

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

DOCTOR’S ASSOCIATES, INC.,	:
Plaintiff,	:
	:
-vs-	: Civil No. 3:03cv728 (PCD)
	:
Terry QUINN and Jim EARLY,	:
Defendants.	:

**RULING ON APPLICATION TO CONFIRM ARBITRATION AWARD AND
APPLICATION TO VACATE AND/OR MODIFY ARBITRATION AWARD**

Plaintiff moves to confirm the arbitration award pursuant to 9 U.S.C. § 9 of the Federal Arbitration Act (“FAA”). Defendants move to vacate and/or modify the arbitration award pursuant to 9 U.S.C. §§ 10(a)(4) and 11(b) of the FAA. For the reasons set forth herein, Plaintiff’s motion is **granted** and Defendants’ motion is **denied**.

I. Background

From approximately 1983 to 2001, Defendants were Development Agents (“DAs”) for the Dayton, Ohio territory for the Subway sandwich shops, which are owned or franchised by Plaintiff. On or about September 1, 1987, Plaintiff and Defendant Quinn entered into a written Development Agent Agreement (“DAA”), and on or about January 1, 1991, the parties signed a Rider adding Defendant Early to the agreement. Pursuant to the DAA, Defendants were responsible to develop and service franchises in the Dayton, Ohio territory in accordance with Plaintiff’s guidelines and standards.

The DAA contains two provisions that are in dispute here:

- 2) The Development Agent agrees to . . .
 - (c) develop franchise units in the territory so that it meets or exceeds the following criteria:

(1) Sales volumes of 3,800 per week for the average store in the Territory. The required average sales volume will be adjusted for inflation based upon the change in the Consumer Price Index from January 1, 1987 which was 333.1.

(2) Establish that the number of units will equal the number of units operated by the fast food chain with the most units in the Territory.

DAA ¶¶ 2(c)(1) and 2(c)(2).

On September 28, 2001, Plaintiff sent Defendants a notice terminating the DAA, alleging that they had breached ¶ 2(c)(2) by failing to open Subway units in the Dayton territory equal to the number of units operated by the fast food chain with the most units in the territory. The termination notice also alleged that Defendants had breached ¶ 2(c)(1) of the agreement by failing to maintain average unit volumes in the Dayton territory at the contractually required level. The DAA provides that

the Development Agent shall be in default of this Agreement if he falls behind the Interim Development Schedule, the Final Development Schedule, or fails to match growth with the fast food chain with the most units in the Territory after completion of the Final Development Schedule. He shall also be in default if the average unit volume for any twelve (12) month period is below the required volume for that period.

DAA ¶ 2(c).

The DAA contains an arbitration clause requiring Defendants to arbitrate all disputes “arising out of or relating to” the Agreement. DAA ¶ 7(c). In November 2001 Defendant Quinn commenced an arbitration against Plaintiff concerning claims arising out of the termination of the Dayton DAA. Although Defendant Early did not seek to arbitrate, he agreed to be bound by the Arbitrator’s decision.

On April 9, 2003, the Arbitrator issued a written interim award on liability,

concluding that Plaintiff was justified in terminating the DAA because Defendants had failed to develop stores in accordance with ¶ 2(c)(2) of the agreement, in material breach of its terms. The Arbitrator rejected Defendant Quinn's claims.

Plaintiff moves the Court to confirm the arbitration award. Defendants move the Court to vacate and/or modify the arbitration, arguing that the Arbitrator acted in manifest disregard of the law by (1) improperly shifting the burden of proof from Plaintiff to Defendants; (2) rejecting Defendants' claim that Plaintiff was required to amend the contract in order to enforce its terms; and (3) dismissing their claim under the Connecticut Unfair Trade Practices Act ("CUTPA"). Defendants also contend that the Arbitrator exceeded the scope of his authority by rejecting Defendant Quinn's testimony that McDonald's is not a "fast food chain" for purposes of the store development requirement in the DAA.

II. 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).

III. Discussion

A. Allocation of the Burden of Proof

Defendants argue Plaintiff failed to offer evidence on which the Arbitrator could have found that Defendant Quinn failed to meet his development obligations, and that consequently the Arbitrator impermissibly shifted the burden of proof to them. They contend that the Arbitrator, in relying on Plaintiff’s “bare allegations,” “has demonstrated an utter infidelity to the governing law and an absolute abandonment of evidentiary considerations, all of which constitute manifest disregard of the clear, controlling legal principles.” Def. Obj. to Pl. Applic. to Confirm Arb. Award and Applic. to Vacate and/or Modify Arb. Award at ¶ 30.

Plaintiff responds that the Arbitrator’s decision was based on specific facts and evidence, including the following: (1) Plaintiff’s report of an independent consulting firm contracted to provide lists and addresses of every fast food outlet in the territory; (2) annually, Plaintiff’s Director of Coordination, Linda Rizzo, shared such reports with Defendants and invited them to contact her with any questions about the data; (3) whenever any other DA’s questioned Rizzo about the data, she would provide them with the list of addresses from the consultant firm so they could verify the information; (4) if

DA's ever found the information to be inaccurate, Ms. Rizzo would adjust the development requirements for that territory if appropriate; (5) Defendants never asked Ms. Rizzo for the list of addresses or contested the number of McDonald's claimed to be in the Dayton territory; (6) Defendants never disputed the accuracy of Plaintiff's store counts at any point or Plaintiff's right to set new development requirements in accordance with those counts; and (7) Defendant Quinn had no idea at the time of the hearing how many McDonald's were in the territory. Plaintiff argues that Defendants did not produce any evidence to rebut its data, and that the Arbitrator reasonably accepted Plaintiff's uncontested evidence about the number of McDonald's in the territory.

