UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN THE MATTER OF THE ARBITRATION BETWEEN:	§ § §	
YPF S.A., *et al*,	§	
Petitioners,	§ §	
VS.	§	CIVIL ACTION NO. 4:17-CV-00178
APACHE OVERSEAS, INC., *et al*,	§ § §	
Respondents.	§	

ORDER

Pending before the Court is the application of the Petitioners, YPF S.A. and YPF Europe B.V. (collectively, "YPF"), to confirm an arbitration award (Doc. 1). Also pending are the response in opposition and motions of the Respondents, Apache Overseas, Inc. and Apache International Finance II S.A.R.L. (collectively, "Apache"), to stay confirmation of the final arbitration award, or in the alternative to vacate the final arbitration award (Doc. 5), as well as YPF's Motion for an Emergency Hearing (Doc. 19). For the reasons discussed below, YPF's motion to confirm the award is granted, Apache's motions are denied, and the motion for an emergency hearing is moot.

I. Background

In February and March of 2014, YPF and Apache engaged in a transaction in which Apache sold its entire business in Argentina to YPF. The transaction was completed on March 12, 2014, at which time YPF paid around $700,000,000 to Apache. Doc. 5 at 3. The Sale and Purchase Agreement (the "SPA") documented this sale. SPA, Doc. 4-1 at 39-466. The SPA contained provisions allowing for adjustment to the base consideration based on a variety of

factors. *Id*. cls. 4.1-4.2. Pursuant to the SPA, Apache was required to and did issue a Final Completion Statement to YPF within sixty days of the completion of the sale proposing the anticipated adjustments. Apache proposed in this Statement that Apache refund an amount of $281,568 to YPF. *Id*. cls. 4.1-4.2, 7.1. As permitted by the SPA, on July 24, 2014, YPF objected to Apache's Statement, describing the specific items in dispute and proposing its own adjustments. *Id.*at cls. 7.2-7.3. YPF challenged Apache's assessment of the "Locked Box Working Capital" amount and "Leakage," and contended that the sum due from Apache to YPF was actually $12,168,281. Doc. 5 at 3-4.

After unsuccessfully attempting to resolve the dispute, the parties invoked the SPA resolution procedure. *Id.* According to the SPA, the disputed amounts are to be referred to Independent Accountants "for final determination in accordance with Schedule 9," which "shall be final and binding on the Parties." SPA, cls. 7.4-7.5. Schedule 9 of the SPA details the procedures that shall govern the Independent Accountants' decision and reiterates that the decision shall be final and binding, save in the case of fraud or manifest error. *Id.* at 136-37. Furthermore, the Independent Accountants' determination shall "include the reasoning supporting the determination." *Id.*

In accordance with the SPA's dispute resolution procedure, the parties agreed to submit their dispute to KPMG for resolution. The Engagement Letter with KPMG, dated February 11, 2016, outlined the procedures to be used by KPMG in resolving the dispute. Doc. 4-1 at 24-34. It explained that the Independent Accountant's Determination shall be final and binding on all parties to the agreement, and it shall be a joint determination made by two KPMG partners: Ginger Menown and Diego Bleger. *Id.* The Letter specified that KPMG shall render its Determination in a written report. After this written report is rendered, either party "may, within

five business days of the rendering of [the] Determination, call to the Independent Accountant's attention any patent arithmetical inaccuracy in the Determination. Corrections by KPMG, if any, will be made within 5 business days of any such submission." *Id.* Furthermore,

> No substantive evidence or pleading shall accompany such notice and any such evidence or pleading shall be ignored. The lndependent Accountant shall weigh such notice as it deems appropriate and notify the Parties of its resolution. At that time, or upon the elapsing of five business days following the rendering of our Determination in the absence of such notice, the Determination (or the revised Determination if a patent arithmetical inaccuracy has been corrected) will become final and binding upon the Parties (subject to the terms of the Agreement).

Id. at 30.

