UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 18-2174-JFW(GJSx)** Date: June 18, 2018

Title: Liu Luwei, et al. *-v-* Phyto Tech Corp.

PRESENT:
HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	None

PROCEEDINGS (IN CHAMBERS): **ORDER GRANTING PETITIONERS' PETITION TO RECOGNIZE, CONFIRM, AND ENFORCE ARBITRATION AWARD [filed 3/15/18; Docket No. 1]**

On March 15, 2018, Petitioners Liu Luwei and Lv Dezheng (collectively, "Petitioners") filed a Petition to Recognize, Confirm, and Enforce Foreign Arbitration Award. On April 26, 2018, Respondent Phyto Tech Corporation ("Phyto Tech") filed its Opposition. Petitioners filed their Reply on May 29, 2018. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found that this matter was appropriate for decision without oral argument. The matter was, therefore, removed from the Court's June 18, 2018 hearing calendar, and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. INTRODUCTION AND BACKGROUND

On February 5, 2015, Petitioner Dezheng, acting on behalf of Petitioner Luwei, entered into a Shareholding Assignment Agreement (the "February 5, 2015 Agreement") with Phyto Tech. Pursuant to the terms of the February 5, 2015 Agreement, Luwei agreed to assign one hundred percent of the shares in Teejoy (Shanghai) Biotechnology Company, Ltd. ("Teejoy"), a limited liability company incorporated under the laws of the People's Republic of China, to a "domestic or foreign-funded enterprise controlled actually by Steven Chen" for RMB 46,000,000 Yuan.[1] At the time, Phyto Tech was controlled by Steven Chen.

[1] RMB is the International Organization for Standardization code for the Chinese renminbi, which is the official currency of the People's Republic of China.

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The February 5, 2015 Agreement was revised and re-executed on February 6, 2015 (the "February 6, 2015 Agreement") and March 5, 2015 (the "March 5, 2015 Agreement") to comply with the People's Republic of China's regulatory requirements. Although the February 6, 2015 Agreement and the March 5, 2015 Agreement were substantially similar to the February 5, 2015 Agreement, they contained two key differences. First, Phyto Tech was specifically named as the assignee and was a signatory to the February 6, 2015 Agreement and the March 5, 2015 Agreement. Second, the purchase price of the Teejoy shares in the February 6, 2015 Agreement and March 5, 2015 Agreement was RMB 34,000,000 Yuan, whereas in the February 5, 2015 Agreement, the price was RMB 46,000,000 Yuan.

Each of the agreements contained a provision that provides that "where any dispute in connection to or arising from this Agreement cannot be settled by amicable negotiation . . . any party can submit the dispute to [the] Shanghai International Economic and Trade Arbitration Commission . . . " (the "Arbitration Clause"). According to the Arbitration Clause, the parties agreed that the arbitration tribunal should be comprised of three arbitrators and that the tribunal's award "shall be final and binding legally on the parties." The Arbitration Clause also provides that the losing party shall bear the expenses associated with arbitration unless otherwise provided in the arbitration award.

After Petitioners transferred their shares in Teejoy to Phyto Tech, a dispute arose regarding the price Phyto Tech was required to pay for the shares. Accordingly, on February 22, 2016, Petitioners filed an Application for Arbitration with the Shanghai International Economic and Trade Arbitration Commission. On June 2, 2016, a three person Arbitration Tribunal ("Tribunal") was formed and the parties subsequently participated in an arbitration proceeding. The Tribunal held an initial hearing on July 22, 2016 and a second hearing on October 26, 2016. Phyto Tech was represented by Grandall (Shanghai) Law Office in both proceedings.

On May 2, 2017, after a full contested arbitration on the merits, the Tribunal issued an Arbitral Award (the "Award") in favor of Petitioners and ordered Phyto Tech to: (1) pay RMB 34,000,000 Yuan to Petitioners for the Teejoy shares; (2) pay RMB 676,000 Yuan to Petitioners in liquidated damages; (3) pay RMB 490,260 Yuan for a portion of Petitioners' arbitration fees; and (4) pay its own arbitration fees of RMB 248,750 Yuan.

On July 14, 2017, Phyto Tech appealed the Tribunal's Award to the Shanghai No. 2 Intermediate People's Court of the Republic of China ("Intermediate Court"). In its appeal, Phyto Tech also objected to the authenticity of evidence that the Tribunal relied on in its Award. On August 2, 2017, the Intermediate Court denied Phyto Tech's appeal and confirmed the Award.

On March 15, 2018, Petitioners initiated this action by filing a petition to enforce the Tribunal's Award.

