IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VARIOUS INSURERS, REINSURERS AND RETROCESSIONAIRES SUBSCRIBING TO POLICY NUMBERS 106/IN/230/0/0, 28807G19, B080130181G19 B080131297G19, B080127577G19, B080130231G19, B080130291G19, B080130328G19, B080128807G19 and B080130331G19 DBD as subrogee of SHARIKET KAHRABA HADJRET EN NOUSS, Plaintiff, v. GENERAL ELECTRIC INTERNATIONAL, INC., GENERAL ELECTRIC COMPANY, GE POWER SERVICES ENGINEERING, GE POWER, and VARIOUS JOHN DOE CORPORATIONS, Defendants.	Civil Action No. 1:21-cv-04751-VMC

ORDER

Before the Court is Defendants' Motion to Compel Arbitration or, Alternatively, to Dismiss the First Amended Complaint ("Motion," Doc. 21).[1] The Parties agreed to stay briefing and defer consideration of the Motion except as to

[1] Defendants' first Motion to Compel Arbitration (Doc. 15) is denied as moot.

the issue of arbitrability. (Doc. 25). Plaintiffs filed a Response in Opposition to the Motion ("Response," Doc. 26). Defendants filed a Reply in Support of the Motion ("Reply," Doc. 27).

Background

This case arises from a catastrophic equipment failure at the Hadjret En Nouss Power Plant located in Tipaza, Algeria (the "Power Plant"). On October 14, 2019, a GE 9371 Frame FB gas turbine Stage 1 Blade designed, manufactured, and installed by the Defendants[2] became detached, or "liberated," from its housing in a power train at the Power Plant while rotating at 3,000 revolutions per minute. This liberation resulted in significant damages to, among other things, the power train that housed the turbine blade, as well as the other components contained within the power train (the "Incident"). (Am. Compl. ¶ 1, Doc. 18). Shariket Kahraba Hadjret En Nouss ("SKH")—the owner of the Power Plant—alleges that it has sustained tens of millions of dollars in business interruption losses and property damage. (*Id.* ¶ 2). SKH has retained partial indemnification for said losses from its direct insurer, which has in turn been partially reimbursed by its reinsurers and retrocessionaires for sums it paid arising from the Incident. (*Id.*).

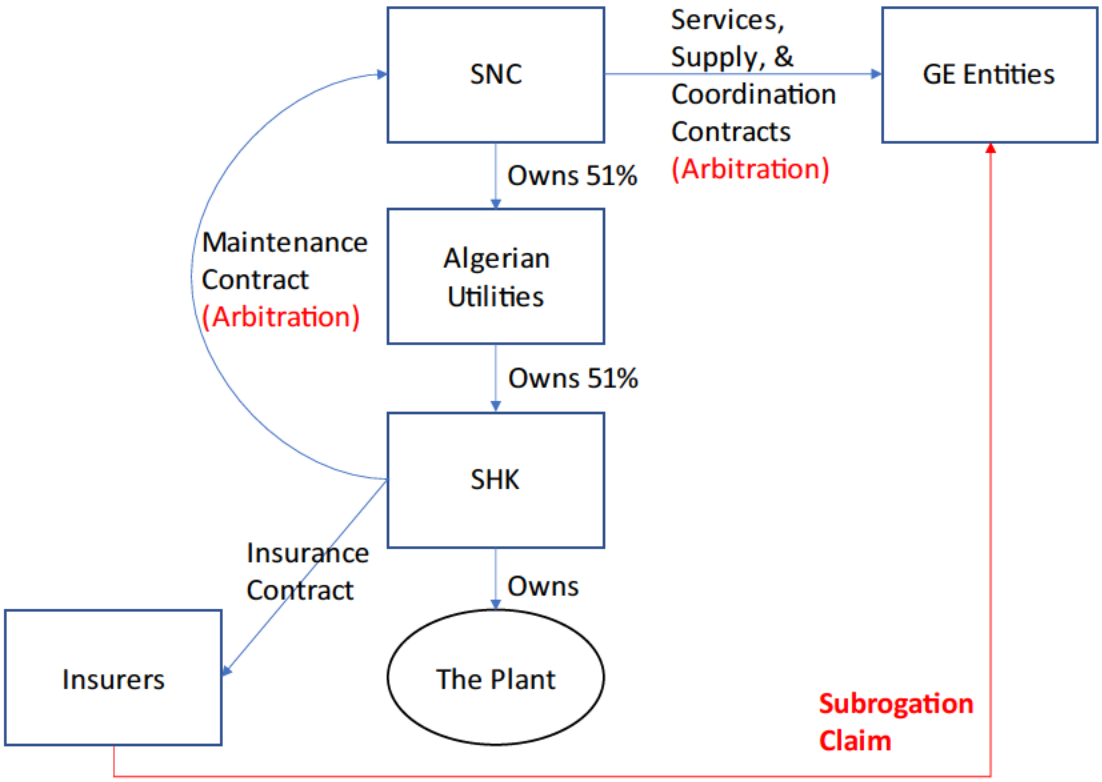
[2] The Court uses the term "Defendants" generally to refer to Defendants General Electric International, Inc., General Electric Company, GE Power Services Engineering and GE Power. While certain of the contracts at issue or products that were manufactured only concern one of these Defendants, the Court's use of the term "Defendants" should be read to refer to the relevant parties based on context.

Plaintiffs (as SKH's subrogees) now seek reimbursement from the Defendants for losses they have allegedly incurred in connection with the Incident that was caused by the Defendants. (*Id.* ¶ 3). Plaintiffs allege that Defendants (and possibly others) held themselves out to SKH, and others, as being capable of the safe and secure design, manufacture, and installation of a sophisticated piece of commercial equipment—i.e., the gas turbine blade that ultimately malfunctioned—and that Defendants failed in this regard. (*Id.*).

The Power Plant was constructed by SNC-Lavalin Constructeurs International Inc. ("SNC"). (*Id.* ¶ 43). SNC served as the operator of the Power Plant pursuant to an Operation and Maintenance Contract entered into between SKH and SNC on or about July 15, 2006 ("O&M Contract"), which contained an arbitration clause. (*Id.* ¶ 44; Mot. Ex. 6, Doc. 21-8). SNC, in that role, entered contracts with one or more of the Defendants, including a 2006 Supply Contract (Mot. Ex. 2), a 2006 Services Contract (*Id.* Ex. 1), a 2006 Installation Contract (*Id.* Ex. 3), and a 2006 Coordination Contract (*Id.* Ex. 4) (collectively, the "GE Contracts"). All of the GE Contracts contained arbitration clauses, as discussed below.

According to SNC's 2021 Annual Report, SNC owns a 26% interest in SKH (Resp. Ex. A at 34, Doc. 26-2). However, as Defendants assert in their Reply, "[t]he most widely read newspaper in Canada stated '*SKH is a recently created company … 51-per-cent owned by Algerian Utilities International Ltd.*, and 49-per-cent owned by

… the Algerian government …. *Algerian Utilities is 51-per-cent owned by SNC….*'" Reply at 4 n.4) (quoting Bertrand Marotte, *SNC Wins Contracts for Power Plant in Algeria*, The Globe & Mail (July 18, 2006)). Assuming for present purposes that this is accurate (and Plaintiffs have not suggested otherwise), the following graphic depicts the relationships between all of these entities.



Legal Standard

"Arbitration is a matter of contract and of consent." *JPay, Inc. v. Kobel*, 904 F.3d 923, 928 (11th Cir. 2018). "[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such

grievances to arbitration." *Id.* (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648–49 (1986)). "The Federal Arbitration Act ("FAA"), Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. § 1 et seq.), treats contractual agreements to arbitrate 'on an equal footing with other contracts,' and 'imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion." *Id.* at 928–29 (quoting *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010) and *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010), respectively)). "The FAA 'reflect[s] both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract.'" *Id.* at 929 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). "Where the parties have agreed to arbitrate their dispute, the job of the courts -- indeed, the obligation -- is to enforce that agreement." *Id.* (citing *Stolt-Nielsen*, 559 U.S. at 682). "At the same time, courts may not require arbitration beyond the scope of the contractual agreement, because 'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Id.* (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)).

"Under the Federal Arbitration Act, parties to a contract may agree that an arbitrator rather than a court will resolve disputes arising out of the contract. When a dispute arises, the parties sometimes may disagree not only about the

merits of the dispute but also about the threshold arbitrability question—that is, whether their arbitration agreement applies to the particular dispute." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527 (2019). "A question of arbitrability is one of a narrow range of 'potentially dispositive gateway question[s],' specifically one that 'contracting parties would likely have expected a court to . . . decide[ ].'" *JPay*, 904 F.3d at 930 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)). "These are fundamental questions that will determine whether a claim will be brought before an arbitrator, and include questions about whether particular parties are bound by an arbitration clause and questions about whether a clause 'applies to a particular type of controversy.'" *Id.* (quoting *Howsam*, 537 U.S. at 84).

While courts "presume that parties would have expected a court to answer questions of arbitrability, . . .[t]he Supreme Court has made clear that 'parties can agree to arbitrate 'gateway' questions of 'arbitrability' because 'arbitration is a matter of contract.'" *Id.* at 930, 936 (quoting *Rent-A-Center*, 561 U.S. at 68–69). "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." *Id.* at 936 (quoting *Rent-A-Center*, 561 U.S. at 70). The Eleventh Circuit has held that by incorporating AAA rules into an agreement, parties clearly and

unmistakably evince an intent to delegate questions of arbitrability. *Id.* at 937 (collecting cases).

Discussion

Defendants seek enforcement of the arbitration clauses under the GE Contracts or, in the alternative, the O&M Contract, pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (the "Convention"), and its implementing legislation, 9 U.S.C. §§ 202–208 (2002) (the "Convention Act"). *See Bautista v. Star Cruises*, 396 F.3d 1289, 1292 (11th Cir. 2005).

"In deciding a motion to compel arbitration under the Convention Act, a court conducts 'a very limited inquiry.'" *Id.* at 1294 (citations omitted).

> First, the Court must consider whether the four jurisdictional perquisites are met under the Convention Act. These four require that (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.

Id. at 1295 n.7 (citing *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 449 (3d Cir. 2003)). Assuming these prerequisites are satisfied, the Court must order

arbitration unless "one of the Convention's affirmative defenses applies." *Id.* at 1294–95. (citations omitted).

The sole issue in this case is the first jurisdictional prerequisite: whether there exists a written agreement to arbitrate. There is no dispute that no written arbitration agreement executed by Plaintiffs and Defendants exists[3]—Plaintiffs' insured, SHK, did not execute any written arbitration agreement with Defendants. Nonetheless, Defendants assert that the either the Services Contract or one of the other GE Contracts between SNC and Defendants satisfies the requirement of a written agreement to arbitrate. Section 25.2 of the Services Contract provides as follows:

> The Parties agree that any or all disputes arising from this Agreement or concerning it . . . shall be definitively resolved on the basis of the Conciliation and Arbitration Rules of the International Chamber of Commerce ICC (hereinafter referred to as the "Rules") by three arbitrators appointed by the ICC Court of Arbitration (hereinafter referred to as the "Court of Arbitration") in accordance with these Rules, the decisions of which shall be final and not open to appeal.

[3] There appears to be no dispute that, to the extent SHK is bound by an arbitration clause, that Plaintiffs are likewise bound, because "an insurer-subrogee stands in the shoes of its insured." *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (quoting *Gibbs v. Hawaiian Eugenia Corp.*, 966 F.2d 101, 106 (2d Cir. 1992)).

(Mot. Ex. 1; Br. Supp. Mot. at 9–10). Defendants assert that Plaintiffs may be compelled to arbitrate under the Services Contract under third-party beneficiary and estoppel theories. In *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1648 (2020), the Supreme Court held that the "Convention does not conflict with the enforcement of arbitration agreements by nonsignatories under domestic-law equitable estoppel doctrines."

Plaintiffs resist the Motion on two grounds: first, that the dispute in this case is not within the scope of the arbitration provision, and second, that those doctrines do not apply to it. As an initial matter, Plaintiffs essentially conflate the scope and enforceability questions by arguing that "for either [non-signatory doctrine to apply, the non-signatory (here, SKH) must actually be seeking to enforce or assert rights under the contract at issue." (Resp. at 12]. While the Eleventh Circuit has held that "[t]he plaintiff's actual dependance on the underlying contract in making out the claim against the nonsignatory defendant is . . . always the *sine qua non* of an appropriate situation for applying equitable estoppel," *In re Humana Inc. Managed Care Litig.*, 285 F.3d 971, 976 (11th Cir. 2002), *rev'd sub nom. on other grounds PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003), it has also noted that "it is well established that a party may not avoid broad language in an arbitration clause by attempting to cast its complaint in tort rather than contract." *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 948 (11th Cir. 1999),

abrogated on other grounds by Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631 (2009) (quoting *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 759 (11th Cir. 1993), *abrogated on other grounds by Arthur Anderson*, 556 U.S. 624)).

As Defendants note, "estoppel can bind a non-signatory to an arbitration clause when that non-signatory has reaped the benefits of a contract containing an arbitration clause" in order to prevent "a non-signatory from cherry-picking the provision of a contract that it will benefit from." *Invista S.A.R.L. v. Rhodia, S.A.*, 625 F.3d 75, 85 (3d Cir. 2010); *see also Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) ("A party is estopped from denying its obligation to arbitrate when it receives a 'direct benefit' from a contract containing an arbitration clause."). Moreover, under federal common law, arbitration clauses can be enforced by—and less commonly against—nonsignatories "when the parties to a contract together agree, upon formation of their agreement, to confer certain benefits thereunder upon a third party, affording that third party rights of action against them under the contract." *Franklin*, 177 F.3d at 947 (quoting *Boyd v. Homes of Legend, Inc.,* 981 F.Supp. 1423, 1432 (M.D. Ala. 1997), *vacated on other grounds,* 188 F.3d 1294, 1300 (11th Cir. 1999)).

The Court finds that Plaintiffs' insured was conferred a benefit as a result of SNC's entry into the Services Contract, and that enforcement of the agreement under a third-party beneficiary doctrine is warranted under the facts of this case.

First, the Court looks at the language of the Services Contract itself.[4] The recital of the contract notes that SNC "is responsible for operating and maintaining a power station . . . pursuant to an O&M Agreement entered into with the Project Owner . . . [and] the Operator wishes to use the Service Provider's services to provide Maintenance Services for the Power Train Sets that form part of the Power Station." (MTD Ex. 1, Doc. 21-3 at 9). Moreover, the Services Contract defines "Scheduled Maintenance" to include "[p]eriodic inspection, testing, **repair, and/or replacement** of components of the Power Train Set." (*Id.* § 1.35) (emphasis added). Thus, providing parts for the Power Plant for the benefit of the "Project Owner" was a basic objective of the contract at the time of its formation.

Moreover, Section 9.9 of the Services Provider states that:

> The Service Provider warrants to the Operator that the Parts and Machinery delivered during the term of this Agreement, and the Parts and Tools in the Initial Inventory, shall be free from defects in material, workmanship and title and that the Services performed during the term of this Agreement shall be performed in a competent, diligent manner.

[4] The Court notes that the Services Contract, as well as the O&M Contract, appear to be the product of negotiations between sophisticated parties and not a contract of adhesion. Where contract terms are drafted by sophisticated parties that presumably understand the legal impact of conferring a substantial benefit on a non-executing third party, the equities further favor application of non-signatory doctrines.

(*Id.* § 9.9). Defendants warranted that the parts delivered to the Power Plant during the term of the agreement would be free from defects. While the warranty was directed to SNC, Plaintiffs' insured received the benefit of this warranty, which would appear to cover the Incident.

Nevertheless, Plaintiffs assert that they only received an incidental benefit, pointing to the First Circuit's decision in *InterGen N.V. v. Grina*, 344 F.3d 134, 147 (1st Cir. 2003). But that case involved an allegation that a parent company benefitted from performance of an agreement based on its equity stake. *Id.* Here, the Service Contract conferred direct tangible benefits in form of replacement parts which Plaintiffs' insured would own as a result of their ownership of the Power Plant, and legal benefits in the form of Defendants' warranty of those parts.

Finally, the Court considers the fact that the defective parts in question were obtained from Defendants during the term of the contract. The Amended Complaint alleges that "Defendants breached their duty of care to the Plaintiffs by, *inter alia*, (i) installing GEN1 S1Bs in Power Train 3 in or around April 2018, when such blades were being phased out due to recurring issues with their performance," *i.e.*, during the term of the contract. (Am. Compl. ¶ 89). Defendants argue that the blades in question were installed "[e]*xclusively* in performance of—and *solely* because of—the Services Contract." (Br. Supp. Mot. at 3). Plaintiffs do not appear to dispute this fact, but argue that a mere "but-for" relationship

between contract and the claims is insufficient under Eleventh Circuit law, citing *Bahamas Sales Assoc., LLC v. Byers*, 701 F.3d 1335, 1340–41 (11th Cir. 2012). But that case also held that "[a] claim 'relates to' a contract when "the dispute occurs as a fairly direct result of the performance of contractual duties." *Id.* (quoting *Telecom Italia, SpA v. Wholesale Telecom Corp.*, 248 F.3d 1109, 1116 (11th Cir. 2001)). There was no dispute in *Byers* that the claims did not implicate performance of the underlying contract; here, the facts necessary to establish Plaintiffs' claims would necessarily constitute a breach of the Services Contract. The Court thus agrees with Defendants that the facts of the case support application of the third-party beneficiary doctrine.[5]

Next, even assuming that the Services Contract applies to it as a non-signatory, Plaintiffs essentially argue that their claims are not "arising from [the] Agreement or concerning it," and therefore are outside of the scope of the Services Contract. Plaintiffs argue that their claims arise in tort or statutory law, not contract. In turn, Defendants make much of the fact that the Original Complaint filed by Plaintiffs sought ""equitable relief, including but not limited to a declaration that Defendants are in violation of their respective contractual duties." (*See* Br. Supp. Mot at 17). Plaintiffs downplay the significance of this sentence and

[5] Defendants also assert that because, among other reasons, the original Complaint referenced their contractual duties, there is a basis to apply equitable estoppel as well. The Court need not reach this issue.

point out that they deleted it in their Amended Complaint. Ultimately, the Court does not reach the issue of whether Plaintiffs' claims are within the scope of the Services Contract's arbitration provision, because the Court finds that the provision in question delegates questions of arbitrability, including scope, to the arbitrator.

In *Terminix International Co., LP v. Palmer Ranch Ltd. Partnership*, 432 F.3d 1327, 1332 (11th Cir. 2005), the Eleventh Circuit held that incorporation of the American Arbitration Association's (AAA) rules into the arbitration clause constituted a clear and unmistakable agreement to delegate the issue of arbitrability to the arbitrator in light of AAA Rule 8's provision that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."

At least one court has held that an incorporation of "[t]he Rules of Arbitration of the International Chamber of Commerce" similarly constituted an agreement to delegate arbitrability. *PPT Rsch., Inc. v. Solvay USA, Inc.*, No. CV 20-2645, 2021 WL 2853269, at *3 (E.D. Pa. July 7, 2021). The *PPT Research* court noted that, like the AAA rules, the ICC rules state that "any decision as to the jurisdiction of the arbitral tribunal, . . . shall then be taken by the arbitral tribunal itself." *PPT Rsch., Inc. v. Solvay USA, Inc.*, No. CV 20-2645, 2021 WL 2853269, at *3 (E.D. Pa. July

7, 2021).[6] The Court finds the *PPT Research* opinion persuasive, and given that the Services Contract provides that disputes "shall be shall be definitively resolved on the basis of the Conciliation and Arbitration Rules of the International Chamber of Commerce," the Court will refer the issue of whether Plaintiffs' claims fall within the scope of the Services Contract's arbitration provision to the arbitrator.[7]

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[6] In *Terminix*, the Eleventh Circuit hyperlinked the AAA rules, which indicates that the Court make take judicial notice of publicly available arbitration rules. 432 F.3d at 1332. Article 6 of the ICC Rules provide that "[i]n all cases referred to the Court *i.e.*, International Court of Arbitration of the International Chamber of Commerce] . . . the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is prima facie satisfied that an arbitration agreement under the Rules may exist. . . .
In all matters decided by the Court under Article 6(4), any decision as to the jurisdiction of the arbitral tribunal, except as to parties or claims with respect to which the Court decides that the arbitration cannot proceed, shall then be taken by the arbitral tribunal itself. . . Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void." 2021 Arbitration Rules, ICCWBO.org, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_6

[7] In a footnote, Plaintiffs briefly contend (without citing case law or evidence) that the non-signatory Defendants should not be able to compel arbitration as to Plaintiffs. Defendants assert that they are able to based on a "sufficiently close relationship," citing *Olsher Metals Corp. v. Olsher*, No. 03-12184, 2004 WL 5394012, at *1 (11th Cir. Jan. 26, 2004) and allegations in the Complaint. Plaintiffs' cursory footnote in response is insufficient to create a dispute as to this issue, which the Court finds in Defendants' favor for the purpose of this motion, without prejudice to any determination by the arbitrator as to the merits.

Conclusion

For the above reasons, it is

ORDERED that Defendants' Motion to Compel Arbitration or, Alternatively, to Dismiss the First Amended Complaint (Doc. 21) is **GRANTED IN PART** to the extent it seeks an order compelling arbitration of this dispute. It is

FURTHER ORDERED that Defendants' initial Motion to Compel Arbitration (Doc. 15) is **DENIED AS MOOT**. It is

FURTHER ORDERED the Clerk is **DIRECTED** to administratively close the case. The Parties may move to reopen this case at any time for the purpose of confirming or seeking to vacate any arbitral award or for any other relief in furtherance of the arbitration permitted by applicable law.

SO ORDERED this 17th day of March, 2023.

Victoria Marie Calvert
United States District Judge