IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

CREDIT SUISSE SECURITIES (USA), LTD.,	)	
Applicant,	)	
v.	)	**21 L 10952**
MARK HUTCHINSON, et al.,	)	
Respondents.	)	

MEMORANDUM AND ORDER

Credit Suisse Securities (USA), Ltd. ("Credit Suisse") has filed an Application to Vacate and/or Modify and/or Correct Arbitration Award or, in the alternative, to Modify or Correct an Arbitration Award ("Application to Vacate") pursuant to 710 ILCS 5/1 *et seq*. The parties have filed briefs in support of, and in opposition to, the Application to Vacate.

I. Background

Credit Suisse formerly operated a Private Banking wealth management business in the United States ("PBUSA"). Respondents Mark Hutchinson, David Hirsch, Paul Vanden Huevel, James Whitney, Michael Sakach, Mary DiChristofano, James Kelly and Michael Ford are former financial advisors—known as "Relationship Managers" ("RMs") at Credit Suisse—who managed the accounts of certain PBUSA clients. In addition to their cash compensation, Respondents received deferred contingent share awards ("deferred awards") in the form of "phantom" shares of Credit Suisse's publicly-traded parent company Credit Suisse Group A.G. ("CSAG").

In 2015, Credit Suisse announced its intention to cease operations of the PBUSA. In September of 2015, Respondents filed arbitration claims with the Financial Industry Regulatory Authority ("FINRA") against Credit Suisse. Respondents asserted that Credit Suisse terminated them without cause via constructive termination, and further asserted their deferred awards immediately vested on their termination date. Respondents asserted claims for breach of contract, fraud, unjust enrichment and violation of the Illinois Wage Payment and Collection Act ("IWPCA"), 820 ILCS 115/1 *et seq*. Respondents sought an award of attorney's fees on their claims.

Credit Suisse filed counterclaims against the Respondents for breach of fiduciary duty, misappropriation of trade secrets and unfair competition. Credit Suisse amended its counterclaims on June 8, 2018 and September 23, 2019.

On February 8, 2021, Credit Suisse filed a Notice of Withdrawal of Request for Attorney's Fees. The Notice of Withdrawal purported to withdraw all requests for attorney's fees in connection with Credit Suisse's counterclaims or incurred in defense of the Respondents' claims as well as any demand for "fees" that could be construed as a demand for attorney's fees. The parties submitted post-hearing briefs on the issue of attorney's fees and whether Credit Suisse's Notice of Withdrawal was effective.

On November 5, 2021, the arbitration panel issued its Award. Respondents were awarded compensatory damages. The compensatory damages for Whitney, Sakach and DiChristofano included penalties pursuant to the IWPCA. Each Respondent was also awarded attorney's fees pursuant to the common law and the IWPCA.

II. The Application to Vacate

On November 9, 2021, Credit Suisse filed its Application to Vacate pursuant to the Illinois Uniform Arbitration Act ("IUAA"), 710 ILCS 5/1, *et seq*. The Application to Vacate asserts that the arbitration panel exceeded its authority in awarding attorney's fees. The Application to Vacate further asserts that the arbitration panel exceeded its authority in awarding compensatory damages, attorney's fees and penalties to Whitney, Sakach and DiChristofano pursuant to the IWPCA. Finally, the Application to Vacate asserts that the arbitration panel exceeded its authority by rewriting the governing contracts between the parties.

A. *The Applicable Standard for Vacating the Award*

A trial court's review of an arbitration award is extremely limited. Herricane Graphics, Inc. v. Blinderman Constr. Co., Inc. 354 Ill. App. 3d 151, 155 (2d Dist. 2004). "Whenever possible, a court must construe an arbitration award so as to uphold its validity and all reasonable presumptions are to be indulged in favor of the award." Equity Ins. Mgrs. of Ill. v. McNichols, 324 Ill. App. 3d 830,835 (1st Dist. 2001). "[C]ourts will grant a petition to vacate an arbitration award only in extraordinary circumstances." Yorulmazoglu v. Lake Forest Hosp., 359 Ill. App. 3d 554, 564 (1st Dist. 2005).

The Application to Vacate is expressly brought pursuant to the IUAA. However, Credit Suisse cites to both the IUAA and the Federal Arbitration Act ("FAA") in its opening brief. Respondents contend that New York law applies to the Application to Vacate.

Under the Credit Suisse Master Share Plan, the parties agreed that the arbitration would be governed by the substantive law of New York:

> Applicable Law. To provide for the consistent application of the Plan and all Award Certificates, the Plan shall in all cases be governed by, and construed in accordance with, the laws of the State of New York, United States applicable to contracts executed and to be performed in that state without giving effect to principles of conflicts of laws;

(Response, Ex. B, Credit Suisse Master Share Plan).

