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Transaction ID 31355241
Case No. 5107-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CREDIT SUISSE SECURITIES (USA) LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. 5107-VCN**
	:	
INVESTMENT HUNTER, LLC,	:	
	:	
Defendant.	:	

MEMORANDUM OPINION

Date Submitted: March 11, 2010
Date Decided: May 27, 2010

Daniel B. Rath, Esquire and Rebecca L. Butcher, Esquire of Landis Rath & Cobb LLP, Wilmington, Delaware, and Allan N. Taffet, Esquire, Brian A. Burns, Esquire, and Joshua C. Klein, Esquire of Duval & Stachenfeld LLP, New York, New York, Attorneys for Plaintiff.

Thomas W. Briggs, Jr., Esquire of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, and John Shin, Esquire of Silverman Sclar Shin & Byrne PLLC, New York, New York, Attorneys for Defendant.

NOBLE, Vice Chancellor

I. INTRODUCTION

This is an action to confirm an arbitration award which included one million dollars in punitive damages. The losing party did not appear in the arbitration process but now contests the authority of the arbitration panel to award punitive damages. The winning party claims that the losing party's challenge is unfounded and comes too late.

II. BACKGROUND

A. *The Parties*

Plaintiff Credit Suisse Securities (USA) LLC ("Credit Suisse") is a broker-dealer engaged in securities trading and the provision of financial advisory services. Defendant Investment Hunter, LLC ("Investment Hunter") also is a broker-dealer.

B. *The Margin Agreement*

In July 2008, Credit Suisse[1] and Investment Hunter entered into a margin agreement (the "Agreement") under which Credit Suisse extended millions of dollars of margin credit to Investment Hunter and its owner, Gary Evans, against 400,000 shares of GreenHunter Energy, Inc. ("GreenHunter") that Investment

[1] The Margin Agreement was signed with Pershing LLC, the clearing broker for Credit Suisse, and later assigned to Credit Suisse. The Court will refer only to Credit Suisse.

Hunter and Evans pledged as collateral.[2] GreenHunter is a publicly traded renewable energy company which Evans founded and controls.

The Agreement called for any disputes between the parties to be resolved by way of arbitration, stating, in relevant part:

> 20. ARBITRATION DISCLOSURES:
> THIS AGREEMENT CONTAINS A PREDISPUTE ARBITRATION CLAUSE. BY SIGNING AN ARBITRATION AGREEMENT THE PARTIES AGREE AS FOLLOWS:
> - ALL PARTIES TO THIS AGREEMENT ARE GIVING UP THE RIGHT TO SUE EACH OTHER IN COURT . . . EXCEPT AS PROVIDED BY THE RULES OF THE ARBITRATION FORUM IN WHICH A CLAIM IS FILED.
> - ARBITRATION AWARDS ARE GENERALLY FINAL AND BINDING; A PARTY'S ABILITY TO HAVE A COURT REVERSE OR MODIFY AN ARBITRATION AWARD IS VERY LIMITED.
>
> . . .
> - THE ARBITRATORS DO NOT HAVE TO EXPLAIN THE REASON(S) FOR THEIR AWARD.
>
> . . .
> - THE RULES OF THE ARBITRATION FORUM IN WHICH THE CLAIM IS FILED, AND ANY AMENDMENTS THERETO, SHALL BE INCORPORATED INTO THIS AGREEMENT.
>
> 21. ARBITRATION AGREEMENT
> ANY CONTROVERSY BETWEEN YOU AND US SHALL BE SUBMITTED TO ARBITRATION BEFORE THE NEW YORK STOCK EXCHANGE, INC., ANY OTHER NATIONAL SECURITIES EXCHANGE ON WHICH A TRANSACTION GIVING RISE TO THE CLAIM TOOK PLACE (AND ONLY BEFORE SUCH EXCHANGE), OR THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. . . .

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[2] The 400,000 GreenHunter shares pledged as collateral had a market value of $7,628,000 as of July 24, 2008. Compl. Ex. A ("Statement of Claim") ¶ 11.

> 22. THE LAWS OF THE STATE OF NEW YORK GOVERN
> This agreement and its enforcement shall be governed by the laws of the state of New York without giving effect to its conflicts of laws provisions.[3]

The Terms and Conditions provided on Investment Hunter's Account Statement reiterated the terms set forth in the Agreement. The Account Statement restated all of the Arbitration Disclosures contained within the Agreement, including that "the rules of the arbitration forum in which the claim is filed . . . shall be incorporated into this agreement." In addition, under a heading entitled "Arbitration Agreement," was the following provision:

> ANY CONTROVERSY BETWEEN YOU AND US SHALL BE SUBMITTED TO ARBITRATION BEFORE THE FINANCIAL INDUSTRY REGULATORY AUTHORITY OR ANY OTHER NATIONAL SECURITIES EXCHANGE ON WHICH A TRANSACTION GIVING RISE TO THE CLAIM TOOK PLACE (AND ONLY BEFORE SUCH EXCHANGE). . . . <u>THE LAWS OF THE STATE OF NEW YORK GOVERN</u>.[4]

Investment Hunter and Evans represented in the Agreement that the shares of GreenHunter pledged as collateral were not subject to any claims by third parties and that the shares could be liquidated by Credit Suisse to satisfy any margin deficiency, a representation corroborated in a legal opinion by GreenHunter's General Counsel. However, the shares were arguably subject to a

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[3] Def. Investment Hunter, LLC's Mem. of Law in Opp'n to Pl.'s Mot. to Confirm Arbitration Award ("Mem. in Opp'n") Ex. 1 ¶¶ 21-22.
[4] Mem. in Opp'n Ex. 2 at 7 (emphasis in original).

lockup agreement entered into more than a year before the Agreement, a fact that Credit Suisse discovered only after it issued a margin call following a rapid decline in the price of GreenHunter shares. In response, Credit Suisse issued a demand letter to Investment Hunter that sought the payment of all principal, interest, and other obligations outstanding under the Agreement.

C. *The FINRA Arbitration*

In December 2008, Credit Suisse filed its Statement of Claim against Investment Hunter with the Financial Industry Regulatory Authority ("FINRA") regarding Investment Hunter's apparent violation of the Agreement. The Statement of Claim sought compensatory and punitive damages on the grounds of fraudulent inducement, breach of contract, unjust enrichment, and conversion.

After some difficulty in perfecting service, Investment Hunter's registered agents were served with a copy of the Statement of Claim. Nevertheless, Investment Hunter never responded to the Statement of Claim. Likewise, Investment Hunter did not participate in the pre-hearing teleconference conducted by the arbitration panel (the "Panel") appointed in the FINRA Arbitration (the "Arbitration"), or in the Arbitration, where Credit Suisse presented its prima facie case to the Panel.

On August 10, 2009, the Panel entered an award "in full and final resolution of the issues submitted" (the "FINRA Award") in favor of Credit Suisse.[5] The Panel determined that Investment Hunter had been properly served with Credit Suisse's Statement of Claim and found it liable for $2,712,525.41 in compensatory damages and $1,000,000 in punitive damages.[6]

D. *Settlement Talks Fail and Credit Suisse Commences this Action*

After the FINRA Award was issued, counsel for Investment Hunter contacted Credit Suisse in an attempt to settle this matter. In order to avoid further litigation costs, Credit Suisse entered into "good faith settlement negotiations." Although the parties established a framework for settlement, because of Investment Hunter's unwillingness or inability to pay, no settlement agreement was ultimately reached. Credit Suisse then commenced this action, seeking an order confirming the FINRA Award and entering judgment against Investment Hunter for the full amount of the award.[7]

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[5] Compl. Ex. C ("FINRA Dispute Resolution Case No. 08-04754").

[6] Investment Hunter was also required to pay attorneys' fees and filing fees, for total award of $3,734,525.41.

[7] Since the issuance of the FINRA Award, Credit Suisse has recovered $2,355,784 of the total amount due, primary through the sale of those shares pledged to Credit Suisse as collateral in the Agreement. Credit Suisse also received $25,000 from Investment Hunter as a condition to engaging in continued settlement discussions in an attempt to resolve the matter. As such, Credit Suisse now seeks the approximately $1.4 million remaining unpaid under the arbitration award.

E. *Investment Hunter Finally Objects*

After Investment Hunter initially failed to file an answer (or otherwise respond to the Complaint filed) in this case, Credit Suisse moved for a default judgment. After receiving notice of the motion for default judgment, Investment Hunter filed its Answer and asserted that Credit Suisse had failed to state a claim because FINRA did not have authority to award punitive damages since the parties' underlying agreement was governed by New York law, which prohibits the award of punitive damages by arbitrators.[8]

Credit Suisse has moved to confirm the FINRA Award.

F. *The Parties' Contentions*

Investment Hunter contests the FINRA Award's inclusion of punitive damages because the underlying Agreement calls for the contract and its enforcement to be governed by New York law, and, under New York law, arbitrators may not award punitive damages. As such, according to Investment Hunter, the Panel exceeded its authority—or lacked jurisdiction—to include

[8] The Answer also asserted that the parties had reached a settlement agreement which, in conjunction with amounts already paid, superseded the FINRA Award and, otherwise, that FINRA lacked jurisdiction over Investment Hunter as a result of insufficient service of process under the Code of Arbitration Procedure. These arguments have not been advanced, and, moreover, it should be noted that the Panel determined that service on Investment Hunter had been sufficient, and, more importantly, Investment Hunter has not argued that it was not on notice of Credit Suisse's claim.

punitive damages as part of the FINRA Award; thus, the award cannot be enforced to the extent that it awards punitive damages.[9]

Credit Suisse asserts that, while a general contractual choice-of-law provision operates to provide the substantive law that governs an arbitration, it does not necessarily mandate the application of that state's arbitration rules. As such, it contends, the Federal Arbitration Act (the "FAA" or the "Act"),[10] not New York law, governs since the Agreement expressly incorporated the arbitration rules of the National Association of Securities Dealers ("NASD"),[11] which permit the award of punitive damages. Similarly, even if the contract operates to mandate the use of a state's procedural rules, where there is a conflict with the FAA, the FAA rules trump conflicting state rules.

Furthermore, Credit Suisse asserts that Investment Hunter is barred from even challenging the FINRA Award because the 90-day statutory period for doing so under the FAA has expired. Investment Hunter counters that, under New York law, it would not be barred by a failure to move to vacate the FINRA Award within the 90-day period set by the FAA; instead, it would be able to raise an objection to the arbitrators' authority at any time in response to a motion by Credit Suisse to

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[9] Investment Hunter does not challenge any part of the FINRA Award other than its punitive damages aspect.

[10] 9 U.S.C. §§ 1-16.

[11] FINRA now performs the work of NASD.

confirm the FINRA Award.[12] Investment Hunter also argues that the tardiness of its challenge to the FINRA Award should be excused under the equitable tolling doctrine because its delay was the result of unsuccessful settlement discussions with Credit Suisse.[13]

III. DISCUSSION

A. *The Standard of Review*

This Court's authority to overturn an arbitration award is "narrowly circumscribed," and the award will be upheld if "any grounds for the award can be inferred from the record."[14] Under the FAA, awards may be vacated only on very limited grounds, such as where the award was procured by corruption or fraud, where the arbitrators were clearly partial or guilty of misconduct, or where the arbitrators exceeded their powers in granting the award.[15] In reviewing an arbitration award, the Court may not pass its own judgment on the evidence or the law that was submitted to the arbitrator. Nevertheless, "an arbitrator's decision may be vacated if it is in manifest disregard of the law or if the record shows no

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[12] *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Fireman's Fund Ins. Co.*, 504 N.Y.S.2d 24, 24 (N.Y. App. Div. 1986) ("Although an aggrieved party has only 90 days in which to move to vacate or modify an award (CPLR 7511[a]), said party may choose not to make a motion and raise the objection when the victor moves to confirm the award.").

[13] Credit Suisse claims that the FAA's three-month limit is strictly construed and cannot be extended on equitable grounds.

[14] *Audio Jam, Inc. v. Fazelli*, 1997 WL 153814, at *1 (Del. Ch. Mar. 20, 1997) (citations omitted).

[15] Federal Arbitration Act, 9 U.S.C. § 10(a).

support for the award."[16] Summary judgment, frequently the procedural means employed for assessing arbitration awards,[17] is appropriate here because there are no material facts in dispute and the Court is called upon to apply principles of law.

B. *Did the FINRA Panel Exceed its Authority by Awarding Punitive Damages?*

Although the intent of the FAA is to foster the public policy favoring arbitration,[18] parties remain free to contract for the procedural and substantive rules they desire, whether or not such rules are consistent with the purposes and provisions of the Act. As the Supreme Court explained, "[w]here . . . the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA," even if the ultimate result differs from the one permitted under the FAA.[19] Indeed, "[t]here is no federal policy favoring arbitration under a certain set of procedural rules" and "[i]nterpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration . . . simply does not offend [any policy]

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[16] *Falcon Steel Co., Inc. v. HCB Contractors, Inc.*, 1991 WL 50139, at *2 (Del. Ch. Apr. 4, 1991).

[17] *See TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Sec., Inc.*, 953 A.2d 726, 730 (Del. Ch. 2008) ("A motion for summary judgment is the 'common [method] for this court to determine whether to vacate or confirm an arbitration award.'") (citation omitted).

[18] *Cf. Hackett v. Milbank, Tweed, Hadley & McCloy*, 654 N.E.2d 95, 100 (N.Y. 1995) ("The overriding policy of the [FAA] is the enforcement of arbitration agreements according to their terms, including the parties' choice of governing law.").

[19] *Volt Info. Sciences, Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). Where state rules somehow conflict with Congressional objectives in passing the Act, however, the FAA would preempt them. *Id.* at 477.

embodied in the FAA."[20] Nevertheless, when a court interprets a choice-of-law provision in an agreement covered by the FAA, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration."[21]

Investment Hunter relies heavily on *Luckie*,[22] where the New York Court of Appeals broadly read a choice-of-law provision directing that New York law would govern "the agreement and its enforcement," as indicating the parties' "intention to arbitrate to the extent allowed by [this State's] law,"[23] and, perhaps, "that the whole of New York arbitration law would apply."[24] As such, the inclusion of the phrase "and its enforcement" evidenced "an intention to abide by New York arbitration law as well as New York substantive law."[25] Investment Hunter argues that, because the Agreement's choice-of-law provision indicates an

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[20] *Id.* at 476.

[21] *Id. See also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.").

[22] *In the Matter of Smith Barney, Harris Upham & Co., Inc. v. Luckie*, 647 N.E.2d 1308 (N.Y. 1995), *cert. denied sub nom. Manhard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 516 U.S. 811 (1995).

[23] *Id.* at 1313 (bracketed text in original).

[24] *Id.* at 1317 (Kaye, C.J., concurring).

[25] *Prudential v. Laurita*, 1997 WL 109438, at *3 (S.D.N.Y. Mar. 11, 1997).

apparent intention to abide by New York arbitration law, the Panel's decision to award punitive damages ran afoul of New York arbitration law and thus was beyond the scope of the Panel's authority and should not be confirmed. Indeed, it is well-settled that, under New York arbitration law, arbitrators may not award punitive damages.[26]

However, Credit Suisse argues that the Panel's decision to award punitive damages is consistent with the Supreme Court's decision in *Mastrobuono*, which came after *Luckie* and which held that, while parties could choose to prohibit arbitrators from awarding punitive damages through contract, they could do so only through a contractual provision that expressed "an unequivocal exclusion of punitive damages claims."[27] The Court made clear that a general choice-of-law provision "is not, in itself," such an exclusion.[28]

The Court in *Mastrobuono* interpreted a "standard-form" contract that provided that the agreement be "governed" by the laws of New York as not precluding the award of punitive damages by arbitrators, despite New York's prohibition of such damages in arbitration awards. Instead, the Court found that

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[26] *See, e.g.*, *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793, 794 (N.Y. 1976); *Matter of Dreyfus Serv. Corp. (Kent)*, 584 N.Y.S.2d 483, 483 (N.Y. App. Div. 1992) ("Respondent sets forth no compelling reason for this court to depart from the long-standing rule in this State that '[a]n arbitrator has no power to award punitive damages, even if agreed upon by the parties.'") (citation omitted).

[27] *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60 (1995).

[28] *Id.*

the contract's arbitration provision, which provided for "any controversy" to be submitted to arbitration before the NASD,[29] "strongly implie[d] that an arbitral award of punitive damages is appropriate."[30] It reconciled the arbitration provision's authorization of punitive damage awards with the contract's New York choice-of-law provision by narrowly interpreting the scope of the latter provision:

> We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read "the laws of the State of New York" to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other.[31]

The Court suggested that the only way that the contract's choice-of-law provision could operate to preclude the award of punitive damages was if "'New York law' mean[t] 'New York decisional law, including that State's allocation of power

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[29] The agreement in *Mastrobuono* specifically called for arbitration in accordance with either the rules of the NASD, or the Boards of Directors of the New York Stock Exchange and/or the American Stock Exchange. There, the Court held the provision was broad enough to contemplate a remedy of punitive damages and its ambiguity over which set of arbitration rules would apply did not preclude such an award because "[n]either set of alternative rules purports to limit an arbitrator's discretion to award punitive damages. Moreover, even if there were any doubt as to the ability of an arbitrator to award punitive damages under the Exchanges' rules, the contract expressly allows petitioners . . . to choose NASD rules; and the panel of arbitrators in this case in fact proceeded under NASD rules." *Mastrobuono*, 514 U.S. at 61 n.5.

[30] *Mastrobuono*, 514 U.S. at 60. Although no provision in the underlying contract directly addressed punitive damages, the *Mastrobuono* court noted that the NASD Code of Arbitration Procedure granted arbitrators broad authority to award damages, and the NASD manual stated that "[p]arties to arbitration are informed that arbitrators can consider punitive damages as a remedy." *Id.* at 61 n.6.

[31] *Id.* at 63-64; *see also Smith Barney Shearson Inc. v. Sacharow*, 689 N.E.2d 884, 889 (N.Y. 1997) ("While a choice of law clause incorporates substantive New York principles, it does not also pull in conflicting restrictions on the scope of the authority of arbitrators and the competence of parties to contract for plenary alternative dispute resolution.").

between courts and arbitrators, notwithstanding otherwise-applicable federal law.' But, as we have demonstrated, the provision need not be read so broadly."[32]

Credit Suisse asserts that *Mastrobuono* is controlling here "because the facts are analogous in all material respects" and the arbitration provisions are "virtually identical."[33] Indeed, but for the inclusion of the "and its enforcement" language in the Agreement's choice-of-law provision, the relevant facts in this case are virtually identical to those of *Mastrobuono*: the Agreement called for the application of NASD rules,[34] the relevant rules applied in the Arbitration allowed for punitive damages,[35] and the Agreement was subject to the FAA[36]

Investment Hunter insists that *Mastrobuono* is readily distinguishable from this case because the contract at issue in *Mastrobuono* did not specify that New York law governed "the enforcement" of the agreement; instead, arbitration was to be governed "in accordance with the rules of the [NASD], or the Board of

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[32] *Mastrobuono*, 514 U.S. at 60.

[33] Pl.'s Reply Br. at 9.

[34] *See* Mem. in Opp'n Ex. 1 ¶ 21 ("Any controversy . . . shall be submitted to arbitration before . . . the [NASD]."); ¶ 20 ("The rules of the arbitration forum in which the claim is filed . . . shall be incorporated into this agreement.").

[35] As with the precursor NASD rules, FINRA rules state that "[n]o predispute arbitration agreement shall include any condition that . . . limits the ability of arbitrators to make any award." Pl.'s Reply Br. Ex. B, FINRA Rule 3110(f)(4)(D). Similarly, the FINRA Arbitrator's Manual states that "[a]rbitrators may consider punitive damages as a remedy." Pl.'s Reply Br. Ex. C ("FINRA Arbitrators Manual") at 31.

[36] The FAA applies to any transaction that affects "interstate commerce." *See, e.g., Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 291-92 (3d Cir. 2001). Here, the Agreement establishes an investing and borrowing relationship between Credit Suisse, which has its principal place of business in New York, and Investment Hunter, which has its principal place of business in Texas. Therefore, the FAA applies. *See* Compl. ¶¶ 1-2.

Directors of the New York Stock Exchange and/or the American Stock Exchange."[37] Investment Hunter further suggests that, as in *Luckie*, the choice-of-law provision, referencing not only the substantive law to be applied but also the rules of enforcement, operates to subject the Agreement to New York arbitration law, including its prohibition of punitive damages.

Credit Suisse argues that the inclusion of the language "and its enforcement" in the choice-of-law provision does not support the inference of a preclusion of punitive damages because *Mastrobuono* requires that any such waiver be stated explicitly. Indeed, since *Mastrobuono*, courts have routinely held that the FAA supersedes the New York rule against punitive damages when parties contractually agree to NASD or FINRA arbitration.[38] Credit Suisse offers up a host of cases decided after *Luckie* and *Mastrobuono* which upheld the award of punitive damages despite robust New York choice-of-law provisions underpinning the contracts;[39] however, Investment Hunter has suggested that such cases are

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[37] *Mastrobuono*, 514 U.S. at 59.

[38] *See, e.g.*, *Sacharow*, 689 N.E.2d at 888-89.

[39] *Shamah v. Schweiger*, 21 F. Supp. 2d 208, 216 (E.D.N.Y. 1998) (recognizing that "[t]he availability of punitive damages in an arbitration award resulting from a customer agreement mandating the application of New York law has been affirmed in numerous courts, including the Supreme Court's bellwether decision in *Mastrobuono*" and collecting representative decisions; *Sanders v. Gardner*, 7 F. Supp. 2d 151, 175-76 (E.D.N.Y. 1998) (holding that the assertion that NASD arbitrators lacked authority to award punitive damages under *Garrity* was "invalidated by the holding in *Mastrobuono*" and citing cases upholding punitive damages by arbitrators); *In re Lian*, 710 N.Y.S.2d 52, 52-53 (N.Y. App. Div. 2000); *Roubik v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 674 N.E.2d 35, 37-38 (Ill. App. Ct. 1997); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Adler*, 651 N.Y.S.2d 38, 38-39 (N.Y. App. Div. 1996); *Mulder v. Donaldson, Lufkin & Jenrette*, 648 N.Y.S.2d 535, 538 (N.Y. App. Div. 1996) (holding that the FAA preempts the

inapposite because the underlying contract did not include any choice-of-law provision,[40] or because the choice-of-law provision did not contain the "and its enforcement" language,[41] or because the deciding court failed to mention and discuss the implications of *Luckie* in making its determination.[42]

Investment Hunter seems to suggest that the "and its enforcement" language operates as a talisman to shift all rules governing an arbitration over to those of the selected state. Although certain courts appear to have distinguished *Luckie* and *Mastrobuono* on those grounds,[43] other courts have read *Luckie* quite narrowly, while expanding the reach of *Mastrobuono*.[44]

Garrity rule absent an agreement to exclude punitive damages); *In re R.C. Layne Constr.*, 651 N.Y.S.2d 973, 976 (N.Y. App. Div. 1996) (confirming a punitive damages award because the parties expressly agreed that NASD rules governed the arbitration and the parties did not "unequivocally agree to preclude the arbitrators from considering punitive damages"); *Tong v. S.A.C. Capital Mgmt., LLC*, 835 N.Y.S.2d 881, 887-88 (N.Y. Sup. Ct. 2007) (holding that a punitive damages claim was within the arbitrator's authority because the FAA preempted the *Garrity* rule and a choice-of-law provision does not displace the FAA in the absence of evidence that the parties intended to give up their right to punitive damages); *Sacharow*, 689 N.E.2d at 888-89.

[40] *Mulder*, 648 N.Y.S.2d 535.

[41] *Sacharow*, 689 N.E.2d 884; *Lian*, 710 N.Y.S.2d 52.

[42] *Roubik*, 674 N.E.2d 35.

[43] *See, e.g., In the Matter of Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp.*, 826 N.E.2d 802, 806 (N.Y. 2005); *Laurita*, 1997 WL 109438, at *3; *Merrill Lynch, Pierce, Fenner & Smith v. Ohnuma*, 630 N.Y.S.2d 724, 725-26 (N.Y. Sup. Ct. 1995).

[44] *See, e.g., Shaw Group, Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 123 (2d Cir. 2003) ("*Luckie* has been seriously undermined by *Mastrobuono*. Indeed, since *Mastrobuono*, the New York Court of Appeals has limited *Luckie* to its specific facts, which notably included a choice-of-law provision applicable to the 'enforcement' as well as the construction of the contract."); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1200 (2d Cir. 1996) ("In *Mastrobuono*, the Supreme Court rejected the argument that PaineWebber makes here and the argument that the New York Court of Appeals advanced in *Luckie*."); *Sacharow*, 689 N.E.2d at 888 ("Importantly . . . *Luckie* was narrowly tailored to the specific framework presented by the case and was not projected as a

Although the "and its enforcement" language perhaps goes beyond merely applying a state's substantive law, the suggestion in *Mastrobuono* that a choice-of-law provision, without more, does not operate to prescribe "special rules limiting the authority of arbitrators" has not been called into question by *Luckie* or its progeny.[45] This seems to reflect the notion that, given the general presumption in favor of arbitration, for parties to curtail an arbitrator's power through contract requires something more explicit than just a choice-of-law provision, even one including reference to contractual enforcement.[46]

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preclusion against parties freely contracting to submit every part of their disputes to arbitration.").

[45] *See, e.g.*, *Diamond Waterproofing*, 826 N.E.2d at 806 (citing *Luckie* for the notion that "[a] choice of law provision, which states that New York law shall govern both "the agreement *and its enforcement*," adopts as "binding New York's rule that threshold Statute of Limitations questions are for the courts"); *Laurita*, 1997 WL 109438 at *3, *6 (discussing the implications of *Luckie* on the timeliness of arbitration claims but relying solely on *Mastrobuono* in determining that the parties had not waived their right to claims to punitive damages); *Ohnuma*, 630 N.Y.S.2d at 725-26 (holding that *Mastrobuono* had not disturbed *Luckie* with respect to the determination of the timeliness of arbitration claims).

The notion that the types of remedies available for a breach of an agreement are integrally relevant to the enforcement of such a contract, and that, therefore, a choice-of-law provision applying state law to a contract's enforcement ought implicitly to include any state-law strictures as to remedy would, perhaps, not be an unreasonable one, if the Court were considering the issue as a matter of first impression. This not unreasonable perspective is, however, undermined by the imprecision of the specific provision at issue, particularly in light of *Luckie* and *Mastrobuono*, the strong federal presumption favoring deference to decisions made by arbitrators, especially FINRA, and case law that seems generally unconcerned with any apparent tension between *Luckie* and *Mastrobuono* in the area of remedies (in contrast to other procedural questions).

[46] *See also Sec. Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322, 327 (2d Cir. 2004) (citing *Mastrobuono* and *Bybyk* for the rule that "[i]n cases where an ambiguity is introduced by the choice-of-law provision, federal policy favoring arbitration requires a specific reference to the restriction on the parties' substantive rights or the arbitrator's powers to establish that the parties clearly intended to limit their rights under the FAA"); *Lian v. First Asset Mgmt., Inc.*, 710 N.Y.S.2d 52, 52 (N.Y. App. Div. 2000) (finding that an award of punitive damages by arbitrators in the face of a contract that "punitive damages will not be available . . . in any proceedings"

Indeed, in *Bybyk*, the Second Circuit rejected an argument similar to the one that Investment Hunter makes here.[47] There, the Court held that the language "[t]his agreement and its enforcement shall be construed and governed by the laws of the State of New York" did not operate to preclude the award of attorneys' fees by arbitrators, despite the fact that New York law also prohibits the award of attorneys' fees in arbitration unless expressly provided in the contract. *Bybyk* cited *Mastrobuono* for the notion that:

> [A] choice of law provision will not be construed to impose substantive restrictions on the parties' rights under the Federal Arbitration Act, including the right to arbitrate claims for attorneys' fees. Therefore, PaineWebber cannot rely on the New York choice-of-law provision to prevent the Bybyks from seeking in arbitration a remedy that is not foreclosed by the Agreement.[48]

Bybyk did not recognize any distinction between *Mastrobuono* and *Luckie* with respect to remedies and concluded that, in applying a state's law of contract to the actions of the arbitrators, the state's general substantive law applies but not any special rules designed to limit the authority of the arbitrators.[49] Any other rule

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could be rationally justified and therefore confirmed "on the theory that waivers of punitive damages are contrary to rules of the [NASD] and therefore unenforceable in an arbitration subject to those rules" and because the contract only noted the prohibition of punitive damages under New York law and "made no reference to the NASD rules permitting punitive damage claims in arbitration proceedings, and of the limiting effect of the United State Supreme Court's ruling in *Mastrobuono*").

[47] *Bybyk*, 81 F.3d at 1200.

[48] *Id.*

[49] *Id. See also Nat'l Union Fire Ins. Co. v. Odyssey Am. Reinsurance Corp.*, 2009 WL 4059183, at *7 (S.D.N.Y. Nov. 18, 2009) (citing *Bybyk*, and observing that "the ability of an arbitrator to award attorneys' fees is . . . not a matter of substantive law which would be subject to the choice

would run afoul of "federal policy favoring arbitration."[50] The Court sees no reason why an arbitration award that includes punitive damages ought to be treated any differently from an award granting attorneys' fees as expressly approved in *Bybyk*.

Not surprisingly, other courts have applied *Bybyk*'s reasoning to other forms of relief, including punitive damages.[51] Not long after the decision in *Bybyk*, the Supreme Court of Illinois upheld an order setting aside an NASD arbitration panel's determination that punitive damage claims were not arbitrable because of a contract's choice-of-law provision that provided that "this agreement and its enforcement shall be governed by the laws of the State of New York."[52] The Court

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of law provision, as the Second Circuit has since expanded on *Mastrobuono* in holding that a New York choice of law provision does not preclude an arbitral award of attorneys' fees.").

[50] *Mastrobuono*, 514 U.S. at 62.

[51] *See, e.g.*, *Von Steen v. Musch*, 776 N.Y.S.2d 170, 175 (N.Y. Sup. Ct. 2004) (holding that petitioner could not rely on *Luckie* to preclude an award for punitive damages, noting that *Bybyk* had suggested that *Luckie* relied on case law reversed in *Mastrobuono*); *Coleman & Co. Sec., Inc. v. The Giaquinto Family Trust*, 2000 WL 1683450, at *3 (S.D.N.Y. Nov. 9, 2000) (citing *Bybyk* and *Mastrobuono* in rejecting the argument that a choice-of-law provision providing that the "agreement and its enforcement shall be governed by the laws of the State of New York" indicated the parties' intent to be bound by New York's substantive rules limiting the authority of arbitrators); *Porush v. Lemire*, 6 F. Supp. 2d 178, 184-86 (E.D.N.Y. 1998) (relying on the *Bybyk* case to find that a choice-of-law clause stating that all "controversies arising under the Agreement 'shall be governed by and construed, and the substantive rights and liabilities of he parties determined, in accordance with the laws of the State of New York'" did not operate to preclude the award of punitive damages or attorneys' fees by the arbitrators); *Kidder, Peabody & Co., Inc. v. William A. Rosenfield Trust*, 961 F. Supp. 50, 54 (S.D.N.Y. 1997) (holding that the decision in *Bybyk* precluded a stay of arbitration of punitive damages and attorneys' fees); *A.S. Goldmen & Co., Inc v. Bochner*, 1996 WL 413676, *1 (S.D.N.Y. July 24, 1996) (rejecting a stay of pending claims for punitive damages in arbitration, recognizing that *Bybyk* rejected petitioner's "precise argument" that *Luckie*, not *Mastrobuono*, was the controlling precedent).

[52] *Roubik*, 692 N.E.2d at 1169.

found that the arbitration panel's decision, which came before *Mastrobuono*, was properly set aside because of the Court's holding in *Mastrobuono*, which it understood to be based on "facts very similar to those presented here."[53] It further noted that "the question of whether the New York choice-of-law clause precludes the arbitrators from awarding punitive damages" was not simply a matter of procedure, but one that "addressed the scope of the arbitrators' authority. . . ."[54]

In sum, the Court concludes that the Panel acted within its authority when it awarded punitive damages to Credit Suisse.[55]

IV. CONCLUSION

For the foregoing reasons, Credit Suisse's motion to confirm the FINRA Award is granted. An implementing order will be entered.

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[53] *Id.* at 1170.

[54] *Id.* at 1175. Investment Hunter suggests that the *Roubik* decision ought to be ignored by the Court because the decision did not attempt to reconcile *Luckie*'s holding that the inclusion of the words "and its enforcement" necessarily changes the scope of the choice-of-law provision. However, the court in *Roubik* repeatedly cited to *Bybyk*, which acknowledged *Luckie* while firmly adhering to the rule in *Mastrobuono*. Thus, it is not surprising that the *Roubik* court would not feel the need to reconcile its decision with *Luckie*.

[55] With this conclusion, the Court need not decide the timeliness and estoppel arguments interposed by the parties.