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

PRESENT: Lowe Justice

PART 56

National Academy of Television Arts + Sciences

- v -

Academy of Television Arts + Sciences

INDEX NO. 116906/07

MOTION DATE 1/02/08

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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

Mot dec'd in accordance w/ accompanying memorandum decision

FILED
MAR 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/27/08

_____ J.S.C.

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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NATIONAL ACADEMY OF TELEVISION ARTS & SCIENCE,

Petioner,

Index No: 116906/07

-against-

DECISION AND ORDER

ACADEMY OF TELEVISION ARTS & SCIENCES,

Respondent.

RICHARD B. LOWE III, J:

This dispute arises out of the shared use of the Emmy trademark. The parties arbitrated their disputes and an Interim Arbitration Award was issued on December 11, 2007. Motion sequence numbers 001 and 003 are consolidated for disposition. In motion sequence number 001, Petitioner moves to vacate the Interim Award and seeks a preliminary injunction on the ground that the Panel Majority exceeded its power in rendering its award. In motion sequence number 003, Respondent moves pursuant to CPLR 3211(a)(1), (5), and (7) to dismiss the Petition.

BACKGROUND

The Parties

To the extent not disputed by the parties, the facts derive principally from the Petition, the Arbitration Interim Award, and other relevant exhibits.

In 1946, the Television Academy of Arts & Sciences was founded to advance television arts and sciences and to recognize excellence in the industry. In 1949, the Academy issued its

first outstanding achievement awards to persons in the then nascent television industry. In the 1950's, chapters of the Television Academy united to form an unincorporated association called the National Academy of Television Arts & Sciences ("NATAS"), with contingencies in both the cities of New York and Los Angeles. Differences arose between the east and west contingencies of NATAS, which led to a schism resulting in NATAS, the New York group, and the Hollywood Academy of Television Arts & Sciences ("HATAS"), the California group. Ultimately, HATAS dropped "Hollywood" from its name and it is now referred to as the Academy of Television Arts and Sciences ("ATAS").

The 1977 Settlement Agreement

Around 1977, NATAS and ATAS had differences concerning each party's rights with respect to its use of the Emmy trademark. They entered into a settlement agreement (the "Agreement") to resolve those differences and the related litigation.

Among other things, the Agreement granted to NATAS:

> the exclusive right in perpetuity to conduct one annual awards contest and show per year for each of the following:
>
> (a) national daytime programming (the "Daytime Emmy Show"); this contest, if broadcast, may be broadcast only during daytime hours;
> (b) national sports programming (the "Sports Emmy Show"); and
> (c) national news and documentary programming (the "Broadcast Journalism Emmy Show")

(Petition Ex 1 at 11). To ATAS, the Agreement granted: "the exclusive right in perpetuity to conduct one annual awards contest and show per year for national nighttime programming and the exclusive right to use the Emmy in connection therewith" (Petition Ex 1 at 12). Nighttime programming "means all programs aired between the hours of 6:00 p.m. - 2:00 a.m" (Petition Ex 1 at 5). Although the Agreement does not expressly grant the remaining hours of 2:00 a.m. -

6:00 p.m. to NATAS, the NATAS "national daytime programming" is defined as that period by implication and the course of dealing since 1977. According to the Petition, for the past three decades, the parties have awarded Emmys in accordance with the provisions of the 1977 Settlement Agreement and "their own rules" that divide television programming by the hours of the clock (Petition ¶ 11).

The Agreement provides that either NATAS or ATAS must obtain the consent of the other before creating any new national awards or contest , and the consent of which "shall not be unreasonably withheld" (Petition Ex 1 at 12). If either party believes the other has unreasonably withheld its consent, then it must challenge it through a demand for arbitration (Petition Ex 1 at 20). The parties have arbitrated their disputes under the Agreement in two prior circumstances in 1997 and 2002 (Hedges Affirmation ¶ 5).

