UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BLANCA MARIA GOMEZ DE HERNANDEZ,

Petitioner,

-against-

WELLS FARGO ADVISORS, LLC, et al.,

Respondents.

16 Civ. 9922 (LGS)

OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge:

This case arises out of an arbitration award issued in a dispute over control of a brokerage account among Petitioner Blanca Maria Gomez de Hernandez ("Blanca Maria") and Respondents Wells Fargo Advisors, LLC ("Wells Fargo"), Maria Clemencia Batchelor ("Clemencia") and Jorge Hernandez ("Jorge"). Blanca Maria petitions to vacate the award and moves for summary judgment on her claim seeking a declaration that she is the sole owner of the account. Wells Fargo and Clemencia cross-petition to confirm the award, and Clemencia moves to recoup her attorneys' fees and costs. For the reasons stated below, Blanca Maria's petition is denied and her declaratory judgment claim is dismissed. Wells Fargo and Clemencia's cross-petition to confirm the award is granted, and Clemencia's motion for attorneys' fees and costs is denied.

I. BACKGROUND

The following facts are taken from the parties' statements pursuant to Local Civil Rule 56.1 and are undisputed.

Blanca Maria is eighty-three years old and lives in Bogota, Colombia. She is the mother of Jorge, who also lives in Bogota; Clemencia, who lives in New Zealand; and three other adult

children who are not parties to this action. Wells Fargo operates a securities brokerage with offices throughout the United States.

Blanca Maria and her late husband Humberto Hernandez ("Humberto") had a Wells Fargo brokerage account ending in 0100 (the "0100 Account"). Humberto died intestate in October 2007. Pursuant to Colombian law of intestacy, his estate was distributed one half to Blanca Maria and the other half to their five children in equal shares. Blanca Maria opened a new account at Wells Fargo ending in 1285 (the "1285 Account") to hold the distribution she received from the 0100 Account.

The application for the 1285 Account lists Blanca Maria as the "Primary Owner" and also lists Jorge and Clemencia under the heading "Account Registration & Instructions." Paragraph I(16)(a) of the Client Agreement for the 1285 Account provides that, if the account is maintained in the name of two or more persons, each account holder has authority to act individually and without notice to any other account holder. However, Paragraph I(16)(a) further provides that "at any time, [Wells Fargo] may, at [its] sole discretion, require joint or collective action by all Account Holders."

In late 2015, Blanca Maria decided to transfer the 1285 Account from Wells Fargo to UBS Switzerland, AG ("UBS"). Wells Fargo refused to comply with Blanca Maria's instructions unless Jorge and Clemencia joined the request. This effectively blocked the transfer because Clemencia opposed it.

Blanca Maria filed an arbitration claim against Wells Fargo with the Financial Industry Regulatory Authority, Inc. ("FINRA"). The claim alleged that Wells Fargo's refusal to honor Blanca Maria's instructions was a breach of the Client Agreement and requested that the panel of arbitrators order Wells Fargo to comply with her instructions to move the 1285 Account to UBS.

Blanca Maria later amended her claim to add Clemencia and Jorge as respondents and to seek a declaratory judgment that Blanca Maria is the true and/or beneficial owner of the account and Clemencia and Jorge have no ownership interest in the account.

An arbitration hearing was held over the course of three days in September 2016. The panel heard testimony from, among others, Blanca Maria, Jorge, Clemencia and Maria Torne, the Wells Fargo financial advisor assigned to the 1285 Account. The hearing was recorded, but the testimony of Blanca Maria and Jorge (which they gave via videoconference from Bogota) is inaudible on the recording. Accordingly, the transcript that was made from the recording includes the questions that were posed to Blanca Maria and Jorge, but not the answers they gave. No other record of the proceeding exists.

The panel issued the award on October 17, 2016. The award denies Blanca Maria's request to require Wells Fargo to transfer the 1285 Account to UBS. It also orders Wells Fargo to allow no more than $7,500 to be withdrawn from the account per month unless all three account holders submit a signed request. The award does not explicitly address Blanca Maria's declaratory judgment claim but does state that "[a]ny and all claims for relief not specifically addressed herein are denied."