II. LEGAL STANDARD

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly referred to as "the Convention" or "the New York Convention", governs the "recognition of arbitral awards made in the territory of a State other than the State where the

recognition and enforcement of such awards are sought." *Ministry of Def. & Support of the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1096 (9th Cir. 2011). Both the United States and the People's Republic of China have ratified the New York Convention. *Changzhou AMEC E. Tools & Equip. Co., Ltd. v. E. Tools & Equip., Inc.*, 2012 WL 3106620, at *8 (C.D. Cal. July 30, 2012).

A "party who was victorious in a recognized foreign arbitration proceeding" may "seek confirmation of the award in the United States under the New York Convention." *See Wong Lee v. Imaging3,Inc.*, 283 Fed. App'x 490, 492 (9th Cir. 2008). When considering petitions to recognize a foreign arbitration award, courts have "little discretion." *Id.* Indeed, the Ninth Circuit has specifically held that a reviewing court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the New York Convention" is present. *Id.*; *see also* 29 U.S.C. § 207. "The grounds for [a] court's refusal or deferral of recognition of enforcement of an arbitration award are limited to the seven grounds listed in Article V of the New York [C]onvention." *Wong Lee*, 283 Fed. App'x at 492; *see also China Nat'l Metal Prods. Import/Export Co. v. Apex Digital, Inc.*, 379 F. 3d 796, 799–800 (9th Cir. 2004) ("Our review of a foreign arbitration award is quite circumscribed. Rather than review the merits of the underlying arbitration, we review de novo only whether the party established a defense under the Convention.") (citations and internal quotation marks omitted).

A party opposing "enforcement of an arbitral award" bears the burden of proving that one of the defenses set forth in Article V applies. *Zeiler v. Deitsch*, 500 F.3d 157, 164 (2d Cir. 2007) (citation omitted). This "burden is substantial because the public policy in favor of international arbitration is strong . . . and the New York Convention defenses are interpreted narrowly." *Polimaster, Ltd. v. RAE*, 623 F.3d 832, 836 (9th Cir. 2010). Accordingly, Phyto Tech has the heavy burden of establishing that one of the defenses set forth in Article V applies.

III. DISCUSSION

Phyto Tech argues that the Award should not be enforced for four reasons: (1) Phyto Tech was not a party or signatory to the February 5, 2015 Agreement and, therefore, the New York Convention does not apply; (2) Under Article V(2)(b) of the New York Convention, enforcement of the Award would be improper because it would conflict with Chinese law; (3) Under Article V(1)(b), enforcement of the Award would be improper because the Chinese proceedings violated Phyto Tech's due process rights; and (4) Under Article V(1)(c) and V(2)(b), enforcement would be improper because the Tribunal exceeded the scope of issues submitted for arbitration, and the Tribunal's creation of a new agreement violates the most basic notions of morality and justice.

A. Whether the New York Convention Applies to this Action

Phyto Tech argues that the Court does not have subject matter jurisdiction over this action because Petitioners have not established that the New York Convention applies to this dispute. Specifically, Phyto Tech argues that the Arbitration Clause in the February 5, 2015 Agreement does not qualify as an "agreement in writing" under Article II of the New York Convention because Phyto Tech did not sign the February 5, 2015 Agreement, and there is no evidence that the Arbitration Clause was agreed to separately in an exchange of letters or telegrams. Opp'n 2. According to Phyto Tech, because the New York Convention only applies to—and, therefore,

subject matter jurisdiction only exists over—awards derived from a written arbitration agreement agreed to by both parties, the Court lacks subject matter jurisdiction over this matter. The Court disagrees.

Article II(1) of the New York Convention provides that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." In addition, Article II(2) of the New York Convention provides that the "term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

As an initial matter, the Tribunal concluded that Steven Chen, who signed the February 5, 2015 Agreement, was Phyto Tech's authorized representative, and Phyto Tech has not presented any argument or evidence to the contrary. Indeed, it is clear from the Award that the Tribunal found that Phyto Tech was a party to the February 5, 2015 Agreement. Therefore, the Court does not find Phyto Tech's argument that it was not a party to the February 5, 2015 Agreement persuasive.

In addition, even if the February 5, 2015 Agreement does not constitute the required written agreement under Article II, it is undisputed that Phyto Tech signed the February 6, 2015 Agreement and the March 5, 2015 Agreement and that these revised agreements include arbitration clauses which require the parties to submit any disputes "in connection to or arising from" the agreements to arbitration. The parties also do not seriously dispute that the February 5, 2015 Agreement, the February 6, 2015 Agreement, and the March 6, 2015 Agreement all describe their rights and obligations as assignors and assignee of the Teejoy shares. Accordingly, the Court concludes that the arbitration clauses in the February 6, 2015 Agreement and the March 6, 2015 Agreement constitute an enforceable agreement in writing between the parties to submit to arbitration any differences that have arisen between them in connection with their legal relationship as assignee/assignor. *See Chloe Z Fishing, Inc. v. Odyssey Re (London) Ltd.*, 109 F. Supp. 2d 1236, 12451–52 (S.D. Cal. 2000) (holding that the New York Convention applies where the parties exchange written communications manifesting assent to a contract that contains arbitral clauses). Therefore, the New York Convention applies, and the Court has subject matter jurisdiction over this action.

B. Whether Enforcement of the Award Would Violate Public Policy

A court may refuse to enforce an arbitration award if "[t]he recognition or enforcement of the award would be contrary to the public policy" of the country in which enforcement or recognition is sought. 21 U.S.T. 2517, art. V(2)(b). "The public policy exception in Article V(2)(b) . . . is very narrow, and applies only where enforcement of the award would violate the most basic notions of morality and justice of the forum where enforcement is sought." *Europcar Italia S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998).

Phyto Tech argues that enforcement of the Award would violate "the most basic notions of morality and justice under the United States laws and United States public policy" because the Award is based on an agreement that clearly "clashes with Chinese law." The Court does not find

Phyto Tech's argument persuasive. Under the New York Convention, the rulings of a tribunal interpreting a contract are entitled to deference. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 290 (5th Cir. 2004). "Unless [a tribunal] manifestly disregarded the parties' agreement or the law, there is no basis" to disregard a tribunal's decision. *Id.*

Based on the record, it is clear that the Tribunal carefully considered the evidence and arguments presented and applied principles of Chinese contract law to arrive at its Award. Phyto Tech's argument that the Award is unenforceable because the February 5, 2015 Agreement did not comply with Chinese regulatory requirements is without merit. The Tribunal found that there was no material difference in the three agreements and that the difference in share prices in the February 6, 2015 Agreement and the March 5, 2015 Agreement reflected Phyto Tech's down payment of RMB 12,000,000 Yuan. Thus, the fact that the February 5, 2015 Agreement may not have fully complied with regulatory requirements is irrelevant because the revised February 6, 2015 Agreement, which was not materially different than the February 5, 2016 Agreement, was approved by the regulatory authorities.

In addition, Phyto Tech raised these same arguments in its appeal to the Shanghai No. 2 Intermediate People's Court, and that Court concluded that the Award was consistent with Chinese law and, therefore, denied Phyto Tech's appeal. Thus, there is absolutely no basis for the Court to conclude that the Award contravenes Chinese law. Moreover, even if the Tribunal incorrectly interpreted Chinese law in arriving at its Award (and there is no evidence that it did), a court "may not refuse to enforce an arbitral award solely on the ground that the arbitrator may have made a mistake of law or fact." *Id.* Accordingly, the Court concludes that Phyto Tech has failed to demonstrate that enforcement of the Award would violate public policy.

C. Whether the Arbitration Process Violated Phyto Tech's Due Process Rights

Phyto Tech also argues that the Award should not be enforced because the procedures applied in the arbitration proceedings violated its due process rights. Specifically, Phyto Tech argues that its due process rights were violated because the Tribunal: only provided notice of the proceedings to Phyto Tech in Chinese; rejected Petitioners' attempts to obtain signature verifications for the March 5, 2015 Agreement and refused to permit Phyto Tech to obtain signature verifications for the February 5, 2015 Agreement; denied Phyto Tech's request to cross-examine witnesses regarding the February 5, 2015 Agreement; and improperly relied on "unverified" emails from Shilu Wang, who was not an authorized representative of Phyto Tech.

Under Article V of the New York Convention, a court may decline to enforce an arbitration award when the "party against whom the award is invoked was not given proper notice of the arbitrator or arbitration proceedings or was otherwise unable to present his case." 21 U.S.T. 2517, art. V(1)(b). Courts have held that this provision "essentially sanctions the application of the forum state's standards of due process." *Iran Aircraft Indus. v. Avco Corp.*, 980 F. 2d 141, 145–46 (2d Cir. 1992); *see also Karaha Bodas* 364 F.3d at 290 (5th Cir. 2004) (same). A fundamental requirement of due process is "the opportunity to be heard at a meaningful time and in a meaningful manner." *Iran Aircraft*, 980 F.2d at 146 (citation omitted). In addition, a fundamentally fair hearing is one that "meets the minimal requirements of fairness—adequate notice, a hearing

on the evidence, and an impartial decision by the arbitrator." *Slaney v. Int'l Amaetur Athletic Fed'n*, 244 F.3d 580, 592 (7th Cir. 2001).

As an initial matter, the Court concludes that Phyto Tech's argument that the Award is unenforceable because notice of the arbitration was only provided in Chinese borders on the frivolous. There is absolutely nothing in the record that suggests that Phyto Tech did not understand the contents of the notice or suffered any prejudice whatsoever as a result of the language used in the notice. In fact, it is clear from the record that after receiving the notice, Phyto Tech fully participated in the arbitration proceeding, including submitting evidence and a counterclaim against Petitioners written in the Chinese language. Moreover, Phyto Tech was represented by a Chinese law firm in the arbitration proceeding and could have raised any questions about the contents of the notice with their counsel.

As to Phyto Tech's second argument, it is clear from the record that the Tribunal carefully considered both Petitioners' and Phyto Tech's requests regarding signature verifications of the agreements. Indeed, the Tribunal specifically noted in the Award that the parties requested an opportunity to verify Petitioner Dezheng's signature on the agreements and that it denied the parties' respective requests because the authenticity of the signatures would have no bearing on the Tribunal's decision. *See* Arbitration Award at 43–44. Moreover, the evidence in the record indicates that Petitioners admitted and confirmed that their signatures on the February 5, 2015 Agreement were authentic. Therefore, Phyto Tech has failed to demonstrate that it suffered any prejudice as a result of the Tribunal's denial of the signature verification requests.

Finally, the Court rejects Phyto Tech's arguments that it was unable to cross-examine witnesses about the February 5, 2015 Agreement and that the Tribunal improperly relied on unverified emails from Shilu Wang. Petitioners submitted a declaration from their counsel that indicates that Phyto Tech was permitted to conduct cross-examination on the February 5, 2015 Agreement, as well as Shilu Wang's status as an authorized corporate representative and that the Tribunal considered Phyto Tech's evidence and arguments on these issues. Ngai Decl. ¶ 5–6. In addition, the Tribunal indicated in the Award that it carefully considered Phyto Tech's arguments regarding the February 5, 2015 Agreement and Shilu Wang's role as a corporate representative. The Tribunal also indicated that Phyto Tech "cross-examined the evidence" submitted by Petitioners and subsequently submitted written briefs regarding the evidence and the issues in dispute. *See* Arbitration Award at 6. Accordingly, the Court concludes that Phyto Tech has failed to demonstrate that it was not afforded due process in the arbitration proceeding.

D. Whether the Tribunal's Award Exceeded the Scope of the Issues Submitted for Arbitration

Under the New York Convention, a court may refuse enforcement of an arbitration award if the "award deals with a difference not contemplated by or falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration." 21 U.S.T. 2517, art. V(1)(c); *see also Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier*, 508 F.2d 969, 976 (2d Cir. 1974) (explaining that this defense permits a "party to attack an award predicated on arbitration of a subject matter not within the agreement to submit to arbitration").

Phtyo Tech argues that the Tribunal exceeded the scope of the issues submitted for arbitration by "manufacturing a new agreement with different elements of different agreements" rather than determining whether the February 5, 2015 Agreement, the February 6, 2015 Agreement, or the March 5, 2015 Agreement was controlling. Contrary to Phyto Tech's argument, it is clear from the Award that after carefully considering the parties' arguments and the evidence presented, the Tribunal concluded that there was no material difference between the three agreements and that any differences in the three agreements resulted from a change in "basic conditions" at the time the agreements were signed. *See* Arbitration Award at 37–39. Thus, Phyto Tech's claim that the Tribunal manufactured a new agreement is wholly without merit. Accordingly, the Court concludes that Phyto Tech has failed to demonstrate that the Tribunal's decision exceeded the scope of issues for arbitration.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Petitioners' Petition to Recognize, Confirm, and Enforce the Award. The parties are ordered to meet and confer and prepare a joint proposed Judgment which is consistent with this Order. The parties shall lodge the joint proposed Judgment with the Court on or before **June 19, 2018.** In the unlikely event that counsel are unable to agree upon a joint proposed Judgment, the parties shall each submit separate versions of a proposed Judgment along with a declaration outlining their objections to the opposing party's version no later than **June 19, 2018.**

IT IS SO ORDERED.