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CIETAC Arbitration Award Enforced in the U.S. Despite Alleged Forgery in the Underlying Agreement

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Allegations of fraud and forgery of a sales agreement are for an arbitral tribunal to decide and a party should not ignore a notice of arbitration. This is according to a federal judge who enforced an award against a party that claimed the agreement was forged and did not participate in the arbitral proceedings. On May 30, 2018, U.S. District Court Judge Joanna Seybert of the Eastern District of New York granted a petition to enforce an arbitral award rendered in Tianjin, China, by the China International Economic and Trade Arbitration Commission ("CIETAC") and denied a motion to dismiss the petition to enforce. The Court found that none of the grounds to deny enforcement of an arbitral award alleged by the Respondent under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "NYC") were satisfied. The case is *Tianjin Port Free Trade Zone Int'l Trade Serv. Co., Ltd. v. Tiancheng Chempharm Inc.USA*, No. 17-CV-4130 (JS)(AYS), 2018 LEXIS 90106 (E.D.N.Y., May 30, 2018).

The dispute arose out of an agreement for the sale and purchase of dietary supplements entered into between Tianjin Port Free Trade Zone International Trade Service Co., Ltd., (the "Seller") and Tiancheng Chempharm, Inc. USA (the "Buyer") (the "Sales Agreement"). According to the Seller, the goods were delivered, but the Buyer failed to pay the agreed purchase price. The arbitrator found in favor of the Seller and ordered the Buyer to pay the purchase price, including interest, and the costs of the arbitration.

The Buyer asserted three grounds to oppose the enforcement of the award, namely, that (i) it did not receive "notice of the arbitration proceedings;" (ii) the Sales Agreement "in question was in fact fabricated, and the Buyer's representative signature was forged;" and (iii) the Seller failed to make "a good faith effort to amicably settle [the] dispute" before starting the arbitration as required by the Sales Agreement. [1)] Judge Seybert rejected all three arguments.

The Notice of Arbitration

Article V(1)(b) of the NYC provides that the party against whom an award is sought to be enforced must have been given "proper notice of the appointment of the arbitrator or of the arbitration proceedings" and must have been "able to present his case." Here, the Buyer claimed it "never received any notice of the arbitration proceeding in China" being "unable to appoint an arbitrator" and "deprived of its right to have the opportunity" to serve a petition to vacate the award. [2)]

In the EDNY, the party opposing enforcement under Article V(1)(b) must show that it was not given " 'notice reasonably calculated' to inform [it] of the proceedings and 'an opportunity to be heard' " *Jiangsu Changlong Chem., Co., Inc. v. Burlington Bio-Medical & Sci. Corp.*, 399 F. Supp. 2d 165, 168 (E.D.N.Y. 2005). Consistent with this standard, the Court in *Tianjin Port Free* found that "CIETAC provided Tiancheng with the opportunity to participate in the arbitration in a meaningful manner." CIETAC verified that the notice of arbitration and the other documents were properly delivered to the Buyer who, according to the Court, "simply chose not to participate in the arbitration proceedings." *Tianjin Port Free*, at 4.

The Alleged Forgery of the Sales Agreement

The second argument alleged by the Buyer was that the Sales Agreement was forged. The Buyer alleged that the Sales Agreement was "fraudulent and void" because the Buyer's representatives never signed the document, never had a direct business relationship with the Seller and never traveled to Tianjin, China, the city where the Sales Agreement was allegedly signed.

The Buyer's attack was to the contract as a whole. Judge Seybert rejected the Buyer's argument because "the issue of whether the underlying contract that is the subject of the arbitrated dispute was forged or fraudulently induced [is] a matter to be determined exclusively by the arbitrators." *Tianjin Port Free*, at 5 (citing the Second Circuit's landmark decision on this issue, *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998)). The decision is consistent with Second Circuit precedent.