II. STANDARD

The parties cross-petition to vacate or confirm the arbitration award pursuant to the Inter-American Convention on International Commercial Arbitration ("Inter-American Convention" or "Convention") and the Federal Arbitration Act ("FAA"). Ordinarily, confirmation of an arbitration decision is "a summary proceeding that merely makes what is already a final arbitration award a judgment of the court." *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126, 132 (2d Cir. 2015). "A court's review of an arbitration award is . . . severely limited so as

not to frustrate the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *United Bhd. of Carpenters & Joiners of Am. v. Tappan Zee Constructors, LLC*, 804 F.3d 270, 274–75 (2d Cir. 2015).

The Convention provides a number of possible grounds for refusing confirmation of an award, including that "the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration," "the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties," or "the recognition or execution of the decision would be contrary to the public policy" of the State in which recognition and execution is requested. Inter-American Convention, Art. V(1)(c)–(d), V(2)(b). An arbitration award should be confirmed as long as there is "a barely colorable justification" for the award. *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006). "The arbitrator's rationale for an award need not be explained, and the award should be confirmed if a ground for the arbitrator's decision can be inferred from the facts of the case." *Id.* The party opposing confirmation of an arbitral award has the burden of proving that a defense applies. *Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396, 405 (2d Cir. 2009).

The Convention does not discuss vacating arbitration awards, but a court applying the Convention may vacate an arbitration award based on the grounds recognized under the FAA. *PDV Sweeny, Inc. v. ConocoPhillips Co.*, No. 14 Civ. 5183, 2015 WL 5144023, at *6 (S.D.N.Y. Sept. 1, 2015), *aff'd*, 670 F. App'x 23 (2d Cir. 2016); *cf. Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 45 (2d Cir. 1994) ("The Inter-American Convention incorporates the FAA's terms unless they are in conflict with the Inter-American Convention's terms. . . . Since the Inter-American Convention is silent as to the modification of an award, the court's authority to modify an award pursuant to § 11 [of the FAA] is not in conflict with the

express terms of the Inter-American Convention."). Under Section 10 of the FAA, an arbitration award can be vacated when: (1) "the award was procured by corruption, fraud, or undue means;" (2) "there was evident partiality or corruption in the arbitrators, or either of them;" (3) "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) "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." 9 U.S.C. § 10(a). An award may also be vacated where the arbitrator acts in "manifest disregard of the law." *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 119 (2d Cir. 2011). The party seeking to "vacate an arbitration award has the burden of proof, and the showing required to avoid confirmation is very high." *STMicroelectronics, N.V. v. Credit Suisse Sec. (USA) LLC*, 648 F.3d 68, 74 (2d Cir. 2011).

III. DISCUSSION

A. Petition to Vacate the Award

Blanca Maria asserts three grounds for vacating the award: (i) the panel exceeded its authority by failing to decide the question presented and instead adjudicating Blanca Maria's competency; (ii) the panel exceeded its authority by granting relief that amounts to a de facto trust; and (iii) the panel acted in manifest disregard of the law concerning convenience accounts.[1]

[1] Blanca Maria asserts two additional grounds for vacating the award -- the arbitration was not carried out in accordance with the agreement of the parties and the award violates public policy. These are not grounds for vacatur of an award under the FAA, but rather defenses to confirmation of an award under the Convention. *See* 9 U.S.C. § 10(a)(4); Inter-American Convention, Art. V(1)(d), V(2)(b). As such, these arguments are addressed below in the context of Wells Fargo and Clemencia's cross-petition to confirm the award.

For the reasons explained below, Blanca Maria has failed to carry her significant burden of showing that valid grounds exist for vacating the award.

Section 10(a)(4) of the FAA allows for vacatur "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." 9 U.S.C. § 10(a)(4). Applying that standard, the Supreme Court has held that "[i]t is not enough for petitioners to show that the panel committed an error -- or even a serious error. It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice that his decision may be unenforceable." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010) (internal quotation marks and citations omitted; alterations in original). An award will not be vacated as long as the panel "is even arguably construing or applying the contract and acting within the scope of [its] authority." *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62 (2000).

Here, the panel did not exceed its authority by failing to decide the question presented or adjudicating Blanca Maria's competency because it did neither of those things. The entirety of the requested relief in Blanca Maria's Amended Statement of Claim is to "(i) order Wells Fargo to comply with [her] instruction to move her account to UBS in Geneva, Switzerland; (ii) declare that [Blanca Maria] is the true and/or beneficial owner of the account and that Clemencia and Jorge have no ownership interest in the account; . . . and (iv) grant such further relief as the Panel deems just and proper." The award denied the request to require Wells Fargo to transfer the account. Although the award does not explicitly address the request for declaratory relief, it states that "[a]ny and all claims for relief not specifically addressed herein are denied." The award does not discuss Blanca Maria's competency, and the provision waiving her signature

requirement "[i]n the event [Blanca Maria] should be deemed incapacitated" suggests that the panel did not decide the issue.

