

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

HSM Construction Services, Inc. and	:	
HSM Management Services, Inc.,	:	
	:	CIVIL ACTION
Plaintiffs,	:	NO. 05-5983
	:	
v.	:	
	:	
MDC Systems, Inc.,	:	
	:	
Defendant.	:	

**MEMORANDUM**

BUCKWALTER, S. J.

April 13, 2006

Presently before the Court are Plaintiffs’ Motion to Vacate, Modify, or Correct Arbitration Award (Docket No. 2), Defendant’s Answer to Plaintiffs’ Motion to Vacate, Modify or Correct Arbitration Award, and Defendant’s Motion for Summary Judgment and Defendant’s Motion for an Order Confirming the Award (Docket No. 3), MDC Systems, Inc.’s Answer to Plaintiff’s Complaint and Petition for Confirmation of Contractual Arbitration Award and Entry of Judgment Thereon (Docket No. 4), Plaintiffs’ Reply (Docket No. 5), and Defendant’s Reply (Docket No. 6). For the reasons stated below, Plaintiff’s Motion to Vacate, Modify, or Correct Arbitration Award is denied, and Defendant’s Motion for an Order Confirming the Award is granted. In addition, Defendant’s Motion for Summary Judgment is denied.

## **I. FACTS AND PROCEDURAL HISTORY**

HSM Construction Services, Inc. (“Construction”) is a company that provides construction and architectural supervision services. HSM Management Services, Inc. (“Management”) “provides nursing home management services, including but not limited to, personnel, accounts receivable and accounts payable, for fourteen care facilities located in Illinois and Missouri, known as Rosewood Care Centers.” (Pls.’ Mot. Vacate at 4.)

The present case stems from a lawsuit regarding the construction of the Rosewood Care Center of St. Charles, Illinois, in which Construction was a named defendant. To aid in its defense of that lawsuit, Construction hired MDC Systems, Inc. (“MDC”) to prepare expert engineering reports.

By a letter dated July 18, 2002, MDC drafted a Proposal of Expert Consulting Services. Throughout the Proposal, MDC refers to the other party to the contract as “HSM” and does not specify whether it is referring to “HSM Management” or “HSM Construction.” By a letter dated July 19, 2002, printed on “HSM Management Services, Inc.” letter head, “HSM” provided supplementary terms and conditions. The fax also included the signature page of the Proposal, which was signed by General Counsel for “HSM.” Afterwards, HSM Management Services, Inc. paid the initial retainer and made two subsequent partial payments to MDC.

Construction and Management argue that MDC prepared an unusable expert disclosure report. As a result, MDC was not paid for the balance due under the contract. MDC then submitted a Demand for Arbitration to the American Arbitration Association (“AAA”) seeking relief of \$80,662.53 in unpaid fees from only “HSM Management Services, Inc.” Construction was not named as a party on MDC’s initial Demand.

On March 16, 2004, the arbitration Panel conducted a preliminary hearing conference call. Management argued that it was not a party to the contract in question. The Panel later amended the caption from “HSM Management, Inc.” to “HSM, Inc., HSM Management, Inc., and HSM Construction Services, Inc.”

On July 12, 2004, MDC sent a letter addressed to the individual arbitrators but sent to the AAA’s address. The letter stated that “HSM has not paid the AAA-required fees or deposits, nor has it requested *in forma pauperis* relief . . . . In a word, HSM’s failure to pay is willful, done for the purpose of stonewalling the AAA arbitration process.” (Pls.’ Mot. Vacate Ex. 8.)

The parties appeared before the arbitration Panel on February 2, 2005. At the close of the first day of hearings, the Panel spoke with the parties about the need for an additional day of hearings. Construction and Management claim that “[d]uring that discussion, the Panel members were well aware that [they] were not paying their share of arbitration fees and that, for the session to continue, MDC would have to pay the fees for all parties.” (Pls.’ Mot. Vacate at 5.)

On August 18, 2005, the Panel issued its decision in favor of MDC and holding Construction and Management jointly and severally liable for \$86,969.00.

## **II. ANALYSIS**

### **A. Choice of Law**

The parties dispute whether the Federal Arbitration Act (“FAA”) or the Delaware Uniform Arbitration Act (“DUAA”) should apply in this case. Construction and Management

argue that the FAA should apply, while MDC argues that the DUAA should apply. MDC points out that the contract states that:

This proposal and all questions relating to its validity, interpretation, performance, and enforcement (including, without limitations, provisions concerning limitation of actions), shall be governed by and construed in accordance with the laws of the State of Delaware, notwithstanding any conflict-of-laws doctrines of such state or any other jurisdiction to the contrary, without the aide of any canon, custom or rule of law requiring construction against the draftsman.

(Def.'s Answer at 3.)

MDC claims that “[t]he principal difference between the FAA and the DUAA is [that] under Delaware law the party applying to vacate has standing only if it did not participate in the hearing and it objected to the proceedings.” *Id.* at 7. MDC fails to cite a specific provision of Delaware law in support of this statement, and the Court is unaware of any such provision.

The provision most similar to MDC’s contention is 10 Del. C. § 5714(a)(5), which provides that an arbitration award shall be vacated where “[t]here was no valid arbitration agreement, or the agreement to arbitrate had not been complied with, or the arbitrated claim was barred by limitation under § 5702(c) . . . and the party applying to vacate the award did not participate in the arbitration hearing without raising the objection.” In the present case, the parties do not dispute that the contract contains an agreement to arbitrate. Further, Construction and Management do not argue that the agreement to arbitrate was not complied with or that the claim was barred by the statute of limitations. Therefore, even if this Court were to apply Delaware law, § 5714(a)(5) would not apply.