NATAS' 2005 Announcement of New Media Awards

In November 2005, NATAS announced it would begin awarding a number of new Emmys to recognize "new media", which includes Broadband video programming transmitted over the internet.[1] NATAS did not obtain the consent of ATAS prior to announcing the awards.

NATAS went on to make further announcements that it would be awarding Emmys in four "Daytime" Broadband categories which include Drama, Comedy, Children's and Variety. Furthermore, it announced a "My Space/MyEmmy" contest and that it would be distributing advanced media awards which include awards for achievement in video games and other

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[1] The Interim Award notes the parties do not provide a precise definition for Broadband noting that it is an "amorphous word that encompasses many technical aspects". The Panel Majority found however that collectively it means "use of technology that permits a greater transmission of data, both images and audio than earlier technology allowed" (Petition Ex 3 ¶ 3.16).

technologies. NATAS indicated it would be awarding "all entertainment programming on broadband media, without respect to the time of day it were [sic] distributed - - resulting in an impressive array of programming in a variety of formats" (Conciatori Affirmation Ex. D). There is presently scheduled an award show to be held by NATAS in June during which these contested Broadband awards are scheduled to be distributed (Tr 1/3/08 10:26).

The 2007 Arbitration Proceeding

On March 12, 2007, ATAS filed a Demand for Arbitration with the American Arbitration Awards ("AAA"). The Demand requested declaratory relief responding to NATAS' announcement of the new awards which allegedly are in breach of the Agreement.

Pursuant to the Agreement, the parties empaneled a three-member arbitration panel (the "Panel") consisting of retired judges. ATAS selected Hon. Lester Olson (Ret.), NATAS selected Hon. George Pratt (Ret.), and the two panelists selected a third, Hon. William Masterson (Ret.).

In preparation for the arbitration, the parties conducted discovery and eighteen mutually agreed upon categories of documents were exchanged with a total of over 6,000 pages of documents produced between them. Seven witnesses were deposed prior to the arbitration. During the five-day arbitration, nineteen witnesses testified, hundreds of exhibits were admitted into evidence, and both parties submitted extensive briefing.

On December 11, 2007, the Panel issued an Interim Award (the "Interim Award"), in which Panel member Pratt dissented. The Panel Majority (Panel members Olson and Masterson) found that NATAS had improperly exploited the Emmy on at least four separate occasions by unilaterally announcing the new media awards without the consent of ATAS.

The Panel Majority stated that its first issue was "to determine if there is ambiguity in the

language of the Agreement." Based on California authority, the Panel Majority found ambiguity in the Agreement, reasoning that

> although certain classes of programming were identified (e.g., "national sports programming" and "national news and documentary programming") there was no similar identification for either "national nighttime programming" or "national daytime programming." This is either latent or patent ambiguity or possibly both. Whoever reads the language is left in the dark as to whether ATAS ("nighttime programming") is restricted in the award of Emmys to the particular shows that were then being aired when the Agreement was executed or, as ATAS contends, to the particular type or genre of material then being shown during its allotted hours.

(Petition Ex 3 ¶ 3.7.) Ultimately finding the evidence adduced by ATAS more credible than the evidence of NATAS, the Panel Majority found that "'national nighttime programming' and 'national daytime programming' are reserved by the Agreement to NATAS and ATAS respectively, and that neither can infringe on the jurisdiction of the other in the award of the Emmys, irrespective of the time when the televised matter is shown" (Petition Ex 3 ¶ 3.11). Further, the Panel Majority found that the genres of programming are:

> "National nighttime programming" - drama, comedy variety shows, music, "long form" including mini-series, reality shows, children's animation, made for television movies and non-fiction film making.
> "National daytime programming" - soap operas, children's comedy, talk shows, game shows, national sports programming, national news and documentary programming.

