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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CHANGZHOU AMEC EASTERN TOOLS AND EQUIPMENT CP., LTD., Plaintiff, v. EASTERN TOOLS & EQUIPMENT, INC., A CALIFORNIA CORPORATION, AND GOUXIANG FAN, AN INDIVIDUAL, Defendants.	Case No. EDCV 11-00354 VAP (DTBx) **ORDER DENYING MOTION TO CONFIRM** **[Motion filed on April 23, 2012]**

Before the Court is a Motion to Confirm Foreign Arbitration Award ("Plaintiff's Motion") filed by Plaintiff Xuchu Dai ("Plaintiff"), and a Motion for Order Denying Petition to Confirm Foreign Arbitral Award ("Defendants' Motion") filed by Defendants Eastern Tools & Equipment, Inc. and Guoxiang Fan (collectively, "Defendants"). After considering the papers in support of, and in opposition to, the Motions, the Court DENIES Plaintiff's Motion and GRANTS Defendants' Motion.

I. BACKGROUND

A. Procedural Background

On March 2, 2011, Changzhou AMEC Eastern Tools & Equipment Co., Inc.[1] ("Joint Venture") filed a Complaint against Defendant Eastern Tools & Equipment, Inc. ("Eastern Tools") and Defendant Guoxiang Fan ("Mr. Fan") seeking to confirm and enforce a foreign arbitration award pursuant to the New York Convention, 9 U.S.C. §§ 201, et seq. (Doc. No. 1.) Defendants filed an Answer on April 4, 2011, in which they counterclaimed for declaratory relief, arguing the contract at the heart of the foreign arbitration award was signed under duress. (Doc. No. 10.)

Plaintiff filed its First Amended Complaint ("FAC") on April 28, 2011, alleging identical claims to enforce the foreign arbitration award under the New York Convention and under the Federal Arbitration Act ("FAA"), but naming Plaintiff as the bankruptcy administrator for the Joint Venture. (Doc. No. 17.)

Defendants filed an Answer to the FAC ("Answer to FAC") on May 16, 2011, in which they reiterated their previous counterclaims that the foreign arbitration award should not be confirmed and enforced because the

[1] Plaintiff Xuchu Dai serves as the bankruptcy administrator for the Joint Venture in this action. (See FAC at 1-2.)

arbitration agreement was procured by duress, fraud, undue means, and collusion. (Doc. No. 18.)

On April 23, 2012, Plaintiff filed its Motion to Confirm, (Doc. No. 57), and submitted the following in support:

1. Declaration of Enoch H. Liang ("Liang Declaration"), (Doc. No. 57-1); and
2 Declaration of James Feinerman ("Feinerman Declaration"), (Doc. No. 57-2).

On April 23, 2012, Defendants also filed their Motion to Deny Confirmation. (Doc. No. 58.) In support of their motion, Defendants attached:

1. Declaration of Guoxiang Fan ("Fan Declaration"), (Doc. No. 58-1);
2. Declaration of Jerome A. Cohen ("Jerome Cohen Declaration"), (Doc. No. 58-2);
3. Declaration of Myron Cohen (Myron Cohen Declaration"), (Doc. No. 58-3); and
4. Declaration of Rodney Bell ("First Bell Declaration"), (Doc. No. 58-4).

On May 7, 2012, Defendants filed their Opposition to Plaintiff's Motion ("Defendants' Opposition"). (Doc. No. 59.) In support of their opposition, Defendants submitted:

1. Declaration of Guoxiang Fan ("Second Fan Declaration"), (Doc. No. 59-1);
2. Declaration of Penny Kole ("Kole Declaration"), (Doc. No. 59-2);
3. Declaration of Rodney W. Bell ("Second Bell Declaration"), (Doc. No. 59-3); and
4. Objections to Plaintiff's Evidence ("Defendants' Objections"), (Doc. No. 59-4).

Also on May 7, 2012, Plaintiff filed an Opposition to the Motion to Deny ("Plaintiff's Opposition"). (Doc. No. 60.) In support of this Opposition, Plaintiff attached:

1. Declaration of Enoch H. Liang ("Second Liang Declaration"), (Doc. No. 60-1);
2. Evidentiary Objections to Jerome Cohen Declaration, (Doc. No. 60-2);
3. Evidentiary Objections to Myron Cohen Declaration, (Doc. No. 60-3); and
4 Evidentiary Objections to Fan Declaration ("Plaintiff's Objections to Fan Declaration"), (Doc. No. 60-4).

On May 14, 2012, Defendants filed their Reply in support of their Motion ("Defendants' Reply"). (Doc. No. 61.) In support of their Reply, Defendants submitted:

1. Declaration of Rodney Bell ("Third Bell Declaration"), (Doc. No. 61-1); and

2. Response to Plaintiff's Evidentiary Objections to: Fan Declaration; Jerome Cohen Declaration, and Myron Cohen Declaration ("Defendants' Response to Plaintiff's Objections"), (Doc. No. 61-2).

Also on May 14, 2012, Plaintiff filed a Reply in support of its Motion ("Plaintiff's Reply"). (Doc. No. 62.) In support of its Reply, Plaintiff attached:

1. Reply to Defendants' Evidentiary Objections, (Doc. No. 62-1); and
2. Declaration of Enoch H. Liang ("Third Liang Declaration"), (Doc. No. 62-2).

On May 31, 2012, the Court ordered the parties to resubmit their evidence in the format specified by the Court's Local Rules governing motions for summary judgment and this Court's standing order. (Doc. No. 65.) In accordance with this order, Plaintiff filed a Statement of Undisputed Facts in support of the Motion to Confirm ("Plaintiff's SUF") on June 18, 2012. (Doc. No. 66.) Defendants filed a Statement of Undisputed Facts in support of the Motion to Deny ("Defendants' SUF") on June 18, 2012, as well. (Doc. No. 67.)

On June 25, 2012, Defendants filed a Statement of Genuine Issues in support of Defendants' Opposition ("Defendants' SGI"). (Doc. No. 68.) Defendants attached to their SGI their Objections ("Defendants' Objections") to Plaintiff's SUF. (Doc. No. 68-1.) Also on June 25, 2012, Plaintiff filed a Statement of Genuine Issues in support of Plaintiff's Motion to Confirm ("Plaintiff's SGI"). (Doc. No. 69.)

On July 2, 2012, Plaintiff filed a Reply Statement of Undisputed Facts in support of the Motion to Confirm ("Plaintiff's Reply SUF"). (Doc. No. 71.) In support, Plaintiff submitted a Reply to Defendants' Objections. (Doc. No. 71-1.) The same day, Defendants filed a Reply Statement of Undisputed Facts in support of the Motion to Deny ("Defendants' Reply SUF"). (Doc. No. 72.)

B. Preliminary Evidentiary Issues

The Court addresses only those objections relating to evidence the Court found necessary to consider in ruling on the Motions.

1. Declaration of Guoxiang Fan

Plaintiff objects to certain statements in Mr. Fan's Declaration on the basis that these statements are hearsay.[2] Specifically, Plaintiff objects to:

1) Paragraph 15: "the police supervisor told me that the investigation had been finished. He told me that I would not be released until I signed an agreement."
2) Paragraph 18: "I was told by the police supervisor that I would have to wire the money to an account before I would be released."
3) Paragraph 24: "I was told by the police supervisor that I would have to wire $300,000 to a certain account before I would be released."
4) Paragraph 25: "I was not released from police custody until the police confirmed that the $300,000 had been received in the account."
5) Paragraph 26: Mr. Fan's description of telephone conversations with the Changzhou Public Security Bureau and Officer Huang.

(Pl.'s Objections to Fan Decl. at 2-3.)

Defendants argue these statements are not hearsay because they are not submitted for the truth of the matter asserted, but instead to show Mr. Fan's state of

[2] The Court addresses only those objections to statements which the Court considers as material in ruling on the Motions.

mind and the voluntariness of his subsequent conduct. (Defs.' Response to Pl.'s Objections at 2-3.)

