Third District Court of Appeal

State of Florida, January Term, A.D. 2013

Opinion filed February 6, 2013.
Not final until disposition of timely filed motion for rehearing.

No. 3D11-1087
Lower Tribunal No. 10-56884

Suzlon Energy, A/S, etc.,
Appellant,

vs.

Ventus De Nicaragua, S.A., etc.,
a Nicaraguan Corporation,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Victoria S. Sigler, Judge.

Brown Sims and Hilary K. Jonczak and Frank J. Sioli, for appellant.

Silverio & Hall, and Brian M. Silverio, for appellee.

Before LAGOA, SALTER[*] and FERNANDEZ, JJ.

FERNANDEZ, J.

Suzlon Energy, A/S, etc. appeals the order confirming the award of the

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[*] Judge Salter did not participate in oral argument.

arbitrators in favor of appellee Ventus de Nicaragua, S.A., etc. and denying Suzlon's motion to vacate the award. We reverse, concluding that Ventus' General Manager initiated the arbitration when he did not have the authority to do so.

Ventus, a Nicaraguan corporation organized under Nicaraguan law, is a joint venture between the Rondon brothers (Roberto, Alberto, and Juan), their sister (Carina), and her husband (Fernando Gallo). The Rondon brothers sold four-hundred-one acres of their land in Nicaragua to Ventus in exchange for fifty-one percent of the shares in the company. The other forty-nine percent of the shares belong to Carina and Gallo.

In April 2005, Ventus held a General Shareholders Meeting. The shareholders re-elected Gallo as President and granted him General Power of Attorney. The shareholders also appointed Roberto Rondon ("R. Rondon") as General Manager and granted him a lesser General Power of Attorney for Administration.

Gallo entered into a contract with Suzlon Energy, a Danish corporation, where Ventus would sell wind turbines for Suzlon in Nicaragua and Suzlon would pay a commission to Ventus. Gallo invoiced Suzlon for the first commission payment to be wired to one of his Panamanian business accounts, LOHR

Enterprises, Inc. Suzlon wired the first commission payment of $132,652.72 to Gallo's LOHR account.[1]

R. Rondon thereafter convened a special General Assembly of Shareholders. Although fifty-one percent of the shareholders were present, Gallo and his wife, Carina, were not. The shareholders revoked Gallo's general power of attorney and vested that power in R. Rondon. Further, the shareholders removed Gallo from his position as President, and they elected Juan Rondon in his stead. The Nicaraguan Supreme Court later nullified these results in June 2008.

R. Rondon then brought a shareholder derivative action on behalf of Ventus and the remaining officers/shareholders against Gallo, on claims of conversion and civil theft of the commission payments. Although Suzlon was originally a defendant in the lawsuit, it was voluntarily dismissed without prejudice in adherence to an arbitration clause in the contract with Ventus. The trial court dismissed this lawsuit for forum non conveniens.

R. Rondon then petitioned for arbitration before the American Arbitration Association, despite a Nicaraguan injunction precluding him from doing so. The trial court initially granted a stay of arbitration until the Nicaraguan courts made sufficient findings to determine whether R. Rondon was entitled to represent Ventus, but later lifted the stay before that determination was made. Gallo, as

[1] Suzlon later made a second commission payment to the LOHR account, totaling $500,000.

President of Ventus, moved to intervene and dismiss the arbitration, but the trial court denied the motion. The Award of the Arbitrators granted R. Rondon, on behalf of Ventus, the full amount of the commission plus interest accruing daily.

The issue this Court must decide is whether R. Rondon had the authority to initiate this arbitration, an issue we review de novo. Estate of Irons ex rel. Springer v. Arcadia Healthcare, L.C., 66 So. 3d 396, 398 (Fla. 2d DCA 2011). We conclude that R. Rondon had no authority to initiate arbitration.