After noting the evidentiary data supplied by Plaintiff's outside agency, the Arbitrator stated that "[Defendant] Quinn produced no evidence that sufficiently undermined the reliability of the information obtained by [Plaintiff]. In fact, [Defendant] Quinn admitted that he never checked the number of fast food chain units that [Plaintiff] advised were the greatest in his territory." Interim Award of Arbitrator at 4-5.

Defendants argue that *Hartford Elec. Supply Co. v. Allen-Bradley Co.*, 250 Conn. 334 (1999) supports their position that the Arbitrator improperly shifted the burden of proof. In *Hartford Elec. Supply*, the court considered the applicability of the Connecticut Franchise Act, which is not at issue here. The court stated that "[t]he franchisor has the burden of proving 'good cause' to terminate the franchise." *Hartford Elec. Supply Co.*, 250 Conn. at 361. Assuming *arguendo* that *Hartford Elec. Supply* is clearly controlling law in cases not involving the Connecticut Franchise Act, the Arbitrator did not act in manifest disregard of such law. The Arbitrator's noting Defendant Quinn's failure to

contest Plaintiff's evidence does not constitute an impermissible shifting of evidence. Although Defendants argue that Rizzo herself expressed some doubt regarding the data's accuracy, this does not render the Arbitrator's determination unreasonable or unsupported by the evidence. The Arbitrator considered the various facts and evidence submitted by Plaintiff and found them to be credible and reliable. Defendants' disagreement does not mean that the Arbitrator acted in manifest disregard of the law.

B. Mutual Assent to a Contract Term

Defendants argue that the Arbitrator acted in manifest disregard of the law in rejecting the argument that Plaintiff was required to execute a written amendment to the contract in order to enforce the store development requirements as set forth in ¶ 2(c)(2) of the DAA, which provides that

In three years time, the parties shall determine the number of units of the fast food chain with the most units in the Territory. At that time, the Interim Schedule will be replaced by a Final Schedule which will equal that number of units operated in the Territory by that chain at that time. . . . After the final Schedule is complete, the Development Agent shall maintain the number of operating units at the number operated by the fast food chain with the most units in the Territory.

Defendants point to ¶ 11 of the DAA, which provides that “[n]o modification of this Agreement shall be binding upon either party unless and until the same has been made in writing and duly executed by the parties.” Consequently, Defendants argue that the only development schedule that Defendant Quinn agreed to is the Final Schedule, which required seventy-one units by March 1995. Defendants contend that the Arbitrator “disregarded the most fundamental concept of contract law—that mutual assent to a contractual term is essential for an enforceable right to exist.” Def. Obj. to Pl. Applic. to

Confirm Arb. Award and Applic. to Vacate and/or Modify Arb. Award at ¶ 41 (citations omitted).

However, the plain language of the contract takes into account that the number of operating units of the fast food chain with the most units may change after the Final Schedule is complete: “After the Final Schedule is complete, the Development Agent shall maintain the number of operating units at the number operated by the fast food chain with the most units in the Territory.” DAA § 2(c)(2). The contract contemplates that the number of operating units will not be static over time. Accordingly, the Arbitrator’s interpretation of the contract is reasonable and no written amendment is necessary for Plaintiff to enforce the provision.

C. CUTPA Claim

Defendants argue that the Arbitrator improperly dismissed their CUTPA claim based on the failure of the Connecticut Franchise Act (“CFA”) claims. Plaintiff responds that the CUTPA claim was based entirely on their CFA claims, and accordingly once the CFA claims were discounted the CUTPA claim must fail.

“CUTPA violations do not necessary have to be based on an underlying actionable wrong.” *Hartford Elec. Supply Co.*, 250 Conn. at 361. In bringing this action, Defendants sought “[a] declaration that [Plaintiff’s] termination of the Dayton DAA . . . is a violation of [CUTPA].” Amended Prayer for Relief ¶ 4. Assuming *arguendo* that Defendants’ CUTPA claim survives absent the underlying CFA claims, there is no CUTPA violation because, as discussed above, Plaintiff did not act improperly by terminating the contract.

D. Arbitrator’s Scope of Authority–Consideration of Whether McDonald’s Is a Fast Food Chain

Defendants argue that the Arbitrator exceeded his authority by deciding whether McDonald’s is a fast food chain under ¶ 2(c)(2) of the Dayton DAA, because this issue was neither contained in the Demand nor the Amended Prayer for Relief. Def. Obj. to Pl. Applic. to Confirm Arb. Award and Applic. to Vacate and/or Modify Arb. Award at ¶ 44.

As long as the arbitrator “is even arguably construing or applying the contract and acting within the scope of his authority” an arbitrator’s decision should not be vacated on the ground that the arbitrator exceeded the scope of his authority. *United Paperworks Int’l Union*, 484 U.S. at 38. Here, determining whether Defendants violated the contract by not meeting the terms of ¶ 2(c)(2) necessitated consideration whether McDonald’s is a fast food chain in order to determine whether Defendants complied with the terms of ¶ 2(c)(2). Accordingly, the Arbitrator did not exceed the scope of his authority.

IV. Conclusion

Defendants have failed to meet the high burden of showing that the Arbitrator exceeded his authority or acted in manifest disregard of the law. For the reasons set forth herein, Plaintiff's motion to confirm the arbitration award [Doc. No. 1] is **granted** and Defendants' motion to vacate and/or modify the arbitration award [Doc. No. 9] is **denied**. The clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, September 19, 2003.

Peter C. Dorsey
United States District Judge