(*Id.*) Accordingly, the Panel Majority granted the following injunctive relief:

> (a) NATAS will be enjoined from promoting or participating in a "MySpace/MyEmmy" contest.
> (b) NATAS will be enjoined from awarding new Emmys which infringe on the genres reserved to ATAS by the Agreement, being drama, comedy, variety shows, music, "long form" including mini-series, reality shows, children's animation, made for television movies and non-fiction film making as described in paragraph 3.11 and 6.6 above.
> (c) Both ATAS and NATAS will be enjoined from awarding new Emmys for non-

television devices such as cell phones, and iPODS.

(*Id.*)

The Panel Majority also held NATAS improperly exploited Broadband by announcing the awards without consent and was wrong in its contention that "Broadband gives greater rights to award Emmys than it had before" and "[b]oth ATAS and NATAS may award Emmys for programming transmitted via Broadband on the same basis that Emmys have been awarded in the past for programming transmitted via broadcast TV, cable and satellite" (Petitio, Ex 3 ¶ 3.16).

The Within Action

On December 20, 2007, NATAS sought relief in the form of a preliminary injunction and temporary restraining order in conjunction with its Petition to vacate the Interim Award. NATAS argues that the Panel Majority exceeded its powers by essentially rewriting the Agreement and by deciding issues never submitted to the Panel.

DISCUSSION

Choice of Law

In the Agreement, the parties agreed that "[t]he conduct of [an] arbitration and the issuance of an award by the arbitration tribunal shall comply with the arbitration procedures of the American Arbitration Association . . ." (Petition Ex 1 ¶ 16). Furthermore, the Agreement provides that it "is made and entered into in the State of California, and all questions of the rights, duties and obligations of the parties hereto and of construction, interpretation and enforcement thereof, shall be decided by the internal laws of said State . . ." (Petition Ex 1 ¶17).

Consistent with the Agreement, the arbitration hearing was conducted in accordance with the AAA rules. At the hearing, the parties agreed that California law applied to the arbitral

issues and the issues were briefed accordingly. The arbitration panel applied California law in making its determinations.

The parties do not dispute that this matter has an effect on interstate commerce and is therefore subject to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 (*see e.g., Citizens Bank v Alafabco, Inc.*, 539 US 52 [2003]). However, "[i]f the parties' arbitration agreement contains a choice of law clause providing that the law of a particular State will govern their arbitration, the parties' choice will be given effect if to do so will not conflict with the policies underlying the FAA; otherwise the FAA applies" (*Salvano v Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 85 NY2d 173, 180 [1995]). Therefore, the laws of California will apply when determining the appropriate legal standard regarding the enforcement of the award except where they are found to be in conflict with the policies underlying the FAA.

California statute sets forth the grounds justifying vacatur of arbitration award (*See, Cal. Civ. Proc. Code* § 1286.2(a)(1)-(6)).[2] Petitioner, in seeking to vacate the award, relies upon California Civil Procedure Code § 1286.2(a)(4) which mandates the award to be vacated where

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[2]*See* § 1286.2. Grounds to vacate award; Petition to vacate award
(a) Subject to Section 1286.4, the court shall vacate the award if the court determines any of the following:
(1) The award was procured by corruption, fraud or other undue means.
(2) There was corruption in any of the arbitrators.
(3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.
(4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.
(5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.
(6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision. However, this subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives.

"[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." California courts have held that its code is similar to the FAA in providing for vacatur of an arbitration award if the arbitrators exceeded their powers (*Citibank v Crowell, Weedon & Co.*, 4 Cal App 4th 844, 909 [Cal Ct App 1992]; (*see also Safeway Stores v Board of Teamsters*, 83 Cal App 3d 430 [Cal Ct App 1978]) .

The Petitioner argues this court must also consider whether the award violates the FAA's "manifest disregard of the law" standard. However, with limited exceptions, the provisions of California Civil Procedure Code §§1286.2 and 1286.6 are the exclusive grounds for vacatur under California law (*Reed v Mutual Service Corp.*, 106 Cal App 4th 1359, 1365 [Cal Ct App 2003]). The court in *Crowell v Downey Cmty. Hosp. Found.* held that "the Legislature clearly set forth the trial court's jurisdiction to review arbitration awards when it specified grounds for vacating or correcting awards in sections 1286.2 and 1286.6, [therefore] parties cannot expand that jurisdiction by contract to include a review on the merits" (95 Cal App 4th 730, 739 [Cal Ct App 2002] [where parties attempted to contract for judicial review under the Federal Arbitration Act]). Furthermore, courts have held California's rules regarding review of arbitration awards are not preempted by the FAA's "manifest disregard of the law" standard because they further the FAA policy of promoting arbitration (*see, e.g., Siegel v Prudential Ins. Co. Of America*, 67 Cal App 4th 1270, 1290 [Cal Ct App 1988]).

Standard of Review of Arbitration Awards

Under California Civil Procedure Code § 1286.2, an aggrieved party to an arbitration is entitled to a limited judicial review to determine if "the arbitrators exceeded their powers" (*Pac. Gas & Elec. Co. v Superior Court*, 15 Cal App 4th 576, 590 [1993]). Decided in 1992,

Moncharsh v Heily & Blase is the leading California case for the proposition that arbitral finality is the rule (3 Cal 4th 1 [1992]). *Moncharsh* and its progeny, provide a framework to review an arbitrator's award. Various statements of law - expressed as advice and admonitions - demonstrate the tremendous latitude accorded to an arbitrator's judgment in fashioning a remedy. Arbitration awards are subject to very limited trial court review (*Moncharsh*, 3 Cal 4th at 12–13, 25). Courts should generally defer to an arbitrator's finding of arbitrability; it is for the arbitrator to determine what issues are necessary to the ultimate decision; courts must refrain from substituting its judgment for the arbitrator's in determining the scope of its powers; and judicial intervention should be minimized *(Advanced Micro Devices v Intel Corp.*, 9 Cal 4th 362, 372, 373 [1994] [internal quotation marks and citations omitted]). "Courts may not review either the merits of the controversy or the sufficiency of the evidence supporting the award" (*California Faculty Assn. v Superior Court*, 63 Cal App 4th 935, 943 [Cal Ct App 1998]). "With limited exceptions, an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties" (*id.* at 943–944 [internal quotation marks omitted], quoting from *Moncharsh*, 3 Cal 4th at 6). Even an error of law causing substantial injustice is not a ground to vacate or to correct an award. (*Moncharsh*, 3 Cal 4th at 14).

Nonetheless, these notions of extreme deference are tempered by the agreement granting authority to the arbitrator. Under § 1286.2(a)(4), the court shall vacate the award if arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted. The parties define the scope of arbitration (*Moncharsh*, 3 Cal 4th at 8). Furthermore, the agreement limits and circumscribes the powers of the arbitrator

(*id.*). The deference accorded an arbitrator's decision under the arbitration agreement is not unrestricted, and indeed, is limited by the agreement to arbitrate (*Advanced Micro Devices*, 9 Cal 4th at 375).

Indeed, California case law recognizes numerous grounds upon which an arbitrator exceeds its powers: the arbitrator acts without subject matter jurisdiction (*National Union Fire Ins. Co. v Stites Prof. Law Corp.*, 235 Cal App 3d 1718, 1724 [Cal Ct App 1991]); decides an issue that was not submitted to arbitration (*California Faculty Assn. v Superior Court*, 63 Cal App 4th 935, 952 [Cal Ct App 1998]; *Pacific Crown Distributors v Brotherhood of Teamsters*, 183 Cal App 3d 1138, 1143 [Cal Ct App 1986]; *Ulene v Murray Millman of California, Inc.*, 175 Cal App 2d 655 [Cal Ct App 1959]); arbitrarily remakes the contract (*Pacific Gas & Electric Co. v Superior Court*, 15 Cal App 4th 576, 590 [Cal Ct App 1993]); upholds an illegal contract (*Loving & Evans v Blick*, 33 Cal 2d 603, 609 [1949]); issues an award that violates a well-defined public policy *(City of Palo Alto v Service Employees Internat. Union*, 77 Cal App 4th 327, 338–340 [Cal Ct App 1999]); issues an award that violates a statutory right (*Board of Education v Round Valley Teachers Assn.*, 13 Cal 4th 269, 272 [1996]); fashions a remedy that is not rationally related to the contract (*Advanced Micro Devices, Inc. v Intel Corp.*, 9 Cal 4th 362, 375 [1994]); or selects a remedy not authorized by law (*Marsch v Williams*, 23 Cal App 4th 238, 248 [1994] [appointing receiver]; *Luster v Collins*, 15 Cal App 4th 1338, 1350 [1993]). (*O'Flaherty v Belgum*, 115 Cal App 4th 1044; *Jordan v Department of Motor Vehicles*, 100 Cal App 4th 431, 443 [Cal Ct App 2002].)

