided at the time of withdrawal. (January 27 Order at 1.) On January 23, 2016, petitioners, and later their new counsel Matthew Draper of Draper & Draper LLC, requested a "short delay" of the February hearing dates to allow Draper to familiarize himself with the case. (Email from Matthew Draper to Arbitrator dated January 23, 2016, Berezin Decl. Ex. 10.) Draper argued that petitioners would be denied the "fundamental right to

be heard" in the arbitration if they were forced to go ahead without more time for him to prepare for the hearings. (Id.)

A conference call was held to discuss Draper's request for an adjournment. (See January 27 Order at 2.) On that call, it was undisputed that petitioners had failed to comply with their discovery obligations and other pre-hearing requirements. (Id.) The reasons given included "disagreements between [petitioners] and former counsel about payment of fees" and "various tactical matters" as well as "possible failures in communication between counsel and client about the importance of discovery obligations and hearing schedules." (Id.) The Arbitrator noted that none of these reasons would justify adjourning the February hearing had Fox Rothschild not withdrawn, however, in "deference to new counsel," a delay was warranted. (Id.) Ultimately, the Arbitrator issued an order on January 27, 2016 granting an adjournment of one month for all but one witness who might otherwise have been unable to testify. (Id.) According to the Arbitrator, this one-month adjournment would "allow sufficient time for preparation while avoiding unnecessary prejudice to Forbes, further inconvenience to third parties, and further delay in resolving pending sanctions and other issues and the status of the [L]icense [A]greement." (Id.)

On January 31, 2016, just three days before the first merits hearing, Draper withdrew from the arbitration and another attorney, J. Jason Tyson-Phipps, took over as petitioner's counsel. (Email from Jason Tyson-Phipps to Arbitrator dated January 31, 2016, Berezin Decl. Ex. 11.) Tyson-Phipps renewed Draper's request for an adjournment of the hearings to allow him time to prepare, which the Arbitrator denied. (Id.; Email from Arbitrator to Robert Berezin dated January 31, 2016, Berezin Decl. Ex. 17.) The day before the first scheduled hearing, Tyson-Phipps contacted OFAC to find out if he needed a license to represent

petitioners and if so, to request that license. (See Email from Jason Tyson-Phipps to Arbitrator dated February 24, 2016, Berezin Decl. Ex. 20.) There is no evidence in the record that OFAC ever responded to this request.

The first merits hearing in the arbitration was held on February 3, 2016. (See Feb. Hearing Tr., Berezin Decl. Ex. 12.) Petitioners were represented by Tyson-Phipps. (Id.) Prior to the hearing, the Arbitrator had suggested that the parties seek guidance from OFAC about how EO 13660 would apply to a License Agreement such as the one at issue. (See Feb. Hearing Tr., Marks Decl. Ex. 8 at 88:12-88:20.)

On February 24, 2016 Tyson-Phipps withdrew from the arbitration primarily because of his concern that he would need an OFAC license to continue, but also because of significant communication, cooperation, direction, and payment issues with petitioners. (See Email from Jason Tyson-Phipps to Arbitrator dated February 24, 2016, Berezin Decl. Ex. 20; Email from Arbitrator to Jason Tyson-Phipps dated February 24, 2016, Berezin Decl. Ex. 21; Email from Robert Berezin to Jason Tyson-Phipps dated February 24, 2016, Berezin Decl. Ex. 21.) Three days later, petitioners asked the Arbitrator to adjourn the March hearings to give them time to retain new counsel. (Email from Oleksandr Khomiak to Arbitrator dated February 27, 2016, Berezin Decl. Ex. 22.) Petitioners also indicated that they were suspicious of Tyson-Phipps' reliance on the need for an OFAC license as a reason to withdraw because none of their prior attorneys had ever raised this issue. (Id.) The Arbitrator denied petitioners' request for an adjournment on February 28, 2016 for "reasons articulated even before Mr. Tyson-Phipps's involvement." (Email from Arbitrator to Oleksandr Khomiak dated February 28, 2016, Berezin Decl. Ex. 24.)

On March 1, 2016 Forbes received a letter from OFAC in response to its letters of October 26 and December 18, 2015. (Letter from OFAC to Richard Newcomb dated March 1, 2016, Berezin Decl. Ex. 25.) In it, OFAC confirmed that United Media Holding, NV was a "blocked person" under EO 13660. (Id.) Therefore, according to OFAC, the Arbitrator and counsel for petitioners would require a license from OFAC in order to participate in the arbitration, or "otherwise deal in property in which [petitioners have] an interest, including the Trademarks and the [License] Agreement." (Id.) OFAC also explained that Forbes would need a similar license to enter into any settlement agreement or arbitral award with petitioners. (Id.) However, OFAC denied Forbes' request for a directive license requiring the Arbitrator to vacate the August 19 Order. (Id.)

