STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-CV-08-19

HL 1, LLC, et al.,

Plaintiffs

v.

Riverwalk, LLC, et al.,

Defendants

DECISION AND ORDER

This matter is before the Court on the Motion of Defendants Intercontinental Fund IV Ocean Gateway, LLC, Intercontinental Real Estate Investment Fund IV, LLC, Intercontinental Real Estate Corporation (the "Intercontinental Defendants") and Pennbrook Properties II, LLC ("Pennbrook") to confirm the arbitration award entered on October 30, 2008.

Procedural History

On October 30, 2008, following a three-day arbitration hearing, the arbitrators issued an award against Plaintiffs. On November 6, 2008, Pennbrook and the Intercontinental Defendants filed the instant Motion to Confirm that arbitration award.

On November 20, 2008, Plaintiffs filed a Notice of Appeal seeking judicial review of six legal conclusions contained in the arbitration award. Plaintiffs contend that under the terms of the parties' arbitration agreement, Plaintiffs are entitled to seek judicial review of the arbitration award. Conversely, Pennbrook and the Intercontinental Defendants maintain that regardless of the terms of the parties' arbitration agreement, Maine law does not authorize the review that Plaintiffs seek.

If Plaintiffs are entitled to the judicial review that they have requested, logic suggests that the Court must first consider the merits of Plaintiffs' appeal before it determines whether confirmation of the arbitration award is warranted. Similarly, if the law does not authorize the review, the Court would entertain the motion to confirm the arbitration award. The preliminary issue is, therefore, whether the parties can by contract expand the scope of the judicial review of an arbitration award beyond the review authorized by statute.[1]

Discussion

The parties submitted their dispute to arbitration in accordance with the parties' Operating Agreement,[2] which provides in pertinent part:

> 11.01 Arbitration. All disputes and controversies between the parties hereto arising out of or in connection with this Agreement shall be submitted to arbitration pursuant to the following procedure. Either party may, by written notice to the other within thirty (30) days after the controversy has arisen hereunder, appoint an arbitrator who shall be either an attorney or accountant. The other party shall, by written notice, within fifteen (15) days after receipt of such notice by the first party, appoint a second arbitrator who shall also be an attorney or accountant, and in default of such second appointment the first arbitrator shall serve as the sole arbitrator. When two arbitrators have been appointed as herein provided, they shall agree on a third arbitrator and shall appoint him by written notice signed by both of them and a copy mailed to each party hereto within fifteen (15) days after such appointment. On appointment of three arbitrators (or one arbitrator if there was no appointment of a second arbitrator) as hereinabove provided, such arbitrators shall hold an arbitration hearing within thirty (30) days after such appointment. At the hearing the three arbitrators shall allow each party to present his case, evidence, and witnesses, if any, in the presence of the other party, and shall render their award, including a provision for payment of costs and expenses of the arbitration to be paid by one or both of the parties hereto, as the arbitrators deem just. *The decision of the arbitrators shall be binding on the parties hereto (although each party shall retain his right to appeal any questions of law arising at the hearing), and judgment may be entered in any court having jurisdiction.*

Operating Agreement § 11.01 (emphasis added).

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[1] This approach – to consider first whether the parties to an arbitration agreement can under the law expand the scope of the judicial review of an arbitration decision – is in accordance with the Court's December 16, 2008, Report of Status Conference and Procedural Order.

[2] The Court granted Certain Defendants' Motion to Compel Arbitration and Stay Proceedings thereby requiring the parties to participate in arbitration.

Plaintiffs contend that because the plain language of the parties' agreement grants to Plaintiffs the right to "appeal any questions of law arising at the hearing," the Court cannot confirm the arbitration award without first considering the merits of Plaintiffs' appellate arguments. Pennbrook and the Intercontinental Defendants argue that Maine law does not authorize a party to seek judicial review of an arbitration award on questions of law regardless of the terms of the parties' agreement. In other words, Pennbrook and the Intercontinental Defendants contend that the provision of the Operating Agreement upon which Plaintiffs' rely is unenforceable.

Section 5927 of Maine's Uniform Arbitration Act (14 M.R.S. §§ 5927-5949) provides that ". . . a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." 14 M.R.S. § 5927. When parties to an arbitration agreement have arbitrated their dispute and an arbitration award has been issued, either party may apply to the court for confirmation of the award and entry of a final judgment. *See* 14 M.R.S. §§ 5937 & 5940.

