United States District Court, S.D. New York.
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01 Civ. 1285 (DAB) (S.D.N.Y. Oct 08, 2002)
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Decided October 8, 2002

SARHANK GROUP v. ORACLE CORPORATION

SARHANK GROUP, Petitioner, v. ORACLE CORPORATION, Respondent.
· 01 Civ. 1285 (DAB)
·United States District Court, S.D. New York.
· October 8, 2002

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OPINION

DEBORAH A. BATTS, United States District Judge

Petitioner brings this action to confirm and enforce an international arbitration award pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "Convention"), codified at 9 U.S.C. § 201-08. The Cairo Regional Centre for International Commercial Arbitration rendered a monetary award ("Arbitration Award") to Petitioner Sarhank Group ("Sarhank") jointly and severally against both Oracle Corporation ("Oracle") and its subsidiary Oracle Systems, Ltd. ("Oracle Systems"). Respondent Oracle seeks to vacate this award on the grounds that it was never a party to the arbitration agreement.

For the reasons set forth below, the Court GRANTS the Petition's Motion for Confirmation of the Arbitration Award. Respondent's Petition to Vacate is DENIED.

I. BACKGROUND

Sarhank is an Egyptian corporation with offices in Cairo, Egypt. (Pet. to Confirm ("Pet.") ¶ 1; Resp. Stmt. ¶ 3.) Oracle is a Delaware corporation that conducts business in New York and has an office in New York. (Pet. ¶ 2; Resp.'s Stmt. ¶ 5.) Oracle Systems is a corporation established under the laws of the Republic of Cyprus, and is a wholly owned subsidiary of Oracle. (Resp.'s Stmt. ¶ 5, 6; Daley Aff. ¶ 2.) In June 1991, Sarhank entered into an Agency Agreement ("Agreement") with Oracle Systems, whereby Sarhank was to act as the provider of Oracle products and services within Egypt. (Resp.'s Mem. Law at Ex. C ("Agency Agreement") at ¶ 1.) The Agreement was extended yearly through May 1997. (Resp.'s Mem. Law at Ex. C ("Attachments AE").)

The Agreement included an arbitration provision that provided for all disputes relating to the Agreement to be submitted to arbitration in accordance with Egyptian law.1 (Pet. ¶ 11, Ex. 1 ¶ 21.2.) Beginning in 1997, a dispute arose between Sarhank and Oracle Systems regarding the termination of the Agreement and the ensuing rights and obligations of the parties. (Pet. ¶ 12, Ex. 3 ¶ 11.) Thereafter, Oracle Systems terminated the Agreement with Sarhank, who then served Oracle and Oracle Systems with a Request of Arbitration. (Pet., Ex. 3 ¶ 14.)

1.

Specifically, paragraphs 21-22 of the Agreement state:

"21.1 All disputes in relation to the interpretation or application of or any matters relating to this Agreement shall be referred to a single arbitrator to be agreed upon by the parties. 21.2. If the parties are unable to agree as to the appointment of the arbitrator within 15 days of either party giving notice or reference to arbitration, each party shall within 15 days appoint one arbitrator and the two arbitrators thus appointed shall agree upon a third arbitrator. If agreement between the two arbitrators upon the appointment of a third arbitrator cannot be reached within 15 days from the date upon which the last is appointed, such third arbitrator shall be appointed, on application of either party, by the ordinary Court of Egypt according to the Law of Civil Procedure. 21.3 The award made by the single arbitrator, all three arbitrators or a majority thereof, as the case may be shall be final and binding upon the parties and subject to no appeal. 22. This Agreement shall be construed and governed in all respects in accordance with the laws of the Republic of Egypt and the parties hereto hereby agree to submit to the jurisdiction of the Courts of Cairo."

