United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DASTIME GROUP LIMITED, et al.,

Petitioners,

v.

MOONVALE INVESTMENTS LIMITED, et al.,

Respondents.

Case No. 17-cv-01859-JSW

ORDER CONFIRMING FINAL ARBITRATION AWARD AND DENYING MOTION TO VACATE THE AWARD

Re: Dkt. Nos. 1, 17

On a petition to confirm an arbitration award, Respondent Peter Kiritchenko moves to vacate the award. The Court has considered the parties' papers, relevant legal authority in this case, and the Court finds Kiritchenko's motion to vacate, and Petitioners' underlying petition to confirm, suitable for disposition without oral argument. *See* N.D. Civ. L.R. 7-1(b). For the reasons set forth below, the Court HEREBY DENIES Kiritchenko's motion to vacate and GRANTS the petition to confirm the arbitration award as to Kiritchenko.

BACKGROUND

The underlying facts relating to the business relationship between Petitioner Konstantin Grigorishin and Kiritchenko are not directly relevant to the instant dispute. Accordingly, the Court does not discuss them at length. The following summary, however, is taken from the Arbitrator's March 23, 2017 Corrected Final Award. (Dkt. No. 17-2, Corrected Final Award ("Award").)

Beginning in the mid-1990s, the Ukrainian government began a process of privatizing state-owned companies. (Award at 12.) Some state-owned companies were sold to investors through a competitive "tender" process. (*Id.*) These tenders often required investors to commit to making future investments in the purchased company in order to win the tender. (*Id.* at 12-13.) In

1996, Grigorishin and Respondent Kiritchenko decided to invest together in a joint venture privatizing Ukrainian companies through this tender process. (*Id.* at 13.) Under the resulting agreement, ownership in the joint business was split 50/50, with Kiritchenko investing tens of millions of dollars into the business. (*Id.* at 13-15.)

Initially, Grigorishin provided Kiritchenko with fairly detailed reports on the joint business. In 1999, however, Kiritchenko encountered various legal problems in the United States. (*Id.* at 15.) As a result, Kiritchenko stopped traveling to the Ukraine, and Grigorishin stopped reporting to Kiritchenko. (*Id.*) In early 2001, Kiritchenko informed Grigorishin that he wanted his capital investment in the joint business to be repaid. (*Id.* at 16.) Grigorishin agreed, and a payment scheduled was created. Over the years, however, Grigorishin failed to make the agreed payments and Kiritchenko was not paid his share of the joint business's profits. (*Id.* at 16-17.)

In 2006, Grigorishin called Kiritchenko and informed him that the joint business was in "great distress and had lost most of its value but that [Grigorishin] was willing to return some money to [Kiritchenko]." (*Id.* at 18.) Grigorishin's business partner, Igor Kuida, subsequently told Kiritchenko that the "business had experienced huge difficulties, that it was having problems with the government, and that it was being sued." (*Id.*) Kuida told Kiritchenko that the joint business did not have sufficient money to pay Kiritchenko the $42.5 million to which Kiritchenko was entitled under the repayment schedule. Instead, Kuida told Kiritchenko and that the joint business could pay him, at most, $14.5 million. (*Id.*) Kiritchenko believed Grigorishin's and Kuida's representations. (*Id.* at 18-19.)

On June 28, 2016, Kiritchenko entered into an agreement with Petitioner Dastime Group Limited ("Dastime")—a British Virgin Island ("BVI") company owned and controlled by Grigorishin. (Dkt. No. 1-3, 2006 Agreement.) In this agreement, Kiritchenko sold his interest in the various companies which comprised the joint business in exchange for a $14.5 million payment. (*Id.*¶2.) As part of the 2006 Agreement, Kiritchenko agreed to a release in which he "waive[d] and release[d]" any "interest in any of the Businesses, whether known or unknown . . . including . . . any claim of [Kiritchenko] . . . relating to . . . any transfer or alleged transfer of rights or assets out of any of the Transferred Companies." (*Id.* ¶ 9.) The 2006 Agreement also

contains an arbitration clause, which provides:

> This Contract shall be governed by the laws of the State of California, without giving effect to any conflict of laws provisions of such law. Any dispute between the Parties arising out of or relating to this Contract shall be resolved by binding arbitration. This arbitration clause shall be deemed to be an agreement independent of the other terms of this Contract. Any arbitration shall be conducted in San Francisco, California before a single arbitrator pursuant to the rules of the Judicial Arbitration and Mediation Services ("JAMS"), and the award or other final determination of such arbitrator shall be final and binding upon the Parties.