Analysis

NATAS argues that the Panel Majority disregarded the provisions in the Agreement,

which divided all programs between the academies on the basis of time, and rewrote those terms to divide programming by specific genres irrespective of the time when the televised matter is shown (Mem of Law in Opposition to Respondent's Motion to Dismiss, at 17; *see* Mem of Law in Support of Petitioner's Motion for a Preliminary Injunction, at 17-20). NATAS refers to the eligibility rules used by both NATAS and ATAS , claiming that eligibility is based on the time period of the programing (Malone Affirmation Ex H, 3-4; Ex I, 16). Further, NATAS claims that the testimony of numerous witnesses demonstrates that eligibility for awards is based on the time period of the programming (*id.*). By holding that programming will be allocated by genres "irrespective" of time, the Panel Majority allegedly eliminates the contract's time provisions.

In order for an arbitrator to exceed his/her power by remaking the contract, the arbitrator's reading and application of the contract must clearly be beyond the limits of "semantic permissibility" (*Pac. Gas & Elec. Co. v Superior Court*, 15 Cal App 4th at 594). "The award will be upheld so long as it was even arguably based on the contract; it may be vacated only if the reviewing court is *compelled* to infer the award was based on an extrinsic source" *(Advanced Micro Devices*, 9 Cal 4th at 381). "In close cases the arbitrator's decision must stand" (*id.*).

Seeking to apply *Blue Cross of Cal. v Jones*, NATAS argues that courts have vacated awards which disregard and contradict the plain language of the agreement (19 Cal App 4th 220 [Cal Ct App 1993]). The court in *Blue Cross* held that the arbitrator exceeded its power because the remedy awarded a monetary amount that exceeded the undisputed financial limits imposed by the agreement. Here, however, the purported limitation is precisely what is being disputed. NATAS and ATAS dispute the division of jurisdiction for awarding Emmys under the Agreement. NATAS argues that the Interim Award contradicts NATAS' interpretation of the

Agreement. Weighing arguments by both parties, the Panel Majority construed the limitation and based the Interim Award on its construction of the limitation. Thus, the same result would not obtain by applying *Blue Cross* because the Panel Majority has not rendered an award that contradicts an undisputed limitation in the Agreement.[3]

NATAS also cites *Cal. Faculty Ass'n v Superior Court* for the proposition that an award should be vacated when it contradicts the contract (63 Cal App 4th 935). However, as the court in *Cal. Faculty* stated, "unlike the arbitration agreements interpreted in the extensive body of case law on this subject, the parties here have taken pains to define the issue to be arbitrated and to specifically describe the limits of the arbitrator's review authority and the available remedies." To that end, the court in *Cal Faculty* found that the arbitrator exceeded its power by resolving issues the parties did not agree to arbitrate. The arbitration clause described in detail the limits on the arbitrator's power of review. Nonetheless, the arbitrator failed to conform to the specific limitation of the parties' agreement and engaged in a decision-making process outside the scope of his authority.

Similarly, in *O'Flaherty v. Belgum*, the court found that "[b]y providing a remedy inconsistent with the provisions of the partnership agreement and specifically in contradiction to the partnership agreement provision that the arbitrator has no power to order a remedy prohibited

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[3]Moreover, "Section 1286.6, subdivision (b) permits correction of an award when the arbitrators have exceeded their powers, if such correction can be achieved without affecting the merits of the decision" (*Blue Cross*, 19 Cal App 4th at 229). The court in *Blue Cross* concluded that correction could be achieved by correcting the award to provide that the benefits, including home nursing, shall not exceed the financial cap to which respondents concede they agreed (*id.*). The court reasoned that the correction did not affect the merits of the controversy, but merely restored the clear and undisputed financial limits of the policies to which the parties agreed, and which have never been contested (*id.*).

by the agreement or not available in a court of law, the arbitrator in effect awarded a remedy expressly forbidden by the arbitration agreement" (115 Cal App 4th 1044, 1061 [Cal Ct App 2004] [also cited by NATAS]). The partnership agreement limited the arbitrator's power and authority to grant certain remedies. Despite the express limitations, the arbitrator provided for the forfeiture of partner capital accounts, which was not only contrary to the partnership agreement, but contrary to partnership and decisional law (*id.*).

NATAS argues the above cited cases stand for the proposition that an award should be vacated when an arbitrator exceeded his/her power by remaking the contract. However, these matters vacated the award where the agreements contained express limitations on the arbitrator's power (e.g., a limitation as to the amount which can be awarded). Such limitations are a significant element not found in the Agreement between ATAS and NATAS.

Furthermore, to the extent that NATAS attempts to distinguish this case from the cases of *Advanced Micro Devices,* and *Taylor v Van-Catlin Const.*, 130 Cal App 4th 1061 [Cal Ct App 2005] on the basis of means (construction) versus ends (remedy), the court in *Advanced Micro Devices* has clearly indicated its disapproval of focusing on contract construction (9 Cal 4th at 377). Referring to the tests articulated in prior cases, the court stated:

> [t]hese statements of the standard tend to focus the inquiry on the arbitrator's construction of the contract. Useful as such an examination may sometimes be, it is incomplete as a test of whether arbitrators have exceeded their powers in awarding a particular item of damages or other relief. The critical question with regard to remedies is not whether the arbitrator has rationally interpreted the parties' agreement, but whether the remedy chosen is rationally drawn from the contract as so interpreted.
>
> * * *
>
> We need not decide here whether an arbitrator's interpretation of a contract is

> subject to review for "irrationality" or "arbitrariness." The present case involves an arbitrator's choice of remedies, rather than interpretation of the agreement. We reiterate, however, that an award generally may not be vacated or corrected, under California law, for errors of fact or law.

(*Id.* at n.10.)

What seems to drive NATAS' motion to vacate the arbitration award is the assertion that Emmy awards traditionally within its jurisdiction are now being taken away. NATAS raises the argument that the Panel Majority went beyond remaking the contract for the purposes of resolving the submitted dispute. Instead, NATAS argues, the Panel Majority struck contractual terms out of the agreement for future disputes. "The Panel Majority enjoined [NATAS] from ever again giving Emmys to programming in the Prohibited Genres even if they aired during the time period allocated to [NATAS] by the Agreement" (Mem in Opp to Rerspondent's Motion, at19). Petitioner argues:

> The arbitrators took away children's animation from the National Academy [NATAS], took away reality shows from [NATAS], took away variety shows from [NATAS]. Sixty percent of the [June] awards cover those areas. Twenty percent of the revenue alone come from children's animation. It's a disaster.

(Tr 1/3/08 8:14-21.) However, the Interim Award is less drastic than it appears in that the award enjoins NATAS from "awarding *new* Emmys which infringe on the genres reserved to ATAS by the Agreement" (Petition Ex 3, at 14 [emphasis added]). While NATAS has certainly awarded Emmys in the category of children's animation (*see* Malone Affirmation Ex K), ATAS has also awarded Emmys for "outstanding children's program" since 1997 (*see* Malone Affirmation Ex L). To be clear, the Interim Award enjoins NATAS from giving new Emmys in the genres of "drama, comedy variety shows, music, 'long form' including mini-series, reality shows, children's animation, made for television movies and non-fiction film making" (Petition Ex 3 ¶

3.18). With the exception of children's animation, ATAS has already been giving Emmys for each of the enumerated genres - some given as early as 1996 (Malone Affirmation Ex L).

Here, the arbitration claim in the Interim Award is stated as whether: "NATAS has breached the Agreement on four occasions by announcing new national awards contests and shows based on a new mode of transmission without securing the consent of ATAS . . ." (Petition Ex 3 ¶ 2.1.) The Panel Majority decided that its "responsibility [was] to determine the Agreement's meaning and then apply that determination to the conflicting claim" (Petition Ex 3, ¶ 3.2.)

The Agreement provided that

> NATAS will have the exclusive right in perpetuity to conduct one annual awards contest and show per year for each of the following: (a) national daytime programming (the "Daytime Emmy Show"); this contest, if broadcast, may be broadcast only during daytime hours; (b) national sports programming (the "Sports Emmy Show"); and national news and documentary programming (the "Broadcast Journalism Emmy Show").

(Petition Ex 1, at 11.) Similarly, the Agreement provides that "[ATAS] will have the exclusive right on perpetuity to conduct one annual awards contest and show per year for national nighttime programming and the exclusive right to use the Emmy in connection therewith." (*Id.* at 12.) Nighttime programming "means all programs aired between the hours of 6:00 p.m. and 2:00 a.m. (*Id.* at 5.)

Ultimately, the Panel Majority found that "'national nighttime programming' and 'national daytime programming' are reserved by the Agreement to NATAS and ATAS respectively, and that neither can infringe on the jurisdiction of the other in the award of the Emmys, irrespective of the time when the televised matter is shown." Further, the Panel

Majority found that the genres of programming are:

> "National nighttime programming" - drama, comedy variety shows, music, "long form" including mini-series, reality shows, children's animation, made for television movies and non-fiction film making.
> "National daytime programming" - soap operas, children's comedy, talk shows, game shows, national sports programming, national news and documentary programming.
>
> Accordingly, the Panel Majority granted the following injunctive relief:
>
> (a) NATAS will be enjoined frm promoting or participating in a "MySpace/MyEmmy" contest.
> (b) NATAS will be enjoined from awarding new Emmys which infringe on the *genres* reserved to ATAS by the Agreement, being drama, comedy, variety shows, music, "long form" including mini-series, reality shows, children's animation, made for television movies and non-fiction film making as described in paragraph 3.11 and 6.6 above.
> (c) Both ATAS and NATAS will be enjoined from awarding new Emmys for non-television devices such as cell phones, and iPODS.

(Petition Ex 3, at ¶ 3.18 [emphasis added].)

The parties agreed to submit to arbitration "[a]ny controversy concerning the meaning and effect of [the] Agreement and/or Exhibits hereto or the relationship, rights and duties of the parties" (Petition Ex 1, at 20). As illustrated in its Decision, the Panel Majority identified the issues it considered it needed to resolve the submitted claim (*Advanced Micro Devices*, 9 Cal 4th at 372), found an ambiguity in the terms of the Agreement, weighed evidence offered by both parties, construed the terms Agreement , and rendered an award based on its construction of the terms in the Agreement. Irrespective of any purported errors of fact or law, it cannot be disputed that the award is "arguably based" on the Agreement (*see id.*). Accordingly, for the reasons stated above, NATAS has failed to demonstrate sufficient grounds to vacate an arbitration award.

The Court has also reviewed the dissent to the Interim Award written by panel member

Pratt with respect to the issues of ambiguity, course of conduct, and resolution of the broadband question. The dissent expressed skepticism and sharp disagreement with the conclusions of the Panel Majority. While this Court may find the dissent compelling, this Court nonetheless concludes that there is a plausible legal basis for the Panel Majority's award. Based upon this conclusion and in view of this Court's limited and deferential review of arbitrator awards, this Court is constrained to deny NATAS' motion to vacate the Interim Award.

