IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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STATE OF WISCONSIN,

Petitioner,

v.

HO-CHUNK NATION,

Respondent.

OPINION and ORDER

12-cv-505-bbc

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Petitioner State of Wisconsin has brought this petition under 9 U.S.C. § 9 to confirm an arbitration award that enjoins respondent Ho-Chunk Nation from offering "non-banking poker" at DeJope Gaming Facility in Madison, Wisconsin. Respondent seeks to vacate the award under 9 U.S.C. § 10(a)(4) on the ground that it did not agree to arbitrate this dispute and that the arbitrator exceeded his authority. Because I agree with respondent that the arbitrator exceeded his authority, I am vacating the award.

BACKGROUND

In 1992 petitioner State of Wisconsin and Respondent Ho-Hunk Nation entered into a compact regarding certain gaming activities in the state. The compact authorizes respondent to conduct "Class III" gaming in certain counties, but not Dane County. Respondent does not need a compact to offer Class II gaming. (The parties dispute the

meaning of "Class II" and "Class III" gaming.) In 2003 the parties executed the "Second Amendment" to the compact, under which respondent would be permitted to offer "Class III" gaming at its DeJope Gaming Facility in Madison, Wisconsin (a "Class II" facility) if voters approved it in a referendum. Although a referendum was placed on the ballot in 2004, it failed to pass. The compact includes an arbitration clause that applies to a dispute that "arises between the Parties regarding the interpretation or enforcement of the Compact."

In 2009 the National Indian Gaming Commission issued an advisory opinion that non-banking poker games are Class II games "when played according to any Wisconsin state rules on hours of operation and the sizes of wagers and pots." Dkt. #6-2, ¶ 44. In a "non-banking game," the players compete against each other rather than the house.

In November 2010 respondent began offering non-banking poker at the DeJope facility. In December 2010 petitioner initiated an arbitration proceeding against respondent in which it "dispute[d] that [respondent] is permitted to operate poker at DeJope under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, et seq. ('IGRA') and the terms of the Compact because it is a Class III game." Dkt. #1-3. In its brief, petitioner argued that respondent "is violating the Class III gaming compact with the state by conducting poker at the DeJope facility." Dkt. #6-6 at 7. However, petitioner devoted the bulk of its brief to arguing that non-banking poker did not meet the definition for "Class II gaming" under the Indian Gaming Regulatory Act.

On May 1, 2012, the arbitrator issued his decision. He identified the "sole question"

as whether respondent "is permitted to offer non-banking poker" at DeJope. Dkt. #6-17 at 1. Although the arbitrator began his analysis with the compact, he concluded his short discussion by stating that "DeJope . . . is not governed by the Compact. There is no Class III tribal-state compact that covers the facility." Id. at 2.

The remainder of the arbitrator's opinion was devoted to the question "whether the non-banking poker the Nation is offering at DeJope is a Class II game (and is thus permissible) or a Class III game (and is thus not permissible unless the parties enter into a compact that covers that gaming facility)." Id. at 3. In answering that question, the arbitrator did not look to the compact, but only to federal and state law. In particular, the arbitrator looked to 25 U.S.C. § 2703(7)(A)(ii), which defines "class II gaming" to include card games that "are explicitly authorized by the laws of the State" or "are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games." Poker did not meet this definition because the Wisconsin Constitution expressly prohibits it. Id. at 4-9. The arbitrator concluded that respondent "is not permitted to offer this non-banking system at DeJope, unless the parties enter into a tribal-state compact that specifically allows this game at that facility." Id. at 10.

OPINION

"The first question in every case is whether the court has jurisdiction." Avila v.

Pappas, 591 F.3d 552, 553 (7th Cir 2010). In an order dated November 13, 2012, dkt. #9, I questioned whether this court had subject matter jurisdiction to decide the petition. It is well established that the Federal Arbitration Act does not provide a basis for a federal court to exercise jurisdiction; any party bringing a claim under the FAA must point to another statute for that purpose. Vaden v. Discover Bank, 556 U.S. 49, 58-59 (2009). Although petitioner did not identify a basis for jurisdiction in its petition, in a footnote in its opening brief, it cited 25 U.S.C. § 2710(d)(7)(A)(ii), which creates a cause of action "to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact." Petitioner did not explain further, but I presumed its position was that jurisdiction is present because the parties' underlying dispute falls within that provision. Cf. Vaden, 556 U.S. at 62 ("A federal court may 'look through' a . . . petition [to compel arbitration] to determine whether it is predicated on an action that 'arises under' federal law.").

My initial review of the arbitrator's decision raised questions about whether 25 U.S.C. § 2710(d)(7)(A)(ii) applied to this case. In his decision granting petitioner's request for relief, the arbitrator concluded that non-banking poker was a "Class III" game and that "the Nation is not permitted to offer" the game "unless the parties enter into a tribal-state compact that specifically allows that game" at the DeJope facility. Dkt. #1-4 at 10. Although the arbitrator's decision supported the view that the state is seeking "to enjoin a class III gaming activity located on Indian lands," it was not clear from the arbitrator's decision that the game was "conducted in violation of any Tribal-State compact." Rather, the arbitrator's

conclusion was that the parties *did not have* a compact that governed the poker game. Accordingly, I asked the parties to submit supplemental briefs on the jurisdictional question.

As it turns out, this question is related to respondent's petition to vacate the arbitrator's order. Respondent's position is that the parties' arbitration agreement is limited to issues related to interpretation and enforcement of the parties' compact, but the only question the arbitrator resolved was whether non-banking poker is a "Class II" or "Class III" game, which respondent says is determined by the Indian Gaming Regulatory Act and state law, not the compact. Because the arbitrator did not purport to interpret or enforce the compact in his decision, but relied entirely on state and federal law, respondent says that he went beyond what the arbitration agreement permitted him to do.

Although the questions on jurisdiction and the merits are related, I conclude that they require different answers. With respect to jurisdiction, a review of petitioner's arbitration demand and brief shows that at least part of its claim was that respondent was violating the compact by offering a Class III game at DeJope. Dkt. #6-6 at 7, 35. That is sufficient to fall under § 2710(d)(7)(A)(ii). Although respondent says that the arbitrator's decision did not address this issue, the general rule is that jurisdiction is determined by looking at the scope of the claims, not the decision maker's opinion. Vaden, 556 U.S. at 50.

With respect to the question whether the arbitrator exceeded his authority, petitioner acknowledges that the arbitration agreement is limited to "interpretation and enforcement of the Compact," dkt. #6-1, and that the question decided by the arbitrator was whether non-banking poker is a Class II or Class III game. However, petitioner believes that the

arbitrator acted within his authority, for two reasons. First, Section IV of the compact defines poker as a Class III game, so the arbitrator's determination is an interpretation of the compact. Second, even if a game's class is determined by federal and state law rather than the compact, the arbitrator's determination was permissible because it was a necessary first step to enforcing the compact's prohibition on Class III games in Section IV.

The problem with petitioner's arguments is that nothing in the arbitrator's decision suggests that he relied on the compact to support his determination that the non-banking poker is a Class III game or even that he found that respondent violated the compact. The arbitrator concluded that non-banking poker was a Class III game because of his interpretation of 25 U.S.C. § 2703(7)(A)(ii) and the Wisconsin Constitution. The only references to the compact that he made were that the dispute fell outside its scope. E.g., Dkt. #6-17 at ("Dejope, however, is not governed by the Compact."). Petitioner calls this "inartful phrasing" and says that the arbitrator meant to say that "[i]t is . . . a violation of the Compact to conduct the [poker] gaming at DeJope because Class III gaming is not 'permitted' by the Compact." Pet.'s Br., dkt. #10, at 6-7.

Unfortunately, the arbitrator did not explain why he believed Class III gaming was prohibited at DeJope. Although petitioner says that the arbitrator's opinion includes the implicit finding that respondent violated the compact, that is not necessarily the case. It may be that the arbitrator found that respondent violated the Indian Gaming Regulatory Act, which prohibits Class III gaming unless certain conditions are met. 25 U.S.C.A. § 2710(d). Regardless what the arbitrator meant, I cannot read in language that he did not

put in his decision. The bottom line is that the arbitrator explained his award as an interpretation and enforcement of federal and state law, not as an interpretation or enforcement of the compact. Accordingly, I conclude that the arbitrator exceeded his powers. in violation of § 10(a)(4).

Unfortunately, I cannot give the parties guidance on the extent to which the arbitrator could cure the deficiencies in his award by issuing a new award that relies explicitly on the compact. To begin with, any ruling on that issue by this court would be advisory. Further, respondent argues in its reply brief that, even if the parties' dispute falls within Section IV of the compact, as petitioner suggests, the arbitration agreement does not cover such a dispute. Resp.'s Br., dkt. #8, at 6 (citing Section XXIV of the compact) ("Unless the Parties agree otherwise, if a dispute arises regarding compliance with or the proper interpretation of the requirements of the Compact, as amended, under Sections IV (Authorized Class III Gaming), XXIII (Dispute Resolution), XXIV (Sovereign Immunity), XXXIV (Payment to the State), and XXV (Reimbursement of State Costs), the dispute shall be resolved by the United States District Court for the Western District of Wisconsin."). Because that issue has not been fully briefed, it would be premature to decide that issue now.

ORDER

IT IS ORDERED that petitioner State of Wisconsin's petition to confirm the arbitrator's award, dkt. #1, is DENIED, and respondent Ho-Chunk Nation's petition to vacate the award, dkt. #4, is GRANTED. The clerk of court is directed to enter judgment

in favor of respondent and close this case.

Entered this 5th day of December, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge