

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[REDACTED]

Plaintiff,

v.

[REDACTED]

Defendant.

Civil Action No. 17-2557 (RDM)

MEMORANDUM OPINION

Having denied Plaintiff [REDACTED] motion to remand, Dkt. 7, the Court turns to [REDACTED]'s motion to vacate the arbitration award in favor of Defendant [REDACTED], Dkt. 10, and [REDACTED]'s cross-motion to confirm, Dkt. 6. The present dispute presents a narrow issue: Did the arbitrator exceed his authority under the parties' agreement when he vacated the sanctions against [REDACTED]? The Court concludes that he did not, and will, accordingly, deny [REDACTED]'s motion to vacate, Dkt. 10, and grant [REDACTED]'s cross-motion to confirm, Dkt. 6.

I. BACKGROUND

Because the facts of this case are set forth in the Court's prior opinion, *see* [REDACTED], No. 17-cv-2557, slip op. at 1–4 (D.D.C. Sept. 26, 2018) [REDACTED], the Court will only briefly summarize the relevant background before turning to the arbitrator's decision itself.

[REDACTED] is a citizen of [REDACTED], where he earned his medical degree. *Id.* at 1–2. In 2014, he began a post-doctoral research fellowship at [REDACTED].

Id. at 2. [REDACTED] is a non-profit organization that provides a service by which it matches medical school students and graduates with positions in graduate medical residency and fellowship programs. *Id.* at 1. From mid-January to late February of each year, applicants submit their “rank order lists of preferred programs” to [REDACTED], and “program directors rank applicants in order of preference for training.” Dkt. 10-2 at 40 (Arb. Award ¶ 23). [REDACTED] then “uses a computerized mathematical algorithm to match applicants with programs using the preferences expressed on their rank lists.” *Id.* (emphasis omitted).

In September 2015, [REDACTED] registered to participate in the 2016 Main Residency Match. *Id.* at 44 (Arb. Award ¶ 29). “By the February 24, 2016 deadline, [REDACTED] completed and submitted his . . . rank order list,” and, in doing so, he “committed to accept an appointment if a match resulted.” *Id.* at 45 (Arb. Award ¶ 32). On February 22, 2016—before his match date—[REDACTED] was arrested in [REDACTED], although he was not detained or charged at that time. *Id.* (Arb. Award ¶ 33). Less than a month later, on March 18, 2016, he matched to the internal medicine residency program at [REDACTED]. *Id.* (Arb. Award ¶ 34). Before he could matriculate, however, [REDACTED] was criminally charged [REDACTED] on April 1, 2016. *Id.* (Arb. Award ¶ 35). Meanwhile, [REDACTED] had forwarded an email to [REDACTED] indicating that he had not yet completed his application to obtain the required J-1 training visa, and, on May 17, 2016, [REDACTED] sent him a further email. *Id.* at 45–46 (Arb. Award ¶¶ 36, 38). On May 16, 2016, [REDACTED] appeared for his arraignment and, at that time, he learned that his hearing on the criminal charges would not take place until July 5, 2016, after the start of the residency program. *Id.* at 46 (Arb. Award ¶ 37). Presumably left without other options, [REDACTED] disclosed “the pending charges” to [REDACTED] on May 23, 2016. *Id.* at 46 (Arb. Award ¶ 39). In completing “an

██████████ Application Affirmation form” that same day, however, ██████████ responded “no” to the question whether any criminal charges were pending against him. *Id.* (Arb. Award ¶ 40).

After learning of the criminal charge, ██████████ concluded that ██████████ would not be able to obtain a J-1 training visa before his June 2016 start date, and it therefore sought a waiver from ██████████ of its match. *Id.* (Arb. Award ¶ 42). ██████████ granted the waiver and, subsequently, convened a review panel to investigate whether ██████████’s actions violated the agreement he signed with ██████████ (“Match Agreement”). *Id.* at 46–47 (Arb. Award ¶¶ 42, 44–45). The panel issued a report (“Panel Report”) concluding that ██████████’s failure to promptly disclose his arrest and criminal charge had violated the Match Agreement, and, the panel imposed a series of sanctions against him. *Id.* at 47 (Arb. Award ¶¶ 46–47). The sanctions included (1) “notifying ██████████ of [his] violation and asking that it become part of his permanent record;” (2) a one-year bar “from accepting or starting a position in any program sponsored by a Match-participating institution;” (3) a two-year bar “from participating in future ██████████ matches;” and (4) a two-year flag “as a Match violator in the ██████████’s Registration, Ranking, and Results . . . system.” *Id.* (Arb. Award ¶ 47).