"A power of attorney need not expressly refer to arbitration to confer the authority to agree to this method of dispute resolution." Candansk, LLC v. Estate of Hicks ex rel. Brownridge, 25 So. 3d 580, 582 (Fla. 2d DCA 2009). However, if nothing in the power of attorney gives a person legal authority to enter into arbitration on behalf of another, then that person cannot initiate said arbitration. See Carrington Place of St. Pete, LLC v. Estate of Milo ex rel. Brito, 19 So. 3d 340, 341 (Fla. 2d DCA 2009). In Estate of Irons ex rel. Springer, the Second District Court of Appeal strictly construed the power of attorney to determine the agent was not authorized to bind her principal to arbitration. Estate of Irons ex rel. Springer, 66 So. 3d at 398. The court analyzed whether the language of the specific powers clarified the broader catch-all provisions to include a particular, but not specifically mentioned, power over arbitration. Id. at 399.

R. Rondon is the General Manager of Ventus with a power of attorney of administration that grants him authority to manage the corporation. In pertinent part, R. Rondon may compromise in arbitration and submit matters to civil court. Following the principle of *expressio unius est exclusio alterius* ("the mention of one thing implies the exclusion of another"), R. Rondon's power to compromise in arbitration excludes his power to initiate arbitration. See United Auto. Ins. Co. v. Salgado, 22 So. 3d 594, 600 (Fla. 3d DCA 2009). Similarly, his power to submit matters to civil court makes no mention of arbitration and, therefore, cannot be extended to arbitration in the matter before this Court. Because R. Rondon did not have the power to initiate arbitration, it necessarily follows that he could not confer jurisdiction on the arbitration panel to conduct the arbitration.

It is clear from the record that Gallo was President and had General Power of Attorney to be the legal representative of Ventus in April 2005. The record also indicates that the Nicaraguan Supreme Court nullified the changes made by R. Rondon at the General Assembly of Shareholders in June 2008. Thus, Gallo was still President and had power of attorney on behalf of Ventus, and he alone had standing to initiate arbitration. R. Rondon has no greater authority than Gallo. In addition, R. Rondon’s name does not appear anywhere in the commission contract between Ventus and Suzlon.

Because we conclude that Ventus' General Manager initiated arbitration without authority to do so, we reverse the order confirming the award of the arbitrators in favor of Ventus and denying Suzlon's motion to vacate the award.

Reversed and remanded.

LAGOA, J., concurs.

SALTER, J. (dissenting).

I respectfully dissent. We should not engage in the very judicial proceedings that these international companies sought to avoid when they specified in their commission agreement that "[a]ny dispute or controversy arising in connection with this Agreement shall be subject to (and settled by) final and binding arbitration." The threshold or "gatekeeper" determination regarding Mr. Rondon's authority to initiate Ventus's demand for arbitration, made here and now by the majority (after, and contrary to, the International Centre for Dispute Resolution Tribunal's ruling on that very point), was a "controversy arising in connection with the agreement" that was properly heard and ruled upon by the tribunal and should not be revisited, much less nullified, by a Florida appellate court. The circuit court ruled in accordance with the deferential and extremely limited scope of review specified by the Florida and counterpart federal arbitration statutes (as interpreted by the Florida Supreme Court), such that the order confirming the Tribunal's detailed and closely-reasoned award should be affirmed.

I. The Arbitrable Dispute

Our starting point in determining arbitrability is the Florida Supreme Court's statement in Seifert v. U.S. Home Corp., 750 So. 2d 633 (Fla. 1999):

> Under both federal statutory provisions and Florida's arbitration

> code, there are three elements for courts to consider in ruling on a motion to compel arbitration of a given dispute: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived.

Id. at 636 (citation omitted).

In the case at hand, we are considering a motion to confirm an arbitral award after entry rather than a motion to compel arbitration, but the Seifert analysis is nonetheless applicable. Here, it is undisputed that a valid written agreement to arbitrate exists (the "Commission Agreement Regarding Three Defined Projects" dated January 10, 2006, between the appellee, Ventus de Nicaragua, S.A., and the appellant, Suzlon Energy A/S of Denmark). Although the agreement concerned commissions payable for the purchase of wind turbines for the generation of electricity in Nicaragua, the agreement was signed in Miami and specified that it was to be governed by Florida law. Neither party has disputed the enforceability of the agreement in general or the mandatory arbitration provision in particular.

Addressing the second element assessed in Seifert, the central issue between the parties is the amount of sales commissions payable, if any, by Suzlon to Ventus.[2] The record before us indicates without dispute that the commissions were

[2] In Seifert, the Florida Supreme Court held that the arbitration provision in a residential purchase and sale contract did not control a post-closing wrongful death claim. 750 So. 2d at 642-43. In the case at hand, however, the issues between Ventus and Suzlon are directly controlled by their commission agreement, and those issues are thus subject to the arbitration provision.

earned by Ventus, and that two arbitrable issues were presented: (a) whether Suzlon was entitled to credit for the payments/misapplications when the President of Ventus, Mr. Gallo, instructed Suzlon to make a partial payment to a company he controlled individually and personally[3] rather than to Ventus (after being advised in writing by an officer and other shareholders of Ventus that no such diversion was authorized); and (b) whether Suzlon properly withheld payment of the balance of the commissions due to Ventus after the Ventus officers and shareholders issued conflicting payment directives.

Addressing the third element of Seifert, Ventus did not waive its right to demand arbitration. Although it initiated a circuit court lawsuit in Miami against Suzlon and Gallo for the misapplications, Ventus commenced its arbitration against Suzlon two weeks later and immediately dropped Suzlon as a defendant in the circuit court case. Ventus took no action in the circuit court lawsuit that could be characterized as a waiver of its right to arbitrate, and Suzlon has not made that argument here.

II. Authority to Demand Arbitration

Having determined that the commission dispute between the Nicaraguan and

[3] Gallo's company was LOHR Enterprises Corp., which had a Miami bank account. Suzlon wired $632,652.72 to LOHR Enterprises at Gallo's direction (rather than to Ventus), and Suzlon withheld payment of the remaining balance due to Ventus, $693,874.48, pending dismissal or the entry of an award in the arbitration.

Danish companies is arbitrable, we turn next to the question that the majority maintains the arbitrators lacked the authority to decide: Was Mr. Rondon, a Ventus shareholder, secretary, and general manager under a power of attorney, authorized to initiate arbitration on behalf of Ventus? The record indicates this issue was submitted to, and decided by, the arbitration tribunal in its order entered July 23, 2010, after a hearing. The motions before the tribunal were: (1) Gallo's motion to intervene in and to dismiss the arbitration; (2) Suzlon's motion to dismiss the arbitration; and (3) Ventus's motion to require Suzlon to deposit or interplead the funds in dispute. Ventus, Suzlon, and Gallo each were represented by counsel. The arbitrators found, in the course of their eleven-page ruling on those motions, that:

> Ventus and Suzlon have stipulated that the claims are arbitrable, that the Tribunal has jurisdiction to determine the Claims, that the substantive law of Florida shall apply, and that the arbitral law shall be the Federal Arbitration Act ("FAA").
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> . . . .
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> . . . No shareholder or officer of Ventus, including Gallo, has any independent right or interest in the dispute between Ventus and Suzlon. Any rights or claims by the shareholders of Ventus to the funds to be paid in the Suzlon contract are defined by the laws of Nicaragua and any agreements among the Ventus shareholders.
>
> Suzlon argues that Gallo is an indispensable party, which it defines as one where the final decree of underlying controversy will affect its interest. Gallo does not fall within the definition of an indispensable party. The claim is being pursued by the company and will inure to the benefit of all shareholders.
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> The relief actually sought by Gallo is to be given the right to act on behalf of Ventus in the arbitration through counsel of his choice. Given the right to control the arbitration, Gallo has represented that he