In *Europcar*, the party resisting enforcement alleged that enforcement of an award based on a forged contract would be contrary to United States public policy, invoking Article V(2)(b) of the NYC. The Second Circuit found that the enforcement would not violate public policy and distinguished two separate issues, "the issue of a fraudulently obtained arbitration agreement or award, which might violate public policy and therefore preclude enforcement," and "the issue of whether the underlying contract that is the subject of the arbitrated dispute was forged or fraudulently induced—a matter to be determined exclusively by the arbitrators." *Europcar*, at 315. The Second Circuit relied on *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) to frame the discussion within the old distinction between attacks to arbitration agreements in particular—for the court to decide—or attacks to the contract in which they are contained as a whole—for the arbitrators to resolve. But *Prima Paint* dealt with the issue of the *validity* of the entire contract tainted with fraud in its inducement. It did not involve allegations of forgery, which would arguably go to the existence of the contract instead of its validity.

Other U.S. circuits have approached the issue of forged contracts containing arbitration agreements differently. In *China Minmetals Materials Imp. & Exp. Co v Chi Mei Corp.*, 334 F.3d at 290 (3d Cir. 2003), the Third Circuit vacated a district court decision confirming a CIETAC arbitration award holding that under First Options, a party opposing enforcement of a foreign arbitration award under the NYC on the grounds that the contract which contains the arbitration agreement "was void *ab initio* is entitled to present evidence of such invalidity to the district court, which must make an independent determination of the agreement's validity…" *China Minmetals*, at 289. The *China Minmetals* court distinguished the case from *Europcar* reasoning that in *Europcar* "the party resisting enforcement did not argue that the agreement containing the arbitration clause (…) was forged or fraudulent; rather, it argued that one of the agreements on which the arbitrators based their substantive decision (…) [which did not include the arbitration clause] was forged." *China Minmetals*, n. 12.

In *Will-Drill Resources, Inc. v. Samson Resources Co.*, 352 F.3d 211 (5th Cir. 2003), another case dealing with allegedly forged contracts, the Fifth Circuit concluded that "where a party attacks the very existence of an agreement, as opposed to its continued validity or enforcement, the courts must first resolve that dispute." *Will-Drill Resources*, at 219.

Accordingly, for the Third and Fifth Circuits, attacks to the validity of the contract as a whole are distinct from attacks to its existence. The U.S. Supreme Court has not yet decided the question of whether challenges to the existence of an agreement to arbitrate are for the court or for the arbitrator to decide. In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), the Supreme Court held that a challenge to the validity of a contract as a whole must go to the arbitrator. *Buckeye*, at 1210. However, in a frequently cited footnote, the Supreme Court clarified that, "[t]he issue of the contract's validity is different from the issue [of] whether any agreement between the alleged obligor and obligee was ever concluded," and that the Court was only deciding the former. *Buckeye*, at 441 n.1.

The Pre-Arbitration Negotiations

The third argument raised by the Buyer was also dismissed because the Court found that the Seller did attempt to amicably settle the dispute before commencing the arbitration. The Buyer claimed the arbitration clause provided that "entering into 'friendly negotiations' for the settlement of a dispute is a condition precedent to instituting arbitration" but the Seller failed to do so. [3)] The Court determined that the Seller tried to resolve the dispute with the Buyer before starting the arbitration but that, "as the arbitration panel found," the Seller did not cooperate (*Tianjin Port Free*, at 5). In other words, the Court did not decide the issue de novo but gave deference to the arbitrator's finding that the condition precedent to the obligation to arbitrate had been satisfied.

The Court's conclusion is consistent with *BG Group Plc. v. The Republic of Argentina*, 134 U.S. 1198 (2014), where the U.S. Supreme Court held that the issue of whether the parties complied with a prerequisite to an obligation to arbitrate set forth in an arbitration agreement is a procedural arbitrability issue that is for the arbitrator to decide.

New York is an international transactions hub and, accordingly, a leading jurisdiction for recognition and enforcement proceedings of foreign arbitral awards. The E.D.N.Y. decision is consistent with the liberal federal policy in the U.S. favoring arbitration of commercial disputes.

References

?1 Resp't Mem. Of P. & A. In Supp. Of Its Mot. To Dismiss Pet. To Confirm Arbitration Award, ECF No. 23, Jan. 4, 2018.

?2 Resp't Mot., p. 7.

?3 Resp't Mot., p. 9.

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