The panel also did not exceed its authority by granting relief that amounts to a de facto trust. The award ordered Wells Fargo to "allow no more than $7,500.00 U.S. dollars in total per month to be withdrawn by or on behalf of [Blanca Maria], unless a signed request is made by all three (3) signatories." In so ordering, the panel arguably applied the Client Agreement -- and thus did not exceed its authority -- because Paragraph I(16)(a) gives Wells Fargo discretion to "require joint or collective action by all account holders" and to "suspend all activity in the Joint Account, except upon further written instructions signed by all of you or upon instructions of a court." The award also acknowledges that in the event the three account holders are unable to agree to a withdrawal of more than $7,500, they may seek recourse in a court of competent jurisdiction. Accordingly, the panel did not exceed its authority and did not impose a trust on the 1285 Account by placing a $7,500 monthly limit on unilateral withdrawals.

Finally, the panel did not act in manifest disregard of the law concerning convenience accounts. A court may vacate an award based on manifest disregard of the law "only if the court finds both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." *Zurich Am. Ins. Co. v. Team Tankers A.S.*, 811 F.3d 584, 589 (2d Cir. 2016). "[T]he award should be enforced, despite a court's disagreement with it on the merits, if there is a *barely colorable justification* for the outcome reached." *Wallace v. Buttar*, 378 F.3d 182, 190 (2d Cir. 2004). Blanca Maria has not shown that either prong is satisfied here. She has not pointed to anything in the award or the transcript of the hearing that suggests the panel subjectively knew of New York law regarding convenience accounts and refused to apply

it. She also has not shown that such law was clearly applicable to the case. Paragraph 16 of the Client Agreement states, "Regardless of the governing law provisions of this Agreement . . . the legal ownership of your Account shall be governed by and interpreted under the internal laws of your state of residence." Because none of the arguable account holders reside in New York, it is not at all clear that New York law would apply to the issue of ownership, regardless of any ambiguity that arises under this provision of the Client Agreement, because two of the account holders reside in Colombia and the third resides in New Zealand.

Because Blanca Maria has not identified adequate grounds for vacating the award, her petition is denied.

B. Cross-Petition to Confirm the Award

Under the Inter-American Convention, "a district court must enforce an arbitral award . . . unless a litigant satisfies one of the seven enumerated defenses." *Corporacion Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploracion Y Produccion*, 832 F.3d 92, 106 (2d Cir. 2016). Blanca Maria asserts three defenses: (i) the award concerns a dispute not envisaged in the parties' arbitration agreement; (ii) the arbitration procedure has not been carried out in accordance with the terms of the parties' arbitration agreement; and (iii) the award violates public policy. Because Blanca Maria has not carried her burden to establish any of these defenses, Wells Fargo and Clemencia's cross-petition to confirm the award is granted.

First, the award was within the panel's authority pursuant to the Client Agreement and the relief requested by the parties in their pleadings. Article V(1)(c) of the Convention allows recognition and execution of an award to be refused where "the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration." This defense is duplicative of § 10(a)(4) of the FAA, which allows for vacatur where the arbitrators exceeded

their powers. *See Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 71 (2d Cir. 2012) ("The FAA and the [Inter-American Convention] work in tandem, and they have overlapping coverage to the extent that they do not conflict."); *Republic of Argentina v. AWG Grp. Ltd.*, 211 F. Supp. 3d 335, 363 (D.D.C. 2016) ("As Argentina has failed to demonstrate . . . excess of powers under the FAA, its admittedly redundant claims under the [Inter-American Convention] must also fail."). For the same reasons that the panel did not exceed its authority in violation of FAA § 10(a)(4), the award does not concern "a dispute not envisaged" in the parties' arbitration agreement.