After an application for confirmation has been filed, "the court *shall* confirm an award, unless" grounds are timely "urged for vacating or modifying or correcting the award, in which case the court *shall* proceed as provided in sections 5938 and 5939." 14 M.R.S. § 5937 (emphasis added). Sections 5938 and 5939, in turn, provide in relevant part:

> § 5938. Vacating an award
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> 1. VACATING AWARD. Upon application of a party, the court shall vacate an award where:
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> A. The award was procured by corruption, fraud or other undue means;
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> B. There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
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> C. The arbitrators exceeded their powers;
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> D. The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to

the controversy or otherwise so conducted the hearing, contrary to the provisions of section 5931, as to prejudice substantially the rights of a party;

E. There was no arbitration agreement and the issue was not adversely determined in proceedings under section 5928 and the party did not participate in the arbitration hearing without raising the objection; or

F. The award was not made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court has ordered, and the party has not waived the objection.

But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

§ 5939. Modification or correction of award

1. APPLICATION. Upon application made within 90 days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

A. There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

B. The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

C. The award is imperfect in a matter of form, not affecting the merits of the controversy.

14 M.R.S. §§ 5938 & 5939.

As Pennbrook and the Intercontinental Defendants note, neither of these sections authorize judicial review of "any questions of law." They argue that the parties cannot by contract grant to the Court authority that the legislature did not confer upon the Court.

This issue – whether parties can by contract expand the scope of the judicial review of an arbitration award – was considered by the United States Supreme Court in the context of a federal arbitration statute (the FAA) in *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008). *Hall Street* involved a dispute between a landlord and tenant relating to whether the tenant, Mattel, Inc. was obliged to indemnify the landlord, Hall Street, for the cost of cleaning up pollutants discovered on the leased

premises. 128 S. Ct. at 1400. Following the adjudication in the District Court of one aspect of the parties' dispute, and after an unsuccessful attempt at mediating the remaining issues, the parties proposed submitting the matter to arbitration. *Id.* "The District Court was amenable, and the parties drew up an arbitration agreement, which the court approved and entered as an order." *Id.* The relevant portion of the arbitration agreement in the case stated:

> [t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.

Id. at 1400-01.

Following the arbitration hearing and a series of appeals and remands, the Supreme Court was asked to determine whether the provision in the parties' arbitration agreement purporting to preserve the right to judicial review of the arbitral award for errors of law was enforceable. In its review, the Supreme Court considered the purpose of the FAA and the scope of the provision that enumerated the grounds for vacatur and modification of arbitration awards.[3] The Court observed that while "the FAA lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, [and] which issues are arbitrable . . .", the statute cannot be

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[3] Title 9 U.S.C. § 10(a) (2000 ed., Supp. V) provides: "(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-- "(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." Title 9 U.S.C. § 11 (2000 ed.) provides: "In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration-- "(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award. "(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted. "(c) Where the award is imperfect in matter of form not affecting the merits of the controversy. "The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties."

read to authorize the parties to an arbitration agreement to expand the bases upon which an award may be vacated or modified. *Id.* at 1404-05. According to the Supreme Court, "expanding the detailed categories [listed in sections 10 and 11] would rub too much against the grain of the § 9 language, where provision for judicial confirmation carries no hint of flexibility." The Court went on to observe:

> On application for an order confirming the arbitration award, the court "must grant" the order "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." There is nothing malleable about "must grant," which unequivocally tells courts to grant confirmation in all cases, except when on of the "prescribed" exceptions applies. This does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else.

Id. at 1405.

A comparison of sections 5937-5939 of Maine's Uniform Arbitration Act and sections 9-11 of the FAA reveals that the two statutes are substantially similar.[4] In fact, the mandatory language used in section 9, and the exclusive bases for vacatur and modification outlined in sections 10 and 11 of the FAA are nearly identical. *Compare* 9 U.S.C. §§ 9, 10 & 11 with 14 M.R.S. §§ 5937, 5938 & 5939. In light of the statutory similarities between the FAA and Maine's Uniform Arbitration Act, and consistent with the persuasive rationale of the Supreme Court in *Hall Street* when presented with the precise issue in this case, the Court concludes that the Maine Uniform Arbitration Act, like the FAA, provides the exclusive grounds for vacatur and modification. As explained below, Plaintiffs' arguments to the contrary are unavailing.

