Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.

ENCYCLOPAEDIA **UNIVERSALIS,** S.A.,
Plaintiff,
v.
ENCYCLOPAEDIA **BRITANNICA,** INC.,
Defendant.

No. 03 Civ.4363 SAS.

Dec. 4, 2003.

Jennifer L. Marlborough, Wormser, Kiely, Galef & Jacobs LLP, New York, New York, for Plaintiff.

Fredrick E. Sherman, Noah Rubins, Jones Day, New York, New York, for Defendant.

OPINION AND ORDER

SCHEINDLIN, J.

I. INTRODUCTION

***1** Each year countless disputes are submitted to arbitration. [FN1] Arbitration has many advantages over resort to the judicial system as a mechanism for resolving disputes: it provides an effective means to dispose of disputes that might otherwise choke an already burdened court system; it can swiftly resolve contract disputes that impede the smooth flow of business; and it allows parties to specify the ground rules for dispute resolution at the time of contract and thus protect themselves from the uncertainty that judicial scrutiny might bring. For these and many other reasons, many have hailed the rise of arbitration as an invaluable tool. [FN2] However, even the finest tool is subject to abuse in the hands of an inept, careless or somewhat manipulative user; likewise, the selection of unqualified or illegitimate arbitrators or the arbitrators' exercise of powers exceeding their mandate may subvert the parties' agreement. Such conduct may transform a fair and efficient adjudicative proceeding into a sham trial bereft of the procedural protections of the judicial system. This opinion addresses the following problem: where the parties have agreed to submit their disputes to an arbitrator selected according to specific, bargained-for guidelines, when does non-adherence to those guidelines destroy the legitimacy of the entire arbitration proceeding?

FN1. Although precise statistics are not readily available, it is worth noting that the American Arbitration Association alone reported over two hundred thousand cases in the year 2002. *See* AAA Fast Facts, *http://www.adr.org/index2.1.jsp?JSPssid=16235* (December 1, 2003) ("In the last year alone ... The AAA administered 230,255 cases--3,298 were commercial cases with claim amounts of $250,000 or greater.")

FN2. *See, e.g.*, Andrew P. Lamis, *The New Age of Artificial Legal Reasoning as Reflected in the Judicial Treatment of the Magnuson-Moss Act and the Federal Arbitration Act,* 15 Loy. Consumer L.Rev. 173, 246 (2003) (echoing "what our Nation's judges have been telling us for a decade and a half. Arbitration is a good thing, arbitration must be embraced.").

II. FACTS [FN3]

FN3. The following facts are undisputed, unless otherwise indicated.

Encyclopaedia **Universalis,** S.A. ("EUSA") and Encyclopaedia **Britannica,** Inc. ("EB") are parties to a Literary Property License Agreement (the "License Agreement"). [FN4] The parties submitted a dispute arising under the License Agreement to arbitration, and an award was entered on January 25, 2002. [FN5] EUSA now seeks recognition and enforcement of the Award pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), and entry of judgment. [FN6]

FN4. *See* License Agreement, Ex. A to the Complaint, Ex. 1 to 8/8/03 Affidavit of

Jennifer L. Marlborough, counsel for plaintiff ("Marlborough Aff.").

FN5. *See* Arbitration Award ("Award"), Ex. D to Complaint.

FN6. *See* EUSA's Memorandum of Law in Support of its Motion Pursuant to Convention on the Recognition and Enforcement of Foreign Arbitral Awards and for Summary Judgment ("EUSA Mem."), at 1; 9 U.S.C. §§ 201-208.

EUSA is a "societé anonyme" organized and existing under the laws of the Grand Duchy of Luxembourg. [FN7] EB is a Delaware corporation engaged in the publication and distribution of encyclopedias and other reference materials. [FN8] On November 21, 1966, EUSA and EB entered into the License Agreement, granting EB the "exclusive right to translate, produce, publish, sell and otherwise distribute" the contents of a reference work entitled "Encyclopaedia Universalis" in all languages other than French. [FN9] EB agreed to pay EUSA a royalty based on such sales. [FN10] On the same day, EB entered into a Two Party Agreement with Club

FN7. *See* EUSA's 8/8/03 Statement of Material Facts Pursuant to Local Rule 56.1 ("EUSA 56.1 Stmt."), ¶ 1.

FN8. *See id.*, ¶ 2.

FN9. *See* License Agreement, at Preamble, ¶ 1.

FN10. *See id.*, ¶ 5.

Francais du Livre ("CFL"), a French corporation, under which EB and CFL agreed to form a corporation called Encyclopaedia Universalis France ("EUF"), which would have rights to publication of Encyclopaedia Universalis in the French language. [FN11] The License Agreement is governed by New York Law. [FN12]

FN11. *See* Two Party Agreement, Ex. B to Complaint, ¶ II; License Agreement.

FN12. *See* License Agreement, ¶ 13.

The parties dispute whether EUSA transferred all rights to the French language version of its encyclopedia to EUF. [FN13] EB asserts that "EUSA transferred all rights in the French language version of Encyclopaedia Universalis to EUF." [FN14] EB's assertion is echoed in the License Agreement, which notes that, according to the Two Party Agreement, "EUSA has agreed to grant to a new French company formed by EB and CFL (hereinafter called "EU France") all exploitation rights in the reference work in the French language." [FN15] EUSA contends that it "never transferred--or intended to transfer--any rights in its French language version to Encyclopaedia Universalis France;" rather, according to EUSA, "it was only in 1999 that EUSA discovered (by viewing the French National Registry) that rights had been illegally transferred from EUSA in 1967 or 1968." [FN16] EUSA's contention, though, is not buttressed by any tangible evidence or direct testimony; rather, it springs from repeating the assertions of EUSA's French counsel, François Tripet, in telephone conversations with EUSA's New York counsel. [FN17]

FN13. *See* Defendant's Response to Plaintiff's Local Civil Rule 56.1 Statement of Material Facts ("EB 56.1 Resp.") ¶ 5; 9/23/03 Reply Affidavit of Jennifer Marlborough ("Marlborough Reply Aff."), ¶ 11.

FN14. *See* EB 56.1 Resp., ¶ 5.

FN15. *See* License Agreement, at Preamble.

FN16. *See* Marlborough Reply Aff., ¶ 11.

FN17. *See id.*, ¶ 9.

***2** In any event, the parties provided for arbitration of disputes arising under both the License Agreement and the Two Party Agreement. The Two Party Agreement provides that, should the parties fail to agree on any matter requiring approval of CFL and EB as shareholders, "either party may demand that the matter be referred to a Board of Arbitration for resolution." [FN18] The Two Party Agreement further states:

FN18. *See* Two Party Agreement, ¶ VIII(a).

> The Board of Arbitration shall be composed of two arbitrators of which one shall be chosen by EB and the other by CFL. In the event of disagreement between these two arbitrators, they shall choose a third arbitrator who will constitute with them the Board of Arbitration. Upon the failure of the two arbitrators to reach agreement upon the choice of a third arbitrator, the third arbitrator, who must be fluent in French and English, shall be appointed by the President of the Tribunal of Commerce of the Seine from a list of arbitrators maintained by the British Chamber of Commerce in London at the request of the arbitrator who is first to make such a request. [FN19]

FN19. *Id.*, ¶ VIII(b).

The License Agreement provides, in pertinent part:

> All disputes arising in connection with the present Agreement shall finally be settled by a Board of Arbitration established and governed by the procedures set forth in the [Two Party] Agreement entered into this day between EB and CFL; provided, however, that EUSA and not CFL shall select one of the arbitrators; and provided further, that the third arbitrator shall be selected by the President of the Tribunal de Commerce of Luxembourg from a list of arbitrators maintained by the British Chamber of Commerce in London at the request of the arbitrator who is first to make such a request . [FN20]

FN20. License Agreement, ¶ 14.

As of March 10, 1999, the British Chamber of Commerce no longer maintained such a list of arbitrators. [FN21]

FN21. *See* 3/10/03 Letter from Marlyn Hope of the British Chamber of Commerce to Eliza Mellor, Ex. 4 to Marlborough Aff.

In October of 1995, EB stopped making royalty payments to EUSA under the License Agreement. [FN22] EUSA and EB disagreed about EB's obligation to continue to make such payments, and were unable to resolve the matter. [FN23] On December 19, 1996, EUSA notified EB that it had "named as arbitrator, charged with representing the interests of Encyclopaedia Universalis S.A., Mr. François Tripet..." [FN24] EB objected repeatedly to Tripet's appointment, protesting that, as EUSA's own French counsel, Tripet could not function as a neutral arbitrator. [FN25] On May 18, 1998, EUSA sent a letter to EB describing its claim and noting that it had named Raymond Danziger, an accountant residing in Paris, as its arbitrator instead of Tripet. [FN26]

FN22. *See* EB 56.1 Resp., ¶ 12.

FN23. *Id.*, ¶ 13.

FN24. *See* 12/19/96 Letter from EUSA to William J. Bowe, Executive Vice President and General Counsel of EB, Ex. A to 9/3/03 Declaration of William J. Bowe ("Bowe Decl.").

FN25. *See* Bowe Decl., ¶ 7, Exs. B, D.

FN26. *See* 5/18/98 Letter from EUSA to EB, Ex. G to Bowe Decl.