(*Id.* ¶ 10.)

In December 2010, Kiritchenko contacted Alexander Vartanyan (Grigorishin's former business manager) to obtain documents to support the value of his initial investment for tax purposes. (Award at 19.) According to Kiritchenko, Vartanyan expressed "amazement" that Kiritchenko had sold his interest in the joint business for $14.5 million. (*Id.*) Vartanyan told Kiritchenko that in 2006 the value of the joint business was hundreds of millions of dollars—a far different story than Kiritchenko had allegedly been told by Grigorishin and Kuida. (*Id.* at 19-20.) This information allegedly led Kiritchenko to investigate potential claims against Grigorishin relating to the 2006 Agreement and Grigorishin's and Kuida's alleged misrepresentations. He ultimately assigned his claims under the 2006 Agreement against Grigorishin and Dastime to Respondent Moonvale Investments, Ltd. ("Moonvale"), a BVI Company. (*Id.* at 11, 20.)

As Kiritchenko's assignee, Moonvale filed an arbitration claim against Grigorishin and Dastime in 2013. This arbitration alleged that Grigorishin and Dastime fraudulently induced Kiritchenko to enter into the 2006 Agreement by misrepresenting material facts relating to the value of the joint business. (*Id.* at 11.) Moonvale asserted claims for intentional misrepresentation, fraudulent inducement, concealment and negligent misrepresentation. (*Id.* at 63.) Grigorishin and Dastime argued that Moonvale's claims were barred by the statute of limitations. In response, Moonvale contended that under the delayed discovery rule, its fraud claims did not accrue until December 2010, when Kiritchenko allegedly first learned of Grigorishin's and Kuida's alleged misrepresentations from Vartanyan. (*Id.* at 11.) Grigorishin and Dastime filed cross-claims against Moonvale and Kiritchenko for breach of contract and

intentional interference with contractual relations based on Kiritchenko's alleged breach of the 2006 Agreement.

After a two-day hearing during which live and written testimony was presented, the Arbitrator dismissed Moonvale's claims as barred by the statute of limitations grounds. The Arbitrator found that Kiritchenko had been on "inquiry notice of Grigorishin's purported misrepresentation and fraud in 2006 when he signed the Agreement. He did nothing to inquire or investigate underlying alleged facts for at least four years." (*Id.* at 28.) The Arbitrator also granted Grigorishin and Dastime's cross-claims. (*Id.* at 63.)

The Arbitrator also awarded Grigorishin and Dastime attorney's fees in the amount of $5,700,132.10. (*Id.*) While the 2006 Agreement is silent on the question of attorney's fees, the Arbitrator found (over Moonvale and Kiritchenko's objections) that the JAMS International Rules—which provide for an award of attorney's fees to the prevailing party—applied. (*Id.* at 38-40.) The Arbitrator found Moonvale and Kiritchenko jointly and severally liable for this amount. (*Id.*)

Grigorishin and Dastime (collectively, "Petitioners") filed the instant action against Moonvale and Kiritchenko, seeking to confirm the Award, including the award of attorney's fees. Kiritchenko opposes confirmation and has filed a motion to vacate the Award.[1]

DISCUSSION

A. The Petition to Confirm the Arbitrator's Award Is Granted as to Kiritchenko.

Petitioners seek to confirm the Award under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("New York Convention"), which is implemented by the Federal Arbitration Act ("FAA") at 9 U.S.C. §§ 201-08. The New York Convention applies because it arises "out of a legal relationship . . . which is considered as commercial" and involves a party that is not a United States citizen. 9 U.S.C. § 202. Where the convention applies, the FAA provides that a party to the arbitration may "apply to any court having jurisdiction . . . for an order confirming the award

[1] Moonvale, by contrast, has failed to appear and the Clerk of the Court has entered default against it. (Dkt. Nos. 23, 36.)

as against any other party to the arbitration" within three years of the arbitration award. 9 U.S.C. § 207. The court is commanded to "confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." *Id.*

Kiritchenko contends that Court should vacate the Award under the New York Convention and FAA for two independent reasons. First, he argues that the Arbitrator exceeded her authority in awarding attorney's fees because the 2006 Agreement does not authorize an award of attorney's fees. Second, he contends the Arbitrator prejudiced his due process rights by failing to compel Grigorishin and Kuida to testify as witnesses at the arbitration hearing. The Court addresses both arguments in turn.