Hearsay is an out of court statement that "a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c)(2). Where a party attempts to introduce a statement that is offered not to prove the truth of the statement, but instead to show a party's state of mind, that statement is not hearsay. See United States v. Brown, 562 F.2d 1144, 1148 (9th Cir. 1977) (defendant's request that witness "[not] hurt him" was non-hearsay; admissible to show defendant's state of mind). Orders, instructions, or directives, "which by their nature are neither 'true' nor 'false,'" do not constitute hearsay if the statements are admitted to show the circumstantial intent of the declarant rather than a factual assertion. Mendez v. County of Alameda, No. C03-4485 PJH, 2005 WL 3157516, at *14 (N.D. Cal. Nov. 22, 2005); see also United States v. Shepherd, 739 F.2d 510, 514 (10th Cir. 1984); United States v. Keane, 522 F.2d 534, 558 (7th Cir. 1975), overruled on other grounds by, McNally v. United States, 483 U.S. 350 (1987). In these instances, the credibility and the reliability of the declarant is not at issue. Rather, the only credibility question presented is whether the statements were made at all and if so, under what circumstances.

Addressing each statement in turn, in paragraphs 15, 18, and 24, Mr. Fan describes warnings, orders, or instructions which the declarant, the Changzhou police supervisor, made to him while he was in detention. Defendants offer these statements not to show the truth of the statements - that the police would not release him - but rather, to show Mr. Fan believed he would not be released unless he signed the agreement and wired the money. These statements are therefore not hearsay and are admissible.

Similarly, Defendants submit paragraph 25 not to prove that $300,000.00 was in fact wired to the specified account, but rather, to show that Mr. Fan believed he was being released only after the police confirmed the receipt of the wired money. The only credibility question concerns the truthfulness of Mr. Fan's statement that this confirmation occurred. Accordingly, the statement is not hearsay.

In paragraph 26, Mr. Fan states that he was contacted at least 10 times over the telephone by the Changzhou Public Security Bureau between April and July 2007. (Fan Decl. ¶ 26.) According to the declaration, Officer Huang, one of the police officers in Changzhou, also called Mr. Fan in July and told him to come back to Changzhou to sign the agreement again. (Id.) Mr. Fan

asserts he did not want to sign the agreement, but knew that if he did not, he would be taken back into custody. (Id.) For the same reasons as explained above, this paragraph is not hearsay. Mr. Fan's statement about Officer Huang describes an order or instruction he received. Likewise, Mr. Fan's statements about his own state of mind upon receiving telephone calls from the Public Security Bureau and Officer Huang do not constitute hearsay.[3]

2. China International Economic and Trade Arbitration Commission ("CIETAC") Arbitration Award

Defendants object to certain statements of fact set forth in the Arbitration Award as inadmissible hearsay. (Defs.' Objections at 2-4.) Specifically, Defendants object to facts numbered 40, 41, 45, and 46 in Plaintiff's SUF: "Defendants selected one member of the three-person arbitration panel: Mr. Zhang Yuqing"; "Two of the three arbitrators – Sun Nanshen (selected by

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[3] At the hearing, Plaintiff argued that under this hearsay exemption Mr. Fan could claim the police told him anything - no matter how incredible - and it would still be admissible. This argument, however, misconstrues the method for presenting evidence in a summary proceeding such as this. Plaintiff had the opportunity to cross-examine Mr. Fan during his deposition, and thus, could have tested the credibility of Mr. Fan's statements then. Plaintiff also could have disputed the facts stated in Mr. Fan's declaration by submitting contradictory declarations or deposition testimony from the Changzhou police, Officer Huang, or Mr. Dai, as well as any other relevant evidence. Plaintiff did not do so.

Plaintiff) and Zhang Yuqing (jointly selected by the Defendants) - are well-known and respected arbitrators in the international arbitration community"; "The CIETAC arbitrators noted that all parties' counsel made arguments, answered the panel's questions, and cross-examined the evidence"; and "During the arbitration, Defendants' counsel 'confirmed in open court that they will no longer challenge the jurisdiction of [CIETAC Shanghai] on the case.'" (Id.)

It is not the Court's role to review the arbitration award or the merits of its findings in ruling on whether a party has established a defense under Article V of the New York Convention. See China Nat'l Metal Prods. Import/Export Co. v. Apex Digital, Inc., 379 F.3d 796, 799-800 (9th Cir. 2004) ("Our review of a foreign arbitration award is quite circumscribed. Rather than review the merits of the underlying arbitration, we review de novo only whether the party established a defense under the Convention.") (citations and internal quotation marks omitted); see also Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc., 969 F.2d 764, 770 (9th Cir. 1992). In determining whether to enforce an award, the Court may consider the facts as presented in the parties' motions, submitted deposition testimony, declarations, and documents to determine whether one of the defenses applies. See Matter of

Arbitration Between Trans Chemical Ltd. and China Nat. Machinery Import and Export Corp., 978 F. Supp. 266, 309 (S.D. Tex. 1997) ("The Convention mandates a summary procedure modeled after federal motion practice to resolve motions to confirm."). Thus, to the extent Defendants object to the admission of CIETAC's determinations with respect to their duress counterclaim, this objection is moot; and to the extent Defendants object to CIETAC's findings regarding Defendants' participation in the arbitration process, these objections are also moot as the Court may consider Article V defenses regardless of whether the parties objected to arbitration.[4] See, e.g., Slaney v. Int'l Amateur Ath. Fed'n, 244 F.3d 580, 592 (7th Cir. 2001) (dealing separately with objecting party's arguments concerning the arbitration panel's decision and the party's Article V defenses).

Furthermore, under Article V, a successful defense may result in a court refusing to recognize or enforce an award. Convention, art. V(1) ("Recognition and enforcement of the award may be refused . . . .").

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[4] The question of whether the parties agreed to arbitrate presents a distinct jurisdictional question. See China Minmetals Materials Imp. and Exp. Co. v. Chi Mei Corp., 334 F.3d 274 (3d Cir. 2003). In cases where courts consider the threshold issue of arbitrability, whether the party seeking denial of confirmation objected throughout the arbitration proceeding may be relevant. See, e.g., id. at 278; Czarina, LLC v. W.F. Poe Syndicate, 358 F.3d 1286, 1294 (11th Cir. 2004).

Accordingly, if Defendants establish a defense of duress under Article V, the Court may refuse to recognize the arbitration award in its entirety. CIETAC's findings about the validity of the underlying agreement therefore cannot control the Court's ruling on the merits of Defendants' defense when considering whether the award contravenes public policy under Article V.

3. Shanghai Court Judgment

Defendants contend the July 21, 2010, Judgment of the Shanghai City, Second Intermediate People's Court is inadmissible because it lacks the proper authentication under Rule 902. (See Defs.' SGI ¶ 52.) Plaintiff responds that the deposition testimony of Mr. Dai authenticates the judgment. (Pl.'s Reply SUF ¶ 52.)

First, Plaintiff does not include the Shanghai Court Judgment as an exhibit to any of the documents filed in support of, or in opposition to, these Motions.[5] Rather, Plaintiff references an exhibit of a declaration attached

[5] In its Order setting the briefing schedule, the Court made clear that the parties must cite to specific page and line numbers in depositions and paragraph numbers in affidavits. (May 31, 2012, Order (Doc. No. 65) at 4.) The Court further noted that if either party failed to provide a pincite to the supporting evidence, the Court would deem the proffered fact (or dispute) unsupported. (Id. (citing Christian Legal Soc. v. Wu, 626 F.3d 483, 488 (9th Cir. 2010) ("Judges are not like pigs, hunting for truffles buried in briefs.")).)

to a discovery motion filed in November 2011. (See Pl.'s Reply SUF ¶ 52 (citing Doc. No. 44, Ex. D).)

Secondly, even if Plaintiff had filed the exhibit properly, the document is not admissible. As stated above, under Rule 902(3), a foreign public document is self-authenticating only if it is accompanied by a final certification of either the signer or attester who executed the document in his official capacity and is authorized by the laws of that country to make the attestation or execution, or of a foreign official whose official position relates to the execution or atttestation. Fed. R. Evid. 902(3). In fact, Plaintiff admits the document is not self-authenticating, but contends the testimony of Mr. Dai authenticates the judgment. (Pl.'s Reply SUF ¶ 52.)

Under Rule 901(a), extrinsic evidence in the form of testimony may sustain a finding of authenticity, but only if the testimony is "sufficient to support a finding that the matter in question is what the proponent claims." Fed. R. Evid. 901(a). A court is not required to accept the testimony as true, but rather, "must assess the credibility of that testimony and determine whether the balance of the evidence is sufficiently compelling" to show the documents are what the party claims them to be. Vatyan v. Mukasey, 508 F.3d 1179, 1185 (9th Cir. 2007);

see also United States v. Perlmuter, 693 F.2d 1290, 1292-93 (9th Cir. 1982) (finding testimony of Immigration and Naturalization Service agent insufficient).

Here, Plaintiff cites to statements Mr. Dai made concerning litigation of the arbitration award. (Pl.'s SUF ¶ 52.) Specifically when asked if "something about the arbitration award" was litigated, he responded, "the two respondents applied to Shanghai Second Intermediate People's Court to withdraw, to withdraw -- to withdraw this arbitration judgment." (Dai Dep. 117:9-17.) It is not clear from the deposition testimony, however, whether Mr. Dai was referring to a document containing the judgment. (Id.) To the contrary, the testimony suggests Mr. Dai was speaking generally from his memory as to whether the parties litigated the arbitration award. (Id.) Nothing in Mr. Dai's testimony therefore establishes that Exhibit D is what Plaintiff claims it to be. As no credible extrinsic evidence authenticates the Shanghai Court Judgment, and the document is not self-authenticating, the Court finds it is not admissible for purposes of ruling on these Motions.

C. Findings of Fact

The facts relevant to enforcing the arbitration award are not in dispute.[6] The following material facts are supported adequately by admissible evidence and are uncontroverted.

This action arises from a contract dispute over the return of allegedly non-conforming goods. Defendant Eastern Tools imports and distributes gasoline-powered generators and related equipment. (Fan Decl. ¶ 4.) Between 2003 and 2006, Eastern Tools purchased the majority of this equipment from the Joint Venture. (Id. ¶ 7.) According to Eastern Tools, it stopped purchasing from the Joint Venture after discovering the equipment did not conform to the contract specifications and had quality problems. (Id.) Eastern Tools then sought payment for the storing, shipping, and repairing of returned shipments of the allegedly non-conforming equipment. (Id. ¶ 8.) The Joint Venture in turn demanded Eastern Tools pay for these same shipments, denying the goods failed to meet specifications. (Id.; Pl.'s SUF ¶ 4.)

[6] To the extent any facts in the SUFs, SGIs, or Reply SUFs are not mentioned in this Order, the Court has not relied on them in reaching its decision.

In an attempt to settle the dispute, the parties took part in a series of negotiations which culminated in the drafting of an agreement in December 2006. (Fan Decl. ¶ 11; Pl.'s Mot. at 3.) The draft agreement provided that Eastern Tools would keep the allegedly defective equipment and pay the Joint Venture $2 million for the merchandise.[7] (Fan Decl. ¶ 11; Pl.'s Mot. at 3.) The parties did not sign the agreement, however, and in February 2007, the Joint Venture filed for bankruptcy. (Fan Decl. ¶ 11; Pl.'s Mot. at 4.)

1. April 2007 Agreement

On April 17, 2007, Changzhou police arrested[8] Eastern Tools's President, Mr. Fan, in Changsu, People's Republic of China.[9] (Fan Decl. ¶ 12.) The police drove him to

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[7] Mr. Fan asserts in his declaration that he was willing to make this agreement in order to help the Joint Venture - Eastern Tools's sole supplier - stay in business. (Fan Decl. ¶ 11.) He also believed Eastern Tools would be able to recover some of the funds by repairing and selling the equipment. (Id.)

[8] Plaintiff refers to Mr. Fan's arrest by the euphemism "residential surveillance," and claims Mr. Fan's agreement to pay Plaintiff $2.5 million to secure his release was actually a Chinese version of a "negotiated plea agreement." (Pl.'s Mot. at 4; Pl.'s Opp'n at 7.) As discussed at length below, whether or not Mr. Fan's arrest was legal under Chinese law, a valid contractual agreement between two private parties is not formed when one party signs in order to secure his or her release from imprisonment, or signs under threat of imprisonment.

[9] Plaintiff argues the facts surrounding the April 2007 Agreement are irrelevant because the April 2007 Agreement is not at issue. (See Defs.' Reply SUF ¶ 11.)

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Changzhou and placed him in a detention facility. (Id. ¶¶ 12-13.) The police told him that he was being held for criminal fraud and asked him to give a statement about the dispute between Eastern Tools and the Joint Venture. (Id. ¶ 14.) The police also confiscated Mr. Fan's phone. (Id. ¶ 13; Defs.' Reply SUF ¶ 11c.) The police informed Mr. Zhu, Eastern Tools's China representative, that Mr. Fan was being held for economic fraud.[10] (Zhu Dep. 8:20; 60:14-61:17.)

On April 26, 2007, while Mr. Fan was still in police custody, Plaintiff Xuchu Dai met with him to discuss a new agreement to resolve the dispute between Eastern Tools and the Joint Venture. (Dai Dep. 37:10-24.) Mr. Dai testified that at the time he believed Mr. Fan was in custody because one of the shareholders in the Joint

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[9](...continued)
As Defendants note correctly, however, whether Mr. Fan signed the April 2007 contract in order to secure his release from prison is relevant to show his state of mind when the police directed him to return and sign the July 2007 Agreement. (See id.)

[10] Plaintiff argues Defendants' claim that Mr. Fan was held without charges is false. Yet Plaintiff does not cite to any evidence demonstrating the Changzhou Police actually charged Plaintiff with a crime. (See Pl.'s Opp'n at 6.) Plaintiff provides only a "Notification of Release," a document which does not charge Mr. Fan with a crime, but states merely that Mr. Fan was placed under "residential surveillance" on "suspicion of contract fraud." (Third Liang Decl. Ex. 1 (English translation).) In fact, the Notification of Release acknowledges there was "insufficient evidence" to warrant Mr. Fan's continued detention. (Id.) The police's purported reason for arrest does not, on its own, constitute a "charge."

Venture had accused Mr. Fan of contract fraud.[11] (Dai Dep. 51:1-14.)

The police permitted an attorney, Wu Jian, to visit Mr. Fan briefly during his detention. (Defs.' Reply SUF ¶ 11g.) The police monitored the visit and Mr. Wu testified at his deposition that he was only allowed to advise Mr. Fan to sign the April 2007 Agreement. (Wu Dep. 35:7-16.) When Mr. Wu began to ask Mr. Fan about the charges brought against him, the police told him to stop, and then pushed him out of the room. (Wu Dep. 35:7-25; 36:1-5.)

After four days, the police supervisor told Mr. Fan the police had completed their investigation, but Mr. Fan would not be released until he signed an agreement.[12]

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[11] Although Mr. Dai testified that he knew Mr. Fan was in detention and that the police were present during his meeting with Mr. Fan, he asserts Mr. Fan negotiated freely the terms of the agreement and that Mr. Fan even suggested the inclusion of the arbitration clause. (Dai Dep. 38:19-39:6; 93:20-94:18.) Whether Mr. Fan negotiated voluntarily the terms of the agreement, however, is a matter of law, not of fact.

[12] Plaintiff claims Mr. Fan negotiated the terms of the April 2007 Agreement. (Pl.'s Mot. at 4-5; see Defs.' Reply SUF ¶ 11i.) The cited deposition testimony, though, does not support this. (Pl.'s Mot. at 4-5.) According to Plaintiff, Mr. Fan testified that, after reviewing the agreement the police gave him to sign, he told the police he did not have enough money to pay the required initial payment. (Id. (citing Fan Dep. 88:3-25).) In response, the police determined he would pay $300,000.00 as a first payment and the remainder would be averaged over the future payments. (Id.) This does not

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(Fan Decl. ¶ 15; Fan Dep. 96:11-13.) The agreement provided that Eastern Tools would pay $2.5 million to settle the dispute over the allegedly non-conforming equipment; required an initial payment of $300,000.00 to be paid to Plaintiff by April 30, 2007; and specified the remaining amount would be paid in six monthly installments of $350,000.00 from May 2007 to October 2007. (Bell Decl. Ex. 3E.) The agreement also designated Mr. Fan as the "Guarantor" and obligated Eastern Tools to pay $6,272,641.00 to Plaintiff if it did not pay the $2.5 million on schedule. (Id.) The agreement specified that all disputes arising from its performance would be submitted to arbitration before CIETAC in Shanghai, China. (Id.)

The police released Mr. Fan on April 29 or 30, 2007. (Fan. Decl. ¶ 15.) According to his testimony, Mr. Fan believed he was released only after the police confirmed they had received the initial payment of $300,000.00. (Fan Dep. 100:11-16; Fan Decl. ¶ 15.)

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[12](...continued)
amount to negotiation. Moreover, Plaintiff does not provide a certified copy of the above cited deposition testimony in the Liang Declaration. See Orr v. Bank of Am., 285 F.3d 764, 775 (9th Cir. 2002). Thus, the Court has no way to verify Plaintiff's assertion.

In June 2007, the creditors of the bankrupt Joint Venture voted not to approve the April 2007 Agreement because they thought Eastern Tools should pay more than $2.5 million to settle the dispute.[13] (See Pl.'s SUF ¶ 23; Fan Dep. 102:23-25; Dai Dep. 84:11-13.)

2. July 2007 Agreement

After release from prison, Mr. Fan remained in China and traveled to various cities to conduct business. (Fan Decl. ¶ 26; Fan Dep. 102:5-14; Pl.'s SUF ¶ 20.) He sent a copy of the April 2007 Agreement to his lawyers in the United States, but did not show the document to his lawyer in China.[14] (Fan Dep. 102:15-22.) According to Mr. Fan, the Changzhou Public Security Bureau contacted him at least ten times between April and July 2007. (Fan Decl. ¶ 26.) In July, Mr. Fan received a telephone call from Officer Huang, a policeman from Changzhou.[15] (Id.)

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[13] Neither party discusses why Xuchu Dai asked Mr. Fan to sign the nearly identical July 2007 Agreement after the creditors had already rejected the earlier agreement's terms. (See Dai Dep. 83:14-22.)

[14] Mr. Fan testified he did not tell anyone else about the circumstances surrounding the agreement because, "this [was] an embarrassing incident in China." (Fan Dep. 108:15-19.)

[15] Plaintiff argues Mr. Fan reversed his testimony in his declaration, contradicting the statements he made at his deposition. (See Pl.'s SGI ¶ 11g.) This is not entirely accurate, however. In his deposition, Mr. Fan testified he did not receive calls from the police *after* he signed the July 2007 Agreement, but that he could not remember if he received calls from Chinese police officers in 2008. (Fan Dep. 16:5-11.) This does not

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Officer Huang directed Mr. Fan to return to Changzhou to sign the April 2007 agreement again. (Id.) Mr. Fan believed that if he did not return and sign the agreement, the police would take him into custody again and detain him until he signed.[16] (Id.)

On July 26, 2007, Mr. Fan signed a second agreement with terms nearly identical to those in the April 2007 Agreement.[17] The agreement provided that Eastern Tools would pay $2.5 million in monthly installments of $350,000.00 to settle the dispute over the allegedly nonconforming shipment of equipment. (Bell Decl. Ex.

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[15](...continued)
contradict the statement in his declaration that the police contacted him at least ten times *between* April and July 2007. (Fan Decl. ¶ 26.)

[16] Plaintiff attempts to dispute this fact by arguing Mr. Fan could have left China after his release in April 2007. (See Pl.'s SGI ¶ 11r.) Whether Mr. Fan could have left China between April and July 2007, however, does not contradict Mr. Fan's assertion that when Officer Huang directed him in July to return to Changzhou to sign the agreement, he believed he would be taken into custody if he did not comply. Mr. Fan is a Chinese citizen and presumably would not have been free to leave China had the police decided to arrest him again.

[17] Plaintiff claims Mr. Fan "freely negotiated" the July 2007 Agreement and that Mr. Fan even admits he made changes to it. (Pl.'s Mot. at 4-5; Pl.'s Opp'n at 9.) Mr. Fan's deposition testimony, however, belies this claim. Mr. Fan testified that Plaintiff drafted the agreement, Plaintiff's representative, Yongkang Shi, then directed him to read the draft, to make certain handwritten changes to the document, and to sign the agreement. (Fan Dep. 109:9-17.) Mr. Fan further testified, "They didn't need me to review it. I had to sign." (Fan Dep. 110:19-22.) As discussed below, this does not constitute negotiation.

5E.) The agreement credited the $400,000.00 Defendants had already paid. (Id.) If Eastern Tools failed to pay the monthly installments on time, it then would owe $6,272,641.00 to Plaintiff. (Id.) Mr. Fan was again listed as the guarantor and assumed joint responsibility under the agreement. (Id.) The July 2007 Agreement also included the same arbitration clause as the April 2007 Agreement. (Id.)

In December 2007, the creditors for the Joint Venture approved the July 2007 Agreement and notified Defendants. (Pl.'s SUF ¶ 30.)

3. February 2008 Payment

Eastern Tools made a payment of $250,000.00 to the Joint Venture in early February 2008.[18]

[18] Plaintiff asserts Eastern Tools made the $250,000.00 payment in February 2008 "voluntarily" and cites to the Arbitration Award at page 6. (See Pl.'s SUF ¶ 31.) First, whether the payment was "voluntary" for purposes of ruling on Defendants' duress defense is a matter of law not of fact. Secondly, the cited page does not include a finding on whether the payment was "voluntary," but merely states the payment was made on February 5, 2008. (See Liang Decl. Ex. 5 at 6.) Finally, Plaintiff asserts the police never called Mr. Fan after 2007; however, in response to the question, "Did you receive any calls from Chinese police officers in 2008?", Mr. Fan responded during deposition, "Should be no. I don't remember." (Fan Dep. 16:9-11.) Thus, the Court does not conclude as a factual matter that the payment was made "voluntarily."

4. CIETAC Arbitration

In May 2008, the bankruptcy estate for the Joint Venture initiated the arbitration process. (Pl.'s SUF ¶ 34.) In December 2008, Defendants filed an action in the Nantong Intermediate People's Court of the People's Republic of China challenging the validity of the July 2007 Agreement. (Id. ¶¶ 35-36.) In late April 2009, Mr. Fan withdrew his challenge in the Nantong Court, and participated in the CIETAC arbitration, but continued to contest the validity of the July 2007 Agreement on the grounds that he signed it under duress. (Id. ¶¶ 39, 42; Liang Decl. Ex. 5 at 14-18.) On December 29, 2009, the CIETAC panel ruled in favor of Plaintiff's claims and denied Defendants' counterclaims. (Pl.'s SUF ¶ 50.)

II. LEGAL STANDARD

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention" or "the New York Convention"), which has been ratified by the People's Republic of China and the United States, governs the "recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought. . . ." Convention on the Recognition and Enforcement of Foreign Arbitral Awards Status, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited July 16,

2012); Convention on the Recognition and Enforcement of Foreign Arbitral Awards Treaty, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.A. 39 ("New York Convention"). The United States Senate ratified the Convention on October 4, 1968, 9 U.S.C. §§ 201, et seq.; the Convention was incorporated into the United States Code on July 31, 1970.

In Article V, the Convention sets out five grounds for refusal that may be raised by parties and two grounds that may be granted by the court sua sponte. Convention, art. V. Respondent has the burden of establishing a defense against enforcement under the Convention because there is a strong presumption in favor of confirmation of arbitral awards. See Polimaster Ltd. v. RAE Sys., Inc., 623 F.3d 832, 836 (9th Cir. 2010) (citing Gould, 969 F.2d at 770) ("[Respondent] has the burden of showing the existence of a New York Convention defense. [Respondent's] burden is substantial because the public policy in favor of international arbitration is strong . . . ."). The presumption in favor of confirmation is based on the goal of the Convention, which is to encourage the recognition of international arbitral agreements. See Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974). Further, favoring the confirmation of arbitral agreements, courts have adopted a narrow view of the defenses enumerated in the Convention. See

Polimaster, 623 F.3d at 836 ("New York Convention defenses are interpreted narrowly."); Gould, 969 F.2d at 770; Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974).

"The Convention mandates a summary procedure modeled after federal motion practice to resolve motions to confirm." Matter of Arbitration Between Trans Chemical Ltd. and China Nat. Machinery Import and Export Corp., 978 F. Supp. at 309. As the party opposing confirmation, Defendants bear the burden of proof of establishing an Article V reason prohibiting confirmation. See Gould, 969 F.2d at 770 (citing La Societe Nationale Pour La Recherche v. Shaheen Natural Res. Co., 585 F. Supp. 57, 61 (S.D.N.Y. 1983), aff'd, 733 F.2d 260 (2d Cir. 1984) (per curiam)). Absent a convincing showing that one of these narrow exceptions applies, the arbitral award will be confirmed. Fitzroy Eng'g, Ltd. v. Flame Eng'g, Inc., No. 94C2029, 1994 WL 700173, at *3 (N.D. Ill. Dec. 13, 1994); see also Biotronik Messund Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co., 415 F. Supp. 133, 136 (D.N.J. 1976); Indocomex Fibres Pte., Ltd. v. Cotton Co. Int'l, Inc., 916 F. Supp. 721, 726 (W.D. Tenn. 1996); Geotech Lizenz AG v. Evergreen Sys., 697 F. Supp. 1248, 1252 (E.D.N.Y. 1988).)

III. DISCUSSION

The Convention governs the Court's confirmation of the award in this case because the purported agreement was made "in a territory of a State other than the State where the recognition and enforcement" of the award is being sought. Convention, art. I(1). The parties do not dispute that the four jurisdictional prerequisites were met here.[19]

Plaintiff seeks confirmation of the arbitral award, while Defendants argue the July 2007 Agreement was made under duress and the Court should therefore decline to recognize and enforce the award under Article V(1)(a), (2)(a), or (2)(b).

A. Review of the Underlying Contract's Validity

At the outset, the Court must determine whether it can consider a contractual defense of duress in ruling on the confirmation of a foreign arbitral award under the Convention. The Court finds that it can. As Defendants contend correctly, a defense of duress can succeed as a

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[19] A court may order arbitration if four conditions are met: (1) there is agreement in writing to arbitrate the dispute, (2) the agreement provides for arbitration in territory of signatory to the Convention, (3) the agreement to arbitrate arises out of a commercial legal relationship, and (4) there is a party to the agreement who is not an American citizen. Bautista v. Star Cruises, 396 F.3d 1289, 1294 n.7 (11th Cir. 2005). Plaintiff also brought its Motion to Confirm within the three year statute of limitations under the Convention. See 9 U.S.C. § 207.

defense to confirmation under Article V(1)(a), or (2)(b) of the Convention. Duress is not, however, a defense under Article V(2)(a).

1. Article V(1)(a)

Under Article V(1)(a), a court may refuse to enforce an award if "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." Convention, art. V(1)(a). Plaintiff and Defendants disagree on the law to which "the parties have subjected" the arbitration agreement for purposes of Article V(1)(a). Defendants argue throughout their papers that American arbitration law applies. (See Defs.' Mot.; Defs.' Opp'n.) Plaintiff argues simply that the Court must defer to the determination of CIETAC, which made its findings based on Chinese law. (Pl.'s Mot. at 13.)

Although there is a dearth of case law addressing defenses under Article V(1)(a), at least some courts have found the "law to which the parties have subjected" the agreement to be the law specified in the underlying agreement's choice-of-law provision. See, e.g., Am. Constr. Mach. & Equip. Corp. v. Mechanised Constr. of

Pak., 659 F. Supp. 426, 428-429 (S.D.N.Y. 1987). Here, while the July 2007 Agreement does not include a choice-of-law provision, CIETAC applied Chinese law in ruling on the parties' claims and counterclaims. (See Liang Decl. Ex. 5 at 36.) "[U]nder the New York Convention, the rulings of the [arbitrator] interpreting the parties' contract are entitled to deference."[20] Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 290 (5th Cir. 2004) (deferring to arbitrator's choice-of-law determination); see also James Ford, Inc. v. Ford Dealer Computer Servs., 56 Fed. Appx. 324, 325 (9th Cir. 2003) (giving broad deference to an arbitrator's choice-of-law decision). Since the CIETAC arbitration panel applied Chinese law, there is no basis to rule on a duress defense under American law "unless the [arbitrator] manifestly disregarded the parties' agreement or the law." Id.; see also Carter v. Health Net of Cal., Inc., 374 F.3d 830, 838 (9th Cir. 2004) ("As federal courts of appeals have repeatedly held, 'manifest disregard of the law' means something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law. It must be

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[20] To clarify, the deference given to the arbitrator's choice-of-law decision is distinct from the deference given to the arbitrator's findings of fact with respect to an Article V defense. Here, the Court defers to CIETAC's application of Chinese law solely for the purpose of determining the "law to which the parties have subjected" the agreement.

clear from the record that the arbitrators recognized the applicable law and then ignored it.").

Here, the Court does not find CIETAC's application of Chinese law in ruling on Defendants' duress defense was a "manifest disregard" of the law. The parties entered into the agreement in China and provided that a Chinese arbitration body would resolve any disputes arising out of the contract. It was therefore reasonable for CIETAC to apply Chinese law in arbitrating the dispute.

The Court does not consider further whether a defense of duress would be successful under Article V(1)(a), however, as the Court denies confirmation under Article V(2)(b).[21]

2. Article V(2)(a)

Defendants next contend that the Court should deny confirmation under Article V(2)(a), which provides that a court may refuse confirmation if "the subject matter of the difference is not capable of settlement by arbitration under the law of that country." (Defs.' Mot. at 6.) Defendants contend the "law of that country" refers to the law of the country in which confirmation is being sought, here the United States. (Defs.' Mot. at

[21] For this reason, the Court makes no findings as to the merits of Defendants' duress defense under Chinese law.

6.) Plaintiff does not object to this reasoning directly, but maintains that the law requires the arbitrator to decide whether the July 2007 Agreement is enforceable. (Pl.'s Mot. at 13.)

Article V(2)(a) provides an extremely limited defense to confirmation. The provision only covers disputes which under domestic law would be "entrusted to the exclusive competence of the judiciary." Parsons, 508 F.2d at 974 (citing American Safety Equip. Corp. v. J. P. Maguire & Co., 391 F.2d 821, 822 (2d Cir. 1968) (finding antitrust claims inappropriate for arbitration and denying confirmation of arbitration award)). The July 2007 Agreement resolved a contract dispute over non-conforming goods – a subject matter entirely capable of "settlement by arbitration."

3. Article V(2)(b)

Article V(2)(b) of the Convention states that a decision "may be refused" if "[t]he recognition or enforcement of the award would be contrary to the public policy of that country." Convention, art. V(2)(b). While the Court has not found any case in which a district court has declined to confirm a foreign arbitral award under Article V(2)(b) based on a defense of duress, courts have addressed whether the defense would undermine enforcement under Article V(2)(b) and concluded that it

would.[22] For instance, in Ameropa AG v. Havi Ocean Co. LLC, the court found that "[e]nforcement would violate this country's 'most basic notions of morality and justice' if the defendant's due process rights had been violated - for example, if defendant had been subject to coercion or any part of the agreement had been the result of duress." No. 10CIV3240 (TPG), 2011 WL 570130, at *2 (S.D.N.Y. Feb. 16, 2011) (interpreting Convention, art. V(1), (2)(b)) (quoting Parsons, 508 F.2d at 974); see also Ministry of Def. and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc., 665 F.3d 1091, 1097 (9th Cir. 2011) (also quoting Parsons); Transmarine Seaways Corp. v. Marc Rich & Co. A. G., 480 F. Supp. 352, 358 (S.D.N.Y. 1979) ("Agreements exacted by duress contravene the public policy of the nation, [citation], and accordingly duress, if established, furnishes a basis for refusing enforcement of an award under Article V(b)(2) of the Convention.") (citing Fluor Western, Inc. v. G. & H. Offshore Towing Co., 447 F.2d 35, 39 (5th Cir. 1971) (discussing common-law public policy against agreements formed under unconscionably unequal bargaining positions)). In

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[22] Consistent with this interpretation, the Ninth Circuit has found that a party's incapacity at the time of the signing of the underlying contract - a defense which also vitiates consent - "is a basis on which the district court could refuse to enforce an arbitration award under the New York Convention . . . ." Seung Woo Lee v. Imaging3, Inc., 283 Fed. Appx. 490, 493 (9th Cir. 2008).

Transmarine Seaways, the court stated categorically that if the underlying agreement was exacted by duress, the arbitration award could not stand. 480 F. Supp. at 358.

The Court also notes that considering duress as a defense under Article V(2)(b) is consistent with the Convention's provision on compelling arbitration under Article II.[23] See Lindo v. NCL (Bahamas) Ltd., 652 F.3d 1257, 1262-63 (11th Cir. 2011) (noting the Convention's corresponding stages of enforcement). More often than not the issue of enforceability comes before courts on a motion to compel arbitration rather than on a motion to confirm an arbitral award. See China Minmetals Materials, 334 F.3d at 281. In those cases, the well-established precedent is that a meritorious defense of duress would undermine the enforcement of the arbitration agreement under Article II(3) of the Convention. See Chloe Z Fishing Co. v. Odyssey Re (London) Ltd., 109 F. Supp. 2d 1236, 1259 (S.D. Cal. 2000); see also DiMercurio v. Sphere Drake Ins. PLC, 202 F.3d 71, 79 (1st Cir. 2000) (fraud, mistake, duress, and waiver grounds to invalidate arbitration clauses under Article II(3)); Bautista v.