> would dismiss the proceeding. . . .
> . . . .
> . . . Gallo asks that we follow the doctrine of comity and accept his position that only he had authority to initiate this arbitration because of the December 11, 2009, judicial decision [in Nicaragua]. That decision only dealt with the propriety of the June 11, 2008, meeting [of Rondon and shareholders other than Gallo], and not the more systemic issues of authority of shareholders, officers and board members, corporate deadlock and the protection of the interests of the shareholders. . . .
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> Although this Tribunal will not decide the niceties of Nicaraguan company governance, under the Rules of the Association, this Tribunal does have authority to decide its own jurisdiction, including the issues raised by Gallo and Suzlon. Although rules of civil procedure do not apply in this proceeding, this Tribunal follows the universal rule that allegations in a complaint (i.e. demand for arbitration) are accepted as true for purposes of a motion to dismiss. Claimant has alleged that Roberto Rondon has authority to act for Ventus by virtue of the General Power of Administration granted to him by the Ventus board of directors on April 4, 2005.[1] The Tribunal concludes that the Rondon family group had apparent authority to initiate this arbitration and direct its prosecution through the law firm of Silverio & Hall, P.A. It is in the best interests of all of the shareholders of Ventus to have the claim against Suzlon reduced to an award. Completion of this proceeding does not pose any risk of double payment by Suzlon. This tribunal has sole jurisdiction over the dispute between Ventus and Suzlon. Any decision on the merits would preclude subsequent litigation of the same issues and any award would be crafted in a way to protect the rights of all Ventus' shareholders.

Tribunal Order Concerning Motions to Intervene, Dismiss and Require Deposit July 23, 2010 (footnote 1 in original: "Also, Gallo has not refuted the assertion that the Rondon family owns 51% of the Ventus shares.").

Only after that threshold hearing and ruling did the Tribunal proceed to address the merits of the Ventus-Suzlon claim, ultimately entering its award in

favor of Ventus. And importantly, neither Gallo nor Suzlon sought or obtained any order in Nicaragua enjoining Ventus from prosecuting the arbitration or holding that Rondon had no authority to commence the arbitration on behalf of Ventus.[4] Finally, the tribunal took care, in the eighteen-page final award in favor of Ventus, not to decide the rights and obligations of the shareholders of Ventus *inter se*. The tribunal awarded Ventus $1,557,224.54 (plus post-award interest) as against Suzlon, but directed that the amount be paid into the registry of the circuit court so that the putative shareholders of Ventus may assert their respective claims. The tribunal properly limited itself to the question governed by the commission agreement and its arbitration provision: What is the amount owed by Suzlon to Ventus?

The arbitration tribunal was correct in its conclusion that the issue of Rondon's authority on behalf of Ventus to commence arbitration was subsumed in the agreement to arbitrate and was within the tribunal's jurisdiction. Issues of procedure and standing, unlike challenges to the existence of an agreement to arbitrate, the arbitrability of the dispute under the agreement, or the question of waiver, are for the arbitrators. See, e.g., Chi. Typographical Union No. 16 v. Chi.

[4] It bears repeating that the only pertinent ruling obtained by Gallo from the courts of Nicaragua was a determination that a 2008 shareholder meeting removing Gallo as President of Ventus, and appointing Rondon as President, was a nullity based on the lack of a quorum. Those courts did not find that Rondon lacked authority to demand arbitration on behalf of Ventus.

Sun-Times, Inc., 860 F.2d 1420, 1424 (7th Cir. 1988) (recognizing that the issue of standing is one for the arbitrator).[5] And having filed motions to dismiss in the arbitration, Suzlon acceded to the tribunal's decisions on standing and arbitrability. George Day Constr. Co. v. United Brotherhood of Contractors & Joiners of Am., Local 354, 722 F.2d 1471, 1475 (9th Cir. 1984) (employer maintained that the dispute was non-arbitrable because the contract in question had expired, but employer raised the issue before the arbitrators and thereby "evinced clearly its intent to allow the arbitrator to decide not only the merits of the dispute but also the question of arbitrability"). In Orion Pictures Corp. v. Writers Guild of America, West, Inc., 946 F.2d 722, 725 (9th Cir. 1991), Orion filed a formal motion "requesting that the arbitrator decide he had no jurisdiction or, in the alternative, to stay the proceedings until a court could decide jurisdiction." The court of appeals determined that "[b]y its own admission, then, Orion has gone too far down the slippery slope in submitting its dispute to arbitration." Id.

The federal courts have clarified the alternatives that were available to, but not chosen by, Suzlon:

[5] Because the FAA is applicable nationally, it has produced more reported cases than the Florida cases applying the Florida Arbitration Code, Chapter 682, Florida Statutes. The federal cases are considered "highly persuasive" because the Code is modeled after the FAA. RDC Golf of Fla. I, Inc. v. Apostolicas, 925 So. 2d 1082, 1091 (Fla. 5th DCA 2006).

> We stated that the party opposed to arbitration could (1) object to the arbitrators' authority, refuse to argue the arbitrability issue, and proceed to the merits of the agreement; (2) seek declaratory or injunctive relief from a court prior to commencement of arbitration; or (3) notify the arbitrators of a refusal to arbitrate altogether.

IBEW, Local Union No. 45 v. Hope Elec. Corp., 380 F.3d 1084, 1101 (8th Cir. 2004) (emphasis added) (citations omitted). As in IBEW, labor union arbitration issues sought to be raised in federal court frequently involve a preliminary standing question similar to the one raised by Suzlon here. As an example, employees may challenge the authority of the union leaders to initiate a demand in arbitration under the collective bargaining agreement, or vice versa. United Steelworkers of Am., AFL-CIO-CLC v. Smoke-Craft, Inc., 652 F.2d 1356, 1360 (9th Cir. 1981) ("Whether the Steelworkers had standing as a party to the arbitration to proceed with that arbitration, which had been properly commenced, was a procedural matter for the determination of the arbitrator."). In such cases, however, federal courts properly conclude that the preliminary standing question is subject to resolution by the arbitrators, not by the court.

In the case at hand, the parties to this appeal, joined by Gallo, submitted the question of corporate authority to the tribunal. When the tribunal ruled against them, Suzlon raised the issue as a purported basis for vacating the tribunal's final award against Suzlon, alleging that the arbitrators "exceeded their powers" under

section 682.13(1)(c), Florida Statutes (2011).[6] The majority opinion has given Suzlon the proverbial and prohibited "second bite at the apple" and has thereby exceeded our powers.

III. Estate of Irons and Carrington Place

The majority relies principally on two Florida cases to support its decision to reverse the trial court's confirmation of the arbitral award. Estate of Irons ex rel. Springer v. Arcadia Healthcare, L.C., 66 So. 3d 396 (Fla. 2d DCA 2011), involves the authority and capacity of a daughter under a health care power of attorney to bind her elderly (later deceased) mother to a nursing home contract which included a mandatory arbitration provision. The issue in that case was whether the arbitration agreement itself could be enforced against the principal, not whether an agent has the apparent or actual authority to invoke a concededly-enforceable arbitration provision by filing a demand in arbitration. Id. at 398-400. In the case at hand, Suzlon concedes that the commission agreement with Ventus and the arbitration provision were validly entered into and enforceable.

[6] Suzlon also alleged below and here, unsuccessfully in each case, that the award should be vacated on grounds that it was procured by "corruption, fraud, or other undue means" (section 682.13(1)(a)), that the arbitrators were "prejudicially partial to the Rondon Group" (section 682.13(1)(b)), and that the arbitrators refused to postpone the hearing (despite a sufficient cause being shown by Suzlon) and refused to hear material evidence (section 682.13(1)(d)). These four claims are not supported by the record and do not merit further analysis.