On October 5, 2016, KPMG issued its Determination in a written letter to YPF and Apache. Doc. 4-1 at 5-10. The Determination stated that it was a joint determination by KPMG partners Ginger Menown and Diego Bleger, signed by both the aforementioned, and that it constituted KPMG's final and binding determination in the matter. Based on its procedures and the documentation provided by the parties, KPMG determined that the Final Completion Statement for the Disputed Amounts owed by Apache to YPF is $9,877,052. Attached to the Determination, KMPG submitted a table itemizing the disputed adjustments and awards and a report of their basis for determining the amount awarded. *Id.*

Unhappy with this finding, Apache attempted to exercise its right to point out "patent arithmetical inaccurac[ies]" in the Determination within five days of its issuance by sending a notice to YPF challenging the Determination. Doc. 5 at 6. However, Apache's complaint did not point out such patent arithmetical inaccuracies; rather, it was substantive in nature. Apache argued that because of the lack of work papers, calculations, and spreadsheets, it was unable to determine if arithmetical errors had been made; in other words, the KPMG partners had not "shown their work". Doc. 5-4, Doc. 6 at 3. KPMG responded to Apache's objection on

November 11, 2016. In a letter signed by Diego Bleger and another KPMG partner, but not by Ginger Menown,[1] KPMG ignored Apache's challenge, stating:

> The objections set forth by Sellers [Apache] do not raise "any patent arithmetical inaccuracy in the Determination." Sellers' objections instead consist of substantive evidence of pleading. As such, in accordance with the Engagement Letter, we have not considered them. Accordingly, we do not intent to respond to Sellers' objections or otherwise address their accuracy.

Doc. 5-5 at 2. Again unhappy with this finding, Apache decided to pursue mediation with KPMG regarding the terms of the Engagement Letter and the services provided thereunder. In the meantime, Apache has refused to pay YPF the amount owed as determined by KPMG despite YPF having sent a formal Demand Letter on November 21, 2016. Doc. 1 at 6.

YPF brought this Application to Confirm Final Arbitration Award, seeking a judgment from the Court confirming the award and entering judgment in the Petitioners' favor against Respondents in conformity with the Award ($9,877,052). Apache argues that the award should not be confirmed, and, in the alternative, that the confirmation of the award should be stayed until the dispute with KPMG is resolved, and, in the alternative, that the award should be vacated.

II. Applicable Law

The standard of review of an arbitration award under the Federal Arbitration Act ("FAA") is one of deference. *Gulf Coast Indus. Workers Union v. Exxon Co.,* 991 F.2d 244, 248 (5th Cir.), *cert. denied,* 510 U.S. 965 (1993). The FAA mandates a summary procedure modeled

[1] Ginger Menown left her position at KPMG for a different job on October 5, 2016, after issuing her joint determination with Diego Bleger, but while Apache was in the process of attempting to dispute that Determination. The Determination issued by Ginger Menown and Diego Bleger was a joint determination, made and signed by the two of them, as agreed by the parties. However, the letter sent by KPMG ignoring Apache's challenge was issued after Menown's departure. Therefore, it was signed by Diego Bleger, but not by Ginger Menown. It was also signed by a different KPMG partner, Bryan Jones.

after federal motion practice to resolve petitions to confirm arbitration awards. *See* 9 U.S.C. § 9. "Judicial review of an arbitration award is extraordinarily narrow and [the Court] should defer to the arbitrator's decision when possible." *Antwine v. Prudential Bache Sec., Inc*., 899 F.2d 410, 413 (5th Cir.1990). "To assure that arbitration serves as an efficient and cost-effective alternative to litigation, and to hold parties to their agreements to arbitrate, the [Federal Arbitration Act] narrowly restricts judicial review of arbitrators' awards." *Positive Software Solutions v. New Century Mortg.*, 476 F.3d 278, 280 (5th Cir. 2007).

Judicial review of arbitrators' decisions is limited to the statutory exceptions enumerated in the FAA. *Gulf Coast Indus. Workers Union v. Exxon Co.,* 70 F.3d 847, 850 (5th Cir.1995); *Forsythe Int'l. S.A. v. Gibbs Oil Co. of Texas,* 915 F.2d 1017, 1020 (5th Cir.1990). In reviewing an arbitration award the court asks whether the arbitration proceedings were "fundamentally unfair." *Gulf Coast,* 70 F.3d at 850. This limited judicial review reflects the desire to "avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *Folkways Music Publishers, Inc. v. Weiss,* 989 F.2d 108, 111–12 (2d Cir. 1993). Thus, "whatever indignation a reviewing court may experience in examining the record, it must resist the temptation to condemn imperfect proceedings without a sound statutory basis for doing so." *Forsythe,* 915 F.2d at 1022. A party moving to vacate an arbitration award has the burden of proof. *Matter of Arbitration Between Trans Chem. Ltd. & China Nat. Mach. Imp. & Exp. Corp*., 978 F. Supp. 266, 303 (S.D. Tex. 1997), *aff'd sub nom. Trans Chem. Ltd. v. China Nat. Mach. Imp. & Exp. Corp*., 161 F.3d 314 (5th Cir. 1998).

Under the Federal Arbitration Act, there are only four grounds upon which a court may vacate an arbitration award:

(1) where the award was procured by corruption, fraud, or undue means;

> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where 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 any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(1)–(4). The party moving to vacate an arbitration award bears the burden of proof. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak*, 364 F.3d 274, 288 (5th Cir. 2004). Further, "all doubts implicated by an award must be resolved in favor of the arbitration." *Rain CII Carbon, LLC v. ConocoPhillips,* 674 F.3d 469, 474 (5th Cir. 2012); *Taylor v. Univ. of Phoenix/Apollo Grp.,* 487 F. App'x 942, 944–45 (5th Cir. 2012).

III. Discussion

Apache argues that the Determination made by Diego Bleger and Ginger Menown on October 5, 2016 is not "final," but rather it is a preliminary determination, and as such, it cannot be confirmed by the Court. Doc. 5 at 8. Apache contends that KPMG "failed to address Apache's challenge in accordance with the terms of the Engagement Letter." *Id.* Because the letter from KPMG dismissing Apache's objections was not signed by Ginger Menown but by Bryan Jones, this voids the finality of the joint Determination, according to Apache.

The Court disagrees. The plain language of the Engagement Letter states that "the Determination shall be made by Ms. Menown and Mr. Bleger." Doc. 4-1 at 30. The Determination was indeed made by Ms. Menown and Mr. Bleger. Doc. 4-1 at 5-10. Both parties were permitted to notify KPMG of any patent mathematical errors within five days of the issuance of the Determination. No such patent arithmetical errors were pointed out by either party.

The Engagement Letter states the following procedure for the Determination to become "final and binding":

> As described above, either Party may, within five days of the rendering of our Determination, call to the Independent Accountant's attention any patent arithmetical inaccuracy in the Determination. *No substantive evidence or pleading shall accompany such notice and any such evidence or pleading shall be ignored.* The lndependent Accountant shall weigh such notice as it deems appropriate and notify the Parties of its resolution. *At that time, or upon the elapsing of five business days following the rendering of our Determination in the absence of such notice, the Determination (or the revised Determination if a patent arithmetical inaccuracy has been corrected) will become final and binding upon the Parties (subject to the terms of the Agreement).*

Doc. 4-1 at 30 (emphasis added). In this case, the substantive pleading submitted by Apache was ignored, according to procedure. Since no patent mathematical inaccuracies were pointed out by either party, the Determination was final and binding after the five days to do so lapsed.

Apache argues in the alternative that the Court should stay this proceeding pending resolution of its ongoing dispute with KPMG. The Court agrees with YPF that that dispute is between Apache and KPMG and should not involve YPF as a party, and therefore a stay of the award is inappropriate and will not be granted. Apache argues in the further alternative that the award should be vacated under section 10(a) of the FAA. Specifically, Apache alleges a violation of 9 U.S.C. § 10(a)(4), which states that a district court may vacate an arbitration award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." Having read the motions, responses, replies, and the relevant provisions in the SPA and Engagement Letter, and having studied the facts that occurred, the Court finds that Apache has not met its heavy burden of showing the arbitrators exceeded their powers and declines to vacate the award.

A district court's review of an arbitration award is "extraordinarily narrow." *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG*, 783 F.3d 1010, 1015 (5th Cir. 2015).

Here, the case does not provide the narrow circumstances that would render the arbitral award unenforceable. For the foregoing reasons, the Court now confirms the arbitration award, denies Apache's request for a stay, and denies Apache's request to vacate the award.

IV. Conclusion

For the reasons discussed above, Apache's motions to stay and to vacate (Doc. 5) are DENIED. YPF's motion for a hearing (Doc. 19) is MOOT.

Under the FAA, if any party to the arbitration proceeding applies for an order confirming the award, "the court must grant such an order unless the award is vacated, modified, or corrected ...." 9 U.S.C. § 9. Apache having failed to show grounds for vacating the award, and YPF having moved for confirmation (Doc. 1), the award is accordingly CONFIRMED. The motion for an emergency hearing (Doc. 19) is MOOT.

SIGNED at Houston, Texas, this 20th day of November, 2017.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE