IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STATE OF WISCONSIN,

Petitioner,

v. Case No. 12-C-505

HO-CHUNK NATION,

Respondent.

PETITIONER'S BRIEF IN OPPOSITION TO RESPONDENT'S MOTION TO VACATE THE ARBITRATION DECISION

INTRODUCTION

In 1992, petitioner State of Wisconsin ("the State") and respondent Ho-Chunk Nation ("the Nation") entered into a Gaming Compact ("the Compact")[1] regarding the location and regulation of Class III gaming conducted by the Nation in Wisconsin. The Compact was amended in 1998 and again in 2003. The second amendment in 2003 incorporated a dispute resolution procedure involving binding arbitration between the parties regarding "any dispute [that] arises between the Parties regarding the interpretation or enforcement of the Compact." Second Amendment to the Wisconsin Winnebago Tribe, Now Known as the Ho-Chunk Nation, and the State of Wisconsin Gaming Compact of 1992 ("Second Amendment"), ¶ 11, Section XXIII.

A dispute arose between the parties when the Nation began offering electronic, non-banked poker at its DeJope Gaming Facility facility ("DeJope") located in Madison,

[1]For purposes of brevity, all references herein to "the Compact" are intended to refer to the Compact as amended.

Wisconsin. The Compact prohibits the conduct of Class III games at the DeJope facility. (Second Amendment, ¶ 9). Pursuant to the State's demand under the Compact, an arbitration was held regarding whether the Nation is permitted to offer such non-banked poker at its DeJope facility. The arbitrator's Opinion, rendered on May 1, 2012, held that such poker is a Class III game and therefore cannot be offered at DeJope.

After the Nation refused to abide by the arbitration order, on July 17, 2012, the State filed in this Court its "Motion to Confirm Arbitration Award." In response to the State's motion, the Nation filed a motion to vacate the arbitrator's award. The Nation advanced two primary arguments in support of its motion: (1) that the arbitrator lacked jurisdiction to determine the matter before him; and (2) that even if the arbitrator did have jurisdiction, his award should be vacated because he "willfully disregard[ed] existing law." (Ho-Chunk Nation's Notice of Motion and Motion to Vacate the Arbitrator's Decision, ¶ 9). For the reasons stated below, the Court should confirm the arbitration award and should deny the Nation's motion to vacate.

ARGUMENT

I. STANDARD OF REVIEW.

Arbitration clauses are to be construed broadly. *See United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. and Service Workers Intern. Union v. TriMas Corp.*, 531 F.3d 531, 536 (7th Cir. 2008), stating that "[w]here the arbitration clause is broad, there is a presumption in favor of arbitrability" and that "[a]ny 'ambiguities as to the scope of the arbitration clause are resolved in favor of arbitration'") (quoting in part *Volt Info. Sci., Inc. v. Board of Trs. of Leland Stanford, Jr. Univ.*, 489 U.S. 468, 475–76 (1989)).

The Seventh Circuit has recognized a "federal policy favoring arbitrability" where parties have agreed to arbitrate a dispute. *Karl Schmidt Unisia, Inc. v. International Union, United Auto., Aerospace, and Agr. Implement Workers of America, UAW Local, 2357*, 628 F.3d 909, 913 (7th Cir. 2010). In furtherance of the federal policy favoring arbitration, the Seventh Circuit has broadly construed arbitration clauses, presuming that the parties have agreed to arbitrate disputes, and has extremely limited the scope of judicial review of arbitrators' decisions. *See, e.g., Prate Installations, Inc. v. Chicago Regional Council of Carpenters*, 607 F.3d 467, 470 (7th Cir. 2010) (stating that "[j]udicial review of arbitration awards is extremely limited, and the merits of the arbitrator's decision will not be reviewed"). "In keeping with the federal policy favoring arbitration, the courts must limit the ability of the losing party in arbitration to challenge the arbitration ruling in supplemental litigation." *Administrative Dist. Council 1 of Illinois of the Intern. Union of Bricklayers and Allied Craftworkers, AFL-CIO v. Masonry Co., Inc.*, 2012 WL 1831454, Slip op. at *2 (N.D. Ill., May 18, 2012).