On April 2, 1998, an International Arbitration was commenced under the auspices of the Cairo Regional Centre for International Commercial Arbitration. (Pet. ¶ 15.) Pursuant to the Agreement and to Egyptian law, each side selected an arbitrator and the Chairman of the Arbitral Tribunal was selected by the two other arbitrators. (Pet. ¶ 17, Ex. 3 at 3.) At the proceedings, Oracle objected to arbitration on the grounds that it did not sign the Agreement, was therefore not a party to the Agreement and had never assented to arbitration nor subjected itself to liability under the Agreement. (Resp.'s Stmt at 5, ¶ 35.) The Arbitrators rejected Oracle's defense that it was not a proper party to the arbitration. (Pet. at 5, ¶ 22(e), Ex. 3; Resp.'s Stmt. at 5, ¶ 35-36.) On March 11, 1999, the Arbitral Tribunal issued a unanimous decision, awarding Sarhank the net amount of US $1,902,573.2 (Pet. at 5, ¶ 22(g), Ex. 3; Resp.'s Stmt at 5 ¶ 36.)

2.

Reflected and offset in the award to Sarhank was an award to Oracle Systems in the amount of US $28,143. (Petition to Confirm at 5 ¶ 22(h), Ex. 3 at 64.)

Oracle appealed the decision of the Arbitral Tribunal to the Cairo Court of Appeals, where the Award was upheld. (Resp. Stmt ¶ 64; Resp.'s Mem. Law, Ex. G.) Oracle's appeal to the Egyptian Supreme Court, the Court of Cassation, remains pending. (Resp.'s Mem. Law, Ex. H.) However, while still considering the appeal, the Cairo Court of Appeals issued an Execution Order on March 22, 2000, (Pet. ¶ 26), which was upheld by the Egyptian Supreme Court on December 12, 2000. (Pet., ¶ 29.)

Sarhank has petitioned this Court to confirm and enforce the Award. (Pet. ¶ 31.) Oracle contends that the Convention does not apply to this case, and that the Court therefore lacks subject matter jurisdiction. (Resp.'s Mem. Law at 5-10.) Additionally, Oracle argues the Court should refuse enforcement of the Award on the grounds that: (1) Oracle was not a party to the Agreement and as such, the arbitrators lacked the authority to determine arbitrability and to impose liability on Oracle, (2) the case is not ripe and (3) enforcement of the Award is contrary to American public policy. (Resp.'s Mem. Law at 11-24.)

II. DISCUSSION

Review of a foreign arbitration award is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), codified at 9 U.S.C. § 201-08. While Respondent disputes the applicability of the Convention to this case, it is clear to the Court that the Convention does apply to the instant matter.

A. Subject Matter Jurisdiction Under the Convention The Convention clearly provides the basis for federal jurisdiction over the enforcement of foreign arbitration awards.3 See 9 U.S.C. § 201-208;Smith/Enron Cogeneration Ltd. Pshp. v. Smith Cogeneration Int'l, Inc., 198 F.3d 88, 91-92 (2d Cir. 1999) (confirming § 201 provides for enforcement of Convention, § 203 provides that action under Convention arises under laws and treaties of United States, and § 202 defines foreign arbitration agreements and foreign arbitral awards as those which fall under Convention). Specifically, District courts have been given original jurisdiction over actions or proceedings falling under the Convention and any party to a foreign arbitration may seek confirmation of that award in a district court within three years after the award is made. 9 U.S.C. § 207; See Europcar Italia v. Maiellano Tours, Inc., 156 F.3d 310, 313 (2d Cir. 1998).

3.

The statute provides that "an action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States." 9 U.S.C. § 203.

The Convention applies to the recognition and enforcement of arbitral awards made (1) in the territory of a State other than the State where the recognition and enforcement of such awards are sought and (2) arising out of differences between persons, whether physical or legal. Convention art. 1(1); See also Yusef Ahmed Alghanim Sons v. Toys "R" US, Inc., 126 F.3d

15, 18, 22 (2d Cir. 1997) (holding that dispute involving "two non-domestic parties and one United States corporation, and principally involv[ing] conduct and contract performance in the Middle East" falls within scope of Convention). The Award at issue in the instant case is clearly foreign as it was rendered in Egypt concerning the rights and obligations between an Egyptian corporation, an American corporation and a Cypriot corporation pursuant to a contract to be performed in Egypt.

Nevertheless, Oracle argues that the Court lacks subject matter jurisdiction over this dispute. However, Oracle's assertion that this Court must first decide whether the parties agreed to arbitrate in order to determine whether it has jurisdiction to enforce the Award is unavailing. Oracle relies on Khan Lucas Lancaster, Inc. v. Lark International, Ltd., 186 F.3d 210 (2d Cir. 1999), to argue that an arbitration agreement must be signed by the parties to the arbitration in order to confer subject matter jurisdiction on federal courts under the Convention. However, the analysis in Khan Lucas centered upon whether there was an "agreement in writing" sufficient to compel arbitration, not upon whether an Award may be enforced pursuant to the Convention under a theory of agency. Id. at 214. Oracle attempts to extend the analysis ofKhan Lucas to foreclose the application of agency doctrine in the enforcement of an arbitral award. This conclusion is certainly not mandated by the Convention, which "should be interpreted broadly to effectuate its recognition and enforcement purposes." Bergesen v. Joseph Muller Corp., 710 F.2d 928, 933 (2d Cir. 1983).

Currently before the Court is a petition to enforce the Award. The Court has not been asked to compel arbitration, in which case it would need to review arbitrability. See e.g., Smith Enron, 198 F.3d at 95 (quoting Chelsea Square Textiles, Inc. v. Bombay Dyeing Mfg. Co., 189 F.3d 289, 294 (2d Cir. 1999) (In considering whether "a particular dispute is arbitrable," a court must first decide "whether the parties agreed to arbitrate.")). Rather, the court has been asked to enforce an international arbitral award in which arbitrability has already been established under the laws of Egypt. In such a case, the Court has original subject matter jurisdiction and may only vacate the Award if the Respondent proves that a condition for vacatur has been met under the Convention, as enumerated in Article V of the Convention, See Alghanim, 126 F.3d at 23; Europcar, 156 F.3d at 313. To do otherwise would preclude federal enforcement of arbitral awards based upon an agency rationale, a result that is clearly inimical to the purposes of the Convention.

B. Grounds for Vacatur Under the Convention

The confirmation of an arbitration award is characterized as a summary proceeding that merely makes what is already a final arbitration award a judgment of the court. Alghanim, 126 F.3d at 23; Florasynth, Inc. v. Pickholz, 750 F.2d 171, 176 (2d Cir. 1984); SAS Group, Inc. v. Madray, No. 00-9599, 2001 U.S. App. LEXIS 15753, 14 Fed. Appx. 98, (2d Cir. 2001). As such, judicial review of arbitration awards remains limited in order to allow the efficient settlement of disputes and to avoid long and expensive litigation. See Alghanim, 126 F.3d at 23 (quoting Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993));Parsons Whittemore Overseas Co. v. Societe Generale de L'Industie du Papier, 508 F.2d 969, 977 (2d Cir. 1974) (concluding that basic purpose of Convention is to dispose of disputes quickly and avoid expense and delay of extended court proceedings)

Accordingly, "the showing required to avoid summary confirmance is high," Ottley v. Schwartzberg, 819 F.2d 373, 376 (2d Cir. 1987), and the Convention itself permits narrow discretion in the vacating of foreign arbitral awards. Convention, arts. II, III; See also,

Europcar, 156 F.3d at 313. The Court may only vacate the award if it finds a ground specified in the Convention for refusal or deferral of recognition or enforcement. See 9 U.S.C. § 207; See also Alghanim, 126 F.3d at 19;Europcar, 156 F.3d at 313. The specific grounds for refusing to enforce an award enumerated in Article V of the Convention include:

(a) The parties to the agreement . . . were . . . under some incapacity, or the said agreement is not valid under the law . . . ; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings . . . ; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . . ; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties . . . ; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Convention art. V(1).

Enforcement may also be refused by the reviewing court if "the subject matter of the difference is not capable of settlement by arbitration," or if "recognition or enforcement of the award would be contrary to the public policy" of the country in which enforcement or recognition is sought. Convention art. V(2) These seven grounds provide the sole basis for vacatur of foreign arbitral awards under the Convention. Alghanim, 126 F.3d at 19. The party opposing enforcement has the burden of proving the existence of one of these enumerated defenses. Europcar, 156 F.3d at 313 (2d. Cir. 1998); Fotochrome, Inc. v. Copal Co., 517 F.2d 512, 518 (2d Cir. 1975); Parsons, 508 F.2d 969 at 973.

Oracle argues that (1) it was not a party to the Agreement, never agreed to arbitrate and as such, the arbitrators lacked the authority to determine arbitrability and to impose liability on Oracle, (2) the case is not ripe, and (3) the Award is contrary to public policy. See Resp.'s Mem. Law at 5-10, 21-24.

1. The Arbitrators' Authority

Although the Convention recognizes that an award may not be enforced where predicated on a subject matter outside the arbitrator's jurisdiction, it does not sanction second — guessing the arbitrator's construction of the parties' agreement. Parsons, 508 F.2d at 977. It is well-settled that absent "extraordinary circumstances", a confirming court is not to reconsider the arbitrators' findings. See Europcar, 156 F.3d at 315. Thus, if the arbitrators' conclusions deal with the construction of the Agreement or are conclusions of law regarding the Agreement, the Award does not fall outside the scope of the arbitrators jurisdiction.

Article 21 of the Agreement defines the scope of arbitration to include all disputes in relation to the interpretation or application of the Agreement or any matter relating to the Agreement. Final Arbitral Award, § 16. The Arbitrators determined that this contractual arbitration clause

between Sarhank and Oracle Systems was binding upon Oracle because "Oracle Corporation is a consolidated partner with Oracle Systems in the relation with Sarhank."4 Final Arbitral Award, § 30, at 28. Specifically, the Arbitrators found that this partnership was facilitated by Article 19 of the Agreement which granted Oracle Systems the right to assign its rights and obligations under the Agreement to "an affiliated company" without the prior written approval of Sarhank. Id. This conclusion of partnership under the contract is one of "construction of the parties' agreement" and will not be reviewed by the Court, absent extraordinary circumstances. In the instant case, no such extraordinary circumstances exist.

4.

The Arbitrators deemed the partnership evidenced "by Sarhank's transmission of revenues of the sales and transactions undertaken by the de facto company directly to Oracle Corporation."

Moreover, Oracle misinterprets the law when it states that the Convention mandates the application of U.S. law in the determination of the enforcement of the award. Resp.'s Mein. Law at 11. United States domestic law regarding arbitrability is not applicable. Under Article V(1)(e) of the Convention, "an application for the setting aside or suspension of the award" can be made only to the courts or the "competent authority of the country in which, or under the law of which, that award was made." International Standard Elec. Corp. v. Bridas Sociedad Anomma Petrolera, Industrial y Comercial, 745 F. Supp. 172, 176 (S.D.N.Y. 1990) (Emphasis in original). "Any suggestion that a court has jurisdiction to set aside a foreign award based upon the use of its domestic, substantive law in the foreign arbitration defies both the logic of the Convention debates and of the final text, and ignores the nature of the international arbitral system." Id. at 177.

2. Ripeness

Oracle next argues that the Court should refuse to enforce the Award because the action is not ripe, as Oracle's appeal to the Egyptian Supreme Court remains pending. See Resp.'s Mem. Law at 21-22. It is true that the limited scope of review allowed under the Convention favors deference to proceedings in the originating country on the premise that a foreign court well versed in its own law is better suited to determine the validity of the award. Europcar, 156 F.3d at 317. However, a district court is not required to stay an action to enforce an arbitration agreement merely because an action is pending in the originating country. See Europcar, 156 F.3d at 317; Sumitomo Corp. v. Parakopi Compania Maritima, S.A., 477 F. Supp. 737, 741-42 (S.D.N.Y. 1979) (holding that Convention did not require stay of action to compel arbitration where court in related proceeding had not yet taken action on merits), aff'd, 620 F.2d 286 (2d Cir. 1989).

Where a parallel proceeding is ongoing in the originating country and there is a possibility that the award will be set aside, a district court should use its discretion to balance the often competing interests of international comity and the goals of arbitration. The adjournment of enforcement proceedings impedes the goals of arbitration, i.e., the expeditious resolution of disputes. See Fertilizer Corp. of Indiana v. IDI Management, Inc., 517 F. Supp. 948, 955-58, 961-64 (S.D.O.H. 1981). Therefore, the Second Circuit has concluded that, when considering a stay, a proper balancing:

should lead a district court to consider several factors, including (1) the general objectives of arbitration — the expeditious resolution of disputes and the avoidance of protracted and expensive litigation; (2) the status of the foreign proceedings to be resolved; (3) whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review; (4) the characteristics of the foreign proceedings including (i) whether they were brought to enforce an award (which would tend to weigh in favor of a stay); (ii) whether they were initiated before the underlying enforcement proceeding so as to raise concerns of international comity; (iii) whether they were initiated by the party now seeking to enforce the award in federal court; and (iv) whether they were initiated under circumstances indicating an intent to hinder or delay resolution of the dispute; (5) a balance of the possible hardships to each of the parties. . . and (6) any other circumstances that could tend to shift the balance in favor of or against adjournment." Europcar, 156 F.3d at 317-18.

Balancing the concerns of expediency and comity, the Court finds decisively in favor of reaching the merits of enforcing the Award. The enforcement of the Award would be more expeditious than denying enforcement to await the ultimate conclusion of the Egyptian court, and moreover, concern for comity weighs in favor of the affirmation of the arbitration award. Indeed, the Supreme Court of Egypt has already declined to stop the implementation of the Award, affirming the Execution Order entered by the Egyptian Court of Appeals. See Pet. ¶ 29. The fact that the pending foreign appeal seeks to set aside, not enforce, the award weighs in favor of enforcement in spite of the parallel proceedings ongoing in the originating country. Europcar, 156 F.3d at 318. Finally, Oracle has failed to demonstrate how enforcement of the Award at this juncture would impose an unjust hardship upon it.5 As implementation of the award would mirror the ruling of the Egyptian Supreme Court, international comity ultimately supports the Court's decision to confirm the Award.

5.

In Europcar, the Second Circuit considers postponement of enforcement to constitute possible hardship and notes that insolvency of one party may play a role in determining relative hardship.156 F.3d at 318.

3. Public Policy

Article V(2)(B) of the Convention allows a court to refuse enforcement where to do so would violate the public policy of the enforcing state. However, the Court must construe the public policy exception very narrowly and applies it "only where enforcement would violate our "most basic notions of morality and justice."6 Waterside Ocean Navigation Co. v. International Navigation Ltd., 737 F.2d 150, 152 (2d Cir. 1984) (quoting Fotochrome, 517 F.2d at 516)); see Parsons, 508 F.2d at 974;Europcar, 156 F.3d at 315.

6.

Thus, the general pro-enforcement leaning informing the Convention points toward a narrow reading of the public policy defense. Parsons, 508 F.2d at 973. The adoption of the Convention by the United States promotes the strong federal policy favoring arbitration of

disputes, particularly in the international context. Smith Enron, 198 F.3d at 92; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638-40 (1985).

Conversely, an expansive construction of the public policy defense would vitiate the Convention's basic effort to remove preexisting obstacles to enforcement. See Straus, Arbitration of Disputes between Multinational Corporations, in New Strategies for Peaceful Resolution of International Business Disputes, 114-15 (1971); Digest of Proceedincrs of International Business Disputes Conference, April 14, 1971, in id. at 191 (remarks of Professor W. Reese). The primary aim of the Convention was to liberalize the enforcement of foreign arbitration awards. The Convention supersedes the Convention on the Execution of Foreign Arbitral Awards ("Geneva Convention"), Sept. 26, 1927, 92 L.N.T.S. 301. Experts argue that the primary defect of the Geneva Convention was that it required the rendering state to recognize the award before it could be enforced abroad. See Geneva Convention arts. 1(d), 4(2), 92 L.N.T.S. at 305, 306, the requirement of "double exequatur." See Jane L. Volz Roger S. Haydock, Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser, 21 Win. Mitchell L. Revs. 867, 876-77 (1996); W. Laurence Craig, Some Trends and Developments in the Laws and Practice of International Commercial Arbitration, 30 Tex. Int'l L.J. 1, 9 (1995). The Convention eliminated this problem by eradicating this requirement. In so doing, the Convention intentionally liberalized procedures for enforcing foreign arbitral awards. See Alghanim, 126 F.3d at 22; Scherk v. Alberto-Culver Co., 417 U.S. 506, 519-20 n. 15; Parsons, 508 F.2d at 973.

Additionally, considerations of reciprocity expressly recognized in the Convention counsel courts to invoke the public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States. Parsons,508 F.2d 969, 973-74. David L. Threlkeld Co. v. Metallgesellschaft Ltd., 923 F.2d 245, 250 (2d Cir.), cert. dismissed, 501 U.S. 1267 (1991) (concluding that "the goal of the Convention is to promote the enforcement of arbitral agreements in contracts involving international commerce so as to facilitate international business transactions."). See also, Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n. 15 (1974).

Oracle maintains that the enforcement of the Arbitration award would violate its right to due process in contravention of United States public policy, as it was neither a party to the Agreement nor to the Arbitration. See Resp.'s Mem. Law at 22-24. However, Oracle's argument is unpersuasive. Oracle was on notice that its interests were before the Arbitrators,7 who determined that Oracle was notified of the proceedings, maintained representation at the proceedings, and expressed pleadings, constituting presence under Art. 83 of the Civil Procedures Law of Egypt. Final Arbitral Award, § 30. Since Oracle had ample notice and was represented by counsel and by pleading at the Arbitration, Oracle has failed to demonstrate a violation of its right to due process of law. See Barbier v. Shearson Lehman Hutton Inc., 948 F.2d 117, 120-21 (2d Cir. 1991); Bridas Sociedad 745 F. Supp. at 181; Fotochrome, 517 F.2d at 512, 517-18.

7.

Notification was made to both Oracle and Oracle Systems by fax and especial express mail to their respective addresses and they have in turn received the notices rendering as such the notification valid according to the law of Egypt. Final Arb. Award, § 30, at 27.

Moreover, the imposition of joint and several liability against Oracle conforms to United States public policy. The Second Circuit has repeatedly held that non-signatories to an arbitration agreement may nevertheless be bound according to "ordinary principles of

contract and agency." Smith/Enron, 198 F.3d at 97 (quoting McAllister Bros., Inc. v. AS Transp. Co., 621 F.2d 519, 524 (2d Cir. 1980)). These principles include "(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel." Id.; see also, Thomson-CSF, S.A. v. American Arbitration Association, 64 F.3d 773, 776 (2d Cir. 1995).8 A number of these concepts would justify imposition of liability upon Oracle via an agreement made by its wholly-owned subsidiary, Oracle Systems.9 Oracle might quibble that a U.S. court would not have imposed liability on an agency theory on the facts of this case, but that argument is misplaced. The Egyptian Arbitrators' decision to do so here, under a theory of partnership akin to veil piercing, cannot be said to undermine "our most basic notions of morality and justice." Thus, the Court fails to find a public policy rationale sufficient to vacate the Award entered against Oracle.

8.

According to Thompson-CSF, S.A. v. American Arbitration Ass'n,64 F.3d 773, 776 (2d Cir. 1995): "It does not follow . . . that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision." (quoting Fisser v. International Bank, 282 F.2d 231, 233 (2d Cir. 1960)); see also Deloitte Noraudit A/S 9 F.3d at 1064. The Thoinson-CSF Court made clear that a nonsignatory party may be bound to an arbitration agreement if the ordinary principles of contract and agency would direct such a result. Thoinson-CSF, 64 F.3d at 776 (2d Cir. 1995).

9.

For example, a non-signatory may be compelled to arbitrate when it has derived other benefits under the agreement containing the arbitration clause. See Smith Enron, 198 F.3d at 98; American Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999).

III. CONCLUSION

For the aforementioned reasons, the Arbitration Award in its entirety is AFFIRMED and Respondent's Motion to Vacate the Arbitration Award is DENIED. The Clerk of the Court shall enter judgment accordingly.

SO ORDERED.