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Jurisdiction	USA
Tribunal	Supreme Court of the State of New York, Albany County
Date of the decision	25 January 2022
Case no./docket no.	907022-21
Case name	*New York State Dept. of Health v. Rusi Technology Co., Ltd.*

In this special proceeding brought under CPLR article 75, petitioner New York State Department of Health («DOH») moves for an order and judgment permanently staying an arbitration commenced by respondent Rusi Technology Company, Limited («Rusi») before the China International Economic and Trade Arbitration Commission («CIETAC»). Rusi opposes the application. 1

Background

This matter arises from DOH's agreement to purchase two million KN-95 masks from Rusi, a Chinese company headquartered in Hong Kong, in the early days of the COVID-19 pandemic. DOH alleges that a substantial number of masks tendered by Rusi did not comply with the KN-95 standard specified in the parties' purchase contract. 2

According to the verified Petition, the purchase contract consists of three written instruments. First, Rusi drafted a document entitled «Export Contact» that DOH executed on March 27, 2020. 3

DOH then sent Rusi a purchase order, dated March 27, 2020, which (1) reduced the total purchase price for the masks from $11 million to $9.6 million, and (2) incorporated two appendices containing additional terms. Appendix A set forth certain standard terms for New York State contracts, and Appendix B provided additional terms for COVID-19 related transactions. 4

The parties then executed a written amendment to the Export Contract, also on March 27, 2020, to conform the pricing terms of the Export Contract with the Purchase Order. 5

The Export Contract is a single document drafted in both the English and Chinese languages. The English language text states that all disputes «shall be settled through friendly consultation», and the English text «shall prevail» in the event of «any discrepancies between the two versions». 6

However, the Chinese language text states that any disputes not resolved through friendly consultation shall be resolved through binding arbitration administered by CIETAC, and the Chinese text shall prevail in the event of any conflict. The Chinese text further provides that the Export Contract shall be governed by the laws of China, and the United Nations Convention 7

on Contracts for the International Sale of Goods (Vienna 1980) shall not apply to the transaction.

Dispute resolution also is addressed in the Purchase Order, a document drafted in English that DOH sent to Rusi after signing the Export Contract. Appendix B requires all disputes concerning international sales transactions that cannot be resolved through friendly consultation to be resolved through binding arbitration in New York administered by the International Chamber of Commerce («ICC»). 8

Appendix B also addresses the law governing the purchase transaction. It states that the «Contract,» which is defined as the Export Contract, together with Appendices A and B, «shall be governed by and construed in accordance with the laws of the State of New York, the United States, except where Federal supremacy clause governs». 9

Upon Rusi's tender of the masks, DOH allegedly determined that «a large number were significantly defective and not in compliance with the KN-95 standards specified in the March 27 Contract». Accordingly, DOH rejected the tender. 10

On or about June 28, 2021, the New York State Office of General Services received a notice of arbitration issued by CIETAC regarding a dispute submitted by Rusi arising from the purchase transaction. The notice of arbitration, which was based on the Chinese text of the Export Contract, obliged the State to respond to Rusi's claim by August 12, 2021. 11

On August 11, 2021, DOH commenced this special proceeding under CPLR 7503(b) to permanently stay the CIETAC arbitration. The Court signed DOH's proposed Order to Show Cause on August 12, 2021 and assigned the Petition an initial return date of October 12, 2021.[1] Included within the OTSC was a temporary restraining order staying the CIETAC arbitration pending determination of DOH's application.[2] 12

Rusi served an answering brief on December 3, 2021, and DOH filed reply papers on December 16, 2021. This Decision, Order & Judgment follows. 13

Analysis

As is relevant here, CPLR 7503(b) permits «a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration» to «apply to stay arbitration on the ground that a valid agreement [to arbitrate] was not made» (*see Matter of Conifer Realty LLC [Envirotech Servs., Inc.],* 106 A.D.3d 1251, 1252 [3d Dept 2013]). 14

DOH argues that the Export Contract «did not have the 'meeting of the minds' required to refer any dispute between [the parties] to arbitration». «If anything, under New York law, which incorporates the Convention for the International Sale of Goods …, Rusi agreed to NY DOH's additional terms set forth in the purchase order attachments requiring any arbitration 15

[1] The return date of the Petition subsequently was adjourned to December 17, 2021 in connection with the grant of DOH's motion to deem service of process upon Rusi sufficient.
[2] On November 11, 2021, CIETAC notified the parties that it had suspended the arbitral proceeding.

proceeding to be brought in New York before the International Chamber of Commerce, to be handled in English».