Aside from this potential difference, the provisions of the FAA and the DUAA that are applicable in this case, the “evidently partial” standard<sup>1</sup> and the “manifest disregard of the law” standard,<sup>2</sup> are identical. Therefore, the Court declines to decide which law applies because the result would be the same under either the FAA or the DUAA.

## **B. Construction and Management’s Arguments**

Construction and Management argue that the Panel’s award should be vacated because: (1) the Panel manifestly disregarded the law by exercising jurisdiction over Management when Management was not a party to the contract; and (2) the Panel was evidently partial due to MDC’s letter to the Panel detailing Construction and Management’s failure to pay arbitration fees.

### **1. The Panel Did Not Manifestly Disregard the Law**

Manifest disregard for the law “means more than error or misunderstanding with respect to the law. Rather, ‘[m]anifest disregard of the law’ encompasses situations in which it is evident from the record that the arbitrator recognized the applicable law, yet chose to ignore it.” Jeffrey M. Brown Assoc., Inc. v. Allstar Drywall & Acoustics, Inc., 195 F. Supp. 2d 681, 684 (E.D. Pa. 2002) (quoting Aetna Cas. & Sur. Co. v. Dravo Corp., No. 97-149, 1997 WL 560134, at \*1 (E.D. Pa. July 31, 1997)). “[A]s long as the arbitrator has arguably construed or applied the

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1. Delaware courts look to law interpreting the FAA’s “evident partiality” standard when analyzing the DUAA’s “evident partiality” standard. See, e.g., Beebe Med. Ctr. v. Insight Health Servs., 751 A.2d 426, 433 (Del. Ch. 1999) (citing the United States Supreme Court’s decision in Commw. Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968)).

2. See Beebe Med. Ctr., 751 A.2d at 441 (vacating an arbitration decision where that decision was in “manifest disregard” of the law).

contract, the award must be enforced, regardless of the fact that a court is convinced that the arbitrator has committed a serious error.” Brown, 195 F. Supp. 2d at 685.

In the present case, the Court finds that the Panel arguably construed or applied the contract correctly. The contract refers to “HSM” and not specifically “HSM Management” or “HSM Construction.” The contract was signed by General Counsel for “HSM.” In addition, letters were exchanged on “HSM Management, Inc.” letterhead and Management paid the initial retainer as well as two partial payments. Based on these facts, the Panel did not manifestly disregard the law when it found Management liable under the contract.

## **2. The Panel Was Not Evidently Partial**

Congress vested federal courts with power to vacate an arbitration award “[w]here there was evident partiality . . . in the arbitrators . . .” 9 U.S.C.A. § 10(a)(2).<sup>3</sup> Courts are split as to whether a petitioner must demonstrate “actual bias” or merely an “appearance of bias” to vacate an arbitrator’s award. See Crow Constr. Co. v. Jeffrey M. Brown Assoc., Inc., 264 F. Supp. 2d 217, 220-24 (E.D. Pa. 2003).

Even assuming that the more lenient “appearance of bias” standard applies in the present case, the Court finds that the Panel was not evidently partial as a result of MDC’s letter. According to Construction and Management, the Panel members’ salaries originate from the payment of AAA fees and because Construction and Management did not pay their AAA fees, and the Panel was informed of its non-payment, the Panel operated under a financial bias. However, Construction and Management admit that it is unclear whether MDC’s letter, which

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3. Similarly, Delaware law provides that a court “shall vacate an award where . . . [t]here was evident partiality by an arbitrator appointed as neutral . . .” 10 Del. C. § 5714 (2005).

was sent to the AAA address but addressed to the individual Panel members, actually reached the Panel members. (Pls.' Opp'n at 17.) (MDC's "letter of July 12, 2004, sent to the AAA, [] might or might have not reached the Panel . . ."). Without additional evidence of bias, the Court concludes that the Panel was not evidently partial.

### **III. CONCLUSION**

For the reasons stated above, the Court denies Plaintiffs' Motion to Vacate, Modify, or Correct Arbitration Award and grants Defendant's Motion for an Order Confirming the Award. The Court also denies Defendants' Motion for Summary Judgment.<sup>4</sup>

An appropriate order follows.

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4. In light of the Court's decision to grant Defendant's Motion for an Order Confirming the Award, the Court declines to grant Defendant's Motion for Summary Judgment.

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	:	
Plaintiffs,	:	CIVIL ACTION
	:	NO. 05-5983
	:	
v.	:	
	:	
MDC Systems, Inc.,	:	
	:	
Defendant.	:	

**ORDER**

AND NOW, this 13<sup>th</sup> day of April, 2006, upon consideration of Plaintiffs’ Motion to Vacate, Modify, or Correct Arbitration Award (Docket No. 2), Defendant MDC Systems, Inc.’s Answer to Plaintiffs’ Motion to Vacate, Modify or Correct Arbitration Award, and Defendant’s Motion for Summary Judgment and Defendant’s Motion for an Order Confirming the Award (Docket No. 3), MDC Systems, Inc.’s Answer to Plaintiff’s Complaint and Petition for Confirmation of Contractual Arbitration Award and Entry of Judgment Thereon (Docket No. 4), Plaintiffs’ Reply (Docket No. 5), and Defendant’s Reply (Docket No. 6), it is hereby **ORDERED** that Plaintiff’s Motion to Vacate, Modify, or Correct Arbitration Award is **DENIED**, Defendant’s Motion for Summary Judgment is **DENIED**, and Defendant’s Motion for an Order Confirming the Award is **GRANTED**.

BY THE COURT:

*s/ Ronald L. Buckwalter, S. J.*  
RONALD L. BUCKWALTER, S.J.