

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

KEN FIELDING,	:
Plaintiff,	:
	:
-vs-	: Civil No. 3:01cv1660 (PCD)
	:
DOCTOR'S ASSOCIATES, INC.,	:
Defendant.	:

RULINGS ON DEFENDANT'S MOTION TO VACATE ARBITRATION AWARD AND
PLAINTIFF'S APPLICATION TO CONFIRM ARBITRATION AWARD

Defendant moves to vacate the arbitration award pursuant to 9 U.S.C. § 10. Plaintiff moves to confirm the arbitration award pursuant to 9 U.S.C. § 9. For the reasons set forth herein, defendant's motion to vacate the arbitration award is denied and plaintiff's motion to confirm the arbitration award is granted.

I. BACKGROUND

On September 23, 1987, plaintiff, through his corporation Kenfield Enterprises, entered into a Development Agent Agreement ("DAA") with defendant to sell and service its franchises in Canada. In 1997, plaintiff sought through arbitration a determination as to, *inter alia*, whether Tim Horton's, a donut store franchise, was a 'fast food chain' per the DAA and whether the term of the DAA was twenty years or forty years. After more than twenty evidentiary hearings over a two-year period, the arbitration panel declared that Tim Horton's was not a fast food chain and that the term of the DAA was forty years.

The relevant portions of the DAA are as follows. The DAA provides that it "shall continue in full force and effect for twenty (20) years from the date of the Agreement." The

DAA also contains a merger clause that provides

This Agreement contains the entire agreement of the parties and there are no representations, inducements, promises, agreements, arrangements, or undertakings, oral or written, between the parties here other than those set forth and duly executed in writing. No modification of this agreement shall be binding upon either party unless and until the same has been made in writing and duly executed by both parties.

As relevant to the question of whether Tim Horton's was a fast food chain, the DAA required plaintiff to "develop franchise units in the territory so that it meets and exceeds the following criteria: . . . [e]stablish that number of units that will equal the number of units operated by the fast food chain with the most units in the Territory." Additional facts will be provided as necessary.

II. DISCUSSION

Defendant moves to vacate the arbitration award because of the panel's declaration that the length of the DAA is forty years and that Tim Horton's is not a fast food chain per the DAA.

A. Standard

Review of an arbitration award is limited. *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 515 (2d Cir. 1991). Vacatur is proper only where the arbitration panel exceeds its authority or acts in manifest disregard of the law. *Id.* A manifest disregard is more than an error or misunderstanding of the law. *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998). In order to vacate an arbitration award for a manifest disregard of the law, a court must find that (1) the arbitrators refused to apply or ignored a legal principle of which they had

knowledge, and (2) the law ignored was definite, explicit and clearly applicable to the issues presented. *Halligan*, 148 F.3d at 202. “[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.” *United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987). Absent a basis for modifying or vacating the arbitration award, the award must be confirmed pursuant to 9 U.S.C. § 9. *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987).

B. Analysis

Defendant argues that the panel acted in manifest disregard of the law by reviewing extrinsic evidence and changing the plain meaning of the DAA notwithstanding the presence of a merger clause.¹ Plaintiff responds that the panel acted properly in light of his argument that he was induced to sign a final agreement that did not represent the bargained for term from previous negotiations.

Before the panel, defendant argued that the DAA contains a merger clause, thus the arbitrators were not permitted to look beyond the four corners of the DAA in determining that

¹ The arbitration demand sought “[a] declaration that the term of the DAA is for forty years.” In seeking a declaration that the term of the DAA was forty years rather than the unambiguous term of twenty years as provided in the DAA, plaintiff apparently sought the equitable remedy of reformation, not the legal interpretation of an ambiguous term. Defendant acknowledged as much in its post-hearing brief by stating that plaintiff “wants the contract rewritten.” Defendant does not argue that the panel did not have the authority to reform the contract and the DAA does not expressly preclude such authority. As defendant did not object to the demand, it is deemed to have waived any argument that the panel did not have the authority to issue such an award. *See Halley Optical Corp. v. Jagar Int’l Mktg. Corp.*, 752 F. Supp. 638, 639 (S.D.N.Y. 1990). It is further noted that defendant, having failed to establish that it presented the panel with law on reformation, *see, e.g., Lopinto v. Haines*, 185 Conn. 527, 531-32, 441 A.2d 151 (1981), cannot carry its burden in establishing that the panel ignored the law of reformation and thus acted in manifest disregard of the law.

the parties intended a forty-year term for the DAA. In its post-hearing brief, it cited *Tallmadge Bros., Inc. v. Iroquois Gas Transmission Sys., L.P.*, 252 Conn. 479, 503-04 (2000), which reflects this contract principle and alluded to the impropriety of looking to extrinsic evidence in contract interpretation when the contract contains a merger clause. Defendant thus argues that vacatur is required because it notified the panel of the law requiring the panel to accord a merger clause near conclusive weight yet the panel proceeded to hear extrinsic evidence and to conclude that the term of the DAA was other than twenty years as expressly provided.

In order to justify vacatur, defendant must establish that the panel both had knowledge of the governing law and that it chose to ignore the same. *See DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821-22 (2d Cir. 1997). A motion to vacate shall be granted if there is no dispute among the parties as to the governing law and the panel chooses to ignore the law after it is informed of the same. *See Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 203-04 (2d Cir. 1998). Such agreement among the parties is not apparent in the present case.

Defendant argues that “unambiguous terms of a written contract containing a merger clause may not be varied or contradicted by extrinsic evidence.” *See Tallmadge Bros., Inc.*, 252 Conn. at 503. This proposition is not without exception, and a merger clause may not preclude resort to extrinsic evidence in cases involving fraud, duress or unequal bargaining power between the parties.² *Id.* Plaintiff, in its post-hearing brief, characterized defendant’s

² Claims of fraud in the inducement are arbitrable when not addressed to the arbitration clause itself. *See Sphere Drake Ins. Ltd. v. Clarendon Nat. Ins. Co.*, 263 F.3d 26, 31 (2d Cir. 2001). As any claim of fraud in the present case does not involve the arbitration clause itself, the panel could permissibly address the claim.

changing the term of the DAA from forty years in prior drafts of the DAA to twenty years in the final version of the DAA as a “bait and switch” and further argued that the term change was presented as a “take it or leave it” proposition. The plaintiff’s argument invokes images of fraud and contracts of adhesion/unequal bargaining power, thus may be construed as advocating the applicability of the exception to the general principle that extrinsic evidence is not allowed when a contract contains a merger clause. The panel thus arguably applied the correct law in allowing extrinsic evidence rendering it inappropriate to scrutinize its analysis in concluding as it did. *See United Paperworkers Int’l Union, AFL-CIO*, 484 U.S. at 38. Defendant has thus failed to establish that the panel ignored applicable law, *see Halligan*, 148 F.3d at 203-04, as required to justify vacatur.

Defendant also seeks vacatur arguing that the panel exceeded its authority by reaching an issue that was not included in the submission to arbitration. Plaintiff responds that the panel acted within its authority.

In its submission, plaintiff sought “[a] definition of the term fast food chain used in the DAA and a declaration that Tim Horton’s is not a ‘fast food chain,’ as that term is used in the DAA.” In its award, the panel concluded that “a definition of ‘fast food chain’ . . . is not ascertainable.” The panel further stated that “the panel notes that Tim Horton’s has been operating in the [plaintiff’s] territory for several years and during that time [defendant] has not affirmatively characterized the chain as a competitor of the [plaintiff’s] units. Accordingly, the panel finds that this delay in contract interpretation by [defendant] is unreasonable, and therefore concludes that [defendant] has waived and forfeited any right to count Tim Horton’s

as a fast food chain in competition with [plaintiff] under the terms of this contract”

Defendant argues that the panel overreached in answering whether Tim Horton’s is a fast food chain based on a waiver theory.

The authority of arbitrators depends on the intent of the parties as determined by the submission to arbitration. *Synergy Gas Co. v. Sasso*, 853 F.2d 59, 63-64 (2d Cir. 1988); *Hill v. Staten Island Zoological Soc’y, Inc.*, 147 F.3d 209, 214 (2d Cir. 1998). An arbitrator is without authority to reach issues not within the scope of the submission to arbitration. *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987). However, the language of arbitration demands is not subject to the strict standards of construction applicable to formal court pleadings, *see Kurt Orban Co. v. Angeles Metal Sys.*, 573 F.2d 739, 740 (2d Cir. 1978), and the burden is on the party challenging the award to show that the facts of the case cannot support a proper basis for the award. *Wall Street Assocs., L.P. v. Becker Paribas Inc.*, 27 F.3d 845, 849 (2d Cir. 1994).

The submission to arbitration sought a declaration that Tim Horton’s was not a fast food chain as defined in the DAA. This arbitration demand is phrased in general terms and does not expressly limit the panel to legal theories of contract interpretation in issuing its declaration. *See Synergy Gas Co.*, 853 F.2d at 63-64. In reviewing arbitration awards, waiver has been considered part and parcel of contract analysis. *See Local 1852 Waterfront Guard Ass’n of Port of Baltimore I.W.A. v. Amstar Corp.*, 363 F. Supp. 1026, 1032 (D. Md. Sep 14, 1973); *United Furniture Workers v. Virco Mfg. Corp.*, 257 F. Supp. 138, 143 (E.D. Ark. 1962). It is not necessary to question the soundness of such a determination as the

present arbitration demand is broad enough to permit application of a waiver theory.

Arbitration demands need not conform to formal pleading standards, *see Kurt Urban Co.*, 573 F.2d at 740, and defendant provides no legal authority imposing a requirement that a demand must expressly mention waiver before the panel is empowered to consider the issue. Having failed to establish that such a decision was not within the scope of authority as determined by the arbitration demand, defendant's motion to vacate the arbitration award is denied.

As plaintiff has failed to establish a statutory basis for vacatur, the award must be confirmed. *See Ottley*, 819 F.2d at 376-77. Plaintiff's motion to confirm the arbitration award is granted.

III. CONCLUSION

Defendant's motion to vacate the arbitration award (Doc. 8) is **denied**. Plaintiff's application to confirm the arbitration award (Doc. 1) is **granted**. The Clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, March ____, 2002.

Peter C. Dorsey
United States District Judge