A. Choice of Law

Before the Court can address the issue of whether the parties agreed to arbitrate before CIETAC, it must first determine the body of substantive law governing that dispute. 16

The Convention for the International Sale of Goods («CISG» or «Convention») is a «self-executing» treaty that «'sets out substantive provisions of law to govern the formation of international sales contracts and the rights and obligations of the buyer and seller'» (*Asante Tech., Inc. v PMC-Sierra, Inc.,* 164 F.Supp.2d 1142, 1147 [ND Cal 2021], quoting U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods: Official English Text, 15 USC App at 52 [1997]; *see* 52 Fed Reg 6262-02 [1987]). Both the United States and China have adopted the Convention (*Ningbo Yang Voyage Textiles Co., Ltd. v Sault Trading,* 2019 WL 5399973, *2, 2019 US Dist LEXIS 155405, * 5 [ED NY, Sept. 10, 2019, No. 18-CV-1961 (ARR) (ST)]). 17

«In the absence of an agreement to the contrary, the CISG governs contracts for the sale of goods between parties in different countries that are signatories to the convention» (*Microgem Corp., Inc. v Homecast Co., Ltd.,* 2012 WL 1608709, *2, 2012 US Dist LEXIS 65166, *7 [SD NY, Apr. 27, 2012, No. 10 CIV 3330 (RJS)]). While «parties may exclude the application of th[e] Convention" (CISG, art 6), «[t]he intent to opt out of the CISG must be set forth in the contract clearly and unequivocally,» and there must be mutual «agree[ment] on the law to displace [the Convention]» (*Hanwha Corp. v Cedar Petrochemicals, Inc.,* 760 F.Supp.2d 426, 430–431 [SD NY 2011]; *see Thyssenkrupp Metallurgical Prods. GmbH v Energy Coal, S.p.A.,* 2015 NY Slip Op 31922[U], 2015 NY Misc LEXIS 3741, *6 [Sup Ct, NY County 2015] [«If parties do not want the CISG to govern their transaction, they must clearly and unequivocally say so in their contract.»]). 18

There is nothing in the English text of the Export Contract that speaks to the law governing the purchase transaction or otherwise evinces the parties' intention to exclude the CISG. In contrast, the Chinese text states that the Export Contract «is governed by and shall be interpreted in accordance with the laws of the People's Republic of China», the Convention «shall not apply», and «in the event of any conflicts between the two texts, the Chinese version shall prevail». From this, Rusi argues that the parties' dispute is governed by Chinese domestic law providing that, «where the parties concerned have a differing opinion upon the validity of an arbitration agreement, a request may be made for an award to be made by [CIETAC] or a judgment made by the People's Court at the place of arbitration». 19

The Court does not find Rusi's argument to be persuasive and, instead, concludes that the Export Contract fails to evince a clear *mutual* intention to exclude application of the Convention. Although the Chinese text purports to reject the Convention in favor of Chinese domestic law, the English version does not. In fact, the English and Chinese texts do not even agree on which version is controlling. And having proposed to DOH a contract drafted in both the English and Chinese languages through a New York agent, Rusi could not have been unaware that DOH's subjective intentions regarding choice of law would be formed on the 20

basis of the purportedly-controlling English text (*see* CISG, art 8 [1];[3] *see also MCC-Marble Ceramic Ctr., Inc., v Ceramica Nuova d'Agostino, S.p.A.,* 144 F.3d 1384, 1387 [11th Cir 1998], *cert denied* 526 U.S. 1087 [1999]), which is precisely the intention that any reasonable purchaser would have had under the same circumstances (*see* CISG, art 8 [2]).