After receiving notice of EUSA's claim, EB expressed its willingness to reach an agreement between the parties, without resort to arbitration, provided that EUSA send it documents which "(i) identify the past and current beneficial owners of

Encyclopaedia Universalis S.A.; and (ii) contain a certification by acceptable independent third party tax authorities that payments made by EB to Encyclopaedia Universalis S.A .... are not part of any scheme or artifice on the part of Encyclopaedia Universalis S.A. to violate the tax laws of France, Luxembourg or any other country...." [FN27] EUSA refused to provide such documentation, stating that EB's terms were "absolutely unacceptable in suspecting that our company might have been incorporated for the purpose of violating laws of other countries" and again suggesting that EB appoint its own arbitrator. [FN28]

FN27. *See* 6/11/98 Letter from Bowe to EUSA, Ex. H to Bowe Decl.

FN28. *See* 6/18/98 Letter from EUSA to Bowe, Ex. I to Bowe Decl.

***3** On July 2, 1998, EB appointed Robert Layton, an attorney doing business in New York, to serve as an arbitrator to resolve the dispute between EUSA and EB. [FN29] Layton and Danziger appear to have discussed the scope of the arbitration and the procedures to be followed therein, but neither party has produced any evidence that the two arbitrators disagreed on, or in fact even discussed, the merits of the underlying claim. [FN30]

FN29. *See* EB 56.1 Resp., ¶ 16.

FN30. *See* 9/1/03 Declaration of Robert Layton, Arbitrator appointed by EB ("Layton Decl."), ¶ 8, Exs. C, D, G.

On March 30, 1999, Danziger wrote to the President of the Tribunal of Commerce of Luxembourg ("the Tribunal"), representing that "the two arbitrators were unable to agree as to the nomination of a third arbitrator," and asking the President to name a third arbitrator pursuant to the License Agreement. [FN31] Danziger informed the President that "the agreement in fact provides for the designation of an arbitrator drawn from the list maintained by the British Chamber of Commerce in London," but noted that "however, information obtained from Ms. Elizza Mellor [sic] ... indicate that such a list is currently non-existent ... that as a result it is appropriate to choose another competent arbitrator." [FN32] Danziger informed Layton of his letter to the President on April 15, 1999. [FN33] On April 22, 1999, Maryse Welter, the Presiding Judge of the Tribunal of Commerce, appointed Nicolas Decker, an attorney admitted to the courts of Luxembourg, as the third arbitrator. [FN34] Layton in turn wrote to the President, stating in pertinent part:

FN31. *See* Unofficial English Translation of 3/30/03 Letter from Danziger to the President of the Tribunal of Commerce, Ex. E to Layton Decl.

FN32. *Id.*

FN33. *See* 4/15/99 Letter from Danziger to Layton, Ex. E to Layton Decl.

FN34. *See* 4/22/99 Order of Judge Welter, Ex. E to Marlborough Reply Aff.

[I]t is plain to me as an experienced international arbitrator that a major step in the course to be followed under the applicable arbitration clause has been overlooked.
M. Danziger and I have never had opportunity [sic] to confer as between ourselves regarding the selection of a Chairman by consent, as opposed to asking you to appoint one from the list referred to in the applicable clause. The parties plainly intended that such a cooperative attempt to agree on an arbitrator take place. See par. VIII.(b) of the Two Party Agreement of Nov. 21, 1966, line 3:
"In the event of disagreement between these two arbitrators, they shall choose a third arbitrator who will constitute with them the Board of Arbitration. *Upon the failure of the two arbitrators to reach agreement upon the choice of the third arbitrator* ..., etc."
...
Hence it is plain that M. Danziger and I are required *first* to attempt to agree upon this important subject. It is not appropriate to skip over this step and to ask you to appoint someone

from a jurisdiction such as Luxembourg or Paris.
...
Accordingly, I must respectfully request that you decline to process M. Danziger's request, with an instruction to both of us to attempt to carry out the dictates of the governing clause in the contract. [FN35]

FN35. 4/28/99 Letter from Layton to President of Tribunal of Commerce, Ex. G to Layton Decl. (emphasis in original).

Layton went on to suggest various desirable criteria by which to choose an arbitrator, and suggested that an appropriate arbitrator might be chosen from a list maintained by the London Court of International Arbitration. [FN36] On May 5, 1999, Judge Welter suspended all arbitration proceedings led by Decker. [FN37] On May 27, 1999, Danziger responded to Layton's April 28 letter, stating:

FN36. *Id.*

FN37. *See* 7/29/03 Declaration of Francois Tripet, counsel for EUSA ("Tripet Decl."), ¶ 26.