II. THE ARBITRATOR DID NOT EXCEED HIS AUTHORITY.

A. This dispute is subject to the Dispute Resolution process specified in Section XXIII.B. of the Compact, as amended.

The threshold question in this matter is whether the dispute between the parties is covered by the arbitration provision in the Compact. As this Court has previously noted in *Wisconsin v. Ho-Chunk Nation*, 564 F. Supp. 2d 856, 861 (W.D. Wis. 2008), the Compact designates "arbitration as the method of dispute resolution when one of the parties demands it in accordance with § XXIII(B). In such a case the parties have agreed to resolve the dispute otherwise than in court." The parties contracted to resolve any "dispute [that] arises between the Parties regarding the interpretation or enforcement of the Compact, Amendment and [] Second Amendment" (Second Amendment, Section XXIII.B.) via binding arbitration. The Nation's primary argument

is that this dispute does not involve the interpretation or enforcement of the Compact, and that the arbitrator therefore had no jurisdiction to decide this dispute. The Nation's position, however, runs contrary to the language of the Compact and to relevant law.

An arbitrator's award can be overturned on procedural grounds only if the arbitrator clearly exceeded his authority. 9 U.S.C. § 10(a)(4). That is not the case here, and it certainly cannot be said "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)).

As noted above herein, it is black-letter law that Arbitration clauses are to be construed broadly. The Compact's arbitration clause by its plain language covers any dispute that involves "the interpretation or enforcement of the Compact" in Section XXIII., as amended. The Nation argues that the dispute does not involve the interpretation or enforcement of the Compact, based on a statement in the arbitrator's Opinion that "DeJope . . . is not covered by the Compact." (Arbitrator's Opinion at 2). The Nation misses the point, however. The arbitrator was simply pointing out that the purpose of the Compact is to designate where and how Class III gaming could be conducted, and that the DeJope facility is not such a location authorized by the Compact. In other words, the arbitrator was simply noting that the Compact was negotiated for the purpose of authorizing Class III gaming at certain locations, and that DeJope is not one of those locations.[2]

[2]The arbitrator makes a point of noting on page 10 of the Opinion that conducting Class III gaming at DeJope is not authorized by the Compact, stating that "the Nation is not permitted to offer this non-banking poker system at DeJope, unless the parties enter into a tribal-state compact that specifically allows this game at that facility."

It is clear from its language that the Compact constitutes an agreement between the parties that specifies where Class III games can be played, and that the necessary conditions for the conduct of Class III games at Dejope have not been met. Section XXVII.B. of the Compact. *See also Wisconsin Winnebago Nation v. Thompson*, 22 F.3d 719 (7th Cir. 1994). If a game that is a Class III game is being played at a non-authorized location, the Compact comes in to play, in that such action is a violation of the Compact. Enforcement of the Compact, therefore, requires a determination as to whether the game in question (here, non-banked electronic poker) is a Class III game that is being played at a location not authorized under the Compact, and that is the question that was addressed by the arbitrator.

The Compact contains numerous clauses and phrases that clearly indicate that this dispute falls within "the enforcement or interpretation of the Compact." For example, the tenth "WHEREAS" clause of the Compact states:

> WHEREAS, the Wisconsin Winnebago Tribe and the State of Wisconsin have mutually agreed to the terms and conditions under which certain Class III gaming may be conducted on the Tribe's lands[.]

In Section II. of the Compact, one of the stated purposes refers expressly to the authorization of Class III gaming:

> II. DECLARATION OF POLICIES AND PURPOSES. The State and the Tribe agree that this Compact is entered for the following purposes and is to be construed and implemented to give effect to these policies:
>
> A. To authorize the operation of certain Class III gaming by the Tribe on the Tribe's lands in the State of Wisconsin as a means of promoting Tribal economic development, self-sufficiency, and strong Tribal government[.]