The Court therefore concludes that the parties have not clearly expressed a mutual intention to exclude the Convention in favor of domestic Chinese law (*see Hanwha Corp.,* 760 F Supp 2d at 431). 21

Accordingly, the contract formation and interpretation principles of the Convention must be applied in determining whether the parties agreed to binding arbitration before CIETAC.[4] 22

B. Arbitration

DOH contends that the parties did not agree to arbitrate before CIETAC, and, if anything, Appendix B of the Purchase Order requires any disputes concerning the purchase transaction to be arbitrated in New York before the ICC. 23

In its one-page «Answer Brief,» Rusi argues that the Chinese language text of the Export Contract is controlling, and there is no conflict between the English and Chinese texts inasmuch as the English version is silent as to arbitration. Rusi further contends that Appendix B of the Purchase Order does not affect or change the arbitration clause in the Export Contract because Appendix B «is a unilateral document of NY DOH and cannot replace the Export Contract signed by both parties». 24

For essentially the same reasons stated in Part A, *supra,* the Court concludes that there was no meeting of the minds between the parties as to the Chinese text purporting to require binding arbitration before CIETAC. By proposing to DOH an Export Contract consisting of parallel Chinese and English provisions and assuring its American purchaser that the English text was controlling, Rusi knew (or must have known) that DOH's subjective intentions would be formed on the basis of the English text (*see* CISG, art 8 [1]), which is precisely what happened here. 25

Further, DOH's reliance on the English text was objectively reasonable under the circumstances (*see* CISG, art 8 [2]) and consistent with the parties' prior course of dealing (*see id*., art 8 [3]). Thus, this is not a case where a party simply failed to read and/or understand the terms of an agreement that included an arbitration clause (*cf. Allied Dynamics Corp. v Kennametal, Inc*., 2014 WL 3845244, *11, 2014 US Dist LEXIS 107920, *38–39 [ED NY, Aug. 5, 2014, No. 1-CV-5904 (JFB) (AKT)]; *Edwards v North Am. Van Lines,* 129 A.D.2d 869, 870 26

[3] Interpretative issues concerning the choice-of-law clause must be determined by «default choice-of-law rules» without regard to the disputed clause (*Nucap Indus., Inc. v Robert Bosch LLC,* 273 F.Supp.3d 986, 1006 [ND Ill 2017]; *see also James v Synovus Bank,* 2020 WL 1479115, *2, 2020 US Dist LEXIS 52078, *6 [D Md, Mar. 26, 2020, No. TDC-19-1137]). The Court therefore applies the Convention to the issue.

[4] The same conclusion would follow if the choice-of-law clause of Appendix B of the Purchase Order were given effect. Under Appendix B, the transaction is governed by New York law, into which the Convention has been incorporated (*see Microgem,* 2012 WL 1608709, *3, 2012 US Dist LEXIS 65166, *8).

[3d Dept 1987]; *Matter of Schwimmer v Malinas,* 38 Misc.3d 1220[A], 2013 NY Slip Op 50158[U], *8–9 & n 6 [Sup Ct, Kings County 2013]).[5]

Finally, contrary to Rusi's contention, the Chinese text requiring binding arbitration is fundamentally inconsistent with the English version, which does not impose such an obligation. Arbitration, of course, «is a matter of contract, grounded in [the mutual, affirmative] agreement of the parties» (*Matter of Belzberg v Verus Invs. Holdings Inc*., 21 N.Y.3d 626, 630 [2013] [internal quotation marks and citations omitted]). **27**

The Court therefore concludes that the Export Contract does not constitute «an express, unequivocal agreement to [arbitrate]» before CIETAC (*Brashear v Pelto,* 94 A.D.3d 1189, 1190 [3d Dept 2012], *lv denied* 19 N.Y.3d 813 [2012]). Accordingly, DOH's application to permanently stay the CIETAC arbitration must be granted.[6] **28**

Conclusion

Based on the foregoing, it is **29**

ADJUDGED that the Petition is granted; and it is further

ORDERED that the arbitration commenced by Rusi before CIETAC on or about May 18, 2021 is permanently stayed.

This constitutes the Decision, Order & Judgment of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for petitioner shall promptly serve a copy of this Decision, Order & Judgment with notice of entry upon respondent and any other party/entity entitled to notice.

[5] Indeed, in *MCC-Marble,* the order form was written in Italian, and buyer's representative neither spoke nor read Italian (*see* 144 F3d at 1387 n 9). Nonetheless, since the seller was aware of the buyer's subjective understanding, the Eleventh Circuit held that summary judgment in favor of the seller was unwarranted (*see id.* at 1391–1392).

[6] DOH further maintains that Rusi is bound by the language of Appendix B requiring binding arbitration before the ICC in New York. However, DOH has not moved to compel such arbitration, and the Court need not reach that issue in order to resolve the pending application to stay the CIETAC arbitration. Accordingly, the Court need not express any view as to whether the dispute resolution clause of Appendix B to the Purchase Order is binding upon Rusi.