Under the Credit Suisse Employment Dispute Resolution Program ("EDRP"), the parties agreed that:

> Authority of Arbitrator(s). In the case of an arbitration, the arbitrator(s)'s authority will be limited to the resolution of legal disputes between the employee and Credit Suisse. The arbitrator(s) will be bound by and will be required to apply all applicable law, including that relating to the allocation of the burden of proof and remedies (including any award of attorney's fees) for violations of such law, if any, as well as all points of substantive law. Similarly, the arbitrator will be bound by and will be required to apply all applicable law for the award of remedies with respect to any claims asserted before the arbitrator (including any award of attorney's fees and costs to a prevailing party). He or she will have no authority either to abridge or to enlarge substantive rights available under existing law. * * *

(Response, Ex. A, EDRP).

Neither the Master Share Plan nor the EDRP provide that confirmation or vacation of an arbitration award will be governed by New York law. Nor do the parties cite to any Illinois authority requiring this court to apply New York's law.

As to the applicability of the FAA, while both parties cite to the FAA, neither party cites to any authority requiring the court to consider the Application to Vacate under the FAA. Moreover, both the IUAA and the FAA provide that an arbitration award may be vacated if the arbitrators exceed their powers. Shearson Lehman Bros., Inc. v. Hedrich, 266 Ill. App. 3d 24, 28 (1st Dist. 1994); 710 ILCS 5/12(a)(3); 9 U.S.C.S. §10(a)(4). Credit Suisse contends that the arbitration panel exceeded their powers.

Under Illinois law, in order to establish entitlement to vacation of the arbitration award, a party must either meet one of the five prongs of 710 ILCS 5/12 or show that the arbitrators made a gross error of law or fact. Id.; Sloan Elec. v. Professional Realty & Dev. Corp., 353 Ill. App. 3d 614, 621 (3d Dist. 2004). Gross errors of law or fact are not a basis for vacating an award unless the errors are apparent on the face of the award. Rauh v. Rockford Products Corp., 143 Ill. 2d 377, 393 (1991). "'The burden is placed on the challenger to prove by clear and convincing evidence that an award was improper.'" Yorulmazoglu, 359 Ill. App. 3d at 565 (citation omitted).

B. *Whether the Parties Submitted the Issue of Attorney's Fees to the Arbitration Panel*

1. The Awarding of Fees Pursuant to Common Law

Credit Suisse contends that the arbitration panel exceeded its authority in awarding attorney's fees to Respondents pursuant to New York common law. New York substantive law is clear that a mutual demand for attorney's fees constitutes an agreement to submit the issue to the arbitrators. See, e.g., Matter of Goldberg v. Thelen Reid Brown Raysman & Steiner LLP, 52 A.D.3d 392, 392-93 (N.Y. App. Div. 2008). The parties executed a Uniform Submission Agreement governing the arbitration before FINRA. Pursuant to that agreement, the parties

submitted "the present matter in controversy, as set forth in the attached statement of claim, answers, and all related cross claims, counterclaims and/or third-party claims which may be asserted to arbitration in accordance with the FINRA By-Laws, Rules, and Code of Arbitration Procedure." (Response, Ex. C).

The Award clearly states that Respondents sought an award of attorney's fees on their claims and Credit Suisse sought an award of attorney's fees on their counterclaims. Credit Suisse, however, argues that it withdrew any consent to submit the issue of attorney's fees to the arbitration panel.

New York law is clear that a party may withdraw consent to the submission of the issue of attorney's fees, but is also clear that a late attempt to withdraw such consent may be rejected. See, e.g., Bear, Sterns & Co. v. Int'l Cap. & Mgmt. Co., LLC, 99 A.D.3d 402, 403 (N.Y. App. Div. 2021); RAS Sec. Corp. v. Williams, 251 A.D.2d 98, 98 (N.Y. App. Div. 1998).

While the Award shows that Credit Suisse filed a Notice of Withdrawal, after the majority of a 70-day evidentiary hearing had taken place, the Award does not state that the attempted withdrawal was effective. Respondents objected to Credit Suisse's Notice of Withdrawal and the parties briefed this issue in post-hearing submissions. The Award expressly states that the arbitration panel considered all post-hearing submissions in rendering the Award. Therefore, the Award shows that the arbitrators considered the issue of Credit Suisse's attempted withdrawal of consent and found that the attempted withdrawal was ineffective. Such a finding was within the arbitration panel's authority.

