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Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BAKER HUGHES SERVICES INTERNATIONAL, LLC,

Plaintiff - Appellee,

v.

JOSHI TECHNOLOGIES INTERNATIONAL, INC.,

Defendant - Appellant.

Nos. 21-5072 & 21-5081

Appeals from the United States District Court for the Northern District of Oklahoma (D.C. No. 4:20-CV-00626-TCK-SH)

Steven M. Harris, Doyle Harris Davis & Haughey, Tulsa, Oklahoma, (S. Max. Harris, Doyle Harris Davis & Haughey, Tulsa, Oklahoma, with him on the briefs) for Defendant-Appellant.

W. Davidson Pardue, Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., Oklahoma City, Oklahoma, (Bryan J. Nowlin, Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C, Tulsa, Oklahoma, with him on the brief) for Plaintiff-Appellee.

Before **EID**, **BALDOCK**, and **CARSON**, Circuit Judges.

CARSON, Circuit Judge.

Many parties entering complex commercial transactions choose to negotiate where and how they might resolve any potential disputes. For those entering

contracts that span multiple countries—each with their own substantive laws—the certainty of knowing where and how disputes will be resolved is almost indispensable.[1] To this end, international arbitration is often an attractive choice, as many businesses prefer to avoid the uncertainty, expense, and potential hostility of a foreign nation's local courts. But when our courts refuse to uphold a foreign arbitrator's award, those advantages are destroyed. As a result, the list of defenses available to a party trying to avoid the enforcement of a foreign award is deliberately short.

This case turns on whether Defendant Joshi Technologies can establish any of those defenses to defeat Plaintiff's attempt to confirm such an award. Plaintiff, after winning an Ecuadorian arbitration against the Ecuador-based Pesago Consortium, secured an arbitral award enforceable jointly and severally against the Consortium's two members—Defendant and third-party Campo Puma Oriente S.A. Plaintiff then brought its award to Oklahoma and sued Defendant to confirm the award in the United States. Plaintiff again prevailed, and the district court entered judgment against Defendant for the award's amount, prejudgment interest, and attorney's fees.

Now before us, Defendant raises three grounds for reversal. First, Defendant contends that the district court lacked subject matter jurisdiction to confirm the award. Second, Defendant argues that the district court should not have confirmed the award because the parties never agreed to arbitrate their dispute. Third,

[1] See Scherk v. Alberto-Culver Co., 417 U.S. 506, 516–17 (1974).

Defendant argues that the district court improperly awarded attorney's fees and incorrectly calculated prejudgment interest. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm everything except the district court's award of prejudgment interest, which we vacate and remand for the district court to reconsider.

I.

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (commonly known as the "New York Convention") governs actions to enforce foreign arbitral awards in the United States. The New York Convention is an international treaty that Congress adopted "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which. . . arbitral awards are enforced in the signatory countries." Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974). With that goal in mind, Congress vested the federal courts with jurisdiction over actions "falling under" the Convention, 9 U.S.C. § 203, and implemented the Convention's rules establishing how and when a party may enforce an international arbitration award. See 9 U.S.C. § 201 et seq.

The award Plaintiff presently seeks to enforce arises from a straightforward contractual dispute. The Pesago Consortium engaged Plaintiff to provide goods and services in connection with the development and operation of the Consortium's oil and gas interests in the Puma block of the Ecuadorian Amazon region. To define the scope of their business relationship, the Consortium and Plaintiff executed a "Master

Services Agreement."[2] That contract contained an arbitration clause providing that "[a]ll disputes arising from or relating to this CONTRACT or the products/services provided herein . . . must be resolved by means of a conclusive and final arbitration award in accordance with the regulations . . . of the Arbitration and Mediation Center of The Ecuadorian-American Chamber of Commerce . . . ." Appellant's App. Vol. 2 at 84. In addition, the MSA generally set forth the terms by which Plaintiff agreed to furnish goods necessary for the Consortium's oil and gas activities.

Plaintiff provided the goods and services the Consortium requested. Plaintiff then invoiced the Consortium for those goods and services. But no one paid Plaintiff. So, as required by the MSA's arbitration clause, Plaintiff filed a claim against the Consortium and its members with the Arbitration and Mediation Center for the Ecuadorian American Chamber of Commerce for the amount due. The Center appointed a single arbitrator to hear the case. The appointed arbitrator analyzed Plaintiff's claims and Defendant's defenses, reviewed documents, and heard testimony from several expert witnesses before ultimately awarding Plaintiff roughly half a million dollars in damages.

Plaintiff then returned to the States and moved to confirm the arbitral award in the United States District Court for the Northern District of Oklahoma. Defendant

[2] The Parties dispute whether Plaintiff or Plaintiff's affiliate signed the contract because the MSA lists Baker Hughes International Services, *Inc*. rather than Plaintiff—Baker Hughes International Services, *LLC*—who performed Baker's obligations under the contract. This issue is discussed further in section IV of this opinion, *infra*.

responded by moving to vacate the arbitral award and to dismiss Plaintiff's complaint for lack of subject matter jurisdiction. After briefing, the district court sided with Plaintiff, denied Defendant's motions, and entered judgment against Defendant confirming the arbitrator's award. Plaintiff then moved for attorney's fees and costs, as well as accrued interest from the date of the arbitrator's award. After more briefing, the district court awarded fees, costs, and interest to Plaintiff. Defendant timely appeals both rulings.[3]

II.

When we review the confirmation of an arbitral award, we review the district court's factual findings for clear error and its legal determinations de novo. See Burlington N. & Santa Fe Ry. Co. v. Pub. Serv. Co. of Okla., 636 F.3d 562, 567 (10th Cir. 2010) (citing Sheldon v. Vermonty, 269 F.3d 1202, 1206 (10th Cir. 2001)). But although we give no deference to the district court's legal conclusions, we afford "extreme deference" to the arbitrator's decisions because the standard of review of arbitral awards is "among the narrowest known to law." See THI of N.M. at Vida Encantada, LLC v. Lovato, 864 F.3d 1080, 1083 (10th Cir. 2017) (quoting ARW Expl. Corp. v. Aguirre, 45 F.3d 1455, 1462 (10th Cir. 1995)) (emphasis omitted).

As for the secondary issues, we review the district court's grant of contractual attorney's fees for an abuse of discretion as to any factual determinations but de novo

[3] Plaintiff appeals separately from the entry of judgment confirming the award and from the district court's order awarding fees, costs, and interest. For convenience, we consolidated the appeals for briefing and submission.

for the legal conclusions on which the district court based the award. Tulsa Litho Co. v. Tile & Decorative Surfaces Mag. Pub., Inc., 69 F.3d 1041, 1043 (10th Cir. 1995). And we review a district court's prejudgment interest award for an abuse of discretion. Reed v. Mineta, 438 F.3d 1063, 1066 (10th Cir. 2006).

III.

Defendant first contends that the district court lacked subject matter jurisdiction over this action because Plaintiff failed to satisfy the mandatory procedural requirements to enforce an international arbitration award found in article IV of the Convention. Article IV reads in relevant part:

> 1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
>
> (a) The duly authenticated original award or a duly certified copy thereof;
> (b) The original agreement referred to in article II or a duly certified copy thereof.
>
> 2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a [certified] translation of the documents into such language.

N.Y. Convention art. IV. Because the Ecuadorian arbitrator wrote his award in Spanish, Defendant contends that article IV required Plaintiff to supply: (1) the duly authenticated award or a duly certified copy; (2) the original agreement or certified copy; and (3) duly certified translations of the agreement and award. Plaintiff only provided certified English translations of the agreement and award. And so, as Defendant's argument goes, Plaintiff's failure to produce the original Spanish

documents violated article IV and deprived the district court of subject matter jurisdiction over Plaintiff's action. We disagree.

Even if article IV required Plaintiff to provide the original Spanish documents, article IV is not the relevant jurisdictional provision. Congress vested the federal courts with jurisdiction to hear actions and proceedings "falling under the Convention" in 9 U.S.C. § 203. And Congress defined that phrase in 9 U.S.C. § 202. An arbitration agreement or award "falls under the Convention" when it arises out of a commercial legal relationship, whether contractual or not, unless the relationship is wholly between United States citizens and does not involve property in another country, envision performance abroad, or have some other reasonable connection to one or more foreign states. See 9 U.S.C. § 202. Notably absent from that definition is anything requiring courts to assess a plaintiff's enforcement action against the Convention's procedural rules before exercising jurisdiction.

Defendant relies only on the Eleventh Circuit's holding in Czarina for the idea that article IV's procedural prerequisites are jurisdictional despite their absence from the relevant statutes. See Czarina, LLC v. W.F. Poe Syndicate, 358 F.3d 1286, 1292 (11th Cir. 2004). In Czarina, the court indeed held that a plaintiff seeking to confirm an international arbitral award must comply with article IV to establish the district court's subject matter jurisdiction to confirm the award. Id. According to the Czarina court, because the Convention's prerequisites use mandatory language, a plaintiff must satisfy those requirements for a federal court to have jurisdiction. Id.

But Defendant ignores that in the years since Czarina, every circuit court to consider this issue has rejected the notion that article IV's rules are jurisdictional. See Sarhank Grp. v. Oracle Corp., 404 F.3d 657, 660 (2d Cir. 2005); Reddy v. Buttar, 38 F.4th 393, 399 (4th Cir. 2022); Al-Qarqani v. Chevron Corp., 8 F.4th 1018, 1024–25 (9th Cir. 2021). Instead, these circuits all hold that a plaintiff's failure to comply with the Convention's procedural requirements raises the *merits* question of whether the plaintiff can enforce its award, not the *jurisdictional* question of whether the court has the power to adjudicate the claim. See Sarhank, 404 F.3d at 660 (rejecting Czarina as inconsistent with Supreme Court precedent); Reddy, 38 F.4th at 399 (concluding that the analysis in Czarina blurs the distinction between jurisdictional and merits requirements); Al-Qarqani, 8 F.4th at 1024 ("It does not follow that simply because a statute uses mandatory language, it limits the subject-matter jurisdiction of a district court.").

We agree with the Second, Fourth, and Ninth Circuits' analyses and conclude that Czarina conflicts with more recent Supreme Court caselaw. Two years after Czarina, the Supreme Court criticized courts for conflating merits issues with jurisdictional deficiencies and adopted the bright-line rule that controls in today's case: a threshold limitation on a statute's scope is jurisdictional only when Congress clearly says it is. See Arbaugh v. Y&H Corp., 546 U.S. 500, 502 (2006); Gonzalez v. Thaler, 565 U.S. 134, 146 (2012). And Congress can clearly say a statutory limitation is jurisdictional either by placing it in a jurisdictional subsection or describing the limitation as such. See Gad v. Kan. State Univ., 787 F.3d 1032, 1038–

39 (10th Cir. 2015). But for article IV, Congress has done neither. So—even if Plaintiff violated article IV, which we do not decide—we hold that the district court properly exercised jurisdiction over Plaintiff's action to enforce the Ecuadorian arbitration award.

Our jurisdictional ruling ends our discussion of this issue. Although Defendant argues that Plaintiff's alleged failure to comply with article IV deprived the district court of subject matter jurisdiction over Plaintiff's action, Defendant does not argue in the alternative that Plaintiff's alleged failure to comply with article IV requires us to dismiss Plaintiff's action on the merits.[4] Thus, by not arguing that article IV precludes Plaintiff from enforcing its award on the merits, Defendant has waived this issue. See e.g., Bronson v. Swensen, 500 F.3d 1099, 1104 (10th Cir. 2007).

IV.

Defendant next argues that the district court erred by deferring to the arbitrator's conclusion that the Parties agreed to arbitrate their dispute. Defendant contends no valid arbitration agreement ever existed between Plaintiff and Defendant

[4] And Defendant's potential merits argument raises different issues than Defendant's jurisdictional challenge, largely because Defendant does not claim that the English versions of the agreement and award Plaintiff supplied are inaccurate in any way. See CEEG (Shanghai) Solar Sci. & Tech. Co., Ltd v. LUMOS LLC, 829 F.3d 1201, 1207 (10th Cir. 2016) (assuming without deciding that a defendant must show prejudice to establish one of the Convention's defenses); see also Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 296 (5th Cir. 2004) (noting that courts are loath to set aside arbitral awards under the Convention based on harmless procedural violations).

because neither Plaintiff nor Defendant signed the MSA containing the arbitration clause that led to the disputed arbitration award. For that reason, Defendant argues that it is entitled to judicial review on the issue of whether the parties agreed to arbitrate their claims.

A party opposing the confirmation of a foreign jurisdiction's arbitral award bears the burden to establish one of the Convention's seven enumerated defenses. See Goldgroup Res., Inc. v. DynaResource de Mex., S.A. de C.V., 994 F.3d 1181, 1191–92 (10th Cir. 2021) (citing Compania de Inversiones Mercantiles, S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V., 970 F.3d 1269, 1294–95 (10th Cir. 2020)). And that burden is a heavy one because we construe the Convention's defenses narrowly to encourage the recognition and enforcement of commercial arbitration agreements in international contracts. CEEG (Shanghai) Solar Sci. & Tech., 829 F.3d at 1206 (citing Karaha Bodas Co., 364 F.3d at 288). The defense relevant here—article V(2)(a)—allows courts to refuse to recognize a foreign arbitral award if "[t]he subject matter of the difference is not capable of settlement by arbitration under the law of [the country where enforcement is sought]."[5] N.Y. Convention art. V(2)(a). Because parties cannot be compelled to arbitrate without their consent in the United States, a dispute between parties without a binding

[5] Defendant declined to cabin its argument that the Parties never agreed to arbitrate into any of article V's enumerated defenses. The district court analyzed it under article V(1)(a). But as discussed above, Defendant's argument that no arbitration agreement existed between the parties properly falls under article V(2)(a).

arbitration agreement cannot be "capable of settlement by arbitration" under United States law. See Al-Qarqani, 8 F.4th at 1024 (first citing Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 299 (2010); and then citing VRG Linhas Aereas S.A. v. MatlinPatterson Glob. Opportunities Partners II L.P., 717 F.3d 322, 325 (2d Cir. 2013)). For that reason, article V(2)(a) allows a defending party to resist the domestic enforcement of a foreign arbitration award if it can prove that the parties never entered a valid arbitration agreement.

But Defendant cannot establish that defense.[6] We first reject Defendant's contention that no valid arbitration agreement existed because Defendant did not sign the MSA containing the arbitration clause. True, Defendant did not sign the MSA. Campo Puma Oriente S.A. signed the MSA on behalf of the Pesago Consortium. But Defendant's name does not have to appear on the MSA for it to bind Defendant. At the time of the signing, the Pesago Consortium consisted of two companies: Campo and Defendant. And the arbitrator found that not only could Campo bind Defendant under black-letter principles of agency law, but also that Defendant agreed with Campo in writing that they would both "jointly and severally respond for full compliance with the obligations. . . contained in the [MSA]." Appellants App. Vol. 3

[6] To the extent that Defendant argues it deserved judicial review on this issue, Defendant is correct. Like all defending parties under the Convention, Defendant has a right to have a domestic court determine whether any of the Convention's enumerated defenses apply. But the district court's order makes clear Defendant received that review. See Appellant's App. Vol. 1 at 240 ("The Court finds Joshi has not shown the Arbitration Agreement is invalid based on the enumerated grounds . . . .").

at 133. Defendant does not even argue to this Court—let alone produce evidence to prove—that Campo lacked the power to bind Defendant to the MSA. Accordingly, we conclude that Defendant's challenge to the validity of the arbitration agreement on this ground lacks merit.