Similarly, in Carrington Place of St. Pete, LLC v. Estate of Milo ex rel. Brito, 19 So. 3d 340 (Fla. 2d DCA 2009), the issue was whether a daughter had the authority to enter into an agreement containing an arbitration provision with a nursing home on behalf of her mother. The reviewing court determined that the power of attorney "did not grant [the daughter] the authority to enter into the arbitration clause of the nursing home admission agreement." Id. at 341. The court did not address whether the daughter had the authority under the power of attorney to demand arbitration after her mother passed away.

These cases are distinguishable and inapposite because they address the authority to enter into an agreement containing an arbitration provision, not the authority to make a demand under such an agreement when it is conceded that the agreement and arbitration provision are enforceable. The enforceability question ordinarily is to be determined by a court, while a corporate officer's authority to make a demand under an enforceable agreement and arbitration provision ordinarily is to be determined by the arbitrators.

IV. Confirmation of the Award

The final factor that has not been addressed by the majority is the substantial deference afforded by state and federal courts in our review of arbitration awards. See, e.g., Dluhos v. Strasberg, 321 F.3d 365 (3d Cir. 2003). The Florida Supreme

Court summarized the rationale for such deference almost 100 years ago in Johnson v. Wells, 73 So. 188, 190-91 (Fla. 1916):

> The reason for the high degree of conclusiveness which attaches to an award made by arbitrators is that the parties have by agreement substituted a tribunal of their own choosing for the one provided and established by law, to the end that the expense usually incurred by litigation may be avoided and the cause speedily and finally determined. To permit the dissatisfied party to set aside the award and invoke the judgment of the court upon the merits of the cause would be to destroy the purpose of the arbitration and render it merely a step in the settlement of the controversy, instead of a final determination of it.

That rationale remains sound under both the FAA and the Florida Arbitration Code. "[M]ere errors of judgment either as to the law or as to the facts" are insufficient to permit a court to set aside an arbitral award, Cassara v. Wofford, 55 So. 2d 102, 105 (Fla. 1951), as is "[t]he fact that the relief granted is such that it could not or would not be granted by a court of law or equity," Prudential-Bache Sec., Inc. v. Shuman, 483 So. 2d 888, 889 (Fla. 3d DCA 1986). It does not matter that we may interpret Rondon's power of attorney in a fashion that differs from the tribunal's interpretation; the international corporations agreed in 2006 that the tribunal would decide "any dispute or controversy" between Ventus and Suzlon regarding the commissions.

V. Conclusion

The practical effect of the majority's intrusion into the tribunal's proceedings is disastrous for all of the parties, not just the appellee. The parties

and the feuding Ventus shareholders (Gallo and the Rondons) return to square one, and presumably in Nicaragua,[7] even though Ventus and Suzlon agreed that any dispute or controversy between them would be decided in Miami. The majority has essentially determined that Gallo, the shareholder and officer of Ventus who initiated all these proceedings by directing Suzlon not to send the commissions to a Ventus bank account (but rather to a Miami account controlled by him), is the only person entitled to initiate an arbitration against Suzlon, with the inevitable result that Gallo will dismiss the arbitration after the award is vacated. If the derivative rights of shareholders to protect their corporation are to mean anything, as the tribunal properly found, the commission agreement cannot be construed to empower an officer allegedly misapplying corporate funds to dismiss the corporation's claim against the payor brought to arbitrate that very issue. The written agreement between Ventus and Suzlon that called for arbitration of "any dispute or controversy," in the City of Miami and under Florida law, has been judicially vaporized, and our well-settled deference to arbitral decisions has been disregarded. Over four years of proceedings and enormous legal expenses all will be for nought.

For all these reasons, I would affirm the circuit court's order confirming the

[7] The circuit court previously determined that Ventus's lawsuit against Gallo should be dismissed on grounds of forum non conveniens.

award of the International Centre for Dispute Resolution's arbitral tribunal and denying Suzlon's motion to vacate that award.