1. The Arbitrator Did Not Exceed Her Authority in Awarding Attorney's Fees.

Under the New York Convention, a court may refuse enforcement of an arbitration award if the "award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration." 21 U.S.T. 2517, art. V, § 1(c). Similarly, the FAA at 9 U.S.C. § 10, permits a court to vacate an arbitration award on certain grounds, including where the "arbitrators exceeded their powers." *Id.* § 10(a)(4).[2] These two defenses are similar in scope and "basically allow a party to attack an award predicated on arbitration of a subject matter not within the agreement to submit to arbitration." *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier*, 508 F.2d 969, 976 (2d Cir. 1974); *see also Phoenix Bulk Carriers, Ltd. v. American Metals Trading, LLP*, No. 10-cv-2963 (NRB), 2013 WL 5863608, at *7 (S.D.N.Y. Oct. 31, 2013). Both defenses provide "an extremely limited review authority, a limitation that is

[2] Under 9 U.S.C. § 208, Chapter 1 of the FAA (which governs arbitrations not covered by the New York Convention) will apply to actions to confirm an arbitration award governed by the New York Convention "to the extent [those provisions are] not in conflict with this chapter or the Convention as ratified by the United States." Accordingly, in reviewing Kiritchenko's challenges to the Arbitrator's Award, the Court considers both the defenses contained in the New York Convention as well as the grounds for vacatur contained at 9 U.S.C. § 10. *See Ario v. Underwriting Members of Syndicate 54 at Lloyds for 1998 Year of Account*, 618 F.3d 277, 292 (3d Cir. 2010) ("When both the arbitration and the enforcement of an award falling under the Convention occur in the United States, there is no conflict between the Convention and the domestic FAA because Article V(1)(e) of the Convention incorporates the domestic FAA and allows awards to be 'set aside or suspended by a competent authority of the country in which . . . that award was made.'").

designed to preserve due process but not to permit unnecessary public intrusion into private arbitration matters." *Kyocera Corp. v. Prudential Bache T Servs.*, 341 F.3d 987, 998 (9th Cir. 2003); *see also See Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 665 F.3d 1091, 1096 (9th Cir. 2011) (holding that defenses under the New York Convention are construed narrowly).

Under the FAA's limited review, a party seeking to challenge an arbitration award as outside the power of the arbitrator bears a "heavy burden." *Oxford Health Plans, LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013). A court cannot find an arbitrator exceeded his or her powers "when they merely interpret or apply the governing law incorrectly." *Kyocera*, 341 F.3d at 997. Rather, a court must uphold an arbitrator's decision unless it is "completely irrational . . . or exhibits a manifest disregard of law[.]" *Id.* (internal quotations and citations omitted).

Where a party opposing confirmation of an arbitration award, raises a question of arbitrability, however, courts will not always defer to the Arbitrator's determination. Questions of arbitrability include "'certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy.'" *Oxford Health Plans*, 133 S. Ct. at 2068 n.2 (quoting *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444,4 52 (2003) (plurality op.)). These questions are "presumptive[ly] for courts to decide" and courts will review an arbitrator's determination of such a matter de novo absent 'clear[] and unmistakeabl[e]' evidence that the parties wanted an arbitrator to resolve the dispute." *Id.* (quoting *AT&T Tech., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986)); *see also Gerton v. Fortiss, LLC*, No. 15-cv-04805-TEH, 2016 WL 613011, at *6 (N.D. Cal. Feb. 16, 2016) ("If there is no clear and unmistakable delegation clause stating that the issue of arbitrability should be decided in arbitration, the issue of arbitrability remains for courts to decide.").

Kiritchenko argues that his challenge to the Arbitrator's award of attorney's fees raises a question of arbitrability and that the Court should therefore apply a *de novo* standard of review. Kiritchenko is not arguing that the Court (as opposed to the Arbitrator) has the power under the

2006 Agreement to award attorney's fees.[3] Instead, Kiritchenko is arguing that the Court, and not the Arbitrator, must determine whether the Arbitrator had authority under the 2006 Agreement to award attorney's fees. Petitioners argue that Kiritchenko's arguments do not present a question of arbitrability and that this Court should defer to the Arbitrator's determination.