***4** In the letter you sent to the President of the Tribunal de Commerce of Luxemburg on April 28 1999, you suggest that the third Arbitrator should be a lawyer, presumably a resident of New York, -or at least located in London-, and well versed in the laws of New York. Recommending the London Court of International Arbitration, you wish an English speaking Arbitrator, but not necessarily a French speaking one.
I do not agree with these suggestions or wishes. Therefore, there is no doubt that we failed to reach an agreement upon the choice of the third Arbitrator. [FN38]

FN38. 5/27/99 Letter from Danziger to Layton, Ex. C to Marlborough Reply Aff.

On or about December 14, 1999, counsel for EUSA and EB attended a hearing before Judge Welter regarding the appointment of Decker. [FN39] On February 22, 2000, Judge Welter issued an order for Decker to proceed as an arbitrator. [FN40] Decker forwarded Judge Welter's decision to Danziger and Layton and announced that he intended to commence arbitration proceedings, scheduling a meeting for May 19, 2000. [FN41] On April 13, 2000, Layton informed Decker that he would not attend such a meeting, stating:

FN39. *See* Tripet Decl. ¶ 27.

FN40. *See id.*, ¶ 28.

FN41. *See* 4/11/00 Letter from Decker to Danziger and Layton, Ex. I to Layton Decl.

Our counsel in Luxembourg, as well as I, have explained that the EU party disregarded the requirement of the Agreement between the parties that the two appointed arbitrators *attempt to agree on a Chairman.* That procedure never took place. Mr. Danziger simply skipped over that requirement and sought relief from the Luxembourg court. Additionally, absent agreement from EB and in violation of the Agreement, the Court disregarded the Agreement's requirement that a Chairman be appointed from the list of arbitrators maintained by the British Chamber of Commerce. The fact that such a list is no longer maintained by that organization does not give anyone carte blanche to appoint a Luxembourg attorney as Chairman. Lastly, the agreement mandates that it be governed by New York law. EB is not aware that you are qualified as one learned in the law of New York. [FN42]

FN42. *See* 4/13/00 Letter from Layton to Decker, Ex. J to Layton Decl. (emphasis in original).

On May 12, 2000, Danziger wrote to Decker agreeing to meet on May 19, opining that "the arguments that [Layton] presented to refuse to go to the meeting that you proposed in your April 11, 2000 letter confirms--if there was a need--the dilatory tactics utilized by Encyclopedia Britannica since February 1998 to avoid the arbitration

required by the agreement between the parties." [FN43]

FN43. 5/12/00 Letter from Danziger to Decker, Ex. F to Marlborough Reply Aff.

Decker wrote to Danziger and Layton on May 16, 2000, urging Layton to attend the arbitration proceedings, and setting a new date of June 16, 2000 for the tribunal's first meeting. [FN44] Layton again refused, reiterating the objections presented in his letter of April 13, 2000. [FN45] On June 20, 2000, Decker informed EB of Layton's refusal to participate in the arbitration tribunal and asked EB to appoint another arbitrator, which EB refused to do. [FN46] On July 24, 2000, Decker informed counsel for both parties of Layton's refusal to participate and of EB's refusal to appoint another arbitrator, and stated that the arbitration tribunal, composed of Decker and Danziger, intended to commence the arbitral proceedings. [FN47]

FN44. *See* 5/16/00 Letter from Decker to Layton and Danziger, Ex. 8 to Marlborough Aff.

FN45. *See* 6/6/00 Letter from Layton to Decker, Ex. K to Layton Decl.

FN46. *See* 6/20/00 Letter from Decker to EB, Ex. 9 to Marlborough Aff.; Tripet Decl., ¶ 34.

FN47. *See* EB 56.1 Resp., ¶ 32.

***5** The arbitration tribunal commenced proceedings without participation by either Layton or EB. [FN48] On January 25, 2002, the arbitration tribunal found that EUSA was entitled to: (1) a termination of the License Agreement, as of February 12, 1998; (2) payment from EB in the amount of 2,174,077.42 Euros plus ten percent per annum interest on royalties of 1,348,900.77 Euros from November 1 until settlement of the Award; (3) payment from EB in the amount of 914,696.10 Euros plus ten percent per annum interest from January 25, 2002 until settlement of the Award; and (4) payment from EB in the amount of seventy-five percent of the Arbitration Award costs, including the arbitrators' expenses and fees, totaling 67,200 Euros, including twelve percent Value Added Tax. [FN49] EUSA now seeks recognition, confirmation and enforcement of the Award.

FN48. *See id.*, ¶¶ 33-41.

FN49. *See id.*, ¶ 48; Award at 2002/2293.

III. LEGAL STANDARD

Under the New York Convention, a court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." [FN50] Under Article V of the Convention, a court may refuse to confirm or enforce an arbitral award on one or more of the following grounds:

FN50. 9 U.S.C. § 207; *see Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194, 196 (2d Cir.1999).

(a) The parties to the agreement ... were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; 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 was otherwise unable to present his case; 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, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such

agreement, was not in accordance with the law of the country where the arbitration took place; 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. [FN51]

FN51. New York Convention, art. V(1); *See Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 19 (2d Cir.1997)

A court may also refuse to enforce an award if "[t]he 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. [FN52] "[I]n an action to confirm an award rendered in, or under the law of, a foreign jurisdiction, the grounds for relief enumerated in Article V of the Convention are the only grounds available for setting aside an arbitral award." [FN53]

FN52. *See id.*, art. V(2).

FN53. *Yusef Ahmed Alghanim & Sons*, 126 F.3d at 20 (declining to read the FAA's implied defenses to confirmation of an arbitral award into the New York Convention).

IV. DISCUSSION

***6** EB argues that this Court should refuse to confirm and enforce the Award because it meets three of the grounds specified in the New York Convention. Specifically, EB claims: (1) the License Agreement's arbitration clause was invalid under the doctrines of impossibility and frustration of purpose; (2) the arbitral tribunal was improperly composed; and (3) the arbitrators exceeded their powers.

A. The Agreement to Arbitrate Was Not Invalid

The New York Convention provides that enforcement of a foreign arbitral award may be refused if "the agreement is not valid under the law to which the parties have subjected it." [FN54] The License Agreement is governed by New York Law. [FN55] EB accordingly argues that, under New York law, the disappearance of the list of arbitrators maintained by the British Chamber of Commerce rendered the License Agreement's arbitration clause unenforceable, relying on the common law contract defenses of impossibility and frustration of purpose. Neither of these defenses, however, renders the arbitration agreement fundamentally invalid.

FN54. New York Convention, art. V(1)(a); *see also China Minmetals Materials & Export Co., Ltd. V. Chi Mei Corp.*, 334 F.3d 274, 289-90 (3d Cir.2003) (holding that "a party that opposes enforcement of a foreign arbitration award under the Convention on the grounds that the alleged agreement containing the arbitration clause on which the arbitral panel rested its jurisdiction was void *ab initio* is entitled to present evidence of such invalidity to the district court, which must make an independent determination of the agreement's validity and therefore of the arbitrability of the dispute").

FN55. *See* License Agreement, ¶ 13.

1. Impossibility

EB posits that, because the arbitration clause specifically requires that any third arbitrator "be selected by the President of the Tribunal de Commerce of Luxembourg from a list of arbitrators maintained by the British Chamber of Commerce in London," the disappearance of that list renders performance of the arbitration clause impossible. [FN56] EB's literal definition of impossibility, though, is not legally correct.

FN56. *See* EB's Memorandum of Law in Opposition to EUSA's Motion to Confirm Arbitration Award ("Opp.Mem."), at 14-16.

The Second Circuit defines impossibility as follows:

In general impossibility may be equated with an inability to perform as promised due to intervening events, such as an act of state or destruction of the subject matter of the contract. The doctrine comes into play where (1) the contract does not expressly allocate the risk of the event's occurrence to either party, and (2) to discharge the contractual duties ... of the party rendered incapable of performing would comport with the customary risk allocation. Essentially, then, discharge by reason of impossibility ... enforces what can reasonably be inferred to be the intent of the parties at the time of contract. [FN57]

FN57. *United States v. General Douglas MacArthur Senior Village, Inc.*, 508 F.2d 377, 381 (2d Cir.1974) (applying New York law).

The License Agreement does not explicitly allocate the risk of the disappearance of the Chamber of Commerce list to either party. However, it cannot reasonably be inferred from the License Agreement that the parties intended that the unforeseen disappearance of that list should result in complete discharge of the parties' obligation to arbitrate disputes.

Indeed, under New York law, the dominant intent of the parties is the key question. [FN58] Here, the terms of the License Agreement and the actions of both parties, at least until Danziger's request that the Tribunal appoint a third arbitrator and EB's subsequent withdrawal from the arbitration proceedings, support a finding that the dominant purpose of the License Agreement's arbitration provision was that disputes between EB and EUSA should be arbitrated. The disappearance of the Chamber of Commerce list could not alone render the satisfaction of the parties' dominant intent impossible. Arbitration of disputes was begun, and could have been concluded legitimately and satisfactorily, in the absence of the Chamber of Commerce list.

FN58. *See Laboratorios Grossman, S.A. v. Forest Laboratories, Inc.*, 295 N.Y.S.2d 756, 757 (1st Dept.1968) (holding that where parties specified that disputes arising under a contract should be arbitrated pursuant to the "rules and procedures of the Pan-American Arbitration Association," a nonexistent organization, lower court should conduct a hearing (1) to determine whether the parties actually meant to refer disputes to the similarly named "Inter-American Commercial Arbitration Commission" and, if the court finds that the parties did not so agree, (2) to determine whether the dominant intent of the parties was that disputes should be arbitrated, rather than that one precise instrumentality should be used to arbitrate the disputes, and to act accordingly).

2. Frustration of Purpose

*7 EB next argues that the purpose of the arbitration clause was frustrated by the disappearance of the Chamber of Commerce list. The requirement that a third arbitrator be selected from that list, according to EB, "ensured both Britannica and EUSA that if it became necessary to appoint a third arbitrator, he or she would be from a neutral jurisdiction and qualified." [FN59]

FN59. *See* Opp. Mem., at 16.

EB's analysis, like its analysis of the impossibility theory, has intuitive appeal. It is, indeed, unlikely that two parties would have agreed specifically that the third arbitrator could be chosen only from a list maintained by the British Chamber of Commerce absent some underlying reason for that designation. However, the doctrine of frustration of purpose generally applies only where "a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party." [FN60]

FN60. *See General Douglas MacArthur Senior Village*, 508 F.2d at 381.

It is difficult to argue that the disappearance of the Chamber of Commerce list rendered the arbitration clause completely valueless to either EB or EUSA. Rather, EB and EUSA were able to appoint their two arbitrators satisfactorily, and, had those

arbitrators agreed on the merits of the case, or on the identity of a third arbitrator, the disappearance of the list would have remained wholly irrelevant to the arbitral proceedings. Indeed, even in the event of disagreement between the two party-appointed arbitrators, the purposes of the clause could be served if the Tribunal chose a third arbitrator embodying the salient characteristics of those arbitrators previously listed by the British Chamber of Commerce. The disappearance of the Chamber of Commerce list, then, does not amount to the "virtual cataclysm" necessary to support EB's theory of frustration of purpose.

B. The Arbitral Tribunal Was Improperly Composed

EB next argues that EUSA's arbitrator acted improperly by asking the Tribunal to appoint a third arbitrator, without first attempting, and failing, to agree with EB's arbitrator as to either the merits of the dispute or the identity of a third arbitrator. Because the procedures for selecting arbitrators outlined in the parties' agreement were not followed, EB concludes, the appointment of a third arbitrator was improper, and this Court should refuse to enforce the Award pursuant to the New York Convention. [FN61] Those procedures, which appear in the Two Party Agreement and are incorporated into the License Agreement, require that:

> FN61. *See* New York Convention, art. V(1)(d).

> In the event of disagreement between these two arbitrators, they shall choose a third arbitrator who will constitute with them the Board of Arbitration. Upon the failure of the two arbitrators to reach agreement upon the choice of a third arbitrator, the third arbitrator, who must be fluent in French and English, shall be appointed by the President of the Tribunal of Commerce.... [FN62]

> FN62. *See* Two Party Agreement, ¶ VIII(b); License Agreement, ¶ 14.

The License Agreement further provides that:

> [T]he third arbitrator shall be selected by the President of the Tribunal de Commerce of Luxembourg from a list of arbitrators maintained by the British Chamber of Commerce in London at the request of the arbitrator who is first to make the request." [FN63]

> FN63. License Agreement, ¶ 14.

***8** The parties' agreement, then, requires that: (1) the arbitrators must "disagree" before appointing a third arbitrator; (2) that the two party- appointed arbitrators must then attempt to choose a third arbitrator; and (3) upon the failure of the two party-appointed arbitrators to agree on a third arbitrator, the Tribunal of Commerce must appoint an arbitrator from the Chamber of Commerce list. I will address each requirement in turn.

1. The Arbitrators Met and Failed to Agree

After EUSA appointed Danziger and EB appointed Layton, the two arbitrators communicated with each other regarding the form and function of the arbitration, but do not appear to have addressed the merits of the underlying claim. [FN64] EB complains that, because "Mr. Layton and Mr. Danziger never solicited or received submissions on the substance of the dispute from the parties ... [or held] any discussions concerning the elements of the parties' disagreement," they never attempted to agree on the merits, and hence never should have appointed a third arbitrator. [FN65]

> FN64. *See* Layton Decl., ¶ 8, Exs. C, D, G.

> FN65. *See* Opp. Mem., at 19.

However, EB reads more into the requirements of the arbitration clause than the language will bear. The Two Party Agreement, and by incorporation the License Agreement, simply states that the arbitrators shall choose a third arbitrator "in the event of disagreement between these two arbitrators." [FN66] The contract does not specify whether that disagreement must regard the underlying merits of the case or whether other points of disagreement might trigger the appointment of a third member. Here, Danziger and Layton seem to have disagreed as to the procedural

rules which would govern the arbitration proceedings. Specifically, in his letter of October 20, 1998, Layton refers to a conversation in which he and Danziger discussed certain procedural rules and encloses a copy of one possible body of governing rules. [FN67] On November 4, 1998, Danziger responded, referring again to a telephone conversation, and asserting that there would be "no need to refer to any international rules." [FN68] Although such discussions do not suggest a terminally deadlocked arbitral tribunal, they do provide ample support for the position that the two party-appointed arbitrators disagreed on at least one issue relevant to the arbitration proceedings. Indeed, the purpose of the arbitration clause itself--to provide for the effective arbitration of disputes--would be stymied if, as EB suggests, solely procedural disagreement between the two arbitrators could never be remedied by a third arbitrator. A disagreement regarding arbitral procedure could, under that theory, indefinitely stall proceedings and negate any benefits of arbitration. The two party-appointed arbitrators in this case properly turned to the appointment of a third arbitrator once they reached substantial disagreement as to the governing procedural rules.

FN66. *See* Two Party Agreement, ¶ VIII(b).

FN67. *See* 10/20/98 Letter from Layton to Danziger, Ex. C to Layton Decl.

FN68. *See* 11/4/98 Letter from Danziger to Layton, Ex. D to Layton Decl.

2. The Arbitrators Did Not Attempt to Agree on a Third Arbitrator

In contrast to the requirement of initial disagreement, the clause requiring the arbitrators to choose a third member of the tribunal is quite specific. That clause provides that, in the event of disagreement, the two arbitrators "shall choose a third arbitrator who will constitute with them the Board of Arbitration. Upon the failure of the two arbitrators to reach agreement upon the choice of a third arbitrator," either arbitrator may request that the Tribunal appoint a third arbitrator from the Chamber of Commerce list. [FN69] Neither party has produced any evidence suggesting that the identity of a third arbitrator was ever discussed by Layton and Danziger.

FN69. Two Party Agreement, ¶ VIII(b); License Agreement, ¶ 14.

*9 EB maintains that "Mr. Danziger made no attempt to agree with Mr. Layton on a third arbitrator, and instead immediately petitioned the Tribunal to make the appointment." [FN70] This assertion is supported by Layton's vehement objections to Danziger's request, and is not controverted by any of EUSA's submissions. [FN71] Indeed, because Danziger would not discuss the identity of a third arbitrator with him, Layton was forced to present his concept of a qualified arbitrator directly to the Tribunal. [FN72] The only evidence EUSA can muster to suggest any disagreement between the arbitrators as to the identity of a third arbitrator is a letter written by Danziger after issuing his request to the Tribunal. In that letter, Danziger attempts to construct a process of deliberation and deadlock after the fact, stating:

FN70. *See* Opp. Mem., at 20.

FN71. *See* 4/28/99 Letter from Layton to Tribunal of Commerce, Ex. G to Layton Decl.

FN72. *See id.*

Dear Bob.
In the letter you sent to the President of the Tribunal de Commerce of Luxemburg on April 28, 1999, you suggest that the third Arbitrator should be a lawyer, presumably a resident of the city of New York, -or at least located in London-, and well versed in the laws of New York. Recommending the London Court of International Arbitration, you wish an English speaking Arbitrator, but not necessarily a French speaking one.
I do not agree with these suggestions or wishes. Therefore, there is no doubt that we failed to reach an agreement upon the choice of the third

Arbitrator. [FN73]

FN73. *See* 5/27/99 Letter from Danziger to Layton, Ex. C to Marlborough Reply Aff.

Danziger's *ex post facto* attempt to redefine the procedural requirements of the License Agreement is ingenious but disingenuous. After failing to discuss, let alone agree upon, a third arbitrator with Layton, Danziger skipped directly to requesting the Tribunal to appoint one. Condoning such arbitral behavior would effectively eviscerate the specific requirements of the arbitration clause.

It should be noted that the Tribunal, apparently seeing the procedural problems inherent in Danziger's application for a third arbitrator, stayed its appointment of Decker pending a hearing with both parties. [FN74] After the hearing, the Tribunal reinstated Decker as its choice of third arbitrator. [FN75] However, the arbitration clause does not provide for a hearing in front of the Tribunal to discuss selection of a third arbitrator; rather, it provides that the two party-selected arbitrators must attempt to agree on a third arbitrator. Only if they fail to agree may the parties turn to the Tribunal. Here, the Tribunal's premature appointment of Decker irremediably spoiled the arbitration process. [FN76] Danziger, knowing the Tribunal had already appointed a Luxembourg lawyer as the final arbitrator, and knowing also that EB and Layton strenuously objected to such an appointment, had no need to negotiate in good faith to reach a mutually acceptable third arbitrator. Rather, Danziger had only to maintain his position, knowing that the resulting failure to agree would most likely result in the reaffirmation of the Tribunal's choice of Decker. Here, far from satisfying the purposes of the License Agreement, the hearing before the Tribunal offered no real incentives for either side to agree on a third arbitrator, and led to the eventual impasse between Layton and the European arbitrators.

FN74. *See* Tripet Decl., ¶ 26.

FN75. *See id.*, ¶ 28.

FN76. There is, however, no need to consider the question of whether Decker's appointment, in light of the disappearance of the Chamber of Commerce list, would satisfy the requirements of the arbitration clause. Danziger's premature petition for appointment of a third arbitrator, not necessarily the Tribunal's appointment of Decker, violated the procedures specified by the License Agreement.

3. The Tribunal's Appointment of Decker

***10** I do not criticize the Tribunal's decision to appoint Decker to serve with Layton and Danziger. Indeed, the outcome of the Tribunal's decision is irrelevant to today's decision. Had the British Chamber of Commerce maintained a list of arbitrators, and had the Tribunal selected an arbitrator from that list, the arbitration board still would not have been properly composed unless the party-appointed arbitrators had first attempted and failed to agree on a third arbitrator. Such a defect in the proceedings is not attributable to any decision made by the Tribunal, but rather to the premature involvement of the Tribunal as a result of Danziger's actions.

As I discussed earlier, Danziger's premature petition for selection of a third arbitrator, and the Tribunal's subsequent appointment of Decker, created an artificial negotiating environment for the two party-selected arbitrators. Because the Tribunal had already appointed Decker as third arbitrator, an appointment which Danziger favored and Layton opposed, Danziger had the option of refusing to agree with Layton on the identity of a third arbitrator, knowing that such disagreement would likely lead to Decker's reaffirmation. Should the parties, in the aftermath of this opinion, return to the arbitral forum, Danziger might believe that if he reaches an impasse with Layton as to the appointment of a third arbitrator, the Tribunal might again choose Decker.

Indeed, both Decker and Danziger have now participated in a tainted arbitration proceeding. Both arbitrators proceeded to hear EUSA's evidence and decide on an Award, in the absence of both Layton and EB. As a result, both are now disqualified based on an appearance of impropriety and perceived bias. Should EUSA once again choose arbitration, it must appoint an arbitrator

other than Danziger. EB may, if it so chooses, reappoint Layton as its arbitrator, as Layton justifiably abstained from the arbitration proceeding and therefore did not form an opinion based on the evidence presented by only one of the parties. Moreover, to preserve as closely as possible the spirit of the parties' arbitration agreement, a third arbitrator should be chosen from a list of qualified international arbitrators similar to that once maintained by the British Chamber of Commerce. As Layton suggests, a list of international arbitrators maintained by the London Court of International Arbitration is an appropriate analog to the list once maintained by the Chamber of Commerce. [FN77]

FN77. *See* 4/28/99 from Layton to Tribunal, Ex. G to Layton Decl.

If the parties again seek to arbitrate under the License Agreement, the following procedure should be used. Upon failing to agree on any matter important to the arbitration of the dispute, substantive or procedural, the two party-appointed arbitrators shall attempt to reach agreement as to a third arbitrator. Should the parties fail to agree on a third arbitrator, the Tribunal shall appoint a third arbitrator from a list maintained by the London Court of International Arbitration.

C. The Arbitrators Exceeded Their Powers

***11** EB's final contention is that, "[b]ecause the Board of Arbitration was improperly constituted, it had no authority to adjudicate the parties' dispute, and the Award was by definition beyond its (non-existent) powers." [FN78] This rather tautological argument is nonetheless true. [FN79] Because the arbitral tribunal was improperly composed, it had no power to bind the parties; any assertion of such power, by definition, exceeded its mandate.

FN78. *See* Opp. Mem., at 22.

FN79. *See, e.g., Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 832 (11th Cir.1991) (reversing district court's confirmation and finding that panel composed of two arbitrators was improperly constituted and exceeded its power where parties' agreement required arbitration before a board of at least three arbitrators); *Bear Stearns & Co. V. N.H. Karol & Associates, Ltd.*, 728 F.Supp. 499, 501 (N.D.Ill.1989) ("[b]ecause the arbitrator has no power beyond the agreement of the parties, an arbitrator who is improperly elected has no power to resolve a dispute between the parties").

V. CONCLUSION

For the reasons set forth above, the Arbitration Award cannot be enforced. The Clerk is directed to close this motion and this case.

2003 WL 22881820 (S.D.N.Y.)

END OF DOCUMENT