Credit Suisse further argues that it never initially demanded attorney's fees, essentially asserting that the arbitration panel misconstrued Credit Suisse's counterclaims. Determining whether Credit Suisse requested attorney's fees was certainly within the arbitration panel's authority. Credit Suisse's issue is not with the arbitration panel's authority, but with its conclusion. The merits of the Award cannot be considered by this court absent a gross error of fact or law apparent on the face of the Award. Rauh v. Rockford Products Corp., 143 Ill. 2d 377, 393 (1991). No such gross error appears on the face of the Award.

The arbitration panel did not exceed its authority in awarding attorney's fees pursuant to New York common law.

2. The Attorney's Fees Awarded Pursuant to the IWPCA

Credit Suisse contends that the arbitration panel exceeded its authority in awarding attorney's fees pursuant to the IWPCA to those Respondents that did not assert IWPCA claims. However, the arbitration panel awarded attorney's fees all the Respondents based upon both common law and the IWPCA. As the arbitration had the authority to award attorney's fees pursuant to New York common law, it is irrelevant whether the arbitration had authority to award attorneys' fees pursuant to the IWPCA.

C. *The Award of Compensatory Damages and Penalties to Whitney, Sakach and DiChristofano under the IWPCA*

Credit Suisse contends that the arbitration panel exceeded its authority in awarding compensatory damages, penalties and attorney's fees to Whitney, Sakach and DiChristofano pursuant to the IWPCA. Credit Suisse argues that the deferred compensation did not constitute wages under the IWPCA and, therefore, the arbitration panel exceeded its authority in awarding compensatory damages, penalties and attorney's fees.

Credit Suisse is correct that the IWPCA does not apply to compensation the amount of which "could not possibly be known" until actual payment. McLaughlin v. Sternberg Lanterns, Inc., 395 Ill. App. 3d 536, 545 (2d Dist. 2009). However, Whitney, Sakach and DiChristofano asserted two different claims under the IWPCA: (1) a claim based on non-payment of deferred compensation, and; (2) a claim based on non-payment of earned commissions. (Brief in Support of Application, Ex. 3).

The arbitration panel had the authority to award compensatory damages and penalties under the IWPCA based upon non-payment of earned commissions. While Credit Suisse argues that the earned commissions were also discretionary, the Award makes no such finding. Nothing on the face of the Award shows that the arbitration panel made a gross error of fact or law in awarding damages and penalties based upon non-payment of earned commissions.

Credit Suisse has not shown that the arbitration panel exceeded its authority in awarding compensatory damages, penalties and attorney's fees under the IWPCA to Whitney, Sakach and DiChristofano.

D. *Whether the Arbitration Panel Exceeded its Authority in Awarding Damages for Breach of the Parties' Agreements*

Credit Suisse contends that the arbitration panel exceeded its authority by ignoring the plain and unambiguous language of the parties' agreements in awarding damages. Credit Suisse seeks an order requiring the arbitration panel to recalculate the damages in accordance with the parties' agreements.

Credit Suisse does not dispute that the parties submitted the breach of contract dispute to the arbitration panel or that the arbitration panel had the authority to interpret the parties' agreements. Rather, Credit Suisse argues that the arbitration panel committed gross errors of law and/or fact in calculating the damages.

Credit Suisse fails to identify any gross errors of fact or law apparent on the face of the Award. Rather, Credit Suisse disagrees with the arbitration panel's decision and essentially invites this court to conduct a *de novo* review of the merits of the damages award. Arbitration awards are not subject to *de novo* review. 710 ILCS 5/12; Sloan Elec. v. Professional Realty & Dev. Corp., 353 Ill. App. 3d 614, 621 (3d Dist. 2004). Having failed to identify any gross error

of fact or law on the face of the Award, Credit Suisse is not entitled to vacation or modification of the damages award.

The court further notes that the arguments Credit Suisse now raises, asserting that the damages awarded to Respondents are contrary to New York law, are substantively the same arguments raised in Matter of Lerner v. Credit Suisse Securities (USA), LLC, 2020 N.Y. Misc. LEXIS 3355 (N.Y. Sup. Ct. July 16, 2020). rev'd in part on other grounds, 193 A.D.3d 649 (N.Y. App. Div. 2021). After noting that the arbitration panel's factual findings and contract interpretations were not subject to judicial challenge, as with Illinois law, the Lerner court rejected Credit Suisse's arguments that the arbitration panel had manifestly disregarded the controlling contracts and the compensation language of those contracts. Id.

Credit Suisse has not shown that the arbitration panel exceeded its authority or that the arbitration panel committed a gross error of fact or law apparent on the face of the Award.

III. Conclusion

Credit Suisse's Application to Vacate and/or Modify and/or Correct Arbitration Award or, in the alternative, to Modify or Correct an Arbitration Award is denied. The Award is confirmed.

This order is final and appealable. The status date of July 11, 2022 is stricken.

Enter: 7.8.22

Judge Neil H. Cohen