

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: IRAGAMMERMAN

PART 27

Index Number : 651640/2010

**QWEST COMMUNICATIONS**

vs.

**GEO-GROUP COMMUNICATIONS, INC.**

SEQUENCE NUMBER : 001

CONFIRM AWARD

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided  
in accordance with the  
accompanying memo  
decision.*

*It is so ordered.*

*Enter!*

**U N F I L E D J U D G M E N T**

This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.

**IRAGAMMERMAN**

Dated: \_\_\_\_\_

*2/23/11*

*[Signature]*

*J.S.G. JKD*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

*6*

0019

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 27

-----X

In the Matter of the Application of

QWEST COMMUNICATIONS COMPANY, LLC,  
f/k/a/ QWEST COMMUNICATIONS CORP.,

*Petitioner,*

Pursuant to CPLR Article 75 To Vacate  
Arbitration Award

- against -

Index No. 651640/10  
P.C. No. 26682

GEO-GROUP COMMUNICATIONS, INC.,

*Respondent.*

**U N F I L E D J U D G M E N T**  
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.

-----X  
**IRA GAMMERMAN, J.H.O.:**

Petitioner Qwest Communications Company, LLC ("Qwest") brings this proceeding, pursuant to section 9 of the Federal Arbitration Act ("FAA"), 9 USC § 9, to confirm and have judgment entered on an arbitration award (the "Award") dated September 13, 2010. The Award was issued by the Judicial Arbitration and Mediation Services ("JAMS") in an arbitration proceeding captioned *Geo-Group Communications, Inc. v Qwest Communications Corp.*, JAMS Arbitration No. 1425003065. Respondent Geo-Group Communications, Inc. ("GCI") cross-petitions, pursuant to CPLR 7511, for a judgment vacating the Award. Inasmuch as the arbitration was governed by the FAA, GCI's cross petition is governed by FAA § 10.

On February 4, 2000, the parties entered into a Carrier Services Agreement, pursuant to which Qwest sold certain telecommunications services to GCI for resale to GCI's customers. Disputes soon arose between the parties, and on December 16, 2004, the parties entered into both a Wholesale Services Agreement ("WSA") that would govern their future dealings, and a Confidential Settlement and Release Agreement whereby the parties compromised their outstanding

disputes. The WSA contained an arbitration clause that provides, in relevant part:

Except with respect to disputes [that are not relevant here,] any dispute arising out of, or relating to, this Agreement shall be settled by arbitration to be conducted in accordance with the Judicial Arbitration and Mediation Services ("JAMS") Comprehensive Arbitration Rules. The Federal Arbitration Act, 9 U.S.C. Sections 1-16, not state law, shall govern the arbitrability of the dispute. New York law, without regard to choice of law principles, will otherwise govern and apply to any and all claims. . . . Except for misapplication of law, the arbitrator's decision shall be final, binding, and enforceable in a court of competent jurisdiction.

Respondent's Ex. A, at 6.

Insofar as is relevant here, JAMS Rule 11 (c) provides:

Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought . . . shall be submitted to and ruled on by the Arbitrator.

Petitioner's Ex. 5, at 12.

The relationship between the parties remained rocky, and in February 2007, the parties entered into both an amendment of the WSA, and a Confidential Settlement Agreement (the "Settlement Agreement"), pursuant to which, among other things, Qwest agreed to credit GCI's account in the amount of \$352,259.73 in settlement of four discrete disputes, and GCI agreed to give Qwest a broad release. Disputes continued to arise, however, and on August 29, 2008, GCI commenced the underlying arbitration proceeding. In its statement of claim, GCI sought, among other things, damages for alleged Qwest overcharges "since December 2004," Respondent's Ex. D, at 3. In its Response to Demand For Arbitration and Counterdemand, Qwest asserted, among other things, that all of GCI's claims pertaining to a time prior to February 19, 2007, were barred by the release that GCI had given Qwest in the Settlement Agreement. In its Reply to Counterdemand for Arbitration, GCI asserted that neither the Settlement Agreement, nor the release therein, was "valid or effective, and that pursuant to the terms of the 2007 Settlement Agreement, the Arbitrator has no jurisdiction to determine the validity or effectiveness thereof," Respondent's Ex. D, at 2. The arbitrator, Robert B. Davidson (the "Arbitrator"), thereupon requested briefs on the question of whether he had the power to determine whether issues arising from the Settlement were arbitrable.