Section IV. of the Compact as amended by the Second Amendment again refers to the authorization of Class III gaming, and lists the specific activities (*i.e.*, Class III games) authorized under the Compact. This provision, as amended, now reads:

> III. AUTHORIZED CLASS III GAMING. The States of Illinois, Iowa and Michigan authorize within their borders a full range of casino games. In order to make Wisconsin Indian gaming facilities competitive with these surrounding States, the Parties have agreed that the Nation can offer for play the games authorized by this Section IV. . . .
>
> A. The Tribe shall have the right to operate the following Class III games during the term of this Compact but only as provided in this Compact:
>
> 1. Electronic games of chance with video facsimile displays;
> 2. Electronic games of chance with mechanical displays;
> 3. Blackjack;
> 4. Pull-tabs or break-open tickets when not played at the same location where bingo is being played;
> 5. All other banking, percentage and pari-mutuel card games;
> 6. *All forms of Poker*, to the extent that these games are not included in the previous subsection;
>
> . . . .
>
> 15. Any other game, whether played as a table game or played on an electronic or mechanical device, including devices that operate like slot machines, which consist of the elements of prize, chance and consideration[.]

(Emphasis added). Thus, the plain language of the Compact specifies "All forms of Poker" as Class III games.[3] Subsection C of Section IV. goes on to explicitly state that: "The Tribe may not operate any Class III gaming not expressly enumerated in this section of this Compact unless this Compact is amended pursuant to section XXX."

The numerous excerpts from the Compact quoted above, as well as Section XXVII., make it abundantly clear that the parties have agreed via the Compact as to where Class III

[3]The phrase "to the extent that these games are not included in the previous subsection" that follows "All forms of Poker" does not limit the definition, but rather expands it to make it clear that *all* forms of poker (which includes banked and non-banked) are included under the definition as to what constitutes Class III games. (Second Amendment, Section IV.A.6.).

games, as described by the Compact, can be played in Wisconsin, and that any disputes regarding such matters are to be resolved via arbitration. The dispute that was placed before the arbitrator (whether or not electronic non-banked poker is a Class III game, and thus whether or not it can be played at non-Class III facilities pursuant to the Compact) unmistakably arises "regarding the interpretation or enforcement of the Compact" as indicated by the plain language of the Compact. In this matter, the Seventh Circuit's directive that arbitration clauses are to be construed broadly[4] need not even come into play, given that even a narrow reading of the Compact's language results in the conclusion that this matter was properly placed before the arbitrator.

The Nation also argues that the dispute is beyond the arbitrator's authority because it involves interpretations of federal and state law. (Respondent's brief at 14-17). If the dispute is covered by the arbitration provision in the Compact, however, it is within the arbitrator's authority to interpret and apply the relevant law. The fact that the dispute might involve the interpretation or application of state or federal law does not render it as being outside the authority of the arbitrator. The case cited by the Nation, *Wisconsin v. Ho-Chunk Nation*, 564 F. Supp. 2d 856, is not on point. In that case, the counts dismissed as not being arbitrable did not arise under the Compact, but were based on a statutory grant of federal jurisdiction to determine the propriety of granting injunctive relief. By contrast, in this matter the Compact specifies which Class III games (including poker, as a Class III game itemized in the Compact) can be played, as well as where such games can be played. The State is not simply arguing that electronic non-banked poker is barred under the Indian Gaming Rights Act ("IGRA"), it is

[4]*See United Steel*, supra, 531 F.3d at 536.

asserting that offering such a game at its DeJope facility violates the terms of the contract (*i.e.*, the Compact).

The Nation argues that under federal law, states cannot regulate Class II gaming, as if that is what the State is trying to do in this matter. The Nation concedes, however, that states *do* have the authority to regulate Class III gaming under the "terms of the tribal-state compacts." (Respondent's brief at 14-15 (quoting *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1060 (9th Cir. 1997)). That is exactly what is at issue here. The State asserts that Class III gaming is being played at a location outside those locations that were agreed to by the parties via the Compact, and that constitutes a violation of the terms of the Compact.

In addition, the Nation's statement that "[t]he Compact does not . . . define what constitutes Class II gaming" (Respondent's brief at 15) misses the point that the Compact *does* define what constitutes Class III gaming, including "[a]ll forms of Poker." (Compact, Section IV.A.6.). The question is not, as the Nation suggests, purely a legal question that exists in a vacuum outside the Compact. Given that Compact terms may only apply to Class III gaming, the interpretation of the Compact necessarily involves at least an implicit determination that the game at issue is a Class III game. The parties have freely chosen to adopt the IGRA terminology. Where parties have adopted statutory terms in their contractual agreement interpretation of the relevant statutes may properly be the subject of arbitration even though a separate statutory cause of action may exist. *Ho-Chunk Nation*, 564 F. Supp. 2d at 862.

Put simply, the State asserts that poker, as a Class III game, cannot be played at DeJope because the Compact does not allow it. The Nation disputes that it is a Class III game, and therefore argues that it is not prohibited by the Compact. Given the legal standard that arbitration clauses are to be broadly construed, it is difficult to see how it can be argued that this

is not a dispute that arises under the Compact. The parties' dispute is whether electronic, non-banked poker is a Class III game that is covered by and regulated under the Compact. That is clearly a dispute that arises regarding the interpretation and enforcement of the Compact.

III. THERE ARE INSUFFICIENT GROUNDS FOR VACATING THE ARBITRATOR'S OPINION UNDER THE APPLICABLE LEGAL STANDARDS.

The standard of review of an arbitrator's decision by the court is very narrow. The scope of review is extremely limited, and the court may not vacate an award even if it disagrees with the decision or believes that the arbitrator erroneously interpreted or applied the law, as noted by the Seventh Circuit in *Local 15, IBEW v. Exelon Corp.*, 495 F.3d 779, 782-83 (7th Cir. 2007):

> "[I]f an arbitrator is even arguably construing or applying the contract and acting within the scope of this authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision. It is only when the arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509, 121 S.Ct. 1724, 149 L.Ed.2d 740 (2001) (citations and quotations omitted); *see also Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 269 (7th Cir. 2006) ("[T]he issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrator has failed to interpret the contract at all. . . .")[.]

"The court will not relitigate issues submitted to arbitration. The parties contracted for the arbitrator's decision, not the court's." *Joint Sch. Dist. No. 10 v. Jefferson Educ. Ass'n*, 78 Wis. 2d 94, 117, 253 N.W.2d 536 (1977). Further, the decision of an arbitrator cannot be interfered with for mere errors of judgment as to law or fact.

The Federal Arbitration Act sets out four grounds for vacating an arbitration award:[5]

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

[5]The Nation has not alleged that any of the first three grounds apply in this case.

> (3) where 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) 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)(1)-(4).

In addition to these four reasons, a court may also "set aside arbitration awards that are in 'manifest disregard of the law.'" *Wise v. Wachovia Secs., LLC*, 450 F.3d 265, 268 (7th Cir. 2006). However, the Seventh Circuit has "defined 'manifest disregard of the law' so narrowly that it fits comfortably under the first clause of the fourth statutory ground—'where the arbitrators exceeded their powers.'" *Id.* (citations omitted). Indeed, the Seventh Circuit has consistently "confined [manifest disregard of the law] to cases in which arbitrators 'direct the parties to violate the law.'" *Id.* at 269 (quoting *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001)). Except to the extent recognized in *George Watts & Son*, "manifest disregard of the law" is not a ground on which a court may reject an arbitrator's award under the Federal Arbitration Act. *Affymax, Inc. v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 660 F.3d 281, 285 (7th Cir. 2011).

According to the Seventh Circuit, a court may reject an arbitrator's award as a manifest disregard of the law "when the arbitrator has commanded the parties to violate legal norms (principally, but not exclusively, those in positive law) but . . . judges may not deprive arbitrators of authority to reach compromise outcomes that legal norms leave within the discretion of the parties to the arbitration agreement." *George Watts & Son*, 248 F.3d at 580. "[T]he 'manifest disregard' principle is limited to two possibilities: an arbitral order requiring the parties to violate the law (as by employing unlicensed truck drivers), and an arbitral order that does not adhere to

the legal principles specified by contract, and hence unenforceable under § 10(a)(4)." *Id.* at 581. Neither element is present in this arbitration.

The Nation has an immense hurdle to overcome in attempting to overturn the arbitrator's Opinion on the merits, and it is a hurdle that it cannot clear. For the Nation to assert that the arbitrator "'willfully flouted the governing law by refusing to apply it.'" (Respondent's brief at 18 and 35) is, to put it charitably, a stretch. The arbitrator carefully considered the arguments made by the Nation and provided a well-reasoned, thoughtful analysis that examined and ultimately rejected those arguments. (Arbitrator's Opinion at 3-9). The fact that the Nation disagrees with the arbitrator's analysis does not mean that he "willfully flouted" the law.

The Nation spends the better part of its brief making arguments as to why the arbitrator's Opinion constitutes an incorrect interpretation and application of the law, and that it should therefore be overturned on the merits. The Nation does not, however, make a compelling case as to how the arbitrator's Opinion "willfully ignored controlling case law." (Respondent's brief at 19). In fact, the arbitrator specifically addressed the legal arguments made by the Nation and clearly explained why he interpreted and applied the law as he did, and why he disagreed with the Nation's arguments on legal grounds. In order to constitute a willful disregard of the law, the arbitrator would have had to acknowledge the legitimacy of the Nation's arguments, and then explicitly ignore them, and there is nothing in the arbitrator's opinion to indicate that such was the case. Even if one assumes that the arbitrator's legal analysis was wrong, that doesn't rise to the level of willful (*i.e.*, intentional) disregard of the law. The Nation's position seems to be that the arbitrator "willfully ignored" the law simply because he didn't buy their legal arguments.

Moreover, even if one assumes *arguendo* that the arbitrator's Opinion could be second-guessed on the merits, the Nation's arguments are defective on a number of grounds.[6] For example, the Nation asserts that poker is a Class II game[7] that is not explicitly prohibited by the Wisconsin Constitution because the relevant clause specifies that poker "'may not be conducted by the state as a lottery.'" (Respondent's brief at 31-32 (citing Wis. Const. art. IV, § 24)). While the Nation sees this as some kind of exception from which it infers that poker is not otherwise prohibited, the arbitrator reached the exact opposite conclusion—that it is explicitly prohibited, and he clearly explained his reasoning in the Opinion, concluding that "poker is a game subject to Wisconsin's blanket prohibition." (Arbitrator's Opinion at 5-6).

The Nation also asserts that poker is already permitted in Wisconsin by virtue of the fact that several lottery scratch-off type games are called various forms of "poker." (Respondent's brief at 9-10, 32). Calling a frog a duck does not, however, make it a duck. Such poker-labeled scratch-off lottery games do not constitute the playing of poker any more than scratch-off games that have a football theme constitute the playing of a football game. Similarly, with respect to "video poker" machines that may be located in some taverns, the fact that the State has reduced penalties for the presence of such machines does not constitute the legalization of such machines for gambling purposes.

[6]As a legal matter, the State asserts that the arguments on the merits are fundamentally irrelevant, in that they merely represent the parties' (and the arbitrator's) differing interpretations and applications of the law, and the Nation has not shown that the arbitrator's legal analysis rises to the level of "willful disregard of the law" such that his Opinion can be overturned.

[7]Throughout its arguments, the Nation consistently ignores the fact (as noted above herein) that it has agreed via the Compact that "[a]ll forms of Poker" are Class III games.

Finally, as noted by the arbitrator, the relevant IGRA clause (25 U.S.C. § 2703(7)(A)(ii)) contains an "and" provision with respect to what constitutes a Class II game, and that both elements must therefore be satisfied:

> To fit within the definition of a Class II game, IGRA requires that the card game be "not explicitly prohibited by the laws of the State *and* are played at any location in the State."

(Arbitrator's Opinion at 6 (emphasis in original)). As noted by the arbitrator, even if one assumes the second prong, it is not relevant based on his legal conclusion that poker *is* explicitly prohibited by the laws of the State of Wisconsin.

CONCLUSION

No matter how the Nation characterizes its challenge to the arbitrator's Opinion, this action is at its core an attempt by the Nation to second-guess the Opinion, which is prohibited. *See, e.g., United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). The Seventh Circuit has stated that when "parties agree to arbitrate their disputes they opt out of the court system" and that the courts should intervene in such arbitration only in limited instances. *Wise*, 450 F.3d at 269. Indeed, the Nation characterizes the arbitrator's reasoning as "erroneous legal conclusions" (Respondent's brief at 35), but even if such conclusions are defective, that does not rise to the standard under either 9 U.S.C. § 10(a)(4) or under controlling Seventh Circuit precedent. The Nation has not shown that the arbitrator relied on improper evidence or exhibited a willful disregard of the law in rendering his Opinion.

The Nation's motion to vacate the arbitration award is without basis in fact or law and should be DENIED and the State's motion to confirm the award should be GRANTED.

Respectfully submitted this 28th day of August 2012.

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