Ultimately, the Court need not decide whether the *de novo* standard of review or a more deferential standard applies. Even if the Court were to accept Kiritchenko's characterization of the challenge to the arbitrator's authority and apply a *de novo* standard of review (and thus afford no deference to the Arbitrator's findings regarding her power), the Court would nonetheless find that the Arbitrator was authorized to award attorney's fees under the 2006 Agreement.

Whether under the New York Convention or the FAA, parties "have a right to arbitration according to the terms for which [they] contracted." *W. Employers Ins. Co. v. Jefferies & Co., Inc.*, 958 F.2d 258, 261-62 (9th Cir. 1992). In determining whether parties "agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Accordingly, the Court looks to what the 2006 Agreement has to say regarding the availability, and arbitrability, of attorney's fees. *Cf. Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995) ("[T]he FAA ensures that [the parties] agreement will be enforced according to its terms . . . . Thus, the case before us comes down to what the contract has to say about the arbitrability of petitioners' claim for punitive damages.").

The 2006 Agreement contains no express provision regarding attorney's fees within the four corners of the agreement. However, under California law,[4] "parties may validly incorporate by reference into their contract the terms of another document." *Slaught v. Bencomo Roofing Co.*, 25 Cal. App. 4th 744, 748 (1994). In order for the terms of another document to be incorporated into the parties' contract, "'the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the

[3] In fact, Kiritchenko would appear to take the position that *no* entity has the authority to award attorney's fees under California law or the 2006 Agreement.

[4] The parties provided that the 2006 Agreement would be "governed by the laws of the State of California." (2006 Agreement ¶ 10.)

incorporated document must be known or easily available to the contracting parties.'" *Shaw v. Regents of University of California*, 58 Cal. App. 4th 44, 54 (1997) (quoting *Williams Constr. Co. v. Standard-Pacific Corp.*, 254 Cal. App. 2d 442, 454 (1967)). Rules of an arbitration company, such as JAMS, are the type of "document" that can be incorporated by reference. *See, e.g., Levy v. Lytx, Inc.*, No. 16-cv-03090-BAS (BGS), 2017 WL 2797113, at *6 (S.D. Cal. June 28, 2017).

As detailed above, the 2006 Agreement provides that "[a]ny arbitration shall be conducted in San Francisco, California pursuant to the rules of the Judicial Arbitration and Mediation Services ('JAMS')." (2006 Agreement ¶ 10.) At first blush, this reference to JAMS rules is "clear and unequivocal"—"any" arbitration (without exception) shall be governed by the "rules of the Judicial Arbitration and Mediation Services." Further, the 2006 Agreement provides that "[e]ach Party has had an opportunity to have input into the wording of this Contract," which, combined with the relatively clear reference to JAMS rules, suggests that the reference to JAMS' rules was properly called to the attention of both parties and consented to by both. (*Id.* ¶ 12.) Finally, Kiritchenko has not argued that JAMS' various sets of rules were not "easily available to the contracting parties."

This last sentence, however, hints at Kiritchenko's main attack on the Arbitrator's Award: JAMS does not have a single set of rules that govern arbitrations before it. Instead, there are various sets of Rules which can apply depending on the parties' agreement or the nature of the underlying dispute. In his motion to vacate, Kiritchenko argues, as he did before the Arbitrator, that JAMS' "Comprehensive Arbitration Rule & Procedures" ("Comprehensive Rules") should have governed the arbitration. By contrast, Petitioners contend, and the Arbitrator agreed, that JAMS' "International Arbitration Rules" ("International Rules") governed the arbitration. This is central to the instant dispute because while the International Rules provide the Arbitrator with authority to award attorney's fees, the Comprehensive Rules do not. The parties did not expressly provide in the 2006 Agreement which set of JAMS Rules would apply. This, according to Kiritchenko, means that at the time the parties entered into their contract, "the parties could not have predicted" which set of Rules would govern their arbitration and, as a result, the 2006 Agreement did not "clearly and unequivocally" incorporate any JAMS Rule. (Motion at 6.)

The Court agrees with Kiritchenko that looking solely to the face of the 2006 Agreement reveals an ambiguity as to which set of JAMS rules would apply. However, the 2006 Agreement clearly, and unequivocally, references the "rules of the Judicial Arbitration and Mediation Services."[5] This is significant because the JAMS Rules themselves contain provisions indicating which set of Rules will apply when the parties fail to identify a particular set of Rules in their agreement. As a result, any potential ambiguity in the 2006 Agreement is resolved by reference to the "rules of the Judicial Arbitration and Mediation Services" themselves. *See Perez v. Maid Brigade, Inc.*, No. 07-cv-3473-SI, 2007 WL 2990368 (N.D. Cal. Oct. 11, 2007) ("[S]he contends that the agreement's reference to the [AAA] rules is ambiguous because either the AAA's Labor Arbitration Rules or its Employment Arbitration Rules might apply. The rules themselves resolve any such ambiguity in favor of the AAA's Employment Rules."); *Lucas v. Gund, Inc.*, 450 F. Supp. 2d 1125 (C.D. Cal. 2006) ("When an agreement references other rules but does not specify which version of the rules should apply to the dispute, but the referenced rules themselves answer that question, those rules control.").

The 2005 version of the Comprehensive Rules, which were in force at the time the 2006 Agreement was executed, provide:

> (a) The JAMS Comprehensive Arbitration Rules and Procedures ("Rules") govern binding Arbitrations of disputes or claims that are administered by JAMS and in which the parties agree to use these Rules or, in the absence of such agreement, any disputed claim or counterclaim that exceeds $250,000, not including interest or attorneys' fees, *unless other Rules are prescribed*."

2005 Comprehensive Rule 1(a) (emphasis added).[6] Accordingly, the Comprehensive Rules are a

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[5] Accordingly, this case is distinguishable from the arbitration provision at issue in *Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771 (2012). In that case, the provision provided that any arbitration would be governed by the rules of either the National Association of Securities Dealers, the American Arbitration Association, or any other ADR organization selected at the employer's sole discretion. *Id.* at 789. Thus, in that case, the plaintiff had no way of knowing what regime would govern any subsequent dispute. That is not the case here where Respondent, a sophisticated businessman involved in a multi-million dollar transaction, agreed to arbitration governed by a specific organization's rules and that organization's rules provide a framework for determining which set of rules will apply (as discussed below).

[6] The 2005 version of the Comprehensive Rules are available at: https://www.jamsadr.com/files/Uploads/Documents/comprehensive_arbitration_rules-2005.pdf. The Comprehensive Rules in force at the time the underlying arbitration was initiated contain a similar provision.

form of default rule that will apply wherever (1) the parties agree to apply them or (2) when the disputed claim exceeds $250,000 and no other set of Rules applies.

The Comprehensive Rules do not apply to parties' dispute arising out of the 2006 Agreement, however, because "other Rules are prescribed" for that dispute by JAMS. Specifically, the 2005 version of the International Rules state:

> Where parties have agreed in writing to arbitrate disputes under these International Arbitration Rules ("the Rules") *or have provided for arbitration of an international dispute by JAMS without specifying a particular set of rules to govern the arbitration*, the arbitration will take place in accordance with these Rules, as in effect at the date of commencement of the arbitration subject to whatever modifications the parties may adopt in writing.

2006 International Rules art. 1.1 (emphasis added).[7] An arbitration is said to involve an "international" dispute where

> at the time of the making of their agreement, the parties are located in different states or if a substantial amount of the transaction(s) or occurrence(s) that gave rise to the dispute took place in different states.

Id. art. 1.4. When Moonvale filed the underlying arbitration, it alleged that (1) Moonvale and Dastime were both BVI companies (2) Grigorishin was a "Ukrainian businessman"; and (3) that at the time the 2006 Agreement was executed and the alleged wrongdoing occurred, Kiritchenko was a resident of the United States (Dkt No. 21-1, at 1, 5.) The parties' dispute arising out of the 2006 Agreement therefore fits squarely within the International Rules' definition of an "international" dispute. Because the parties' dispute is "international" as defined by JAMS, and the parties agreed for arbitration by JAMS without specifying which set of rules will apply, the JAMS Rules provide that the International Rules govern the arbitration.[8]

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[7] The 2005 version of the International Rules are available at: https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Internationl_Arbitration_Rules-2005.pdf. The International Rules in force at the time the underlying arbitration was initiated contain a similar provision.

[8] Kiritchenko argues, however, that under the Comprehensive Rules, the Comprehensive Rules govern "unless other Rules are prescribed" and, here, the parties did not "prescribe" another set of rules. 2005 Comprehensive Rule 1.4(a). In essence, he contends that only the parties, and not the various sets JAMS Rules, can "prescribe" which rules would govern. The Court disagrees. There is nothing in Rule 1.4 which states (or implies) the limitation Kiritchenko would have the Court read into the Rule.