Motion to Dismiss

Next, the Court considers ATAS' motion pursuant to CPLR 3211(a)(1), 3211(a)(5), and 3211(a)(7) for an order dismissing the Petition to Vacate the Arbitration Award and Obtain Preliminary Injunction. ATAS' chief argument is that NATAS has failed to set forth any basis upon which the Interim Award may be vacated (Mem in Support of Motion to Dismiss, at 21).

The Respondent argues that the petition should be dismissed because Interim Award is Non-Final. ATAS argues that it was the intent of the Panel Majority that the award not be final. ATAS also argues that the Panel Majority reserved jurisdiction, further demonstrating that the award was not intended to be final. Indeed, the Interim Award Decision states: "Having examined the submissions and evidence proffered by the parties, the Panel issues this Interim Award. This is not a Final Award, the Panel retaining jurisdiction to decide any reserved issues and to award counsel fees, expenses and costs according to proof" (Petition Ex 3, at 1).

However, later in its Decision the Panel Majority expands on those statements. "The Panel reserves jurisdiction on issues relating to the 2007 International Interactive Emmy awards ceremony at the Cannes film festival and succeeding years" (Petition Ex 3, at 25). "Those reserved issues will be resolved by the Final Award" (*id.*). "The Panel reserves jurisdiction to

resolve matters relating to a determination of the 'prevailing party' and an award of fees and costs" (Petition Ex 3, at 26). "The resolution of such matters shall be made at the same time the Panel resolves other reserved matters" (*id.*). Thus, the Panel made clear that it was reserving the issues relating to the International Interactive Emmy awards ceremony at the Cannes film festival and to an award of fees and costs to the "prevailing party." The language stating that the award "is not a Final Award" refers to the pendency of the reserved issues. In contrast, the Panel made no reservations for further decision as to the First Award of the Interim Award, which is at issue in this Petition. Moreover, the Panel stated "[t]his Interim Award shall be effective when each of the arbitrators has signed a counterpart signature page and delivered it to the American Arbitration Association" (Petition Ex 3, at 27). "Additionally, this Award shall remain in full force and effect until such time as a final Award is rendered" (*id.*)

Accordingly, because the Court finds that the arbitrator's award is sufficiently final and definite, ATAS fails to demonstrate that NATAS' Petition to vacate the Arbitration Award should be dismissed for lack of a final arbitration award (*Board of Education v Half Hollow Hills Teachers Assoc.*, 79 Misc 2d 223 228 [Sup Ct, Suffolk County 1974]). Moreover, as the Court of Appeals has stated, "reservation of jurisdiction to resolve disputes that might arise as the parties undertook to satisfy the award does not necessarily mean that the award is indefinite or nonfinal" (*Meisels v Uhr*, 79 NY2d 526, 536 [1992]).

However, alternatively, where the Court finds that NATAS fails to set forth the grounds upon which the Interim Award may be vacated, the Petition may properly be dismissed (*In re Public Employees Fed'n,* 191 AD2d 569, 569 [2d Dept 1993] ["Since the petitioner failed to establish a basis for vacating the award, the petition to vacate the award was properly

dismissed"]; *see Sims v Siegelson*, 246 AD2d 374, 377 [1st Dept 1999] ["Since no basis exists to vacate the award, [Respondent's] cross motion to confirm the arbitration award is granted"]). Accordingly, because NATAS fails to demonstrate grounds to vacate the Interim Award, ATAS' motion to dismiss the Petition is granted.

CONCLUSION

Therefore, based upon the foregoing, it is hereby

ORDERED that the Petition seeking an order granting a preliminary injunction and an order vacating the First Award of the December 11, 2007 Interim Award is denied; and it is further

ORDERED the Respondents' motion to dismiss the Petition is granted and the Petition is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This shall constitute the Order and Decision of the Court.

Dated: February 27, 2008

ENTER:

J.S.C.