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[23] "To implement the Convention, Chapter 2 of the FAA provides two causes of action in federal court for a party seeking to enforce arbitration agreements covered by the Convention: (1) an action to compel arbitration in accord with the terms of the agreement, 9 U.S.C. § 206, and (2) at a later stage, an action to confirm an arbitral award made pursuant to an arbitration agreement, 9 U.S.C. § 207." Lindo, 652 F.3d at 1262-63.

Star Cruises, 396 F.3d 1289, 1302 (11th Cir. 2005) (standard breach-of-contract defenses "such as fraud, mistake, duress, and waiver" apply under Article II(3)). If an agreement is "null and void" under Article II(3), the underlying agreement to arbitrate is unenforceable and the Court cannot compel arbitration. Chloe Z Fishing, 109 F. Supp. 2d at 1258-59. Several "internationally recognized defenses" render a contract "null and void" under Article II; duress is one such defense. Id. ("[I]t is well-established that . . . internationally recognized defenses to contract formation or public policy concerns of the forum nation . . . make[] a valid agreement to arbitrate the subject of the dispute unenforceable under Article II, section 3 of the Convention."); see also DiMercurio, 202 F.3d at 79; Bautista, 396 F.3d at 1302.

If a successful duress defense would undermine a court's ability to compel arbitration under the Convention, it would be unjust for the court to be unable to consider this defense in confirming the award.

a. Applicable Law

Absent any precedent on what law to apply to a defense of duress under Article V(2)(b), the Court considers the law courts have applied in ruling on contractual defenses under Article II(3) of the

Convention – the provision which allows a party to raise a defense of duress to motions to compel arbitration. Similar choice-of-law issues arise in cases which concern the validity of an arbitration agreement under Article II. Whether and how a court applies its domestic law to determine if a valid agreement exists for purposes of Article II(3) remains unsettled, however. Some district courts have applied domestic state law to determine the issue of validity. See, e.g., Javier v. Carnival Corp., No. 09CV2003-LAB (WMc), 2010 WL 3633173, at *3-4, 10-12 (S.D. Cal. Sept. 13, 2010) (applying domestic law to rule on fraud and unconscionability defenses in determining validity of underlying agreement under Article II(3)) (citing Davis v. O'Melveny & Myers, 485 F.3d 1066, 1072 (9th Cir. 2007)).

At the same time, the inquiry into whether an agreement is "null and void" under Article II(3) does not begin with an analysis of state contract law. In Chloe Z Fishing, the court stated "it is well-established that it is not state law, but internationally recognized defenses to contract formation or public policy concerns of the forum nation, which makes a valid agreement to arbitrate the subject of the dispute unenforceable under Article II, section 3 of the Convention." 109 F. Supp. 2d at 1258-59. There, the court refused to consider the state law defense of unconscionability – a defense not

articulated as one of the "internationally recognized defenses" which would render an agreement unenforceable under Article II(3). Id. at 1259; see also DiMercurio, 202 F.3d at 79; Bautista, 396 F.3d at 1302. While the authorities cited clearly limit challenges to an agreement's validity under Article II(3) to only those "internationally recognized defenses," such as duress, mistake, fraud, or waiver, the case law provides little guidance on what law a court should apply to determine whether one of these defenses is meritorious in a particular case.

Perhaps more helpful is the line of cases addressing the applicable law in determining the validity of arbitration agreements with foreign choice-of-law provisions. In those cases, courts apply domestic law to determine the threshold issue of validity. For instance, in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, the Supreme Court clarified that "the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." 473 U.S. 614, 626 (1985). In this initial determination, a foreign choice-of-law provision does not control and courts are to apply domestic law. Id. at 625; see also Sea Bowld Marine Group, LDC v. Oceanfast Pty, Ltd., 432 F. Supp. 2d 1305, 1312 (S.D. Fla. 2006); Kamaya Co. Ltd., v. Am. Prop. Consultants, Ltd., 91 Wash.

App. 703, 713-14 (Wash. Ct. App. 1998) (noting that despite choice of law and forum selection clauses, it is "axiomatic that courts must have some law to apply when initially determining whether the parties agreed to arbitrate a particular dispute" and finding that law in the analytical framework of the FAA).

Similarly, in Britton v. Co-op Banking Group, the Ninth Circuit held that a party who had not contracted to a valid agreement had no standing to compel arbitration. 916 F.2d 1405, 1413 n.9 (9th Cir. 1990) ("Standing, of course, is always a threshold issue. When evaluating a motion to compel arbitration, the first determination is whether the parties intended to contract for arbitration.") (citing Van Ness Townhouses v. Mar Industries Corp., 862 F.2d 754, 756 (9th Cir. 1988)). On appeal after remand, the Ninth Circuit applied California contract law, finding the parties had not formed a valid arbitration agreement. Britton v. Co-Op Banking Group, 4 F.3d 742, 745 (9th Cir. 1993) (citing Martinez v. Socoma Cos., Inc., 11 Cal. 3d 394 (1974)).

Moreover, as this Court's subject matter jurisdiction arises under the Convention and Chapter 2 of the FAA, the law under which the case "arises" arguably applies to the question of whether these parties consented freely to the agreement. See Chloe Z Fishing, 109 F. Supp. 2d at 1252;

Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1234-36 (S.D.N.Y. 1992) (noting that the "Convention, as a treaty, is the supreme law of the land, U.S. Const. art. VI cl. 2, and controls any case in any American court falling within its sphere of application" such that "any dispute involving international commercial arbitration which meets the Convention's jurisdictional requirements, whether brought in state or federal court, must be resolved with reference to that instrument"); Coenen v. R. W. Pressprich & Co., 453 F.2d 1209, 1211 (2d Cir. 1972) ("Once a dispute is covered by the [Federal Arbitration] Act, federal law applies to all questions of [the arbitration agreement's] interpretation, construction, validity, revocability, and enforceability."). As federal arbitration law applies state law to rule on the merits of the defense of duress, the Court follows this approach. See Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) ("generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [9 U.S.C. § 2]"); see also Al-Safin v. Circuit City Stores, Inc., 394 F.3d 1254, 1257 (9th Cir. 2005).

Finally, the Court notes that applying Chinese contract law in ruling on a defense of duress under Article V(2)(b) would subvert the purpose of the

Convention. "Article V(2) of the Convention provides that a United States court is not required to enforce an agreement if its subject matter is not capable of arbitration in the United States, or if enforcement of the arbitral award would be contrary to American public policy." Sarhank Group v. Oracle Corp., 404 F.3d 657, 661 (2d Cir. 2005) (internal citation omitted). In order to determine whether the award is contrary to American public policy, the Court must apply federal arbitration law. Id.

Accordingly, the Court applies California state contract law in ruling on Defendants' duress defense.

b. Standard of Review

The Court's review of a defense of duress under Article V(2)(b) is highly circumspect. The public policy behind both the FAA and the Convention strongly favors arbitration, and "the party opposing enforcement of an arbitral award has the burden to prove that one or more of the defenses under the New York Convention applies." Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc., 403 F.3d 85, 90 (2d Cir. 2005) (citing Europcar Italia, S.p.A. v. Maiellano Tours, Inc., 156 F.3d 310, 313 (2d Cir. 1998)); see also Compagnie Noga D'Importation et D'Exportation, S.A. v. The Russian Federation, 361 F.3d 676, 683 (2d Cir. 2004). "The

burden is a heavy one, as 'the showing required to avoid summary confirmance is high.'" Id. "Under the Convention, [a] district court's role in reviewing a foreign arbitral award is strictly limited." Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 19 (2d Cir. 1997) (internal quotation marks omitted). "A federal court cannot vacate an arbitral award merely because it is convinced that the arbitration panel made the wrong call on the law." Wallace v. Buttar, 378 F.3d 182, 190 (2d Cir. 2004); see also Telenor Mobile Commc'ns AS v. Storm, LLC, 524 F. Supp. 2d 332, 344 (S.D.N.Y. 2007), aff'd, 584 F.3d 396 (2d Cir. 2009).

Despite the limited scope of this Court's review and the relative lack of guiding precedent, the Court nevertheless concludes that it can consider Defendants' defense of duress.

B. Duress

Defendants argue that Mr. Fan was under duress in July 2007 because his fear of detention deprived him of his free will. (Defs.' Mot. at 8-10; Fan Decl. ¶ 26.) Plaintiff contends the July Agreement was not made under duress because Mr. Fan could have left China between April and July 2007, but instead negotiated the July Agreement freely. (Pl.'s SGI ¶ 11r; Pl.'s Mot. at 4-5; Pl.'s Opp'n at 9.)

Under California law, a contract is voidable if the agreement was made under duress. California codified the common law rule of duress in Civil Code Section 1569,[24] but that standard has since been relaxed. In re Marriage of Baltins, 212 Cal. App. 3d 66, 84 (1989). Today, "[d]uress generally exists whenever one is induced by the unlawful act of another to make a contract or perform some other act under circumstances that deprive him of the exercise of free will." Tarpy v. Cnty. of San Diego, 110 Cal. App. 4th 267, 276 (2003). A party must show duress by a preponderance of the evidence. In re Marriage of Balcof, 141 Cal. App. 4th 1509, 1523 (2006).

A contract is also voidable if a party's assent was the result of the threat of duress, or "menace."[25] See Odorizzi v. Bloomfield Sch. Dist., 246 Cal. App. 2d 123 (1966). There are various ways in which a threat may be improper. For instance, threats of criminal prosecution or the use of the civil process constitute improper threats to induce a party's assent to a contract.

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[24] "Duress consists in: (1) Unlawful confinement of the person of the party . . . ; (2) Unlawful detention of the property of any such person; or (3) confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive." Cal. Civ. Code § 1569.

[25] "Menace consists in a threat: (1) Of such duress as is specified in Subdivisions 1 and 3 of [Cal. Civ. Code § 1569]; (2) Of unlawful and violent injury to the person or property of any such person as is specified in [Cal. Civ. Code § 1569]; or, (3) Of injury to the character of any such person." Cal. Civ. Code § 1570.

Restatement 2d, Contracts § 176(1)(b)-(c); see Shasta Water Co. v. Croke, 128 Cal. App. 2d 760, 764 (1954). It is also improper for a party to threaten to use its power for illegitimate means if the resulting agreement is not on fair terms. Restatement 2d, Contracts § 176(2)(c). Finally, a threat may be improper if a party's previous unfair dealing increases significantly the chance of inducing the other party's assent, and the agreement benefits the threatening party unfairly. Id.

In addition to statutory duress and menace, California recognizes economic duress as a basis for vitiating a coerced party's consent to an agreement. CrossTalk Productions, Inc. v. Jacobson, 65 Cal. App. 4th 631 (1998). This doctrine applies "when one party has done a wrongful act which is sufficiently coercive to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract." Id. at 644. To determine if a party had a reasonable alternative depends on whether "a reasonably prudent person would follow the alternative course, or whether a reasonably prudent person might submit." Id.

A party may also void a payment on a contract if such payment was made while under duress. See Berrien v. New Raintree Resorts Int'l., LLC, 176 F.R.D. 355, 363 (N.D. Cal. 2011).

> Duress for this purpose is shown 'where, by reason of the peculiar facts a reasonably prudent man finds that in order to preserve his property or protect his business interests it is necessary to make a payment of money which he does not owe and which in equity and good conscience the receiver should not retain.'

Steinman v. Malamed, 185 Cal. App. 4th 1550, 1558 (2010) (quoting Western Gulf Oil Co. v. Title Ins. & Trust Co., 92 Cal. App. 2d 257, 266 (1949)).

The circumstances surrounding the July 2007 Agreement deprived Mr. Fan of his free will, and thus, Defendants did not consent to the agreement. In April 2007, just three months before Mr. Fan signed the agreement, the Changzhou police:

- Arrested and detained Mr. Fan for at least twelve days without charging him with a crime, (Fan Decl. ¶¶ 12-13, 15; Fan Dep. 100:11-16; Zhu Dep. 8:20; 60:14-61:17);
- Barred Mr. Fan from speaking with an attorney about his arrest, (Defs.' Reply SUF ¶ 11g; Wu Dep. 35:7-25; 36:1-5);
- Instructed an attorney that he could only advise Mr. Fan to sign the April 2007 Agreement, (Id.);
- Told Mr. Fan, after detaining him for four days, that even though the police investigation had been completed, they would not release Mr. Fan until he signed the April 2007 Agreement, (Fan Decl. ¶ 15; Fan Dep. 96:11-13); and

- Released Mr. Fan only after confirming the first payment on the April 2007 Agreement - totaling $300,000.00 - had been received, which was at least eight days after the police had closed their investigation. (Fan Decl. ¶ 15; Fan Dep. 100:11-16.)

Following Mr. Fan's arrest and up until he signed the July Agreement, the Changzhou Public Security Bureau contacted Mr. Fan at least ten times. (Fan Decl. ¶ 26.) Thus, when Officer Huang called Mr. Fan and directed him to return and sign the July 2007 Agreement, Mr. Fan believed reasonably that if he did not return and sign the agreement, the police would detain Mr. Fan again until he signed.[26] (Fan Decl. ¶ 26.)

Additionally, the terms of the July 2007 Agreement, when viewed in contrast with those to which the parties agreed in December 2006, further indicate Mr. Fan did not assent freely to the agreement. In December, the parties agreed Eastern Tools would retain the allegedly defective equipment and pay $2 million to the Joint Venture. (Fan Decl. ¶ 11; Pl.'s Mot. at 3.) The July Agreement's terms, however, increased the amount Eastern Tools would

[26] While Plaintiff argues Mr. Fan could have left China, the Court declines to find a Chinese citizen, who has legitimate business to conduct in China, (Fan Decl. ¶ 26; Fan Dep. 102:5-14; Pl.'s SUF ¶ 20), must flee the country in order to preserve a duress defense.

pay by $400,000.00; provided that if the monthly installments were not paid timely, then Defendants would owe $6,272,641.00; and held Mr. Fan personally liable for the entire amount. (Bell Decl. Ex. 5E.) The sharp contrast in the terms of the two agreements, coupled with the threatening circumstances surrounding Mr. Fan's signing of the July 2007 Agreement, suggest strongly that the agreement was not the result of the parties' free assent.

Plaintiff presents no evidence disputing the above facts. At the hearing, Plaintiff argued the Court should decline to consider Mr. Fan's statements describing his detention, release, and the continued police contact, as these statements represent hearsay and lack credibility. As the Court notes above, however, Plaintiff had the opportunity to cross-examine Mr. Fan during his deposition, and thus, could have tested the credibility of Mr. Fan's statements then. Plaintiff also could have disputed the facts stated in Mr. Fan's declaration by submitting contradictory declarations or deposition testimony from the Changzhou police, Officer Huang, or Mr. Dai, as well as any other relevant evidence. But, Plaintiff did not present any evidence disputing Mr. Fan's statements.

1. Third Party Duress

California allows an innocent party, whose assent was induced by a third party's use of duress, to void that contract under certain circumstances.[27] For instance, "a party who enters into a contract under duress may obtain rescission against another contracting party, who, although not responsible for the duress, knows that it has taken place and takes advantage of it by enforcing the contract, particularly a contract made with inadequate consideration." Chan v. Lund, 188 Cal. App. 4th 1159, 1174 (2010). An innocent party may not void a contract due to a third party's use of duress when the other contracting party acted in good faith, without reason to know of the third party's use of duress, and relied materially on the contract. Id. (citing Restatement 2d, Contracts § 175, com. e, p. 479).[28]

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[27] "A party to a contract may rescind the contract in the following cases: (1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party." Cal. Civ. Code § 1689(b).

[28] "If a party's assent has been induced by the duress of a third person, rather than that of the other party to the contract, the contract is nevertheless voidable by the victim. There is, however, an important exception if the other party has, in good faith and without reason to know of the duress, given value or changed his position materially in reliance on the transaction. 'Value' includes a performance or a return promise that is consideration . . . so that the other party is protected if he has made the contract in good faith before learning of the duress." Restatement 2d,

(continued...)

The law treats a contracting party's use of duress and a third party's use of duress, where the contracting party was aware of such duress, the same. In Leeper v. Beltrami, 53 Cal. 2d 195 (1959), the court stated that a contracting party cannot take advantage of a third party's use of duress knowingly. Id. at 206. There, in an effort to stave off wrongful foreclosure proceedings, the plaintiff conveyed her property for one-third of its actual market-value. Id. at 205. The plaintiff sought to rescind the conveyance but did not allege any active wrongdoing on behalf of the purchaser. Id. The court found the plaintiff stated a cause of action against the purchaser because the purchaser was aware the plaintiff needed to sell her property quickly, at less than actual market-value, in order to protect herself from other wrongful foreclosure proceedings. Id. at 206. In doing so, the court indicated that mere knowledge of another contracting party's predicament, i.e., that such party's assent was induced by another party's use of duress, is sufficient to create a right of rescission. Id.

Here, the following uncontroverted facts illustrate Plaintiff was aware Mr. Fan signed the July 2007 Agreement under duress:

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[28](...continued)
Contracts § 175, com. e, p. 479.

- Mr. Dai met with Mr. Fan to discuss the dispute between Eastern Tools and the Joint Venture while Mr. Fan was in police custody, (Dai Dep. 51:1-14);
- Mr. Dai testified that at the time he met with Mr. Fan to negotiate the July 2007 Agreement he believed Mr. Fan was in custody because one of the shareholders in the Joint Venture had accused Mr. Fan of contract fraud, (Dai Dep. 51:1-14.);
- The July 2007 Agreement listed Mr. Fan in his personal capacity as a guarantor assuming joint responsibility for the entire agreement even though Mr. Fan had not agreed to this in any of the negotiated agreements before his detention, (Fan Dep. 109:9-17; Bell Decl. Ex. 5E); and
- Plaintiff's representative obtained Mr. Fan's signature on the July 2007 Agreement without allowing Mr. Fan to review the agreement, (Fan Dep. 109:9-17; 110:19-22).

The uncontroverted facts show Mr. Fan was under duress in July 2007 when he signed the agreement; thus, he never consented freely to the agreement's terms. Since Plaintiff knew of the circumstances undermining Mr. Fan's capacity to assent freely, and nevertheless took advantage of the situation to induce Mr. Fan to sign the

agreement, Defendants may void the agreement under California law.

For purposes of ruling on the Motions, the Court therefore finds Defendants have shown by a preponderance of the evidence that the July 2007 Agreement was invalid based on a defense of duress.

2. Ratification

Plaintiff argues that even if Mr. Fan entered into the July 2007 Agreement under duress, Defendants ratified the agreement when Mr. Fan authorized the first payment in February 2008. (Pl.'s Opp'n at 11-12.) Defendants contend Mr. Fan remained under duress when he authorized this payment. (Defs.' Opp'n at 15.)

"A contract which is voidable solely for want of due consent, may be ratified by a subsequent consent." Cal. Civ. Code § 1588. Whether a party ratified a voidable contract depends primarily on the party's intention, as demonstrated by his or her declarations, acts, or conduct. Esau v. Briggs, 89 Cal. App. 2d 427 (1948). The test for ratification is "whether the releasor with full knowledge of material facts entitling him to rescind has engaged in some unequivocal conduct giving rise to an inference that he intended his conduct to amount to a ratification." Union Pac. R. Co. v. Zimmer, 87 Cal. App.

2d 524, 532 (1948). "Whether the releasor has such knowledge, or whether retention has been for an unreasonable length of time, are normally questions for the trier of fact." Aikins v. Tosco Refining Co., Inc., No. C–98–00755–CRB, 1999 WL 179686, at *4 (N.D. Cal. Mar. 26, 1999) (applying Zimmer test). In a summary proceeding such as this, the Court decides questions of fact based on the evidence submitted. See Matter of Arbitration Between Trans Chemical Ltd. and China Nat. Machinery Import and Export Corp., 978 F. Supp. at 309.

While Defendants bear the burden of presenting evidence sufficient to establish a defense of duress, Plaintiff must present some evidence showing Mr. Fan ratified the agreement in order to sustain their ratification argument.[29] See Aikins, 1999 WL 179686, at *6 (party asserting ratification did not present evidence sufficient to show as a matter of law that opposing party ratified agreement). Plaintiff presents no evidence to establish Plaintiff ratified the July 2007 Agreement. The only facts Plaintiff cites in support of its ratification argument are: 1) Defendants made the

[29] While "the party opposing enforcement of an arbitral award has the burden to prove that one or more of the defenses under the New York Convention applies," Encyclopaedia Universalis, 403 F.3d at 90, this does not eviscerate completely the burden on Plaintiff to present some evidence to support an asserted fact or legal argument.

February payment; and 2) Mr. Fan was not contacted by Chinese police after signing the July 2007 Agreement.

First, the fact that Defendants made the payment, on its own, does not demonstrate Defendants ratified the agreement. Plaintiff does not show Mr. Fan had "full knowledge of material facts entitling him to rescind," nor that his conduct when he made the payment created "an inference that he intended his conduct to amount to a ratification." See Union Pac. R. Co., 87 Cal. App. 2d at 532. If Mr. Fan remained under duress in February 2008, the payment would not have been voluntary and would not have constituted a ratification. See Rakestraw v. Rodrigues, 8 Cal.3d 67, 73 (1972) (no ratification if adoption of contract is only a result of duress or misrepresentation); Cf. Aikins, 1999 WL 179686, at *6 (noting evidence supported finding of ratification where plaintiff *conceded* he accepted benefits under the agreement *after* regaining mental functions and *after* he understood terms of agreement, but holding defendant still failed to show ratification as a matter of law).

Secondly, Mr. Fan's deposition testimony does not entirely support Plaintiff's argument that the police never contacted Mr. Fan after July 2007. In response to the question, "Did you receive any calls from Chinese police officers in 2008?", Mr. Fan stated, "Should be no.

I don't remember." (Fan. Dep. 16:9-11.) Other than citing this deposition testimony, Plaintiff presents no evidence showing Mr. Fan's state of mind had shifted by February 2008 so that he no longer feared being arrested if he did not comply with the July 2007 Agreement. (See Pl.'s SUF.)

The Court finds a sufficient temporal connection existed between Mr. Fan's arrest in April 2007, the telephone calls from the Public Security Bureau between April and July 2007, the order from Officer Huang in July 2007, and the first payment in February 2008, to support Defendants' claim that Mr. Fan continued to fear possible detention if he did not authorize the first payment. As Plaintiff does not present evidence to show Mr. Fan had full knowledge of the facts entitling him to rescind, Plaintiff's ratification argument fails.

3. Act of State

Plaintiff next argues the Court may not rule on Defendants' duress defense because, under the act of state doctrine, the Court cannot inquire into the validity of the acts of the Changzhou Public Security Bureau. (Pl.'s Opp'n at 14.) Defendants contend the act of state doctrine has no application here. (Defs.' Opp'n at 16.)

"The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964). Here, however, the Court is not ruling on the validity or legality of Mr. Fan's arrest. The Court makes no findings as to whether his arrest was legitimate under the laws of the People's Republic of China. The only holding the Court reaches is that, under California law, Mr. Fan could not properly consent to an agreement when he held a reasonable belief that he would be detained if he did not sign. Thus, the act of state doctrine has no bearing on the Court's ruling in this case.

C. Denying Enforcement

Having found Mr. Fan entered into the July 2007 Agreement under duress, the Court denies confirmation of the arbitral award under Article V(2)(b). While it may be unusual for a court to deny confirmation under Article V(2)(b), it is equally unusual for a court to enforce contracts created without one party's consent and complied with out of fear of imprisonment. The Court will not wield its power to enforce contracts which would be wholly unenforceable under domestic laws. See Diapulse Corp. of Am. v. Carba, Ltd., 626 F.2d 1108, 1110

(2d Cir. 1980) ("an award may be set aside if it compels the violation of law or is contrary to a well accepted and deep rooted public policy"). The Convention does not mandate categorical confirmation of awards; rather, the Article V(2) defenses contemplate courts will consider domestic laws in confirming an award. Article V(2)(b) would lack any meaning if a court could not rule against confirmation when the "defendant had been subject to coercion or any part of the agreement had been the result of duress." Ameropa AG, 2011 WL 570130, at *2. Here, the July 2007 Agreement was a result of duress and the Court will not confirm the arbitral award.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Plaintiff's Motion to Confirm and GRANTS Defendants' Motion to Deny Confirmation.

IT IS SO ORDERED.

Dated: July 30, 2012

VIRGINIA A. PHILLIPS
United States District Judge