UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV17-05232 JAK (ASx)	Date	June 6, 2018
Title	Certain Underwriters at Lloyd's London v. Phelps Dunbar, LLP, et al.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER RE PHELPS DUNBAR, LLP'S MOTION TO COMPEL ARBITRATION (DKT. 15)**

CERTAIN UNDERWRITERS AT LLOYD'S LONDON'S MOTION TO REMAND (DKT. 31)

LINDAHL BECK, LLP'S MOTION TO TRANSFER (DKT. 47)

JS-6: Remand

I. Introduction

Plaintiff Certain Underwriters at Lloyd's London ("CU") brought this legal malpractice action against Phelps Dunbar, LLP ("Phelps") and Lindahl Beck, LLP ("Lindahl") in the Los Angeles Superior Court on May 19, 2017. Dkt. 1-1. Phelps removed the action on July 14, 2017 (Dkt. 1), and Lindahl consented to the removal. Dkt. 22. Phelps filed a motion to compel arbitration and, upon the entry of such an order, either stay or dismiss this action ("Arbitration Motion" (Dkt. 15)). CU opposed the Arbitration Motion (Dkt. 30), and Phelps replied. Dkt. 38. Lindahl did not state a position on the Arbitration Motion, and it is undisputed that Lindahl and CU have not entered any agreement to arbitrate any matters.

After Phelps filed the Arbitration Motion, CU filed a motion to remand ("Remand Motion" (Dkt. 31)). Phelps opposed the Remand Motion (Dkt. 40), and CU replied. Dkt. 45. Lindahl did not respond to the Remand Motion. However, Lindahl then filed a motion to transfer venue to the Southern District of California ("Transfer Motion" (Dkt. 47)). CU opposed the Transfer Motion (Dkt. 53) and Lindahl replied. Dkt. 54.[1] Phelps did not file an opposition on the Transfer Motion.

A hearing was held on all three motions on October 23, 2017, and they were taken under submission. CU and Phelps were ordered to submit supplemental briefing as to certain issues, and both timely filed

[1] Lindahl also filed evidentiary objections as to portions of the Declaration of Alan Van Gelder, counsel for CU, which was offered in support of CU's opposition to the Transfer Motion. Dkt. 55. Those objections are not addressed because that motion is moot.

supplemental briefs. Dkts. 58, 59.[2] For the reasons stated below, the Remand Motion is **GRANTED** and the Compel Motion is **DENIED**. In light of these rulings, the Transfer Motion is **MOOT**.

II. Requests for Judicial Notice

Lindahl seeks judicial notice of the following exhibits that have been presented in support of the Transfer Motion:

1. Business Entity Search for H.B.A. Medical Group, Inc. from California Secretary of State;
2. Statement of Information for H.B.A. Medical Group, Inc. from California Secretary of State;
3. State Bar of California Profile for Attorney Deborah Ann Wolfe (Bar No. 97971);
4. State Bar of California Profile for Attorney Brian Paul Worthington (Bar No. 179590);
5. State Bar of California Profile for Attorney Daryoosh Khashayar (Bar No. 236496);
6. State Bar of California Profile for Attorney Neil Kenneth Nydegger (Bar No. 72125);
7. State Bar of California Profile for Attorney Matthew Kevin Hillman (Bar No. 206541);
8. Complaint from *Asbaghi et al. v. Neil K. Nydegger*, No. 37-2013-66639-CU-PN-CTL (Cal. Sup. Ct. Sept. 10, 2013);
9. First Amended Complaint from *Asbaghi et al. v. Neil K. Nydegger*, No. 37-2013-66639-CU-PN-CTL (Cal. Sup. Ct. Sept. 30, 2013);
10. Answer to First Amended Complaint from *Asbaghi et al. v. Neil K. Nydegger*, No. 37-2013-66639-CU-PN-CTL (Cal. Sup. Ct. Jan. 29, 2014);
11. Substitution of Attorney from *Asbaghi et al. v. Neil K. Nydegger*, No. 37-2013-66639-CU-PN-CTL (Cal. Sup. Ct. Mar. 22, 2016);
12. Joint Trial Readiness Conference Report from *Asbaghi et al. v. Neil K. Nydegger*, No. 37-2013-66639-CU-PN-CTL (Cal. Sup. Ct. July 22, 2016);
13. Judgment from *Asbaghi et al. v. Neil K. Nydegger*, No. 37-2013-66639-CU-PN-CTL (Cal. Sup. Ct. Oct. 20, 2016);
14. Registrar of Actions from *Asbaghi et al. v. Neil K. Nydegger*, No. 37-2013-66639-CU-PN-CTL (Cal. Sup. Ct. 2016);
15. Complaint filed in Los Angeles Superior Court in this action;
16. Business Entity Search for Brodshatzer, Wallace, Spoon & Yip, APC from California Secretary of State; and
17. State Bar of California Profile for Attorney Charles Fanning (Bar No. 248704).

Dkt. 49.

Fed. R. Evid. 201(b) permits judicial notice of a fact that is "not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Taking judicial notice of court filings and other matters of public record may be appropriate where there is adequate authentication. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006). "[R]ecords and reports of administrative bodies" are within this category. *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986), *overruled on other grounds*, *Astoria Fed. Sav. & Loan Ass'n*

[2] CU filed evidentiary objections seeking to exclude portions of the Declaration of Marshall M. Redmon, a partner for Phelps, which was filed with Phelps' supplemental brief. Dkt. 60. Rulings on those objections are set forth in a separate order. Dkt. 61.

v. Solimino, 501 U.S. 104 (1991). Neither Phelps nor CU has objected to the request for judicial notice, including as to any potential hearsay issues. Further, there are no issues as to the authenticity of the materials. All of them are either public records, referred to in the Complaint, or central to CU's underlying claims. For the foregoing reasons, the requests for judicial notice are **GRANTED**.

III. Factual Background

In March 2012, Anthony Hobkinson ("Hobkinson"), the Group Head of Claims for Beazley,[3] executed a Service Level Agreement ("2012 SLA" (Dkt. 31-8)) with Phelps to provide it with legal services and advice for CU's insurance claims. Declaration of Anthony Hobkinson ("Hobkinson Decl."), Dkt. 31-5 ¶¶ 2-4. The 2012 SLA, which was signed by both Phelps and Hobkinson, includes the following provisions:

> **40. Term of this Agreement**
> The term of this Agreement commences when executed by both parties. Any deviation from the Agreement shall be in writing. . . .
>
> **41. Law and Jurisdiction and resolution of any dispute**
> This Agreement (and any dispute hereunder) shall be governed by and construed in accordance with the laws of New York.
>
> Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by non-binding Mediation to be held in County of New York by a mutually agreed upon mediator. If the parties are unable to agree on a mediator within 30 days of a written request to mediate, then the dispute shall be referred to JAMS or a similar entity agreed by The Firm and Beazley. If an impasse is reached by the mediator, The Firm agrees to refrain from any legal action for 90 days thereafter.
>
> . . .
>
> **44. Modification of the Agreement.**
> Unless expressly provided for in the Agreement or the appendices hereto, no provision of the Agreement may be amended, waived or discharged except by agreement in writing signed by each party hereto.

2012 SLA at 5. It is undisputed that the 2012 SLA was a binding and operative agreement between Phelps and CU until Spring 2016.

Neil K. Nydegger and his law firm Nydegger & Associates (collectively, "Nydegger") were insureds under a $1 million professional liability insurance policy that was underwritten by CU. Declaration of Alan Van Gelder ("Van Gelder Decl."), Dkt. 31-1 ¶ 10(a). In October 2012, a professional negligence claim was brought against Nydegger in the San Diego Superior Court ("San Diego Action"), and CU extended a defense to Nydegger under to the insurance policy. Van Gelder Decl. ¶ 10(b)-(c). Pursuant

[3] The relationship between Beazley and CU is not discussed in detail. However, it is not disputed that Beazley had the authority to bind CU to such an agreement.

to the 2012 SLA, Phelps acted as the coverage and monitoring counsel with respect to the San Diego Action. Dkt. 1-1 ¶¶ 4, 10. In June 2013, CU hired Lindahl to serve as defense counsel for Nydegger in the San Diego Action. *Id.* ¶ 11.

On April 21, 2016, Misa Nateghi ("Nateghi"), a Claims Manager with Beazley responsible for insurance policies underwritten by CU, sent an email to Marshall Redmon ("Redmon"), a partner at Phelps. It stated: "As promised, please see attached a revised Standard Level Agreement for your comments/sign off . . . . If you would like to discuss any of the provisions, please do let me know. I think you will agree it is easier to digest than the former document." Declaration of Marshall Redmon ("Redmon Decl."), Dkt. 16 at 7.

The referenced attachment, which is titled Beazley Group Claims Terms of Service ("2016 TOS"), includes the following provisions:

> **29. Term of this Agreement**
> The term of this Agreement commences when executed by both parties. . . .
>
> **30. Dispute Resolution**
> The parties are free to choose the law and jurisdiction that applies to this agreement which shall be recorded in appendix A. In the absence of any choice having been recorded in Appendix A any dispute or differences arising out of or relating to this Agreement will be subject to the laws of England and Wales and shall be submitted to the decision of a single arbitrator before the LCIA. The arbitration proceedings shall take place in London, England and shall be conducted in the English language.
>
> . . .
>
> **34. Variation of the Agreement**
> Unless expressly provided for in the Agreement or the appendices hereto, no provision of the Agreement may be amended, waived or discharged except by agreement in writing signed by each party hereto.

Dkt. 14-2 at 8, 19-20.

It is undisputed that the version of the 2016 TOS sent by Nateghi was unsigned. Appendix A, which follows the signature page, included a two-column, single page table that stated the "Service Provider Name" as "Phelps Dunbar LLP," the "Choice of Law" as "England and Wales," and the "Jurisdiction" as "England and Wales." Dkt. 14-2 at 21.

Redmon responded the next day by email. It stated: "Indeed, this SLA version is user friendly . . . executed signature page attached. If you could send a copy of Beazley's page for our records please." Redmon Decl. at 7. Attached to his email was the signature page of the 2016 TOS executed by Redmon. Redmon Decl. ¶ 3. Redmon states that both he and Phelps understood that Beazley subsequently executed the 2016 TOS. *Id.* Redmon states that "at no time was the efficacy of the Agreement ever questioned." *Id.*

Nateghi states that it was her understanding that sending the document to Redmon would provide to Phelps "an opportunity to review the TOS, propose changes to the TOS, and ask any questions about the TOS." Nateghi Decl., Dkt. 31-6 ¶ 6. She also understood that, once "Phelps Dunbar approved/signed off on the language for the TOS . . . Mr. Hobkinson would review the final TOS and sign the final TOS if he approved [it]." *Id.* Nateghi states that she was not authorized to bind CU to the 2016 TOS when she sent the email to Redmon. She also states that it was her understanding that the 2016 TOS would become binding as to CU only if Hobkinson approved and signed it. *Id.* ¶ 7. Nateghi did not send the 2016 TOS to Hobkinson for his review prior sending it to Redmon. *Id.* After receiving the signed copy of the 2016 TOS from Redmon, Nateghi transmitted the document to Stephanie DiChiara ("DiChiara"). *Id.* ¶ 8. Consistent with her practice, DiChiara then provided the signed 2016 TOS to Hobkinson for his review. Declaration of Stephanie DiChiara ("DiChiara Decl."), Dkt. 31-7 ¶¶ 6-7. It was Hobkinson's practice to return to her any agreements that he executed and signed; he did not do so with a copy of the 2016 TOS. *Id.* ¶¶ 7-8.

Since at least January 1, 2016, Hobkinson was responsible for executing agreements with third-party service providers. He does not recall signing the TOS. A search of his email and associated document folders did not result in finding a signed copy of the TOS. Hobkinson Decl. ¶¶ 5, 7. Hobkinson claims that it would have been his custom and practice to have provided any such executed document to Chiara. *Id.* ¶ 7.

In September 2016, a jury returned a verdict of more than $45 million against Nydegger, and judgment was entered against him in that amount in October 2016. RJN 13, Dkt. 49-13 at 3. Post-trial motions were filed in November 2016. Before the motions were heard, the San Diego Action settled. In that process, Nydegger agreed to assume liability of an amount that was greater than $1 million, which was the policy limit in the relevant insurance policy. Dkt. 48 at 8; Van Gelder Decl. ¶ 10(f), (g), (i).

CU then brought this action. In support of its legal malpractice claims, CU alleges that Phelps failed properly to advise it on settlement, and Lindahl failed properly to defend Nydegger and others during the litigation. Dkt. 1-1 ¶¶ 14-17.

IV. Analysis

A. Remand Motion

1. Legal Standards

A motion to remand challenges the removal of an action. *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir. 2009); *see* 28 U.S.C. § 1447(c). In general, a state civil action may be removed only if, at the time of its removal, it is one that initially could have been brought in a federal court. 28 U.S.C. § 1441(a). Because federal courts are ones of limited jurisdiction, the removal statute is to be strictly construed; any doubt about removal is to be resolved in favor of remand. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). The removing party has the burden of establishing that it was proper to do so. *Id.* "If a case is improperly removed, the federal court must remand the action because it has no subject-matter jurisdiction to decide the case." *ARCO Envtl. Remediation, L.L.C. v. Dep't of Health & Envtl. Quality of Mont.*, 213 F.3d 1108, 1113 (9th Cir. 2000).

2. Removal Pursuant to the Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention") is a multilateral treaty. It provides for "the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought." Convention, art. I(1), 21 U.S.T. 2517. Congress approved the Convention through the enactment of Chapter II of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 201-08. "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto–Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

The FAA provides that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." 9 U.S.C. § 203. In this regard, § 205 of the FAA provides:

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal.

9 U.S.C. § 205.

Although courts generally "strictly construe the removal statute against removal jurisdiction," *Gaus*, 980 F.2d at 566, "the plain language of § 205 provides federal courts with remarkably broad removal authority." *Infuturia Global Ltd. v. Sequus Pharm., Inc.*, 631 F.3d 1133, 1138 n.5 (9th Cir. 2011) (citing *Beiser v. Weyler*, 284 F.3d 665, 674 (5th Cir. 2002) ("[E]asy removal is exactly what Congress intended in § 205.")). Section 205 is triggered by "just about any suit in which a defendant contends that an arbitration clause falling under the Convention provides a defense." *Id.* at 1138 (citing *Beiser*, 284 F.3d at 669). "Section 205 does not include any requirement that, as a prerequisite for removal, the removing party establish that the arbitration agreement is valid and enforceable." *Miller v. Tri Marine Fish Co.*, No. 16-2203-JAK-SSx, 2016 WL 3545523, at *5 (C.D. Cal. 2016). Rather, removal is proper "whenever an arbitration agreement falling under the Convention could *conceivably* affect the outcome of the plaintiff's case." *Infuturia Global Ltd.*, 631 F.3d at 1138 (quoting *Beiser*, 284 F.3d at 669) (emphasis in original). *Davis v. Cascade Tanks, LLC* explained this distinction:

> [T]hat the jurisdictional inquiry is separate from the merits of enforcement is required by the text of the Convention and the provisions in which it is implemented. The Convention provides that a court, "when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." Convention art. II(3), 21 U.S.T.

> 2517. The text contemplates that only a court "seized of" the suit will turn to the question whether the arbitration clause shall be enforced. As used in article II(3), the phrase "seized of" means that the court is "in possession of" the action. *See* 14 *Oxford English Dictionary* 896 (J.A. Simpson & E.S.C. Weiner eds., 2d ed.1989); *Black's Law Dictionary* 1524 (Rev. 4th ed.1968). . . . [A] federal court cannot be "seized of an action" under this provision in the absence of federal jurisdiction, which is granted in 9 U.S.C. §§ 203 and 205.
>
> . . . .
>
> As implemented, article II(3) must be read such that in the absence of jurisdiction the district court would not be "seized of" the action. It is therefore appropriate to determine whether federal jurisdiction exists before turning to the question whether there is an allowable defense to enforcement; only a court "seized of" a suit related to an arbitration clause covered by the Convention can turn to the question whether the arbitration clause shall be enforced, and only a court with jurisdiction may be seized of the suit. Only once jurisdiction is determined is the court to turn to the enforceability of the arbitration agreement, a question which requires it to consider whether the agreement is "null and void, inoperative or incapable of being performed." Convention art. II(3), 21 U.S.T. 2517; *see also Jain v. de Mere*, 51 F.3d 686, 691 (7th Cir. 1995) ("Given that the court is properly seized of this action, it should not then be left helpless to enforce the arbitration agreement.").

No. 13-CV-02119-MO, 2014 WL 3695493, at *4-5 (D. Or. July 24, 2014) (footnote omitted). Notwithstanding these rules, "the removing party continues to bear the burden of establishing federal jurisdiction." *Freaner v. Valle*, No. 11-CV-1819-JLS-MDD, 2011 WL 5596919, at *2 (S.D. Cal. Nov. 17, 2011).

Even if the removing party demonstrates that there is an arbitration agreement that "relates to" the action, "if it is later determined that there is no binding arbitration agreement," remand may be appropriate. *Miller*, 2016 WL 3545523, at *6. Thus, if such a later assessment shows that there was no binding agreement, 9 U.S.C. § 205 no longer provides a basis for subject matter jurisdiction. *See Beiser*, 284 F.3d at 675 ("The district court thus had jurisdiction under § 205. The correct procedure for Beiser to have followed would have been to respond on the merits to Huffington's motion to compel arbitration. If successful, Beiser then could have moved to remand to the state court.").

3. Application

In removing this action, Phelps relied on the arbitral clause in the 2016 TOS, which requires that CU's claims be arbitrated in the United Kingdom. Under the relaxed jurisdictional requirements of 9 U.S.C. § 205, Phelps has stated a sufficient basis to support a preliminary conclusion of federal, subject matter jurisdiction. Thus, there was an initial showing of the presence of an applicable arbitration agreement that "fall[s] under the Convention [which] could *conceivably* affect the outcome of the plaintiff's case." *Infuturia Global Ltd.*, 631 F.3d at 1138 (emphasis in original). Under this preliminary analysis, removal was appropriate. However, if it is determined that there is no binding arbitration agreement between CU and Phelps, the initial determination of jurisdiction would be vacated. *See Beiser*, 284 F.3d at 675.

For the reasons stated in this Order, there is no enforceable arbitration agreement between CU and Phelps. Accordingly, there is no subject matter jurisdiction under 9 U.S.C. § 205 for CU's claims against Phelps. Because 9 U.S.C. § 205 is the only basis that has been advanced to show subject matter jurisdiction, the action must be remanded. Therefore, the Remand Motion is **GRANTED**.

B. Arbitration Motion

Phelps seeks arbitration of CU's malpractice claims in England and Wales in light of the arbitral clause in the 2016 TOS. CU argues that the 2016 TOS is not an enforceable agreement. Lindahl did not join the Compel Motion, nor does Lindahl argue that CU's claims against it are covered by any operative arbitration agreement. Therefore, the only question is whether arbitration of CU's claims against Phelps must be compelled.

1. Legal Standards

a) Federal Arbitration Act

The FAA applies to "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction." 9 U.S.C. § 2. The FAA provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id*.

Under the FAA, the initial inquiry in connection with a motion to compel arbitration is limited to determining "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). If both of these conditions are met, "the Act requires the court to enforce the arbitration agreement in accordance with its terms." *Id.*

The FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983). Therefore, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id*. at 24-25.

b) Determination of Gateway Issues

"Unlike the arbitrability of claims in general, whether the court or the arbitrator decides arbitrability is an issue for judicial determination unless the parties *clearly and unmistakably provide otherwise.*" *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1208 (9th Cir. 2016) (alterations and internal quotation marks omitted) (emphasis in original). "Such '[c]lear and unmistakable evidence of agreement to arbitrate arbitrability might include . . . a course of conduct demonstrating assent . . . or . . . an express agreement to do so.'" *Momot v. Mastro*, 652 F.3d 982, 988 (9th Cir. 2011) (quoting *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 79-80 (2010) (Stevens, J., dissenting)). "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Ctr.*, 561 U.S. at 70 (2010).

In a typical contract, "it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide." *BG Group, PLC v. Republic of Argentina*, 124 S. Ct. 1198, 1206 (2014). "If the contract is silent on the matter of who primarily is to decide 'threshold' questions about arbitration, courts determine the parties' intent with the help of presumptions." *Id.* "[C]ourts presume that the parties intend courts, not arbitrators to decide . . . disputes about 'arbitrability,'" such as "whether the parties are bound by a given arbitration clause." *Id.* (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *see First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 941 (1995) (court, not arbitrator, should decide whether arbitration clause applied to a party who "had not personally signed" the document containing it). "On the other hand, courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration," such as the application of waiver, delay or other defense to arbitrability and prerequisites such as time limits, notice, laches, or estoppel. *BG Group*, 134 S. Ct. at 1207 (citing *Moses*, 460 U.S. at 25; *Howsam*, 537 U.S. at 85).

c) The Convention and the Corresponding Legislation

Congress adopted the Convention by enacting Chapter II of the FAA, 9 U.S.C. §§ 201-08. That statute provides that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." 9 U.S.C. § 203. The Convention "applies to 'an arbitration agreement' . . . arising out of a legal relationship, whether contractual or not, which is considered as commercial." *Balen v. Holland Am. Line, Inc.*, 583 F.3d 647, 654 (9th Cir. 2009) (quoting 9 U.S.C. § 202).

In determining whether to enforce an arbitration agreement under the Convention, courts consider four factors: "(1) there is an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states." *Balen*, 583 F.3d at 654-55 (quoting *Bautista v. Star Cruises*, 396 F.3d 1289, 1294 n.7 (11th Cir. 2005)).

2. Application

a) Determination of Gateway Issues

Phelps argues that the arbitral clause in the 2016 TOS requires an arbitrator to decide the threshold issues of jurisdiction and arbitrability. Because Phelps raised that argument for the first time in the reply brief, CU did not address it.

There is no clear and unmistakable provision in the 2016 TOS or parallel inference from the parties' course of conduct suggesting that the threshold issues of jurisdiction and arbitrability were to be addressed by an arbitrator. Rather, the 2016 TOS states that "[t]he parties are free to choose the law and jurisdiction that applies to this agreement which shall be recorded in appendix A" and that "[i]n the absence of any choice having been recorded in Appendix A any dispute or differences arising out of or

relating to this Agreement will be subject to the laws of England and Wales and shall be submitted to the decision of a single arbitrator before the LCIA." Dkt. 14-2 at 19. England and Wales were added in Appendix A for both jurisdiction and choice of law. *Id.* at 21. This language is not sufficient to overcome the presumption that "parties intend courts, not arbitrators to decide . . . disputes about 'arbitrability,'" such as "whether the parties are bound by a given arbitration clause." *BG Group*, 124 S. Ct. at 1206. Therefore, it is appropriate to determine in this proceeding whether the 2016 TOS includes an enforceable arbitration clause.

b) Compliance with the Convention

Of the four factors required for enforcement of an arbitration agreement under the Convention, the second, third and fourth are clearly satisfied.[4] Thus, the central dispute is whether the 2016 TOS is an "agreement in writing within the meaning of the Convention." The Convention provides that "each 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 . . . concerning a subject matter capable of settlement by arbitration." Convention Art II § 1. The Convention also provides that an "'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." Convention Art II § 2.

Neither the Ninth Circuit nor the Supreme Court has interpreted this language, about which there is a split among other circuits. The Fifth Circuit has concluded that an "agreement in writing" is either "(1) an arbitral clause in a contract, or (2) an arbitration agreement, (a) signed by the parties or (b) contained in an exchange of letters or telegrams." *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666, 669 (5th Cir. 1994). The Second Circuit has held that the "the modifying phrase 'signed by the parties or contained in an exchange of letters or telegrams' applies to *both* 'an arbitral clause in a contract' and 'an arbitration agreement.'" *Kahn Lucas Lancaster, Inc. v. Lark Intern. Ltd.*, 186 F.3d 210, 218 (2d Cir. 1999) (emphasis added).

Any binding agreement to arbitrate in this action must be within the 2016 TOS. The TOS has many provisions. Thus, because the instrument in question is not a standalone "arbitration agreement," the analysis turns on the "arbitral clause in a contract" term. If *Sphere Drake* is applied, the agreement in writing requirement is satisfied so long as the 2016 TOS is a valid contract containing an arbitral clause. If *Kahn Lucas* is applied, the agreement in writing requirement is satisfied if the 2016 TOS is a valid contract, which contains an arbitral clause signed by the parties or contained in an exchange of letters or telegrams. *Chloe Z Fishing Co v. Odyssey Re (London) Ltd.*, 109 F. Supp. 2d 1236 (S.D. Cal. 2000), adopted the *Kahn Lucas* test in light of "the inherent persuasiveness of the Second Circuit's reasoning and because of that Court's comprehensive analysis relative to the Fifth Circuit's conclusory interpretation in *Sphere Drake*." *Greenberg v. Park Indemnity Ltd.*, No. 12-CV-10756 JAK (AJWx), 2013 WL 12123695 (C.D. Cal. Oct. 8, 2013), acknowledged the split of authority, but held that the agreement in question satisfied the Convention's requirements under both *Kahn Lucas* and *Sphere Drake*. As in

[4] These factors include that CU is not a citizen of the United States, the 2016 TOS arises out of a commercial legal relationship between Phelps and CU, and each party's principal place of business and the designated forum for arbitration are located in states that are signatories to the Convention. Because the requirement of the second factor -- that the "agreement provides for arbitration" -- overlaps with the requirement of the first factor -- an arbitration agreement as contemplated by the Convention -- the issue is addressed in the same discussion.

Greenberg, the determination of whether the 2016 TOS satisfies the "agreement in writing" element is not part of the split between the Second and Fifth Circuits. Rather, because the 2016 TOS was "contained in an exchange of" emails, the operative questions under either test are whether there was a valid contract and whether it contains an arbitral clause.

c) Choice of Law

When a "case arises under Chapter 2 of the Federal Arbitration Act, the issue of whether the [disputed instrument] constituted a binding agreement is governed by federal common law, which, in turn, looks to 'general principles for interpreting contracts.'" *Casa Del Caffee Vergano S.P.A. v. ItalFlavors, LLC*, 816 F.3d 1209, 1211 (9th Cir. 2016) (citing *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 500 F.3d 571, 577-78 (7th Cir. 2007); quoting *GECCMC 2005–C1 Plummer St. Office L.P. v. JPMorgan Chase Bank,* 671 F.3d 1027, 1033 (9th Cir. 2012); citing *InterGen N.V. v. Grina,* 344 F.3d 134, 143-44 (1st Cir. 2003)). "Often, those general principles are found in the Restatement (Second) of Contracts." *Id.* at 1212. Some circuits have held that a choice-of-law provision in the disputed instrument overrides this presumption, and requires a court to apply the substantive contract law of the jurisdiction identified there. *See, e.g.*, *Argonaut Ins. Co.*, 500 F.3d at 577-78; *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 51 (2d Cir. 2004) (Swiss choice of law provision supersedes presumption); *Smith/Enron Cogeneration Ltd. v. Smith Cogeneration Intern., Inc.*, 198 F.3d 88, 96 (2d Cir. 1999) (choice of law provision may override the presumption, but dispute as to enforceability of contract was outside scope of the choice of law provision).

ItalFlavors acknowledged that the disputed instrument contained a clause providing that "the contract was to be construed according to Italian law," but nonetheless applied federal common law to determine whether a valid contract had been formed. 816 F.3d at 1210. The written instrument at issue in *ItalFlavors* stated that "[t]his contract shall be construed and interpreted in accordance with the Italian law" and that "[a]ny dispute, controversy or claim arising out of or in connection with this Agreement . . . shall be settled by final and binding arbitration in accordance with the UNCITRAL Arbitration Rules as presently in force." No. 13-56091, Dkt. 8-3 at 63 (S.D. Cal. Oct. 19, 2013). *ItalFlavors* applied federal common law because it was not "construing" or "interpret[ing]" the disputed instrument, but rather determining, based on extrinsic evidence and different terms in a contemporaneously signed document, that the parties did not intend to be bound by the instrument containing the arbitration language. The broad terms "[a]ny dispute, controversy or claim" used in the subsequent provision supported this narrow reading of the choice-of-law term.[5]

The 2012 SLA, which was the agreement that was operative prior to the 2016 TOS, includes a New York choice-of-law provision. *See* 2012 SLA at 5 ("This Agreement (and any dispute hereunder) shall be governed by and construed in accordance with the laws of New York."). From this, CU argues that New York law applies. Phelps disagrees, and contends that federal common law governs, citing *ItalFlavors*. Unlike *ItalFlavors*, the choice-of-law provision in the 2012 SLA states that the "Agreement (and any dispute hereunder)" are governed by New York law. This warrants a broad reading of the provision to apply to issues of contract interpretation and formation. Because there is no dispute as to the validity of the 2012 SLA, its choice-of-law provision is binding. Therefore, New York law applies.

[5] The alternative interpretation of *ItalFlavors* is not persuasive. It claims that, the Ninth Circuit created a per se rule that parties cannot contract around the presumptive application of federal common law. If accepted, this would create a circuit split.

d) Applicable Contract

Phelps argues that the 2016 TOS is a valid contract and that it superseded the 2012 SLA. CU argues that the 2016 TOS never became the operative agreement, and that the 2012 SLA remains in place. Which party prevails under New York law is determined by an assessment of several factors, including that CU drafted the 2016 TOS, the contents of certain emails between the parties, and their conduct.

(1) Legal Standards

The unilateral understandings of one party, reasonable or not, are insufficient to form a contract. *Cacchillo v. Insmed Inc.*, No. 10-CV-1199-TJM-RFT, 2013 WL 622220, at *14 (N.D.N.Y. Feb. 19, 2013). To determine whether the parties entered into a binding contract, it is necessary to consider evidence through words and conduct as to an objective manifestation of their intent. *Agosta v. Fast Sys. Corp.*, 26 N.Y.S.3d 534, 536 (N.Y. App. Div. 2016).

New York General Obligation Law § 15-301(1) provides: "A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent." Under these terms, attempted oral or written modifications of a contract are without effect. This includes attempted written modifications that require signatures under the term of the prior agreement, but that are not signed. *See Alison Place, Ltd. v. Contowers Assoc. Ltd.*, 690 N.Y.S.2d 23, 24 (N.Y. App. Div. 1999); *Roth Young Personnel Serv., Inc. v. 1500 Realty Co.*, 611 N.Y.S.2d 514, 515 (N.Y. App. Div. 1994). Thus, "[i]t is well settled that, if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed." *Scheck v. Francis*, 26 N.Y.2d 466, 469-70 (N.Y. 1970); *see also John Street Leasehold LLC v. FDIC*, 196 F.3d 379, 382 (2d Cir. 1999) ("New York law enforces [anti-modification] requirements and does not permit oral modification when the original written agreement provides that modifications must be in writing and signed."). To satisfy § 15-301, more is required than "a simple note or memorandum of agreement," and "any writing must be signed by the party to be charged or his agent." *Merrill Lynch Interfunding, Inc. v. Argenti*, 155 F.3d 113, 121 (2d Cir. 1998). In *Argenti*, a cover letter signed and presented by a paralegal that transmitted a copy of an unsigned agreement did not satisfy this standard. 155 F.3d at 122.

An exception to the requirements of § 15-301 may arise through partial performance of the terms of the disputed contract:

> For partial performance to overcome § 15-301, that partial performance must be "unequivocally referable" to the new contract. *Rose,* 42 N.Y.2d at 343-44. As interpreted by the New York Court of Appeals, this standard means that the action taken must be "unintelligible or at least extraordinary, explainable only with reference to the oral agreement." *Anostario v. Vicinanzo,* 59 N.Y.2d 662, 664 (1983) (citation and internal quotation omitted); *see also Jim Bouton Corp. v. Wm. Wrigley Jr. Co.,* 902 F.2d 1074, 1080 (2d Cir. 1990) (applying § 15-301). Further, where the performance is "reasonably explained" by the possibility of other reasons for the conduct, the performance is

equivocal. *Anostario,* 59 N.Y.2d at 664.

Argenti, 155 F.3d at 122.

(2) Application

The first issue is whether the clause in the 2012 SLA that limits its modification precludes the enforcement of the 2016 TOS. The 2012 SLA provides that "no provision of the Agreement may be amended, waived or discharged except by agreement in writing signed by each party hereto." Because New York law strictly enforces such provisions, the 2016 TOS would effect a modification of the 2012 SLA only if it were "in writing signed by each party." Although Phelps signed the 2016 TOS, there is no evidence that CU did so. Further, the content of the email sent by Beazley employee Nateghi that was used to transmit the unsigned 2016 TOS is indistinguishable from the cover letter in *Argenti* that served the same function. Therefore, the outcome here is the same -- Nateghi's email to Phelps is insufficient to constitute a writing signed by CU. Nothing in her email indicates an express intent to bind CU to the terms of the 2016 TOS that is being shared for "comments/sign off." Redmon's response the following day, in which he requests a copy of the 2016 TOS signed by Beazley, does not change the outcome. It does not reflect consent, but a request for confirmation of the proposed modification.

Further, Phelps has not presented evidence of its sufficient partial performance and actual reliance to warrant an application of an exception to the general rule that requires an agreement signed by the charged party. The standard for the former is partial performance that is "unequivocally referable" to or "explainable only with reference to" the new, modified contract. Phelps has failed to identify any such conduct between the date when Redmon received the email enclosing the 2016 TOS and the date of filing of this action. Thus, there is no evidence that the parties did not continue to perform their respective obligations under the 2012 SLA. Indeed, their conduct is "reasonably explained" by the terms of the earlier agreement.

This conclusion is confirmed by a clause in the 2016 TOS. It provides that the agreement "only commences when executed by both parties." New York law is the same as to the enforcement of such commencement provisions. "[U]nder New York law, if the parties did not intend to become bound by the agreement until it was in writing and signed, then there was no contract until and unless that event occurred." *Longo v. Shore & Reich, Ltd.*, 25 F.3d 94, 97 (2d Cir. 1994). To be sure, this rule may leave a party "without the protection of a negotiated contract under circumstances where [it] may well believe that [the counterparty], by accepting her services, has chosen to dispense with the need for signing the contract." *Id.* However, once a party is "put on notice of a signing requirement" in a contract, she can "protect herself" by refusing to start or continue performing "until she receives a signed copy of her contract." *Id.* Phelps is a law firm. Given its presumed sophistication as to legal issues, it has no excuse for failing to demand from CU a signed copy of the 2016 TOS and its claims are barred under New York law.

* * *

Because the 2016 TOS is not a valid contract, whether its arbitration clause is enforceable need not be addressed. Without the former, the 2016 TOS cannot satisfy the "agreement in writing" requirement under the Convention. Because there is not "an agreement in writing within the meaning of the

Convention," the arbitration clause in the 2016 TOS is not enforceable. Thus, the Arbitration Motion is **DENIED**.

V. Conclusion

For the reasons stated in this Order, the Remand Motion is **GRANTED** and the Arbitration Motion is **DENIED**. In light of these rulings, the Transfer Motion is **MOOT**. This matter is to be remanded to the Los Angeles Superior Court, 111 North Hill Street, Los Angeles, California, 90012 (Case No. BC662052).

IT IS SO ORDERED.

_____ : _____

Initials of Preparer ak