In September 2016, ██████████ initiated arbitration proceedings to vacate the panel’s findings of a violation and imposition of sanctions. *Id.* at 37 (Arb. Award ¶ 7). The sole arbitrator, Elliot E. Polebaum, found in ██████████’s favor in most, although not all, respects. *See id.* at 59 (Arb. Award ¶¶ 89–94). After considering the parties’ evidence, witness testimony, and post-trial briefing, the arbitrator issued a twenty-six-page decision finding the sanctions against ██████████ arbitrary and capricious, and, accordingly, vacating them. Dkt. 10-2 at 36–61 (Arb. Award). The present dispute concerns whether, in doing so, the arbitrator exceeded the scope of his authority.

██████ argued in its pre-arbitration hearing brief that ██████ violated section 4.4 of the Match Agreement “in multiple respects.” *Id.* at 49 (Arb. Award ¶ 52). First, “██████ maintain[ed] that ██████ failed to provide complete[,] timely, and accurate information during the match process . . . both after his arrest on February 22, 2016, and again after his receipt of a summons and complaint on April 1, 2016.” *Id.* Second, “██████ . . . contend[ed] that ██████’s submission to ██████ of his Applicant Affirmation form, with a ‘no’ answer to the question whether there were any ‘criminal charges now pending’ against him independently violated [s]ection 4.4.” *Id.* (Arb. Award ¶ 54). Finally, ██████ argued that “██████’s conduct violated [s]ection 1 of the Agreement which requires all participants in the Main Residency Match [to] conduct their affairs in an ethical manner.” *Id.* (Arb. Award ¶ 55) (internal quotation marks omitted).

With respect to the question of violation, the arbitrator concluded that ██████ did violate section 4.4 of the Match Agreement, but only to the extent that he “delay[ed] until May 23 in disclosing the criminal charge[,]” even though he had received the summons and complaint on April 1. *Id.* at 55 (Arb. Award ¶ 77). The arbitrator disagreed with ██████ that ██████ had a duty to disclose his arrest before he was charged, however, because he found that “there was no guidance in the ██████ application directing an applicant to disclose any police detention that had not yet resulted in criminal charges.” *Id.* at 52 (Arb. Award ¶ 66). The arbitrator also concluded that ██████ did not violate section 4.4 when he erroneously indicated there were “no” pending criminal charges against him on the Applicant Affirmation Form because “there is no doubt that ██████’s May 23, 2016, email and his subsequent phone call with . . . the ██████ Program Director, made clear that there were.” *Id.* at 56 (Arb. Award ¶ 79). Finally, the arbitrator noted that ██████’s alleged violation of section 1 was not subject to his review

because it was not included in the Panel Report. *Id.* at 59 (Arb. Award ¶ 87). In conclusion, the arbitrator concluded that, “[i]nsofar as [REDACTED]’s findings of violations rested on the circumstances set forth . . . above, they are in violation of the [Match] Agreement, and are vacated.” *Id.* at 59 (Arb. Award ¶ 87).

With respect to the sanctions, the arbitrator found that all four measures were “arbitrary and capricious”:

The sanctions [REDACTED] imposed were for [REDACTED] [failure to notify [REDACTED] about his] “legal issues.” There is no explication in the Review Panel Report whether each claimed violation of Section 4.4 comprising the “legal issues” was necessary to the overall level of sanctions imposed or whether the fact of delay in disclosure after April 1 only, would have supported the same or any sanctions. Given the lack of clarity in the Review Panel Report, the testimony of [REDACTED] witnesses in conflict with the report, [REDACTED]’s failure to consider [REDACTED]’s email and oral reports to [REDACTED] disclosing his pending criminal charges, and my determination that the violations found by [REDACTED] are in important respects not sustainable, the sanctions imposed are arbitrary and capricious

Id. (Arb. Award ¶ 88). Accordingly, the Final Award held that “[t]he sanctions determined in the Review Panel Report for violations of [s]ection 4.4 of the Agreement . . . are therefore vacated.”