The 2006 Agreement therefore incorporated the JAMS International Rules by reference. Under the International Rules, "[w]hen the Rules govern the arbitration, the parties will be deemed to have made the Rules a part of their arbitration agreement." 2005 International Rules art. 1.2. The International Rules provide that as part of an arbitration award, the arbitrator may apportion the costs of the arbitration—including attorney's fees—if the arbitrator finds the apportionment reasonable. *Id.* art. 34.1(c); 34.4. Accordingly, the 2006 Agreement, as a matter of contract,[9] provides for a discretionary award of attorney's fees by the arbitrator. *See, e.g.*, *Berkla v. Corel Corp.*, 302 F.3d 909, 919 (9th Cir. 2002) ("California permits parties to allocate attorney's fees by contract."); *Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal.4th 362 (1994) ("The substantive law underlying the claim being arbitrated, the contract allegedly breached . . . , the arbitration agreement, and the rules adopted by the parties to govern the arbitration are all potential sources that may either expand or limit the scope of the remedies available to an arbitrator.").

For the foregoing reason, the Court finds that the arbitrator did not exceed her authority and correctly determined that she had the power to award attorney's fees. Because the Court finds that the arbitrator had this authority under the provisions of the International Rules, as incorporated into the 2006 Agreement, the Court need not address whether fees were authorized under California Code of Civil Procedure section 1297.318.

2. The Arbitrator Did Not Violate Respondent's Due Process Rights.

At the arbitration hearing, Grigorishin and Igor Kuida, Grigorishin's business partner who made the alleged misrepresentations that led to Kiritchenko entering the 2006 Agreement, did not testify. Kiritchenko argues that the Arbitrator's failure to compel their testimony prejudiced Kiritchenko's due process rights.

The New York Convention, provides that a Court can decline to enforce an arbitration award when the "party against whom the award is invoked . . . was . . . unable to present his case." 21 U.S.T. 2517, art. V, § 1(b). Courts have held that this provision "essentially sanctions the application of the forum state's standards of due process." *Iran Aircraft Indus. v. Avco Corp.*, 980

[9] The Court therefore finds Respondent's argument that the parties only intended for the JAMS Rules to govern the *procedure* of the Arbitration to be unpersuasive.

F.2d 141, 145-46 (2d Cir. 1992); *see also Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004) (same). The "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* (quoting *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976)). A fundamentally fair hearing is one that "meets 'the minimal requirements of fairness'—adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator." *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 592 (7th Cir. 2001).

Similarly, the FAA permits a court to vacate an arbitrator's award where "the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy." 9 U.S.C. § 10(a)(3). Arbitrators "enjoy 'wide discretion to require the exchange of evidence, and to admit or exclude evidence, how and when they see fit.'" *U.S. Life Ins. Co. v. Superior Nat'l Ins. Co.*, 591 F.3d 1167, 1175 (9th Cir. 2010) (quoting *Indus. Risk Insurers v. M.A.N. Gutenhoffnungshutte GmbH*, 141 F.3d 1434, 1444 (11th Cir. 1998)). In order to justify vacating an arbitration award, the "arbitrator's refusal to hear evidence 'must demonstrate bad faith or be so gross as to amount to misconduct.'" *Immersion Corp. v. Sony Computer Enter. Am. LLC*, 188 F. Supp. 3d 960, 974 (N.D. Cal. 2016) (quoting *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987)); *see also Akpele v. Pac. Life Ins. Co.*, 646 F. App'x 908, 913 (11th Cir. 2016) (sane).

As referenced above, the Arbitrator's merits determinations were predicated on her finding that Kiritchenko had reason to know about Grigorishin's and Kuida's alleged misrepresentations at the time he entered into the 2006 Agreement, but failed to conduct a reasonable inquiry. The Arbitrator therefore found that Moonvale's (as Kiritchenko's assignee) claims were barred by the statute of limitations. Kiritchenko, however, argues that if his counsel had been permitted to cross-examine Grigorishin and Kuida, Kiritchenko may have "elicited additional details on their representations" that would have led the Arbitrator to conclude that Kiritchenko "reasonably rel[ied] upon what he was told." (Motion at 14.)