We next reject Defendant's argument that no valid arbitration agreement existed because the Baker Hughes entity listed on the MSA does not match the Baker Hughes entity named in the award. True again, the names on the MSA and the arbitration award do not match—the MSA lists Baker Hughes, *Inc.*, and the arbitrator issued its award to Baker Hughes, *LLC*.[7] But Defendant's argument is not truly that the Consortium and Baker never formed a valid contract to arbitrate disputes arising out of the MSA. Defendant's real position is that the arbitrator allowed the wrong Baker entity to arbitrate on Baker Hughes' behalf in violation of the MSA's anti-assignment clause. That argument cannot preclude the enforcement of the Ecuadorian arbitration award for two reasons.

First, Defendant fails to overcome the extreme deference this Court affords the arbitrator's conclusion that Plaintiff possessed the right to file the arbitration claim. See THI of N.M. at Vida Encantada, 864 F.3d at 1083. Though Baker Inc.'s name appears on the MSA, Plaintiff provided the goods and services the Consortium requested under that contract. The Consortium willingly accepted those goods and

[7] The arbitrator issued the award to Plaintiff over Defendant's objection to Plaintiff's right to file the arbitration claim. But the arbitrator did not discuss the LLC/Inc. discrepancy in its award.

services from Plaintiff. Then the Consortium refused to pay Plaintiff for those goods and services. Now Defendant claims the Consortium never formed a binding contract with Plaintiff because the MSA lists Plaintiff's affiliate as a party, not Plaintiff. Numerous contractual and equitable grounds could foreclose Defendant's attempt to disavow Plaintiff's rights in this way. See e.g., Gartner v. Gartner, 74 N.W.2d 809, 812 (Minn. 1956) (reformation); Griswold v. Coventry First LLC, 762 F.3d 264, 271–72 (3d Cir. 2014) (equitable estoppel); Seale v. Bates, 359 P.2d 356, 358–59 (Colo. 1961) (waiver of right to enforce an anti-assignment clause).

Second, even if the arbitrator allowed the wrong Baker entity to prosecute Baker's arbitration claim, the district court possessed no power to correct the Ecuadorian arbitrator's mistake. As discussed above, article V's specified defenses are the only grounds a domestic court can use to set aside a foreign arbitrator's award. See CEEG (Shanghai) Solar Sci. & Tech. Co., 829 F.3d at 1206.[8] And the

[8] The full list article V defenses reads:

> (1) . . .
>
> (a) The parties to the agreement ... were ... under some incapacity, or the said agreement is not valid under [Ecuadorian] law . . . ; 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
>
> (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 . . . ; or
>
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties . . . ; or

Convention's plain language and history make clear that article V provides an exhaustive list to protect the power of the rendering state's local courts. See Yusuf Ahmed Alghanim & Sons, 126 F.3d at 21–23 (collecting cases and secondary authorities). For that reason, an arbitrator's mistake—or even manifest disregard of controlling law—cannot be the reason a domestic court sets aside a foreign jurisdiction's award. See id.

So, while Defendant continues to claim that no arbitration agreement ever existed between the Parties, Defendant cannot contest that its Consortium signed a contract with a Baker entity—that Plaintiff performed—requiring the parties to arbitrate any disputes arising out of that contract in Ecuador. Though Defendant objects to the arbitrator's legal conclusions about who that agreement could bind, the Parties' dispute arising out of the MSA remains "capable of settlement" under American law and no other defenses under the Convention apply. Thus, we affirm the district court's entry of judgment for the award.

> (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) . . .
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under [United States] law . . . .
>
> (b) The subject matter of the difference is not capable of settlement by arbitration under [United States] law . . . .
>
> N.Y. Convention art. V.

V.

Defendant lastly contends that the district court erred by awarding Plaintiff attorney's fees and prejudgment interest. To this end, Defendant first argues that we must reverse the district court's decision to award fees and costs because we must reverse the judgment enforcing the award. Because we affirm the predicate judgment, this argument fails. In the alternative, Defendant argues that the district court had no basis to award attorney's fees. Defendant also contends that the district court used an improper rate to calculate prejudgment interest.

We first affirm the district court's award of attorney's fees. Plaintiff contends it sought and obtained those fees under the MSA's fee-shifting provision. That provision provides that:

> In the event that the invoices are delivered to an attorney for collection, or a claim for collection is filed, or if they were collected through any judicial procedure, then The Consortium must pay the Contractor all collection expenses, including reasonable expenses of professional legal and court fees, as well as any other amount due.

Appellant's App. Vol. 3 at 112. Defendant responds by challenging the MSA's validity. As discussed above, we reject Defendant's argument that it was not bound by the MSA, and similarly reject Defendant's argument that Plaintiff cannot enforce its terms. Accordingly, we affirm the district court's award of fees based on the MSA.

We turn to prejudgment interest. Before the district court, Plaintiff requested and received an award of prejudgment interest running from the date of the arbitral award to the date of the district court's judgment. In its motion requesting

prejudgment interest, Plaintiff represented that it relied on the postjudgment interest rate of 1.59% from 28 U.S.C. § 1961. Defendant responded that Plaintiff incorrectly calculated the applicable statutory rate, and that it calculated the statutory rate at .07%. Plaintiff replied that it followed the right rules and rested on its calculations. The district court then adopted Plaintiff's calculation, awarding $14,041.48 in prejudgment interest.

Before this Court, Plaintiff no longer argues that it gave the district court the correct numbers. Instead, Plaintiff argues that the district court had discretion to depart from the statutory *post*judgment interest rate when awarding *pre*judgment interest. According to Plaintiff, Defendant now bears the burden of proving that the district court abused that discretion by using a 1.59% rate. And because this Court has approved prejudgment interest rates as high as 8%, Plaintiff says we should affirm the district court's use of a 1.59% rate. On the other side, Defendant urges us to reverse the interest award. Defendant argues that Plaintiff and the district court wrongly calculated the amount of prejudgment interest because they used the wrong statutory rate. Defendant contends that Plaintiff requested a .07% rate, which yields a $618.18 prejudgment interest award.

Neither party has the right rate. The district court awarded prejudgment interest beginning on December 16, 2019, the date the arbitrator issued the award. The applicable postjudgment interest rate under 28 U.S.C. § 1961 for an award entered on that date is 1.55%. See Post Judgment Interest Rates, U.S. DIST. CT. FOR THE N. DIST. OF TEX., https://www.txnd.uscourts.gov/post-judgment-rates. Although

Plaintiff correctly argues that district courts have discretion to depart from the statutory postjudgment rate when awarding prejudgment interest, see Caldwell v. Life Insurance Company of North America, 287 F.3d 1276, 1287–88 (10th Cir. 2002), nothing in the record suggests that the district court intended to do so here. And considering Plaintiff's representations to the district court about Plaintiff's calculations, we will not infer that the district court intentionally deviated from the statutory rate without explanation. Instead, we vacate the district court's prejudgment interest award and remand this issue so that the district court can recalculate an appropriate prejudgment interest award.

VI.

In sum, we AFFIRM the district court's entry of judgment enforcing Plaintiff's arbitral award, but VACATE its prejudgment interest calculation, and REMAND for a new calculation of prejudgment interest.