Thereafter, Forbes sent a letter to OFAC on March 2, 2016 requesting a license permitting the hearings scheduled for March 3-5, 2016 to go forward. (Letter from Richard Newcomb to OFAC dated March 2, 2016, Berezin Decl. Ex. 26.) Later that day, OFAC issued a license permitting Forbes, its counsel, and all other persons participating in the arbitration to "engage in all transactions that are necessary and ordinarily incident to" the hearings on March 3-5, 2016 (the "March 2 OFAC License"). (Berezin Decl. Ex. 27.) Forbes sent a copy of this license to the Arbitrator and petitioners later that day. (Email from Cheryl James to Arbitrator dated March 2, 2016, Berezin Decl. Ex. 34.) In that email Forbes alerted the Arbitrator that, "OFAC states that an OFAC license will be required prior to your issuance of an award." (Id.)

The second set of merits hearings began on March 3, 2016. (See Mar. Hearing Tr., Berezin Decl. Ex. 28.) That morning, petitioners renewed their request for an adjournment so that they could re-engage Tyson-Phipps now that it appeared that he could act under the March 2 OFAC License. (Id. at 11:24-13:16.) The Arbitrator denied this request because

Tyson-Phipps had indicated other reasons for withdrawing stemming from petitioner's failure to participate actively, provide information, and comply with prehearing orders. (See Id. at 14:23-15:7; Award at 9 (explaining Tyson-Phipps' other reasons for withdrawal).) The Arbitrator also cited the fact that the hearings had already been rescheduled multiple times and that they had only a limited window within which to operate. (Id. at 15:9-15:14.) Thereafter the hearings continued during which Forbes disclosed the October 26 Letter and December 18 Letter for the first time by introducing them into evidence. (Id. at 526:23-527:11, 529:5-530:20.)

Several days after the hearing concluded, the AAA suspended the arbitration in order to verify the parties' positions on the need for OFAC authorization. (Email from AAA to Robert Berezin dated March 8, 2016, Marks Decl. Ex. 52.) A conference call was held on March 14, 2016 during which the AAA confirmed that the arbitration was temporarily suspended because the AAA was aware of the need for an OFAC license before the arbitration could proceed. (See Email from AAA to Parties dated March 14, 2016, Marks Decl. Ex. 53.) Forbes indicated that it would reach out to OFAC to request a new license allowing the Arbitrator to issue an award. (Id.) Petitioners did not participate in this conference call due to a mistake in calculating the time difference between the U.S. and the Ukraine. (Id.) On March 15, 2016 petitioners' Ukrainian counsel objected to the conference call and disputed that anyone involved needed an OFAC license to continue with the arbitration. (Email from Oleksandr Khomiak to AAA dated March 15, 2016, Marks Decl. Ex. 53.)

Following the conference call, Forbes wrote to OFAC requesting a thirty-day extension of the March 2 OFAC License specifically to allow the Arbitrator time to issue the final award. (Letter from Richard Newcomb to OFAC dated March 15, 2016 (the "March 15 Letter"), Berezin Decl. Ex. 32 (explaining that "[a] transaction necessary and ordinarily incident

to an arbitration hearing is the issuance of a final award.").) OFAC issued a license authorizing Forbes, its attorneys, and "all other persons participating in [the] arbitration proceeding . . . to engage in all transactions that are necessary and ordinarily incident to the hearing presided over by [the Arbitrator] from March 3 through March 5, 2016, as described in the Application" on March 27, 2016 (the "March 27 OFAC License"). (Berezin Decl. Ex. 29.) Forbes sent a copy of the March 15 Letter and the March 27 OFAC License to the petitioners and the Arbitrator on March 28, 2016 and asked the AAA to lift the arbitration suspension. (Email from Robert Berezin to Arbitrator dated March 28, 2016, Berezin Decl. Ex. 33.)

C. The Award.

The Arbitrator issued the Award on April 20, 2016. The Arbitrator found that Forbes properly terminated the License Agreement for violations of provisions dealing with editorial independence. (Award at 4-6.) The Arbitrator also found that EO 13660 applied to the License Agreement such that continued performance under the License Agreement by Forbes would violate the executive order. (Id. at 8-9.) Therefore, the Arbitrator determined that Forbes properly terminated the License Agreement "on the grounds of force majeure and impossibility of performance." (Id. at 9.) The Award enjoined petitioners from using the Forbes trademark and directed petitioners to reimburse Forbes $48,613.33 representing a portion of the arbitration fees and expenses. (Award at 11.)

On April 21, 2016 Forbes requested a third license from OFAC authorizing Forbes and its counsel to enforce the Award, (Letter from Richard Newcomb to OFAC dated April 21, 2016 (the "April 21 Letter"), Marks Decl. Ex. 20), which OFAC issued on August 20, 2016 (the "August 20 OFAC License"). (Marks Decl. Ex. 21.)

Petitioners filed this petition on July 25, 2016 seeking an order to vacate the Award pursuant to the Federal Arbitration Act (the "FAA"). 9 U.S.C. § 10. Forbes opposes the petition. As discussed below, petitioners have demonstrated no valid basis to vacate the Award and thus, the petition to vacate is denied.