The Court concludes that Kiritchenko has failed to establish that he was denied due process or that the Arbitrator acted in bad faith. In rejecting Kiritchenko's argument that his

inability to cross-examine Grigorishin and Kuida had prejudiced him, the arbitrator stated:

> [Moonvale] contends that Respondents' refusal to present the testimony of Grigorishin and Kuida as witnesses "is direct concealment and interference with Claimant's ability to produce material evidence on the delayed discovery of the claims by . . . Kiritchenko." However, since the Arbitrator has accepted as true for purposes of this motion those facts alleged by Claimant and Peter Kiritchenko with regard to Kuida's and Grigorishin's actions and representations to Kiritchenko before and while entering into the 2006 Agreement, Claimant was not prejudiced by his inability to cross-examine Kuida or Grigorishin at the December hearing. Further, Claimant has neither identified nor proffered material evidence from Grigorishin or Kuida that would have further supported Claimant's claim that Kiritchenko reasonably relied upon the representations of Grigorishin and his agent, Kuida, or could have discovered through reasonable investigation the injury of the misrepresentation. Grigorishin's and Kuida's failure to testify and to deny or explain the misrepresentations made to Kiritchenko are already being interpreted against them in these proceedings. For purposes of this hearing, it has been assumed that the misrepresentations were made.

(Award at 7-8.) Contrary to Kiritchenko's assertion, the Arbitrator's decision not to compel Grigorishin or Kuida to testify did not deprive him of his ability to present his case. To the contrary, the Arbitrator's Award demonstrates that Kiritchenko had the exclusive opportunity to present his (first hand) account of what transpired regarding the joint business, how Grigorishin and Kuida misled him, what misrepresentations were made to him, and why he was unable to discover their misrepresentations before 2010. The Arbitrator took Kiritchenko's testimony regarding Grigorishin's and Kuida's misrepresentations as true and construed Grigorishin's and Kuida's silence against them. While Kiritchenko takes issue with the ultimate *legal* conclusions the Arbitrator drew from her interpretation of the facts, he ultimately fails to demonstrate any factual hole that he was unable to "fill" through cross examination.[10]

Kiritchenko has failed to establish that the Arbitrator's evidentiary determinations were made in bad faith or resulted in him being denied a meaningful opportunity to present his case. Vacatur under either the New York Convention or the FAA is therefore unwarranted.

[10] In light of the fact that the Arbitrator took Kiritchenko's asserted facts as true, the Court finds that even if Kiritchenko had been able to bolster his testimony through cross-examination of Grigorishin or Kuida, the failure of the Arbitrator to compel their testimony would not rise to the level of a due process violation.

3. Conclusion.

The Arbitrator did not exceed her powers in awarding Petitioners attorney's fees. Further, Kiritchenko has failed to demonstrate that the Arbitrator's refusal to require Grigorishin and Kuida to testify at the arbitration hearing was the result of bad faith or deprived Kiritchenko of a meaningful opportunity to present his case. Insofar as these are the only two bases on which Kiritchenko seeks to vacate the Arbitrator's Award, his motion to vacate is DENIED and the petition to confirm the Award as against Kiritchenko is GRANTED.

B. The Court Will Not Enter a Rule 54(b) Judgment at this Time.

In his opposition to the petition to confirm the arbitration Award, Kiritchenko argues that if the Court confirms the award, it should nonetheless delay entering judgment until all claims against Moonvale and Alexander Vartanyan[11] have been resolved. Petitioners, by contrast, have requested that this Court enter a separate judgment under Rule 54(b).

Under Federal Rule of Civil Procedure 54(b), when an action involves multiple parties or multiple claims, "the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). This requires a two-step inquiry. First, the Court must determine that it has rendered a "final judgment" as to a claim or party. Second, it must determine whether there is any just reason for delay. *See Wood v. GCC Bend, LLC*, 422 F.3d 873, 878 (9th Cir. 2005). On this latter point, the Ninth Circuit has recognized that

> "It is left to the sound judicial discretion of the district court to determine the appropriate time when each final decision in a multiple claim action is ready for appeal. This discretion is to be exercised in the interest of sound judicial administration." Whether a final decision on a claim is ready for appeal is a different inquiry from the equities involved, for consideration of judicial administrative interests "is necessary to assure that application of the Rule effectively preserves the historic federal policy against piecemeal appeals."

[11] In a prior action, Petitioners sought, and obtained from this Court, an order compelling Alexander Vartanyan to arbitration based on claims arising out of Vartanyan's role in the arbitration between Petitioners and Moonvale. *See Grigorishin v. Dastime Group Limited*, No. 4:16-cv-05274-JSW. Specifically, Petitioners have stated that they intend to bring claims against Vartanyan for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), tortious interference with contract, fraud, theft, and conversion.