On February 25, 2009, the Arbitrator issued his Award On Arbitrability, which held that the issue of the validity and effectiveness of the release in the Settlement Agreement could be determined in the pending arbitration. The proceeding, including 10 days of hearings, thereupon continued, and on September 17, 2010, the Arbitrator issued the Award, holding, among other things, that the release barred GCI from any recovery for events that took place prior to February 19, 2007, and awarding the net sum of \$9,184,966 to Qwest. Although the Arbitrator did not explicitly discuss GCI's argument that the release was invalid for a number of reasons, he implicitly rejected that argument by applying the release to GCI's pre-February 2007 claims.

The FAA provides that an award may be vacated "where the arbitrators exceeded their powers . . .," 9 USC § 10 (a) (4). GCI's main argument for having the Award vacated is that the Arbitrator exceeded his powers insofar as he determined that he could rule on the validity and the reach of the release in the Settlement Agreement, and insofar as he held that the release in the Settlement Agreement was applicable to GCI's claim. In addition, GCI argues that the Arbitrator prejudiced its rights by failing to compel Qwest to produce certain call detail records ("CDRs"), or to sanction Qwest's failure to do so, and by giving each party one half of the total time that he had allotted for the examination and cross-examination of witnesses. 9 USC § 10 (a) (3) provides, in relevant part, that an award may be vacated "where the arbitrators were guilty of . . . any . . . misbehavior by which the rights of any party have been prejudiced." I shall discuss these arguments *seriatim*.

As an initial matter, it was within the Arbitrator's powers to rule on the validity and the reach of the release. JAMS Rule 11 (c), which is quoted above, vests in the Arbitrator the power to rule on "disputes, including disputes over the . . . interpretation or scope of the agreement under which Arbitration is sought." Thus, the Arbitrator had the power to rule that the scope of the arbitration clause in the WSA extended to the interpretation and the application of the release in the Settlement Agreement. Indeed, the Arbitrator would have had that power even if the arbitration had not been governed by the JAMS rules. Where a contract includes a valid arbitration clause, the effect of a

later settlement on a claim brought under the initial contract is for the arbitrator to determine, *Matter of Opark Constr. Corp. (Eureka Constructors)*, 42 NY2d 1025 (1977).

GCI's argument, that the Arbitrator exceeded his powers by holding that the release in the Settlement Agreement was applicable to GCI's claim under the WSA, rests upon three clauses in the Settlement Agreement. The first of those is a dispute resolution clause, which provides:

Any legal proceeding arising out of, or relating to this Settlement Agreement will be brought in a United States District Court, or absent federal court jurisdiction, in a state court of competent jurisdiction, in the location of the Party to the Settlement Agreement not initiating the action. Each party, to the extent permitted by law, knowingly, voluntarily, and intentionally waives its right to a jury and any right to pursue any claim or action arising out of, or relating to, this Settlement Agreement on a class or consolidated basis or in a representative capacity.

Respondent's Ex. C, at 3-4.

The second is a merger clause, which provides, in relevant part:

This Settlement Agreement and the WSA Amendment constitute the entire agreement between the Parties with respect to the subject matter hereof, and supersedes all prior offers, contracts, agreements, representations and understandings made to or with GeoGroup by Qwest . . . .

*Id.* at 4.

The third is a choice of law clause which provides that the Settlement Agreement is to be governed by the law of the State of Colorado.