DISCUSSION

I. Applicable Law.

Where an arbitration "involve[s] parties domiciled or having their principal place of business outside the [United States]," it is subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") as codified in 9 U.S.C. §§ 201–08. Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 19 (2d Cir. 1997) (internal quotations omitted). Where an arbitration is conducted in the United States, "the domestic provisions of the [Federal Arbitration Act ("FAA")] also apply, as is permitted by Articles V(1)(e) and V(2) of the New York Convention." Scandinavian Reins. Co. Ltd. v. Saint Paul Fire & Marine Ins. Co., 668 F.3d 60, 71 (2d Cir. 2012); see also Solé Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC, 450 F.3d 100, 102 n.1 (2d Cir. 2006) ("[T]he FAA and the New York Convention work in tandem, and they have 'overlapping coverage' to the extent that they do not conflict.").

United Media Holdings and TriLado Enterprises are corporations organized under the laws of the Netherlands and the British Virgin Islands respectively. The arbitration between petitioners and Forbes occurred in the United States. The parties do not dispute that the FAA and the New York Convention govern the petition to vacate the Award. Accordingly, the Court will apply the New York Convention and the domestic provisions of the FAA to the issues raised herein.

a. The Federal Arbitration Act.

"The court's function in confirming or vacating an arbitration award is severely limited." Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997) (citation omitted). "The arbitrator's rationale for an award need not be explained, and the award should be confirmed if a ground for the arbitrator's decision can be inferred from the facts of the case." D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 110 (2d Cir. 2006) (internal quotation marks omitted). Accordingly, a party seeking "to vacate an arbitration award has the burden of proof, and the showing required to avoid confirmation is very high." Id.

The FAA provides "streamlined treatment" for a party seeking "a judicial decree confirming an award, an order vacating it, or an order modifying or correcting it." Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 582 (2008). Section 10(a) of the FAA "sets forth specific grounds for vacating" an arbitration award. Jock v. Sterling Jewelers Inc., 646 F.3d 113, 121 (2d Cir. 2011). "Because the FAA supports a 'strong presumption in favor of enforcing arbitration awards . . . the policy of the FAA requires that the award be enforced unless one of those grounds is affirmatively shown to exist.'" Id. (quoting Wall St. Assocs., L.P. v. Becker Paribas Inc., 27 F.3d 845, 849 (2d Cir. 1994)).

i. Section 10(a)(3).

Section 10(a)(3) provides that a federal court may vacate an arbitration award if "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 the party have been prejudiced." 9 U.S.C. § 10(a)(3). "Misconduct typically arises where there is proof of either bad faith or gross error on the part of the arbitrator." Bisnoff v. King, 154 F. Supp. 2d 630, 637 (S.D.N.Y. 2001) (internal quotation

marks omitted). "Courts have interpreted section 10(a)(3) to mean that except where fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review." Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997).

1. The Arbitrator's Rulings on Adjournments Were Within His Broad Discretion.

"The granting or denying of an adjournment falls within the broad discretion of appointed arbitrators." Id. at 19 (quoting Storey v. Searle Blatt, Ltd., 685 F. Supp. 80, 82 (S.D.N.Y. 1988)). Thus, if there exists "'a reasonable basis for the arbitrators' considered decision not to grant a postponement,' a court should be reluctant to interfere with the award." Ottawa Office Integration, Inc. v. FTF Bus. Sys., Inc., 132 F. Supp. 2d 215, 220 (S.D.N.Y. 2001) (quoting Roche v. Local 32B–32J Serv. Emps. Int'l Union, 755 F. Supp. 622, 625 (S.D.N.Y. 1991)). "Stated another way, as long as there is at least 'a barely colorable justification' for the arbitrators' decision not to grant an adjournment, the arbitration award should be enforced." Bisnoff, 154 F. Supp. 2d at 637 (quoting Alexander Julian Inc. v. Mimco, No. 00 Civ. 4131 (DC), 2001 WL 477010, at *2 (S.D.N.Y. May 4, 2011)).

Courts must also consider whether the arbitrator's decision to deny an adjournment request created a "fundamentally unfair" proceeding. Id. at 637. "A fundamentally unfair proceeding may result if the arbitrators fail to 'give each of the parties to the dispute an adequate opportunity to present its evidence and argument.'" Id. (quoting Tempo Shain, 120 F.3d at 20). An arbitrator "need not follow all the niceties observed by the federal courts. He need only grant the parties a fundamentally fair hearing." Roche, 755 F. Supp. at 624 (quoting Bell Aerospace Co. Div. of Textron, Inc. v. Local 516, 500 F.2d 921, 923 (2d Cir. 1974)).

Petitioners contend that the Arbitrator violated section 10(a)(3) of the FAA "by denying petitioners' request for an adjournment to provide sufficient time for an American

attorney to obtain a license from OFAC to represent them." (Pet. ¶ 31.) When petitioners' third counsel, Jason Tyson-Phipps, cited his lack of an OFAC license as one of the reasons for his withdrawal, petitioners found this "highly questionable" because none of the lawyers they had spoken to before, including their two previous American attorneys, had ever raised any such concerns. (Email from Oleksandr Khomiak to Arbitrator dated February 27, 2016, Berezin Decl. Ex. 22.) Petitioners asserted that the need for an OFAC license was not a "legitimate reason" for withdrawal and even suggested that they might file a complaint against Tyson-Phipps. (See Id.) Thus, before the Arbitrator, petitioners questioned the legitimacy and propriety of their attorney's withdrawal for lack of an OFAC license but now, before this Court, assert that the Arbitrator should have postponed the proceedings to allow their attorneys to obtain an OFAC license. Notably, Tyson-Phipps' application to the Arbitrator was not for an adjournment of the arbitration until such time as OFAC issued him a license, but an application to withdraw. (See Email from Jason Tyson-Phipps to Arbitrator dated February 24, 2016, Berezin Decl. Ex. 20.) It is "hard to fault the [A]rbitrator[] for not being sympathetic to this argument when it was never mentioned to [him]." Cong. Sec., Inc. v. Fiserv Sec., Inc., No. 02 Civ. 3740 (JSM), 2003 WL 21664678, at *2 (S.D.N.Y. July 15, 2003), aff'd sub nom. Cong. Sec., Inc. v. Fiserv Correspondent Servs., Inc., 102 F. App'x 190 (2d Cir. 2004) (summary order).

An Arbitrator need only have "a reasonable basis" for each of his decisions not to grant a postponement. Ottawa Office Integration, Inc., 132 F. Supp. 2d at 220 (quotation marks omitted). Petitioners made four requests to adjourn between January and March 2016. At the time these requests were made the demand for arbitration had been pending for well over a year and the hearings, originally scheduled for February 2016, had been on the calendar for about six months. Each of petitioners' requests were made just days before a scheduled hearing session,

and in each instance petitioners were not in compliance with their discovery obligations at the time of the request. At the time of the February 27 and March 3, 2016 adjournment requests, the continuation of the hearing scheduled for early March, 2016 had already been adjourned once before and further delays would have caused undue prejudice to Forbes. (See January 27 Order at 1-2 (noting that Forbes and its witnesses had already "incurred expense and inconvenience in preparing for the hearing" and that further delay risked conferring "a potentially unwarranted . . . tactical advantage" on petitioners); Award at 10 (delay "clearly favors [petitioners] and disadvantages Forbes unfairly").)

The Arbitrator also noted that although petitioners' adjournment requests often were associated with the withdrawal of petitioners' counsel, petitioners' own actions in failing to provide information in a timely manner, comply with prehearing orders, and pay their own lawyers played a role in each withdrawal. (See Award at 9; January 27 Order at 2; Email from Jason Tyson-Phipps to Arbitrator dated February 24, 2016, Berezin Decl. Ex. 21.) Under these circumstances, the Arbitrator found that it was not fair to prejudice Forbes by adjourning the hearings. (See Award at 9; January 27 Order at 2 (noting that "disagreements between [petitioners] and former counsel about payment of fees" and "various tactical matters" as well as "possible failures in communication between counsel and client about the importance of discovery obligations and hearing schedules" that resulted in a failure to comply with discovery obligations would not justify an adjournment had prior counsel not withdrawn).) Moreover, the fact that petitioners were granted a one-month adjournment of all but one day of the merits

hearing, and that petitioners' Ukrainian counsel was afforded considerable leeway at the March hearing sessions,[2] weigh strongly against any finding of misconduct by the Arbitrator.

Petitioners have also failed to establish that the Arbitrator's refusals to adjourn the proceedings rendered the arbitration "fundamentally unfair" by depriving petitioners of "'an adequate opportunity to present [their] evidence and argument.'" Bisnoff, 154 F. Supp. 2d at 637 (quoting Tempo Shain, 120 F.3d at 20). Petitioners were represented at the February 3 hearing by U.S. counsel and at the March hearings by Ukrainian counsel, and the record reveals that both attorneys ably defended petitioners' position. In the Award, the Arbitrator specifically noted that "[petitioners] have had more than an adequate opportunity to prepare their case during the year and a half since they filed it; their Ukrainian counsel clearly well understood their case and did a thoroughly adequate job of presenting it; and all material points in their pleadings and prior submissions were explored at the hearing through their own witnesses and latitude afforded counsel on cross-examination." (Award at 10.)

Petitioners' claim that the Arbitrator's denial of their adjournment requests violated their due process rights "to be represented by an attorney admitted to practice in New York, familiar with United States and New York law and with native fluency in the English language" fares no better. (Pet. ¶ 32.) The FAA does not require that parties be represented by counsel during arbitration proceedings, see Polin v. Kellwood Co., 103 F. Supp. 2d 238, 262 (S.D.N.Y. 2000), aff'd, 34 F. App'x 406 (2d Cir. 2002) (summary order) (rejecting argument that plaintiff had been denied due process right to counsel); Euromarket Designs, Inc. v. McGovern & Co., LLC, No. 08 Civ. 7908 (LTS) (DCF), 2009 WL 2868725, at *4 (S.D.N.Y. Sept. 3, 2009)

[2] At the beginning of the March 3, 2016 hearing the Arbitrator explained to Khomiak "I realize that you're not a U.S. licensed attorney and you may not be experienced in these kind[s] of tribunals, so I'll cut you a lot of slack, as we say, and won't stand on formalities . . . ." (Mar. Hearing Tr., Berezin Decl. Ex. 28 at 15:23-16:3.)

(citing Polin, 103 F. Supp. 2d at 262), nor is there any specific due process right to American counsel. In any event, petitioners were represented by American counsel up to and including the February 3, 2016 hearing, and were ably represented by Ukrainian counsel at the hearings beginning March 3, 2016.

Furthermore, petitioners provide no evidence of prejudice resulting from their lack of U.S. counsel other than their claim that competent U.S. counsel "would have recognized that the arbitration could not proceed in the United States unless the Arbitrator and Forbes obtained licenses to perform from OFAC." (Pet. ¶ 33.) However, this argument is undercut by petitioners' own assertion that neither Fox Rothschild nor Matthew Draper, both U.S. counsel, ever raised any concerns about a need for an OFAC license. (See February 27, 2016 Email from Oleksandr Khomiak to Arbitrator, Berezin Decl. Ex. 22.) In addition, at the time petitioners were allegedly denied the right to U.S. counsel on February 28 and March 3, 2016, petitioners and their Ukrainian counsel were on notice that counsel and the Arbitrator might have required licenses from OFAC to continue in the arbitration. (See Email from Jason Tyson-Phipps to Arbitrator dated February 24, 2016, Berezin Decl. Ex. 20 (withdrawing in part due to lack of OFAC license); Email from Cheryl James to Arbitrator dated March 2, 2016, Berezin Decl. Ex. 34 (explaining that OFAC indicated that the Arbitrator required a license to proceed).) Therefore, any argument that "competent" U.S. counsel might have made regarding the need for appropriate OFAC licenses was available to Ukrainian counsel at the time the Arbitrator denied petitioners' adjournment requests.

In sum, petitioners have failed to show that on the record before him, the Arbitrator acted unreasonably in denying petitioners' adjournment requests. Petitioners' claim

that they were "unable to present [their] case" in violation of Article V(1)(b) of the New York Convention is denied for the same reasons.

2. The Arbitrator's Award Was Authorized by an OFAC License and Was Not "Misbehavior."

Petitioners next argue that the Arbitrator "engaged in 'misbehavior' in violation of the FAA, §10[(a)](3) because he was not permitted to render an award in violation of [EO 13660]." (Pet. ¶ 34.) There is no basis for this claim. In response to Forbes' letters of October 26 and December 18, 2015 which explained the arbitration, the parties' positions, and the requested relief, OFAC issued the March 2 OFAC License expressly permitting Forbes, its attorneys, and "all other persons participating in [the] arbitration proceeding . . . to engage in all transactions that are necessary and ordinarily incident to the hearing presided over by [the Arbitrator] from March 3 through March 5, 2016, as described in the Application." (March 2 OFAC License.) However, this license expired on March 15, 2016, (id.), and on March 14, 2016, the AAA indicated that the Arbitrator required more time to complete the award. (Email from AAA to Parties dated March 14, 2016, Marks Decl. Ex. 53 (memorializing March 14, 2016 conference call and explaining that the arbitration would be suspended until appropriate OFAC licenses were obtained).) The following day, Forbes wrote to OFAC requesting a thirty-day extension of the March 2 OFAC License. (March 15 Letter.) This letter explained that pursuant to the March 2 OFAC License, the arbitration hearing had been held on March 3-4, 2016 and that "[a] transaction that is necessary and ordinarily incident to such an arbitration hearing is the drafting and issuance of a final award, which contains the arbitrator's decision on the merits of the claims and counterclaims asserted by the parties." (Id.) The letter also summarized the March 14, 2016 conference call with the AAA and concluded by requesting the thirty-day extension of the March 2 OFAC License specifically "to enable the neutral arbitrator to complete

his work and render a decision as is typical and necessary after a hearing has been held in any arbitration." (Id.) No other reason was given to justify the need for the license extension.

On March 27, 2016, OFAC issued a license again authorizing Forbes, its attorneys, and "all other persons participating in [the] arbitration proceeding . . . to engage in all transactions that are necessary and ordinarily incident to the hearing presided over by [the Arbitrator] from March 3 through March 5, 2016, as described in the Application." (March 27 OFAC License.) This license superseded and replaced the March 2 OFAC License and expired on April 30, 2016. (Id.) It was also specifically issued pursuant to Forbes' letters of October 26, 2015, December 18, 2015, March 2, 2016, and, importantly, March 15, 2016. (Id.) As the sole reason given for requesting an extension of the March 2 OFAC License was to allow the Arbitrator time to issue a final award, the March 27 OFAC License authorized the issuance of the Award and the Arbitrator committed no "misbehavior" by issuing it.

Any argument that the Award itself violates the Executive Order is similarly baseless. In its letters of October 26 and December 18, 2015, Forbes provided OFAC with a detailed description of the License Agreement and the circumstances of the arbitration, as well as the history and current status of the arbitration proceedings. Therefore, OFAC understood the nature of the arbitration proceedings, the parties' relative positions, and the requested relief when they issued the March 2 OFAC License permitting the arbitration hearing to proceed. As detailed above, OFAC subsequently authorized the Arbitrator to issue a final award.

Finally, upon receipt of the Award, Forbes sent it to OFAC and requested a license authorizing it to enforce the Award including "the Award's termination of the Agreement and the trademark license for material breach by [petitioners] and by virtue of force majeure and impossibility of performance." (April 21 Letter (attaching the Award, the March 1, 2016 letter

from OFAC and the parties' respective Statements of Claim from the arbitration).) The April 21 Letter also specifically noted that enforcing the Award would include enforcing paragraph 3 of the Award which declares the License Agreement terminated and enjoins petitioners from using the Forbes trademark. (Id. at 2; Award at 11.) Forbes also requested an OFAC license authorizing a bank to unblock certain funds representing a portion of pre-paid royalties the Award found that petitioners had forfeited. (April 21 Letter at 3; Award at 10 n.2.) In response, OFAC issued a license on August 20, 2016 authorizing Forbes, its attorneys, and "all other persons that participated in [the arbitration] . . . to engage in all transactions that are necessary and ordinarily incident to the enforcement of the arbitral award issued by the Arbitrator, James B. Kobak, Jr., on April 20, 2016, including the provision of legal services related to enforcing the arbitral award and trademark infringement actions . . . as described in the Application." (August 20 OFAC License.) The August 20 OFAC License also unblocked the pre-paid royalties as requested in Forbes' April 21 Letter. (Id.) Thus, even if the Award did somehow violate EO 13660, OFAC has explicitly authorized its enforcement in federal court. As OFAC has licensed the arbitration proceeding, the issuance of the Award, and enforcement of the Award, the Court will not vacate the Award on the ground that it violates the Executive Order and/or any associated statutes or regulations.

The Award did not violate EO 13660 and the Arbitrator did not misbehave by issuing it. The Court will not vacate the Award on those grounds. Petitioners' claim that the Arbitrator "exceeded [his] powers" by issuing the Award in violation of section 10(a)(4) of the FAA is similarly meritless.

b. New York Convention.

When a petition is brought under the New York Convention, "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." Scandinavian Reins. Co., 668 F.3d at 78 (quoting 9 U.S.C. § 207). The New York Convention sets out seven grounds for refusing to confirm an award including where, of relevance here:

> (a) The parties to the agreement [to arbitrate] 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 . . . .

New York Convention art. V(1). In addition, a Court may refuse to confirm an award where "[t]he recognition or enforcement of the award would be contrary to the public policy of that country." Id. art. V(2)(b).

"The party opposing enforcement of an arbitral award has the burden to prove that one of the seven defenses under the New York Convention applies." Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc., 403 F.3d 85, 90 (2d Cir. 2005) (citing Art. V(1)). "The burden is a heavy one, as 'the showing required to avoid summary confirmance is high.'" Id. (quoting Yusuf Ahmed Alghanim & Sons, 126 F.3d at 23). "Given the strong public policy in favor of international arbitration, review of arbitral awards under the New York Convention is very limited in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." Id. (internal citations, quotation marks, and ellipsis omitted).

i. Article V(1)(a).

Petitioners claim that the Award must be vacated under Article V(1)(a) of the New York Convention because they were "under some incapacity" in that "they were precluded from engaging American counsel of their choice because they had insufficient time for American counsel to obtain a license from OFAC." (Pet. ¶ 38.) However, for purposes of Article V(1)(a), a party's "incapacity" is determined at the time of the agreement rather than at the time of the arbitration. See China Nat. Bldg. Material Inv. Co. v. BNK Int'l LLC, No. A-09-CA-488-SS, 2009 WL 4730578, at *5–6 (W.D. Tex. Dec. 4, 2009) (noting that Article V(1)(a) as a whole appears to refer to the validity of the underlying arbitration agreement and agreeing with plaintiff that "the incapacity defense requires the challenging party to prove it was under an incapacity at the time the agreement was entered into, not at the time of the arbitration proceeding"); Polytek Eng'g Co. v. Jacobson Cos., 984 F. Supp. 1238, 1242 (D. Minn. 1997) ("The challenging party must prove: 1) it was under an incapacity at the time the agreement was made . . . ."); see also BCB Holdings Ltd. v. Gov't of Belize, No. Civ. 14-1123 (CKK), 2017 WL 486911, at *15 (D.D.C. Feb. 6, 2017) ("Article V(1)(a) provides that an arbitral award may be refused only if the party that is challenging enforcement furnishes to the competent authority proof that '[t]he parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity . . . .' The agreement referred to in Article II of the Convention is 'an agreement in writing under which the parties undertake to submit to arbitration all or any differences . . . .' . . . Therefore, a challenge brought under Article V(1)(a) must be brought against the agreement to arbitrate . . . .") (quoting New York Convention, arts. II, V(1)(a)). As petitioners have offered no evidence that they suffered from any incapacity at the time the License Agreement was signed their claim fails.

Petitioners also claim that the Award should be vacated because the arbitration clause of the License Agreement was "not valid . . . under the law of the country where the award was made," New York Convention, art. V(1)(a), "because [Forbes] could not enforce an arbitration agreement in the United States against an entity whose beneficial owner was an SDN absent a license from OFAC." (Pet. ¶ 39.) Yet Forbes did ultimately get a license from OFAC to conduct the arbitration. The March 2 OFAC License specifically authorized the hearings on March 3-4, 2016 and was issued with full knowledge that arbitration proceedings had been ongoing since 2014. In addition the March 27 OFAC License authorized the issuance of the Award which was necessarily based on all of the earlier arbitration proceedings. Accordingly, petitioners have failed to show that the Award should be vacated under Article V(1)(a) of the New York Convention.

ii. Article V(2)(b).

According to petitioners, the Award must be vacated as violative of Article V(2)(b) because "recognition or enforcement of the [A]ward would be contrary to the public policy of the United States." (Pet. ¶ 43) (internal quotation marks omitted). Petitioners provide three reasons why enforcement of the Award would violate U.S. public policy: (1) "Forbes was prohibited from participating in an arbitration in the United States with Petitioners by [EO 13660] absent a license from OFAC;" (2) "the Arbitrator was prohibited from providing services to Petitioners by [EO 13660] absent a license from OFAC;" and (3) "Petitioners were deprived of the right to engage American counsel of their choice because the Arbitrator refused to adjourn the hearing so American counsel could obtain a license from OFAC to represent them." (Pet. ¶¶ 43-45.)

"Article V(2)(b) must be construed very narrowly to encompass only those circumstances where enforcement would violate our most basic notions of morality and justice." Telenor Mobile Commc'ns AS v. Storm LLC, 584 F.3d 396, 411 (2d Cir. 2009) (internal quotation marks omitted). Again, the Court notes that OFAC specifically licensed the arbitration proceedings as well as Forbes' and the Arbitrator's participation in them. It is difficult to see how enforcement of the Award would violate public policy where the issuance and enforcement of the Award were explicitly sanctioned by OFAC, and where the Award itself appears to further the goal of the sanctions laws by terminating the rights of a blocked person in an American-owned trademark. (See EO 13660 § 1(a) (blocking "[a]ll property and interests in property" of an SDN "that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person").) As for petitioners' third argument, the Court has already found that the Arbitrator's refusals to grant petitioners' adjournment requests were reasonable and that the petitioners were given notice and a meaningful opportunity to be heard. In addition, petitioners' lack of U.S. counsel at the March hearings was as much due to their prior misconduct and mistreatment of counsel as it was due to a lack of an OFAC license. Therefore, the Court declines to vacate the Award on public policy grounds.

c. New York and Federal Law.

Finally, petitioners claim that the Award must be vacated because it was illegal and "against public policy" for the Arbitrator and Forbes to participate in the arbitration pursuant to the arbitration clause of the License Agreement because EO 13660 had made the entire License Agreement "illegal and void" under New York state contract law. (Pet. ¶ 48.) Put another way, petitioners argue that by preventing U.S. persons from engaging in transactions

with petitioners absent an appropriate OFAC license, EO 13660 made performance under the arbitration clause of the License Agreement illegal. (Id. ¶ 47.) Petitioners' argument ignores the existence of OFAC licenses covering the arbitration proceedings, the issuance of the Award enforcement of the Award. Petitioners have failed to identify any violations of state or federal law that would warrant vacating the Award.

As petitioners have provided the Court with no valid grounds for vacating the Award, the petition to vacate the Award is denied.

II. Motion to Amend Petition and Seek Discovery.

By letter dated October 20, 2016, petitioners sought to amend their petition in order to add claims that were first raised in their reply brief in support of the petition to vacate the arbitration award.[3] (Dkt. 27.) Petitioners also sought discovery in aid of the amended petition. (Id.) Forbes opposed both requests. (Dkt. 28.) In an Order dated November 1, 2016 the Court indicated that it would consider petitioners' arguments in support of post-award discovery and an amended petition in the course of adjudicating the petition. (Dkt. 29.) For the following reasons, both the motion to amend and the motion for post-award discovery are now denied.

Petitioners seek to amend the petition principally to include claims asserting that the Award must be vacated because it was based on illegal proceedings and because it was fraudulently procured in violation of section 10(a)(1) of the FAA. (Proposed Am. Pet. ¶¶ 48-53, 67-68.) Whether framed as illegality, misbehavior, corruption, undue means, violation of public

[3] The Court does not address petitioners' other arguments raised for the first time in their reply brief but not included in the Proposed Amended Petition. See United States v. Yousef, 327 F.3d 56, 115 (2d Cir. 2003) ("We will not consider an argument raised for the first time in a reply brief."); Mayer v. Neurological Surgery, P.C., No. 15 Civ. 0864 (DRH) (ARL), 2016 WL 347329, at *4 (E.D.N.Y. Jan. 28, 2016) ("The law in this Circuit is clear that arguments raised for the first time in reply briefs need not be considered."). For this reason Forbes' motion for leave to file a sur-reply in response is denied.

policy or otherwise, petitioners' proposed amendment is an attempt to rehash and repackage its unmeritorious argument that the arbitration proceedings should be deemed void, invalid, and unenforceable because U.S. persons, including Forbes, its lawyers and the Arbitrator, were blocked from engaging in transactions with petitioners, including participation in the arbitration. As discussed at length, OFAC licensed the arbitration proceedings, the Award and the enforcement of the Award. The claims are meritless and futile.

Nor is there any substance to petitioners' attempt to construct a fraud claim based upon Forbes' failure to raise the need for the arbitration participants to obtain OFAC licenses at an earlier point in the proceeding. Petitioners began the arbitration on September 17, 2014. Petitioners became blocked persons on July 30, 2015. As of August 10, 2015, petitioners and the Arbitrator knew that it was the position of Forbes that the blocking order amounted to a force majeure requiring termination of the License Agreement. True, that by October 26, 2015, Forbes sought a license for the arbitration proceeding and expressed the view to OFAC that any arbitration proceeding prior to the issuance of a license was void. Forbes did not inform petitioners or the Arbitrator of the position taken with OFAC until OFAC issued the March 2 OFAC License. However, the October 26, 2015 letter sent on behalf of Forbes to OFAC, was offered into evidence at the March 3, 2016 merits hearing. Indeed, the author of the letter testified as a witness. (See Mar. Hearing Tr., Berezin Decl. Ex. 28 at 511:4-609:13.) Thus the petitioner and the Arbitrator were aware of the position taken by Forbes with OFAC well before the issuance of the Award. OFAC could not have licensed the Award nor its enforcement if it considered it to have been in violation of the Executive Order. There was no cognizable prejudice to petitioners who argued to the Arbitrator on March 15, 2016 that no OFAC license was required for the arbitration proceeding. (See Email from Oleksandr Khomiak to AAA dated

March 15, 2016, Marks Decl. Ex. 53 (disputing that the AAA required a license to continue the arbitration).) For essentially the same reasons, petitioners fair no better by styling their argument as a fraud claim based on the actions of the AAA and the Arbitrator in proceeding to hear the arbitration.

When evaluating a claim under section 10(a)(1) of the FAA, the Second Circuit has observed that the award "must stand unless it is made abundantly clear that it was obtained through corruption, fraud, or undue means." Karppinen v. Karl Kiefer Mach. Co., 187 F.2d 32, 34 (2d Cir. 1951) (internal quotation marks omitted). A party challenging an award under section 10(a)(1) "must adequately plead that (1) respondent engaged in fraudulent activity; (2) even with the exercise of due diligence, petitioner could not have discovered the fraud prior to the award issuing; and (3) the fraud materially related to an issue in the arbitration." Odeon Capital Grp. LLC v. Ackerman, No. 16-1545-CV(L), 2017 WL 3091560, at *3 (2d Cir. July 21, 2017). Here, before the Award was issued, the petitioners had actual knowledge of the essential facts that they now claim to be the fraud.

Leave to amend should be freely given in the absence of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment . . . ." Foman v. Davis, 371 U.S. 178, 182 (1962). Here, all of the claims petitioners seek to add could have been included in the original petition filed in this Court. They are not based on any newly discovered information and petitioners have provided no plausible explanation for seeking to add them at this late date. Petitioners have had all of the information they needed to raise these claims since at least March 3, 2016. When they filed their petition in July 2016, it was incumbent on petitioners to include all of the grounds for

vacatur they wished the Court to consider. Proceedings under the FAA are intended to be streamlined and expedited. See Hall St. Assocs., L.L.C., 552 U.S. at 582. Permitting an amendment at this stage would cause unnecessary delay and unduly prejudice Forbes who reports that it is at risk of losing valuable trademarks in the Ukraine due to petitioners' continued use of the trademarks and trademark cancellation proceedings that have been filed in the Ukraine. (Dkt. 32.) Petitioners' proposed amendments are meritless and futile and belatedly raised for the purpose of further delay.

Petitioners' motion to amend the petition and for post-award discovery in aid of that amendment is denied.

CONCLUSION

For the reasons explained, the petition to vacate the award (Dkt. 1) is DENIED. Petitioners' motion for post-award discovery and leave to amend (Dkt. 27) is also DENIED. Forbes' motion for leave to file a sur-reply (Dkt. 26) is DENIED. The Clerk is directed to enter judgment for the respondent Forbes Media, LLC, terminate all open motions and close the case.

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
August 9, 2017