Id. (quoting *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7-10 (1980)). A "similarity of legal or factual issues will weigh heavily against entry of judgment under [Rule 54(b)]." *Id.* at 881 (citation and internal quotation marks omitted).

The Court concludes that there is just reason for delaying entry of judgment. This is an action seeking to confirm an arbitration Award. Moonvale brought the arbitration as Kiritchenko's assignee under the 2006 Agreement. The Arbitrator awarded attorney's fees under that Agreement and found Moonvale and Kiritchenko to be jointly and severally liable for those fees. In these circumstances, the Court finds that Petitioner's claims against Kiritchenko and Moonvale present materially similar (if not identical) factual and legal issues. As a result, sound judicial administration and the strong policy against piecemeal appeals weigh against entry of separate judgment in this matter. Accordingly, Petitioner's request for entry of a separate Rule 54(b) judgment is DENIED.[12]

The Court notes that Moonvale has failed to appear in this action and that the Clerk of the Court entered default on June 30, 2017. As set forth below, the Court will order Petitioners to file a motion for default judgment against Moonvale within 30 days from the date of this order.

C. Petitioners' Request for Attorneys' Fees Is Denied Without Prejudice.

In their Petition, Petitioners argue they are entitled to their attorney's fees incurred in bringing this action to confirm the Arbitration award. (*See* Petition ¶ 28-29.) Under Federal Rule of Civil Procedure 54(d), "[a] claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages." Fed. R. Civ. P. 54(d)(2)(A). In addition, this district's local rules provide certain requirements for attorney's fees motions. *See* Civ. L.R. 54-5(b). Petitioners have not filed a separate motion for attorney's fees as required, let alone one that complies with the requirements of the local rules. Accordingly, Petitioners' request for attorney's fees is DENIED without

[12] To the extent that Kiritchenko argues that the Court should defer entry of judgment until Petitioners have resolved any claims against Vartanyan, the Court disagrees. The Court finds any claims Petitioners may bring against Vartanyan to be irrelevant for Rule 54(b) purposes. Vartanyan was not a party to either the underlying arbitration or this action seeking to confirm the Award.

prejudice to renewal in a procedurally proper motion.

D. Petitioners' Counsel Are Admonished to Comply with the Court's Standing Orders.

In closing, the Court notes that Petitioners' brief opposing Kiritchenko's motion to vacate the arbitration Award failed to comply with this Court's Standing Civil Orders. Specifically, Standing Order 7 provides:

> All briefs, whether in support of, in opposition to, or in reply to any motion, with the exception of summary judgment motions and claims construction briefs, may not exceed fifteen pages in length. The title page, indices of cases, table of contents, summaries of argument, if required, and exhibits are not included in this page limitation. . . . Briefs exceeding ten pages in length must contain an additional one-page summary of argument, including reference to any important cases cited.

Despite this rule, Petitioners' opposition brief was 24 pages long and contained no summary of argument as required. Kiritchenko, while noting Petitioners' failure to comply with the Standing Orders, did not move to strike the opposition brief or request leave to file an oversized reply brief. Accordingly, the Court has considered the brief in question notwithstanding Petitioners' failure to comply with the Court's Standing Orders.

The Court's Standing Order relating to length and content of briefs is more stringent than the local rules which permit opposition briefs to be 25 pages in length. *See* Civ. L.R. 7-4(b). While the Court would expect counsel to be aware of the need to review and comply with the Court's standing orders, this district's local rules provide that "[i]t is the policy of the Court to provide notice of any applicable Standing Orders to parties before they are subject to sanctions for violating such orders." Civ. L.R. 1-5(o). Accordingly, Petitioners' counsel is admonished that this is their notice of the Court's Standing Civil Orders and as well as their first, and only, warning regarding the need to comply with those Orders. Any future non-compliance with the local rules, or this Court's Standing Orders, will result in appropriate sanctions.

CONCLUSION

For the foregoing reasons, Petitioners' Petition to Confirm Final Arbitration Award is GRANTED as to Kiritchenko and Kiritchenko's Motion to Vacate Arbitration Award is DENIED. The Court CONFIRMS the arbitration award as to Kiritchenko. Petitioners' request for entry of

separate judgment pursuant to Rule 54(b) is DENIED.

IT IS HEREBY ORDERED that Petitioners shall file a motion for default judgment against Moonvale within 30 days of the date of this order.

IT IS SO ORDERED.

Dated: October 11, 2017

JEFFREY S. WHITE
United States District Judge