It is undisputed that the amendment of the WSA, which the parties entered into together with their adoption of the Settlement Agreement, left the arbitration clause of the WSA intact. Even absent that amendment, neither the merger clause, nor the choice of law clause in the Settlement Agreement would invalidate the arbitration clause. It is established that, under the FAA, "any doubts concerning the scope of arbitrable issues' be resolved in favor of arbitration," *Shaw Group Inc. v Triplefine Intl. Corp.*, 322 F3d 115 (2d Cir 2003), quoting *Moses H. Cone Mem. Hosp. v Mercury Constr. Corp.*, 460 US 1 (1983). A merger clause, the purpose of which, generally, is to bar parol evidence, does not vitiate an earlier agreement to arbitrate, *Bank Julius Baer & Co. v Waxfield Ltd.*, 424 F3d 278 (2d Cir 2005); *Matter of Primex Intl. Corp. v Wal-Mart Stores*, 89 NY2d

594 (1997). Neither a choice of law clause, nor a choice of forum clause in a later agreement, is necessarily inconsistent with an earlier agreement to arbitrate, because such clauses may be construed as solely providing for the law that will govern, and the forum that is provided for, litigation arising out of an arbitration. Accordingly, neither such clause vitiates an earlier agreement to arbitrate, *see e.g. Bank Julius Baer & Co., supra*, and for the following reasons, neither clause bars application of the arbitration clause to the release in the Settlement Agreement.

Where a valid arbitration clause is broad, that clause presumptively governs a later, collateral, agreement that does not by its terms provide for arbitration, but that implicates “the parties’ rights and obligations under” the prior contract, *Louis Dreyfus Negoce S.A. v Blystad Shipping & Trading Inc.*, 252 F3d 218 (2d Cir), *cert denied* 534 US 1020 (2001) (citation and internal quotation marks omitted), or “touch[es] matters covered by [the prior agreement],” *Collins & Aikman Prods. Co. v Building Sys., Inc.*, 58 F3d 16 (2d Cir 1995) (citation and internal quotation marks omitted). The phrase “any dispute arising out of, or relating to, this [a]greement,” which appears in the arbitration clause of the WSA, is “precisely the kind of broad arbitration clause that justifies a presumption of arbitrability” in relation to matters governed by a later, collateral, agreement, *Mehler v Terminex Intl. Co.*, 205 F3d 44 (2d Cir 2000), *cert denied* 533 US 911 (2001). Such presumption can be overcome “only . . . if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute,” *Bank Julius Baer & Co. v Waxfield Ltd., supra* (internal quotation marks and citation omitted). Thus, presumptively, the arbitration clause of the WSA is applicable to the substantive terms of the Settlement Agreement, and neither the forum selection clause, nor the choice of law clause, rebuts that presumption, because neither is assuredly inconsistent with the arbitration clause.

I turn, now, to GCI’s contention that the dispute resolution clause in the Settlement Agreement bars the application of the arbitration clause in the WSA to any subject matter included in the Settlement Agreement, because all disputes concerning the latter may be brought solely in one of the courts specified in that clause. In *Matter of Ayco Co. (Walton)*, 3 AD3d 635 (3d Dept 2004),

the parties had entered into an agreement that contained a broad arbitration clause and a subsequent amendment to that agreement that provided that “[a]ny action relating to or arising out of” the substantive matter added in the amendment “shall be brought in and only in the United States District Court for the Northern District of New York,” *id.*, Record on Appeal, at 7. That provision is almost identical (but stronger, because of the mandatory “shall”) to the dispute resolution clause in the Settlement Agreement, which provides that “[a]ny legal proceeding arising out of, or relating to this Settlement Agreement will be brought in a United States District Court, or absent federal court jurisdiction, in a state court of competent jurisdiction. . . .” Citing the “emphatic national policy favoring arbitration,” *Singer v Jefferies & Co.*, 78 NY2d 76 (1991) (citation and internal quotation marks omitted), the *Ayco Co.* Court held that “the designation of a venue for possible litigation is in no way inconsistent with the agreement’s general requirement that all disputes be arbitrated, because, for example, this provision would govern in the event both parties waived arbitration,” *id.* at 637. Accordingly, the dispute resolution clause in the Settlement Agreement does not bar the application of the WSA arbitration clause to the subsequently agreed-upon release, and the Arbitrator did not exceed his powers by holding that the release barred GCI’s claims pertaining to events occurring prior to the date of the Settlement Agreement.