Id. (Arb. Award ¶ 91).

Dissatisfied with the result, [REDACTED] filed a motion to vacate in the D.C. Superior Court, alleging that the Match Agreement did not permit an arbitrator to vacate its sanctions, Dkt. 10-1; Dkt. 10-2, and [REDACTED] removed the case to this Court, Dkt. 1 at 4–7. The parties now cross-move to confirm and to vacate the arbitration award. Dkt. 6; Dkt. 10.

II. LEGAL STANDARD

For purposes of determining whether the arbitrator acted within the scope of his authority, it is immaterial whether the Federal Arbitration Act (“FAA”), Pub. L. 68-401, 43 Stat. 883 (1925) (codified at 9 U.S.C. § 1 *et seq.*), or the D.C. Revised Uniform Arbitration Act

(“DCRAA”), D.C. Code 16-4401 *et seq.*, controls because, under both statutes, “judicial review of arbitration awards is extremely limited.” *Foulger–Pratt Residential Contracting, LLC v. Madrigal Condominiums, LLC*, 779 F. Supp. 2d 100, 113 (D.D.C. 2011); *see also Bolton v. Bernabei & Katz, PLLC*, 954 A.2d 953, 959 (D.C. 2008 (same)). “A court is . . . not ‘authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract.’” *Local 689 v. Wash. Metro. Area Transit Auth.*, 249 F. Supp. 3d 427, 431 (D.D.C. 2017) (quoting *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)); *see also Lazlo N. Tauber M.D. & Assocs. v. Trammell Crow Real Estate Servs., Inc.*, 738 A.2d 1214, 1217 (D.C. 1999) (“In reviewing whether an arbitrator has exceeded his powers pursuant to § 16-4311(a)(3), we do not review [the] arbitration award on the merits.” (citation and internal quotation marks omitted)). The Court must, instead, confirm the award as long as the “arbitrator is even arguably construing or applying the contract and acting within the scope of his authority.” *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 509 (2001); *see also Fairman v. District of Columbia*, 934 A.2d 438, 442 (D.C. 2007) (“If an arbitrator ‘rules only on matters within the scope of the governing arbitration clauses, he [will] not exceed his authority’” (alterations in original) (quoting *Tauber*, 738 A.2d at 1217)).

III. ANALYSIS

For the reasons set forth below, the Court concludes that the arbitrator did not exceed his authority under the Match Agreement.

A. Timeliness of [REDACTED]’s Motion to Vacate

As a threshold matter, [REDACTED] argues that the Court should dismiss [REDACTED]’s motion to vacate as untimely under the FAA, which requires that “notice of a motion to vacate . . . must

be served . . . within three months after the award is filed or delivered.” See Dkt. 5 at 16 (quoting 9 U.S.C. § 12) (emphasis added); see also *Sharp Corp. v. Hisense USA Corp.*, 292 F. Supp. 3d 157, 167 (D.D.C. 2017) (“Although the New York Convention does not contain a statute of limitations . . . the FAA, which supplements the Convention, requires that such actions be filed within three months after the award is filed or delivered.”). ██████ asserts that, although ██████ acknowledged receipt of the award on July 17, 2017, Dkt. 10-2 at 24, it did not serve its motion to vacate until October 31, 2017—more than two weeks after the 90-day statute of limitations had run, Dkt. 5-4 (Forbes Aff.). ██████, for its part, does not dispute that its motion is time-barred under the FAA; instead, it contends that the DCRAA governs this action. Dkt. 9 at 10–13. Under the DCRAA, a motion to vacate need only “be filed”—not served—“within 90 days after the movant receives notice of the award.” D.C. Code § 16-4423(c). ██████ thus argues that the motion is timely because it was filed with the D.C. Superior Court on October 13, 2017. Dkt. 9 at 11 (citing Dkt. 9-2). The Court need not resolve this dispute, however, because the timely filing requirement is not jurisdictional and, as explained below, ██████’s motion to vacate fails on the merits in any event.¹

¹ See *Foster v. Turley*, 808 F.2d 38, 41 (10th Cir. 1986) (“[T]he time limit in section 12” of the FAA is not “jurisdictional in nature;” it is “a statute of limitations, which is subject to waiver.”); see also ██████, slip op. at 8 (“The [DCRAA] cannot ‘strip’ federal courts of subject-matter jurisdiction because[,] to the extent it so impinges, it is preempted . . .”). Although the D.C. Circuit has never addressed whether section 12 of the FAA imposes a jurisdictional bar, the Supreme Court’s decisions in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), and its progeny support the conclusion that it is not. In *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015), for example, the Court noted that “most time bars are nonjurisdictional;” they “cabin a court’s power only if Congress has ‘clearly state[d]’ as much.” *Id.* at 1632 (alteration in original) (quoting *Sebelius v. Auburn Reg’l Med. Ctr.*, 568 U.S. 145, 153 (2013)). Here, there is no indication that Congress intended 9 U.S.C. § 12 to have jurisdictional consequences, and, absent the type of clear statement contemplated by *Arbaugh* and *Kwai Fun Wong*, the Court must conclude that the provision is in the nature of a statute of limitations, not a jurisdictional bar.

B. Merits of Arbitration Award

██████ contends that the arbitration award must be vacated on two grounds: First, it asserts that the arbitrator “exceeded the authority granted to him under the Agreement when he set aside ██████’s . . . sanctions in their entirety.” Dkt. 10-2 at 25. According to ██████, to the extent the arbitrator disagreed with the sanctions, “he was required under the Agreement to modify them in such a way that they were no longer considered by him arbitrary and capricious.” *Id.* at 28. Second, ██████ disagrees with the arbitrator’s reasoning; it contends that “the imposition of sanctions, at least to some degree, was reasonable, rational, justified, and supported by the underlying facts.” Dkt. 10-2 at 26. “Certainly,” ██████ asserts, “at a minimum,” one of the sanctions—“list[ing] ██████ as a violator in ██████’s . . . system”—is “proper because [the arbitrator] confirmed that ██████ had violated the agreement.” *Id.* at 28. The Court is unpersuaded.

██████’s first argument is foreclosed by the plain language of the Match Agreement. Contrary to ██████’s assertion, there is no provision *requiring* the arbitrator to “modify [sanctions] in a way [so] that they [are] no longer . . . arbitrary and capricious.” *Id.* at 28. To the contrary, section 15 states that:

no arbitrator shall have the power to modify any sanctions imposed by ██████ *unless* (1) the arbitrator overturns a finding by the ██████ of a violation of this Agreement or (2) the arbitrator finds that the sanctions imposed by the ██████ are either arbitrary and capricious or were imposed outside of the scope of potential sanctions set forth in this Agreement and the Violations Policy.

Dkt. 5-2 at 35 (emphasis added). Here, the arbitrator expressly found that the sanctions against ██████ were “arbitrary and capricious.” See Dkt. 10-2 at 59 (Arb. Award ¶ 88) (explaining the basis for his finding). Accordingly, the plain language of the provision authorized him to vacate the sanctions.

