E-filed 4/26/2017

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

XIANGKAI XU,

Plaintiff,

v.

CHINA SUNERGY (US) CLEAN TECH INC., et al.,

Defendants.

Case No.15-cv-04823-HRL

ORDER GRANTING MOTION TO CONFIRM ARBITRATION AWARD

Re: Dkt. No. 35

Petitioner Xangkai Xu ("Xu") moves to confirm the final award entered by the International Center for Dispute Resolution ("ICDR") of the American Arbitration Association ("AAA") and for entry of judgment against Respondents China Sunergy (US) Clean Tech, Inc. ("CSCT"), China Sunergy Co., Ltd. ("CSUN Nanjing"), and China Sunergy (Hong Kong) Co., Ltd. ("CSUN Hong Kong"). For the reasons described below, the court grants Xu's motion to confirm the arbitration award.

BACKGROUND

In 2001, Xu and CSUN Nanjing entered into an Offshore Employment Agreement ("OEA") in which CSUN Nanjing hired Xu to serve as a Vice President. Dkt. No. 35, Ex. A. The OEA includes two provisions related to dispute resolution. Section 14(b) selects the laws of the State of New York and reads: "[a]ny action to enforce this agreement . . . (other than an action which must be brought by arbitration pursuant to section 14(d)) must be brought in . . . a court situated in New York County, New York." Dkt. No. 35, Ex. A, § 14(d). Section 14(d) contains an arbitration provision. It reads:

> Except to the extent contemplated by Section 13 [which the parties do not suggest is relevant here], any dispute, controversy or other

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> claim arising out of or relating to (i) this Agreement, or (ii) [Xu]'s employment with the Company shall be resolved by binding confidential arbitration before a single arbitrator, to be held in New York, New York in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Each party shall be responsible for its own expenses relating to the conduct of the arbitration or litigation (including reasonable attorneys' fees and expenses) and the loser party shall bear the fees of the American Arbitration Association and the arbitrator.

Dkt. No. 35, Ex. A, § 14(d). The agreement was executed by Xu and the CEO of CSUN Nanjing. Dkt. No. 35, Ex. A.

The relationship between the parties soured, and Xu submitted a demand for arbitration to the AAA. Dkt. No. 36, Ex. 1. The arbitration demand names all three respondents in this action (and one entity not involved here, China Sunergy Co., Ltd. (Cayman Islands)) as respondents in the arbitration proceeding and identifies CSUN Nanjing as the parent company of the other entities. *Id.* Xu's demand further asserts that the respondents failed to pay him the compensation owed under the OEA and requests damages, interest, fees paid to the AAA and the arbitrator, and "any other relief that may be just and proper." *Id.*

An answer was submitted in response to Xu's arbitration demand. Dkt. No. 36, Ex. 2. The court uses passive voice because the identity of the answering respondent in the arbitration proceeding is in dispute. The answer is titled "Respondent's Answer"—not, as respondents point out, "Respondents' Answer"—suggesting a single respondent (i.e., CSUN Nanjing only). *Id.* But section three of the answer, which further identifies the respondent, confuses the issue (as explained further in the next paragraph). Section three states, in somewhat broken language, that: "The Respondent of this arbitration case shall be China Sunergy (Nanjing) Co., Ltd., the employer of CLAIMANT, the other three legal entities listed in CLAIMANT'S STATEMENT OF FACT as respondents other than China Sunergy (US) Clean [*sic*] Tech Inc. are not in any way involved in the execution and performance of the Agreement and shall not be included as the Respondents of this arbitration case." *Id.*

The AAA transferred the dispute to the ICDR, as it involved international parties. Dkt.

No. 35, Ex. B. The parties arbitrated via videoconference with an arbitrator located in California. *Id.* In his final award, the arbitrator noted that only CSUN Nanjing was a party to the OEA, but nevertheless found that the other respondents (except for the Cayman Islands affiliate) were bound by the arbitration provision. The arbitrator justified this finding on the basis that CSCT waived its objection to his jurisdiction in two ways: (1) through section three of the Respondent's Answer, which he read to admit that CSCT was a respondent to the arbitration, and (2) through respondent's counsel's submission of CSCT's financial reports as an exhibit without making it clear that that submission did not constitute CSCT's participation in the arbitration. *Id.* The arbitrator also determined that CSCT and CSUN Hong Kong were alter egos of CSUN Nanjing, citing the facts that they share a Chairman of the Board and CEOs and that certain decisions are made with respect to the companies without differentiating between them. *Id.* The final award grants Xu 1,650,000 RMB in damages, $5,261.70 in costs incurred by Xu related to the arbitration, 282,402.00 RMB in pre-judgment interest, and $10,130.50 in ICDR fees (which, using the exchange rate on the date of the award, converts to a total of $317,701.99). *Id.* The award states that respondents are jointly and severally liable and requires payment within 30 days. *Id.* Finally, the arbitrator notes that the parties, "especially Respondents," asked for videoconferencing to avoid additional expense. *Id.*

Xu brought this action after respondents allegedly failed to pay the arbitration award. Dkt. No. 1. All parties consented to magistrate judge jurisdiction. Dkt. Nos. 15, 18. Xu now moves the court to confirm the arbitration award and enter judgment against Respondents. Dkt. No. 35. Xu asserts that the New York Convention governs confirmation of this arbitration award, and that none of the Convention's seven grounds for refusing or deferring recognition or enforcement of an arbitration award apply. *Id.*

Respondents oppose Xu's motion. Dkt. No. 36. The opposition concerns only CSCT's objections, stating: "[a]s the only domestic entity, CSCT is the only entity that would be meaningfully affected if this Court were to confirm the arbitration award." Dkt. No. 36. CSCT, after agreeing that the New York Convention applies, raises three principal objections. First, CSCT contends that the arbitration and award improperly included it because it neither signed an

arbitration agreement nor consented to inclusion in the arbitration. CSCT argues that the proper reading of section three of the respondent's answer is that CSUN Nanjing is the only respondent in the arbitration proceeding and that CSCT is the only other entity that was involved in Xu's employment (but that it is nevertheless not a respondent). CSCT also argues that submission of its financials by CSUN Nanjing was not evidence of CSCT's participation in the arbitration. Second, CSCT objects that the arbitration improperly adjudicated alter ego issues that were beyond the scope of the arbitration demand. Third, CSCT argues that the arbitration was conducted contrary to the agreement of the parties because it was not conducted in the location required by the arbitration provision. *Id.*

Xu replies that the court should grant his motion as to CSUN Hong Kong and CSUN Nanjing, since (he argues) they effectively waived their opposition by focusing solely on CSCT's objections. Dkt. No. 37. Xu also argues that the arbitration award can only be rejected if the arbitrator showed manifest disregard for the law in his decisions, which, Xu asserts, he did not do. *Id.*

DISCUSSION

The parties agree that the New York Convention governs whether the court confirms or rejects the arbitration award. *See* 9 U.S.C. § 207. Article V of the New York Convention presents seven grounds for rejecting an arbitration award, which are, roughly: (1) the party resisting enforcement was "under some incapacity, or the [arbitration] agreement is not valid under the law to which the parties have subjected it," (2) the party resisting enforcement was not given proper notice, (3) the award "contains decisions on matters beyond the scope of the submission to arbitration," (4) "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties," (5) the award "has not yet become binding on the parties," (6) the subject matter of the arbitration is not capable of settlement by arbitration, or (7) enforcement would be contrary to public policy. "These defenses are construed narrowly, and the party opposing recognition or enforcement bears the burden of establishing that a defense applies." *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1096 (9th Cir. 2011).

Courts interpreting defenses to confirmation of an arbitration award under the New York Convention may also look to authority regarding the similar defenses under the Federal Arbitration Act ("FAA"). *Polimaster Ltd. v. RAE Sys., Inc.*, 623 F.3d 832, 836 (9th Cir. 2010). Under 9 U.S.C. Section 10, a district court may vacate an arbitration award, *inter alia*, "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). Additionally, a court may vacate an arbitrator's award if it was made with "manifest disregard for the law." *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009); *see also Schwartz v. Merrill Lynch & Co., Inc.*, 665 F.3d 444, 451-52 (2d Cir. 2011). "For an arbitrator's award to be in manifest disregard of the law, 'it must be clear from the record that the arbitrator recognized the applicable law and then ignored it.'" *Comedy Club, Inc.*, 553 F.3d at 1290 (quoting *Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir. 1995).

CSCT's first two arguments— (1) that it should not be subject to the arbitration award because it neither signed an arbitration agreement nor consented to arbitration and (2) that the alter ego decision exceeded the scope of the arbitrator's authority—both concern "questions of arbitrability." The court is not persuaded that CSCT proves a valid defense under either objection.

Under the FAA, there must be a written agreement to arbitrate a dispute. *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1427, 1440 (9th Cir. 1994); *Fisser v. Int'l Bank*, 282 F.2d 231, 233 (2d Cir. 1960). "It does not follow, however, that under the Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision." *Fisser*, 282 F.2d at 233. Courts use ordinary principles of state contract law to determine which parties, including non-signatories, are bound by a written arbitration provision. *Id.*

Questions of whether the parties are bound by a given arbitration clause and questions of whether the arbitration clause covers the dispute at issue are threshold questions known as "questions of arbitrability." *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 71 (2d Cir. 2012). But before a court may answer these threshold questions, there is a logically prior inquiry—"[t]he question of *who* is to decide whether a dispute is arbitrable[.]" *VRG Linhas Aereas S.A. v. MatlinPaterson Glob. Opportunities Partners, L.P.*, 717 F.3d 322, 325 (2d Cir. 2012). Courts are

presumed to have the power to determine questions of arbitrability unless there is "clear and unmistakable evidence that the parties intended to delegate such questions to the arbitrator. *Schneider*, 688 F.3d at 71; *see also Eckert/Wordell Architects, Inc. v. FJM Props. of Willmar, LLC*, 756 F.3d 1098, 1099 (8th Cir. 2014). "Where parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." *Schneider*, 688 F.3d at 72 (quoting *Contec Corp. v. Remote Solution Co., Ltd.*, 398 F.3d 205, 208 (2d Cir. 2005)).

In the present case, the parties do not dispute that a written agreement to arbitrate existed between Xu and CSUN Nanjing. The only question is whether the agreement bound non-signatories CSCT and CSUN Hong Kong. The arbitration provision in the OEA contains clear and unmistakable evidence that the parties intended to delegate this and other questions of arbitrability to the arbitrator, in that the provision explicitly incorporates the AAA Rules. *See* Dkt. No. 35, Ex. A, § 14(d) (disputes "shall be resolved by binding confidential arbitration before a single arbitrator, to be held in New York, New York in accordance with the Commercial Arbitration Rules of the American Arbitration Association."); *see also Eckert/Wordell*, 756 F.3d at 1099 ("We have previously held the incorporation of the AAA Rules into a contract requiring arbitration to be a clear and unmistakable indication the parties intended for the arbitrator to decide threshold questions of arbitrability"). AAA Rule 7 gives the arbitrator power to rule on his or her own jurisdiction, including objections. Dkt. No. 37, Ex. C. Thus, the arbitrator properly considered the question of whether CSCT was before him.

The question of whether CSCT and CSUN Hong Kong were alter egos of CSUN Nanjing was also properly considered by the arbitrator as part of a "question of arbitrability." One of the contract law principles under which a non-signatory may be bound by a written provision to arbitrate is "veil piercing/alter ego." *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 777-78 (2d Cir. 1995). Questions of alter ego were therefore designated to the arbitrator as part of his determination of his own jurisdiction and were not, as CSCT argues, beyond the scope of the

proceeding.[1]

Having determined that these questions of arbitrability were properly before the arbitrator, the question facing this court then becomes whether the arbitrator's decisions on these issues were made in "manifest disregard" of the parties' agreement and the relevant law.[2] The arbitrator ruled that CSCT was subject to his jurisdiction because it had waived its objections and because it was the alter ego of CSUN Nanjing. A party may waive objections to arbitration by voluntarily participating in the proceedings. *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1440 (9th Cir. 1994). Additionally, parties who wish to object to arbitration must do so before the arbitrator (or before a court prior to the arbitration proceeding). *See Envtl. Barrier Co. v. Slurry Sys., Inc.*, 540 F.3d 598, 606 (7th Cir. 2008). Here, the arbitrator determined that CSUN and CSCT had waived CSCT's objections to participating through section three of the Respondent's Answer and through the submission of CSCT's financials as an exhibit. Considering the ambiguities present in section three, which can reasonably bear the interpretation given it by the arbitrator, the court cannot say that these decisions were in manifest disregard of the law.

With respect to the alter ego determination, whether an affiliate is an alter ego of its parent entity is a fact-dependent inquiry. *Thomson-CSF, S.A.*, 64 F.3d at 777-78. Factors relevant to the determination include whether the parent and the subsidiary share staff, whether they are run by common officers, whether they intermingle funds, and whether they deal at arm's length with each other. *Id.* The arbitrator here made his alter ego decision after considering Respondents' shared

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[1] The court notes that, while much of the arbitrator's alter ego determination is framed as an analysis of CSCT's liability rather than an examination of his own jurisdiction, the arbitrator twice acknowledges that his alter ego decision is jurisdictional. Dkt. No. 35, Ex. B, at 6, 9 ("the only way that [CSCT and CSUN Hong Kong] can be subject to the jurisdiction of these Arbitration proceedings is if they either waived their objections to jurisdiction, or they are alter egos of CSUN Nanjing[;]" "the Arbitrator . . . finds that [CSUN Nanjing and CSCT] are alter egos of each other. Accordingly, [CSCT] is treated the same as CSUN Nanjing and as such is not only subject to the jurisdiction of this Arbitration, but is considered a party to the OEA.").

[2] CSCT argues that the court should review the question of whether CSCT waived its objection to arbitration *de novo*, citing *VRG Linhas Aereas S.A. v. MatlinPatterson Global Opportunities Partners II L.P.*, 717 F.3d 322, 325 (2d Cir. 2013). But the court in that case stated that courts must decide "whether a court or an arbitrator is to decide the questions of arbitrability" *before* they decide whether a dispute is arbitrable. *Id.*, at 326. Since there is clear and unmistakable evidence in this case that the parties agreed to have the arbitrator decide questions of arbitrability, the court does not review the arbitrator's decision on these questions *de novo*.

directors and officers and their shared decision-making structures. Dkt. No. 35, Ex. B. Given that the arbitrator applied the law governing this issue, the court cannot vacate the decision for "manifest disregard" reasons.

The arbitrator had authority to determine whether CSCT was subject to his jurisdiction (a question which included an analysis of whether CSCT was an alter ego of CSUN Nanjing) and he did not make these decisions in manifest disregard of the law. CSCT's first two objections therefore do not provide the court with a basis for rejecting or deferring enforcement of the arbitration award.

CSCT's final objection asserts that the court should reject the arbitration award because the arbitration was conducted contrary to the agreement of the parties, in that it was in a different location from that required by the arbitration provision. The arbitration provision states that the parties shall arbitrate in New York, New York. But the arbitrator here was in San Francisco, and the proceedings were conducted over videoconference. The arbitration agreement also, however, incorporates the AAA Rules. And AAA Rule 11 permits the parties to agree to change the location of the arbitration. This is, it seems, what happened here. The arbitration award states that the parties, "especially Respondents," asked to arbitrate via videoconferencing to avoid the expense of travel. Dkt. No. 35, Ex. B. Given these circumstances, CSCT's final objection is not a valid defense to confirmation of the arbitration award.

CONCLUSION

Respondents have failed to state a valid defense to confirmation of the arbitration award under the New York Convention or the FAA. The court therefore confirms the arbitration award as against all three respondents and enters judgment against all three respondents, jointly and severally, in the amount of $317,701.99.

IT IS SO ORDERED.

Dated: 4/26/2017

HOWARD R. LLOYD
United States Magistrate Judge