A court’s review of an arbitration award, under 9 USC § 10 (c), is “restricted to determining whether the procedure was fundamentally unfair,” *Matter of Tempo Shain Corp. v Bertek, Inc.*, 120 F3d 16 (2d Cir 1997) (citation and internal quotation marks omitted); *see also Bradley v Merrill Lynch & Co.*, 344 Fed Appx 689 (2d Cir 2009). With regard to GCI’s contentions about the CDRs, the Arbitrator found that there was no evidence that Qwest had deliberately destroyed any CDRs. GCI offers no evidence here to the contrary. GCI cites its Exhibit W as evidence that Qwest had CDRs for early 2005 that it failed to produce during the arbitration. Exhibit W is an e-mail dated December 16, 2005. That e-mail is not evidence of what CDRs Qwest still had in its possession in August of 2008, when GCI filed its demand for arbitration. Moreover, after noting that GCI’s own expert confirmed that the CDRs that were available accurately reflected Qwest’s switch records, the

Arbitrator reasoned that that accuracy “gave rise to the inference that all of [Qwest's] invoicing . . . was accurate,” Petitioner’s Ex. 1, at 22 (Qwest’s invoices to GCI were based on the CDRs.). Such reasoning did not deny GCI a fundamentally fair hearing.

Nor was GCI denied a fundamentally fair hearing by the Arbitrator’s allocation to each party of 30 hours of testimony time, a decision made prior to the commencement of the hearing and not objected to by either party. While there might be situations in which an equal provision of time to two parties would be highly unfair, given the parties’ respective burdens of proof and the respective quantities of evidence upon which each party may rely, GCI does not make such a claim here. Rather, GCI complains that, on the last day of the hearing, Qwest recalled GCI’s president, Govind W. Vanjani, to the stand, and, on the basis of a GCI document that was already in evidence, questioned him about distributions that GCI had made to its shareholders in the months before and after GCI commenced the arbitration, a matter that Qwest had not raised earlier. While GCI argues that, by then, it had “virtually exhausted its time allocation,” Respondent’s Mem. of Law, at 20, it does not contend that it lacked adequate time to cross-examine Mr. Vanjani, or that it requested, and was denied, additional time to deal with the unanticipated questions that Qwest had addressed to him. Indeed, it is undisputed that, after GCI cross-examined Mr. Vanjani about the distributions, it moved on to other matters. GCI now contends that, had it had notice that Mr. Vanjani would be questioned about distributions, it would have brought its accountant in to testify that the distributions were made for a legitimate reason, and that, in any event, GCI had access to sufficient funds to pay Qwest the amounts that Qwest was claiming to be due to it, at that time. GCI made no such representation to the Arbitrator. In these circumstances, it cannot be said that the Arbitrator did anything, or failed to do anything, that made the proceeding fundamentally unfair to GCI, *see Matter of Griffin v Ayash*, 125 AD2d 226 (1st Dept 1986). Moreover, the Award discusses GCI’s distributions to its shareholders as no more than a possible reason for GCI’s “inappropriately permit[ing] substantial [Qwest] invoices, to which there was no genuine objection, to accumulate,” Petitioner’s Ex. 1, at 32.

Accordingly, it is hereby

ORDERED that the cross petition is denied; and it is further

ADJUDGED that the petition is granted and the award rendered in favor of petitioner and against respondent is confirmed; and it is further

ADJUDGED that petitioner Qwest Communications Company, LLC f/k/a Qwest Communications Corp., having an address at 1801 California Street, Suite 900, Denver, Colorado 80202, do recover from respondent Geo-Group Communications, Inc., having an address at One Landmark Square, Stamford, Connecticut 06901, the amount of \$9,184,996, plus simple interest at 9 % per annum from the date of September 17, 2010, as computed by the Clerk in the amount of \$ \_\_\_\_\_, together with costs and disbursements in the amount of \$ \_\_\_\_\_ as taxed by the Clerk, for a total amount of \$ \_\_\_\_\_, and that the petitioner have execution therefor.

Dated: 2/22/11

ENTER:

**IRA GAMMERMANN**

*W*

\_\_\_\_\_  
J.H.O.

**U N F I L E D J U D G M E N T**  
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