First, Plaintiffs contend that the procedural process by which the arbitration agreement was reached in *Hall Street* is factually significant and distinguishes *Hall Street* from this case. The Court disagrees. Although the District Court in *Hall Street* approved the parties' agreement and entered it as an order, the arbitration agreement was still governed by the FAA. Moreover, the Supreme Court in

[4] As the parties in this case appear to agree, both the FAA and the Uniform Arbitration Act, upon which Maine's statute is based, share a common lineage in the New York arbitration statute.

Hall Street expressly declined to consider the import, if any, of the fact that the trial court approved the arbitration award. *Hall Street*, 128 S. Ct. at 1407. As such, the Supreme Court viewed the arbitration agreement like any other private-party arbitration agreement. Therefore, the distinction Plaintiffs attempt to draw between that agreement and the one at issue in this case is of no consequence.[5]

Plaintiffs' contractual and "judicial estoppel" arguments similarly fail. Plaintiffs contend that if this Court determines that the "judicial review" clause of the arbitration agreement is unenforceable, the Court must conclude that the entire arbitration clause is unenforceable. The severability clause of the parties' agreement dictates otherwise. Section 11.11 of the parties' Agreement reads: "If any provision of this Operating Agreement or the application thereof to any Person or circumstance shall be invalid, illegal or unenforceable to any extent, the remainder of this Operating Agreement and the application thereof shall not be affected and shall be enforceable to the fullest extent permitted by law." Given that the parties agreed to this severability clause, which is in no way an unusual contractual term, the Court perceives no reason, based on the record before it, to invalidate the entire arbitration agreement.

Finally, Plaintiffs' public policy argument is unpersuasive. According to Plaintiffs, if parties were permitted to expand by contract the scope of judicial review beyond the grounds set forth in the Maine Uniform Arbitration Act, parties would be more inclined to seek private dispute resolution of their disputes. This would, Plaintiffs argue, increase the use of a means of dispute resolution that is favored in Maine law. Plaintiffs further maintain that reading the Maine Uniform Arbitration Act to

[5] The District Court's endorsement of the parties' agreement could have arguably provided the Supreme Court in *Hall Street* with a basis for expanding, in limited cases, the scope of the review authorized by the FAA. That is, the fact that the District Court agreed to and evidently authorized the increased scope of the review could have represented a relatively limited circumstance (i.e., when the Court agrees to the increased scope of review) under which expansion would be permitted. In this way, the facts of *Hall Street* present a more persuasive case for expansion of the scope of review than the facts of the instant case. The Supreme Court's reluctance to expand the scope of review where the trial court has authorized it further demonstrates the Court's strong belief that the scope judicial review is limited to the review authorized by statute.

provide the exclusive bases for vacating or modifying an arbitration award will discourage parties from participating in arbitration which is inconsistent with the purpose of the Act, which in part is to promote the use of arbitration.

As the Supreme Court observed in *Hall Street*, the consequence of a prohibiting an expansion of the scope of review is unknown. Specifically, the Court wrote, "[w]e do not know who, if anyone, is right, and so cannot say whether the exclusivity reading of the statute is more of a threat to the popularity of arbitrators or to that of courts. But whatever the consequences of our holding, the statutory text gives us no business to expand the statutory grounds." *Hall Street*, 128 S. Ct. at 1406. Similarly in this case, regardless of the merits of any public policy argument,[6] the statutory language provides no basis upon which to expand the review. Without a basis in the law for the expansion of the scope of judicial review, if Plaintiffs were to prevail on this issue, the Court would in essence allow private parties to increase the jurisdiction of the courts, which jurisdiction is properly established by the legislature and constitution.

In sum, the U.S. Supreme Court's decision in *Hall Street* is sound, and given the similarities between the FAA and Maine's Uniform Arbitration Act, the Court's reasoning is equally applicable in this case. Accordingly, Plaintiffs are not entitled to the review that they seek through their appeal. The Court will, therefore, confirm the arbitration award.

Conclusion

Based on the foregoing analysis, the Court orders:

[6] While the Court understands Plaintiffs' contention that a contrary result could discourage parties from participating in arbitration, the prospect of an increased judicial review with the attendant time necessary for the review could jeopardize the relatively prompt finality that many parties seek by way of arbitration thereby making arbitration less attractive to litigants.

1. The Court confirms the October 30, 2008, Arbitration Award.

2. The Court shall conduct a telephonic conference with the parties, on a date to be determined by the Court after consultation with the parties, to discuss argument on the pending Motion to Dismiss and further proceedings in this matter.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 4/3/09

Justice, Maine Business and Consumer Docket