To the extent that [REDACTED] is arguing that the arbitrator acted outside the scope of his authority because he vacated the sanctions instead of “modify[ing] them,” Dkt. 10-2 at 28, that contention also fails. To be sure, section 15 specifies that the arbitrator “shall have the power to *modify* any sanctions” upon making certain findings. Dkt. 5-2 at 35 (emphasis added). But the plain meaning of “modify”—that is, “to make less extreme” or “to make basic or fundamental changes in,” Merriam Webster’s Collegiate Dictionary 748 (10th ed. 1996)—does not foreclose vacating a sanction in its entirety. Vacatur of an award would, of course, effectuate a “fundamental change[]” in [REDACTED]’s sanctions and would render the punishment “less extreme.” *Id.* Further, when section 15 is read as a whole, it becomes apparent that the arbitrator’s power to modify must include the power to vacate; otherwise, upon “overturn[ing] a finding by . . . [REDACTED] of a violation of [the Match] Agreement,” Dkt. 5-2 at 35, the arbitrator would be powerless to strike the corresponding sanction. This cannot be right. The Match Agreement itself contemplates sanctions for only “confirmed violation[s],” *id.* at 27 (section 8.2); as a result, if the arbitrator concludes that no violation occurred, she must have the power to vacate the corresponding sanctions. Finally, to the extent that there is any ambiguity whether the term “modify” encompasses vacatur, it must be construed in [REDACTED]’s favor. *Capital City Mortg. Corp. v. Habana Vill. Art & Folklore, Inc.*, 747 A.2d 564, 567–68 (D.C. 2000) (“[I]f, after applying the rules of contract interpretation, the terms still are not subject to one definite meaning, . . . the ambiguities [will] be construed strongly against the drafter.” (internal citations and quotation marks omitted)).

To the extent [REDACTED] takes the more modest position that an arbitrator may vacate the imposition of sanctions *as a whole* only if she concludes that the findings of violation are also unsupported *as a whole*, the Court is also unconvinced. Here, the arbitrator wrestled with just

this question, and, indeed, asked the parties to address it in their post-hearing briefs. Dkt. 5-3 at 2. In his decision, the arbitrator then explained that the Panel Report treated ██████'s violation of the Match Agreement as a single, undifferentiated violation and did not address whether the *whole* finding of culpability “was necessary to the overall level of sanctions imposed or whether the fact of delay in disclosure after April 1 only, would have supported the same or any sanctions.” Dkt. 10-2 at 59 (Arb. Award ¶ 88). “Given the lack of clarity in the . . . Report, the testimony of ██████ witnesses in conflict with the report, ██████'s failure to consider ██████'s email and oral reports to ██████ disclosing his pending criminal charges, and [the arbitrator's] determination that the violations found by ██████ are in important respects not sustainable,” the arbitrator concluded that “the sanctions imposed [were] arbitrary and capricious.” *Id.* ██████ may disagree with that conclusion, but the arbitrator acted within his authority when he considered the relevant facts, found that the sanctions, as a whole, were arbitrary and capricious, and set them aside. *See* Dkt. 5-2 at 35 (Section 15).

██████'s second basis for vacating the award is even less persuasive. ██████ seems to suggest, but does not outright argue, that the arbitrator acted improperly because he discounted relevant evidence or failed to grasp that, at a minimum, ██████ should have been “list[ed] as a violator.” *See* Dkt. 10-2 at 21–24. That is, however, not a proper ground for vacatur under either the FAA or the DCRAA. *See* 9 U.S.C. § 10(a) (setting forth the permissible grounds for vacatur); D.C. Code § 16-4423(a)–(b) (same). Neither statute permits ██████ to relitigate the merits of the arbitration before this Court. *See, e.g., United Paperworkers Int'l Union*, 484 U.S. at 36 (“The courts are not authorized to reconsider the merits of an award”); *Lopata v. Coyne*, 735 A.2d 931, 940 (D.C. 1999) (“[T]his court . . . will not review an arbitration award on the merits.”) (alteration in original) (citation omitted). Indeed, ██████ itself concedes that the

only possible ground for vacatur here is that the arbitrator allegedly exceeded the scope of his authority, *see* Dkt. 9 at 13, and, as explained above, he did not.

Given that there is no basis to vacate the arbitration award, the Court will confirm the award in favor of [REDACTED].

CONCLUSION

For the foregoing reasons, Plaintiff's motion to vacate the arbitration award, Dkt. 10, is hereby denied, and Defendant's cross-motion to confirm the award, Dkt. 6, is hereby granted.

A separate order will issue.

/s/ Randolph D. Moss
RANDOLPH D. MOSS
United States District Judge

Date: September 27, 2018