Second, Blanca Maria has not shown that the arbitration procedure deviated from the terms of the parties' agreement. Under Article V(1)(d) of the Convention, it is a defense to confirmation of an award that "the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties." Blanca Maria argues that the award violates this provision because it "fails to answer the question of ownership presented for arbitration, and instead converts Blanca Maria's present-interest ownership into a de facto lifetime trust." This essentially repeats the arguments Blanca Maria raised in support of her petition to vacate the award and is rejected for the same reasons. Blanca Maria also argues that the procedure was not carried out in accordance with the arbitration agreement because the recording FINRA made of the proceeding failed to capture Blanca Maria's and Jorge's testimony. Blanca Maria has not shown how the inaudible recording prejudiced her in the arbitration proceeding, as nothing in the record suggests that the problem hindered the panel's ability to hear and consider the testimony. *See Rai v. Barclays Capital Inc.*, 739 F. Supp. 2d 364, 374 (S.D.N.Y. 2010), *aff'd*, 456 F. App'x 8 (2d Cir. 2011) ("[T]here is no reason to believe the lack of a transcript [because the recording was deleted] or brief deliberations prejudiced the

determination of his case."). Blanca Maria also has not cited any authority stating that a partially inaudible recording is a procedural deviation within the meaning of Article V(1)(d).

Third, the award does not violate public policy. Article V(2)(b) of the Convention allows a court to refuse recognition of an award where it would be "contrary to the public policy" of the State in which recognition is requested. This provision "must be construed very narrowly to encompass only those circumstances where enforcement would violate our most basic notions of morality and justice." *Telenor*, 584 F.3d at 411. "[A] judgment that tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property is against public policy." *Corporacion Mexicana*, 832 F.3d at 106. Blanca Maria argues that the award violates private property rights because it "permanently stripped her of her assets." That is incorrect. The award made no affirmative pronouncement as to the ownership of the account, ordered Wells Fargo to allow Blanca Maria to withdraw up to $7,500 per month unilaterally and acknowledged that the account holders may seek recourse in court if they cannot agree about withdrawals of greater amounts. The award thus does not permanently strip Blanca Maria of her assets and does not violate U.S. public policy.

Because none of the grounds on which confirmation of an award may be refused are satisfied here, Wells Fargo and Clemencia's cross-petition to confirm the award is granted.

C. Declaratory Judgment

The Court declines to exercise supplemental jurisdiction over Blanca Maria's declaratory judgment claim. Blanca Maria seeks a declaration that she is the sole true owner of the 1285 Account. Ownership of the account is not a matter of federal law, so the Court lacks federal question jurisdiction pursuant to 28 U.S.C. § 1331. Diversity jurisdiction pursuant to 28 U.S.C.

§ 1332 also is lacking in this case because the petitioner -- Blanca Maria -- is a foreign citizen and the respondents -- Wells Fargo, Clemencia and Jorge -- include one U.S. citizen and two foreign citizens. *See Bayerische Landesbank, N.Y. Branch v. Aladdin Capital Mgmt. LLC*, 692 F.3d 42, 49 (2d Cir. 2012) (diversity jurisdiction lacking "where on one side there are citizens and aliens and on the opposite side there are only aliens"). The Court has jurisdiction over Blanca Maria's declaratory judgment claim based only on supplemental jurisdiction. The Court declines to exercise supplemental jurisdiction here because "all claims over which it has original jurisdiction" have been dismissed. 28 U.S.C. § 1367(a); *see Kolari v. N.Y.-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006) ("in the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988))).

D. Attorneys' Fees and Costs

Clemencia's request for attorneys' fees and costs she incurred in opposing Blanca Maria's petition and bringing her cross-petition is denied. Clemencia has not shown that Blanca Maria was "acting in bad faith, vexatiously, wantonly, or for oppressive reasons," in seeking to overturn the award. *Local 97, Int'l Bhd. of Elec. Workers, A.F.L.-C.I.O. v. Niagara Mohawk Power Corp.*, 196 F.3d 117, 132 (2d Cir.1999).

IV. CONCLUSION

For the foregoing reasons, Petitioner Blanca Maria Gomez de Hernandez's petition to vacate the award is DENIED, and her declaratory judgment claim is dismissed. Respondents Wells Fargo Advisors, LLC and Maria Clemencia Batchelor's cross-petition to confirm the

award is GRANTED. Maria Clemencia Batchelor's motion for attorneys' fees and costs is DENIED.

The Clerk of Court is respectfully directed to close the motions at Docket Nos. 38, 43 and 48, and close the case.

Dated: July 20, 2017
New York, New York

LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE