

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PURUS PLASTICS GMBH,

Petitioner,

v.

ECO-TERR DISTRIBUTING, INC.,

Respondent.

CASE NO. C18-0277JLR

ORDER DENYING MOTION TO
DISMISS AND CONFIRMING
FOREIGN ARBITRATION
AWARDS

I. INTRODUCTION

Before the court is Respondent Eco-Terr Distributing, Inc.’s (“Eco-Terr”) motion to dismiss. (MTD (Dkt. # 8).) Petitioner Purus Plastics GmbH (“Purus”) opposes the motion and requests that the court confirm the foreign arbitration awards, enter judgment in Purus’s favor, and award prejudgment interest and attorneys’ fees. (Resp. (Dkt. # 16).) The court has considered the parties’ submissions in support of and in opposition to the

//

//

1 motion, the relevant portions of the record, and the applicable law. Being fully advised,¹
2 the court denies the motion, confirms the arbitration awards, and grants in part and denies
3 in part the request for interest and fees for the reasons set forth below.

4 II. BACKGROUND

5 This is an action to recognize and enforce two foreign arbitration awards (“the
6 Awards”) in Purus’s favor. (*See* Pet. (Dkt. # 1).) Both parties sell plastic interlocking
7 grid products, which are “used to reinforce and stabilize surfaces such as grass, gravel,
8 and soil to improve the stability and drainage of those surfaces for humans, animals, and
9 vehicles.”² (Baker Decl. (Dkt. # 10) ¶ 3.) On August 9, 2008, the parties entered into a
10 distributorship agreement (“the Agreement”). (Pet. ¶ 7; *see also* 1st Helkenberg Decl.
11 (Dkt. # 1-1) ¶ 3, Ex. A (“Agreement”).)³

12 Pursuant to the Agreement, Purus transferred “distribution of the flooring system
13 ECOGRID (‘the Product’)” to Eco-Terr, which assumed a duty to “actively promote
14

15 ¹ Eco-Terr requests oral argument (MTD at 1), but the court determines that oral
16 argument would not be helpful to its disposition of the motion, Local Rules W.D. Wash. LCR
7(b)(4).

17 ² Both parties provide extensive factual information. Unless directly applicable to one of
18 the seven grounds for declining to recognize and enforce a foreign arbitration award, *see infra*
19 § III.B, the court recounts the facts only to provide background information, *see Zeiler v.*
20 *Deutsch*, 500 F.3d 157, 169 (2d Cir. 2007) (“Confirmation under the Convention is a summary
proceeding in nature, which is not intended to involve complex factual determinations, other than
a determination of the limited statutory conditions for confirmation or grounds for refusal to
confirm.”).

21 ³ The Agreement was executed in German. (*See* 1st Helkenberg Decl. ¶ 3.) The parties
22 also prepared a “Convenience Translation” version of the Agreement, which translates the
Agreement into English. (*See id.*) Because neither party the English translation, the court cites
that version. (*See generally* MTD; Resp.; Reply (Dkt. # 19).)

1 distribution of the Product and to use its best efforts to safeguard the interests of [P]urus.”
2 (Agreement § A.1.) The Agreement extended to Eco-Terr’s distribution efforts in
3 Canada and the United States. (*Id.* § A.2.) The Agreement further granted Eco-Terr the
4 exclusive right to distribute the Product under the designations HOOFGRIID,
5 STABILIGRID, and HOMEGRID. (*Id.* § H.6.)

6 Within six months of executing the Agreement, Eco-Terr was required to “apply
7 for registration of the designations HOOFGRIID, STABILIGRID[,] and HOMEGRID as
8 trademarks solely for the Product (the ‘Trademarks’) with the United States Patent and
9 Trademark Office [“the USPTO”] and with the Canadian Intellectual Property Office.”
10 (*Id.* § H.7.) Eco-Terr was to “take all necessary steps to have the Trademarks registered
11 to it without undue delay and bear any costs related to the registration.” (*Id.*) The
12 Agreement provided that Eco-Terr would transfer the Trademarks to Purus effective from
13 the expiration date of the Agreement. (*Id.* § H.8.) Eco-Terr, however, did not register the
14 Trademarks while the Agreement was in effect. (*See* Pet. ¶ 13.)

15 The Agreement also contained an arbitration clause. (*See* Agreement § N.5.) That
16 clause specified that the parties would first attempt to resolve any “differences of opinion
17 over the performance or termination of this Agreement” by mediation. (*Id.*) But the
18 Agreement further provided that if the parties could not reach a resolution through
19 mediation, they could “require that arbitration proceedings be instituted—to the exclusion
20 of ordinary courts—on the basis of the rules of arbitration for the standing arbitral
21 tribunal of the Nuremberg Chamber of Industry and Commerce for Central Franconia.”
22 (*Id.*) The arbitral tribunal’s decision would be “final and binding.” (*Id.*)

1 On June 22, 2011, Purus informed Eco-Terr that Purus intended to terminate the
2 Agreement on December 31, 2011. (Pet. ¶ 14; *see also* Christian Decl. (Dkt. # 9) ¶ 10.)
3 The day after the Agreement terminated, Eco-Terr filed applications with the USPTO for
4 the HOOFGRID and STABILIGRID marks. (Pet. ¶ 15.) In January 2012, Purus first
5 learned of Eco-Terr’s attempts to register the marks. (*Id.* ¶ 18.) The United States
6 registration of the HOOFGRID mark became effective on December 11, 2012, followed
7 by the United States registration of the STABILIGRID mark on January 1, 2013. (*Id.*
8 ¶ 16; *see also* Christian Decl. ¶¶ 11-15.) Eco-Terr’s registration of those marks with the
9 Canadian Trademark Office became effective on February 5, 2013. (Pet. ¶ 17.) Purus
10 demanded that Eco-Terr transfer the marks as called for by the Agreement, and when
11 Eco-Terr refused, Purus filed an arbitration action. (*Id.* ¶¶ 18-19.)

12 The arbitration commenced on May 7, 2013, with Purus’s submission of an
13 arbitration statement. (*Id.* ¶ 19.) A three-member arbitral panel in Nuremberg, Germany
14 presided over the arbitration (*id.* ¶ 21), and issued the first award on September 8, 2015
15 (*id.* ¶ 22). The unanimous panel (1) ordered Eco-Terr to transfer the United States and
16 Canadian trademarks to Purus; (2) enjoined Eco-Terr from further using those marks in
17 the United States and Canada; (3) ordered Eco-Terr to turn over to Purus “information
18 regarding the sales and distribution channels of the subject products”; (4) ordered
19 Eco-Terr to pay compensatory damages of €20,000.00; (5) ordered Eco-Terr to
20 compensate Purus for all past and future damages arising from its failure to register the
21 marks pursuant to the Agreement and its use of the marks; and (6) ordered Eco-Terr to
22 reimburse Purus for its arbitration costs. (*Id.* ¶ 23; *see also* Christian Decl. ¶ 19, Ex. 12

1 (“9/8/15 Award”).) On October 24, 2015, the panel issued a second award that detailed
2 the amount Eco-Terr was to reimburse Purus for bringing the arbitral action. (Pet. ¶ 24;
3 *see also* Christian Decl. ¶ 20, Ex. 13 (“10/14/15 Award”).)

4 According to Purus, since the panel issued the Awards, Purus has “repeatedly
5 demanded that Eco-Terr comply” with the terms of the Awards. (Pet. ¶ 25.) Specifically,
6 Purus contends that on May 23, 2016, its counsel demanded compliance with the Awards
7 and that Eco-Terr cease and desist from continuing to use the marks. (*Id.* ¶ 28.) Purus
8 further contends that Eco-Terr continues to use the marks in the United States and
9 Canada. (*Id.* ¶ 29.)

10 On February 22, 2018, Purus filed a petition for recognition and enforcement of
11 the Awards. (*See generally id.*) Eco-Terr moves to dismiss the petition, contending that
12 certain exceptions in the United Nations Convention on the Recognition and Enforcement
13 of Foreign Arbitral Awards (“the Convention”), June 10, 1958, 21 U.N.T.S. 2517, permit
14 the court to deny Purus’s petition (*see* MTD). In response, Purus requests that the court
15 deny Eco-Terr’s motion, enter judgment confirming the Awards, and award Purus
16 attorneys’ fees and costs and post-award, prejudgment interest. (Resp. at 8, 28.) The
17 court now addresses the petition and motion to dismiss.

18 //

19 //

20 //

21 //

22 //

1 **III. ANALYSIS**

2 **A. Legal Standard⁴**

3 The Convention governs the “recognition and enforcement” of foreign arbitration
4 awards in United States courts.⁵ See 9 U.S.C. § 201. “The goal of the Convention, and
5 the principal purpose underlying American adoption and implementation of it, was to
6 encourage the recognition and enforcement of commercial arbitration agreements in
7 international contracts and to unify the standards by which agreements to arbitrate are
8 observed and arbitral awards are enforced in the signatory countries.” *Scherk v.*
9 *Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

10 When a party seeks confirmation of an award under the Convention, the court
11 “shall confirm the award unless it finds one of the grounds for refusal or deferral of
12 recognition or enforcement of the award specified in the said Convention.” See 9 U.S.C.
13 § 207. Those seven grounds are:

14
15 ⁴ Eco-Terr’s motion to dismiss is not subject to the standards that typically apply to such
16 motions under Federal Rule of Civil Procedure 12(b)(6) because Eco-Terr does not argue that
17 Purus fails to state a claim. Cf. Fed. R. Civ. P. 12(b)(6). For that reason, the court does not
18 recite those standards herein and considers the evidence the parties have submitted in support of
19 their filings.

18 ⁵ In 1970 Congress ratified the Convention, a multilateral treaty providing for ‘the
19 recognition and enforcement of arbitral awards made in the territory of a State other
20 than the State where the recognition and enforcement of such awards are sought.’
21 Convention, art. I(1), 21 U.S.T. 2517. Congress implemented the Convention by
22 passing Chapter II of the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 201-208,
which provides that ‘[a]n action or proceeding falling under the Convention shall
be deemed to arise under the laws and treaties of the United States. The district
courts of the United States . . . shall have original jurisdiction over such an action
or proceeding, regardless of the amount in controversy.’ 9 U.S.C. § 203.
Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1119-20 (9th
Cir. 2002) (internal footnote omitted).

1 [1] The parties to the agreement . . . were, under the law applicable to them,
2 under some incapacity, or the said agreement is not valid under the law to
3 which the parties have subjected it or, failing any indication thereon, under
the law of the country where the award was made; or

4 [2] The party against whom the award is invoked was not given proper
5 notice of the appointment of the arbitrator or of the arbitration proceedings
or was otherwise unable to present his case; or

6 [3] The award deals with a difference not contemplated by or not falling
7 within the terms of the submission to arbitration, or it contains decisions on
8 matters beyond the scope of the submission to arbitration, provided that, if
9 the decisions on matters submitted to arbitration can be separated from those
submitted to arbitration may be recognized and enforced; or

10 [4] The composition of the arbitral authority or the arbitral procedure was
11 not in accordance with the agreement of the parties, or, failing such
12 agreement, was not in accordance with the law of the country where the
arbitration took place; or

13 [5] The award has not yet become binding on the parties, or has been set
14 aside or suspended by a competent authority of the country in which, or
15 under the law of which, that award was made[; or] . . .

16 [6] The subject matter of the difference is not capable of settlement by
17 arbitration under the law of [the country where enforcement is sought]; or

18 [7] The recognition or enforcement of the award would be contrary to the
19 public policy of [the country where enforcement is sought].

20 *Admart AG v. Stephen & Mary Birch Found., Inc.*, 457 F.3d 302, 307-08 (3d Cir. 2006)

21 (internal quotation marks omitted). The party defending against enforcement of the
22 award must prove one of the Convention's enumerated defenses, which the court

1 interprets narrowly. *Polimaster Ltd. v. RAE Sys., Inc.*, 623 F.3d 832, 836 (9th Cir. 2010).
2 The “burden is substantial because the public policy in favor of international arbitration is
3 strong.” *Id.*

4 “Under the Convention, a district court’s role is limited—it must confirm the
5 award unless one of the grounds for refusal specified in the Convention applies to the
6 underlying award.” *Admart AG*, 457 F.3d at 307; *see also Ministry of Def. of the Islamic*
7 *Republic of Iran v. Gould, Inc.*, 969 F.3d 764, 770 (9th Cir. 1992). Accordingly,
8 confirmation proceedings are necessarily “summary” in nature and are “not intended to
9 involve complex factual determinations, other than a determination of the limited
10 statutory conditions for confirmation or grounds for refusal to confirm.” *Marker Volkl*
11 *(Int’l) GmbH v. Epic Sports Int’l, Inc.*, 965 F. Supp. 2d 308, 311 (S.D.N.Y. 2013)
12 (internal quotation marks omitted). The court does “not sit to hear claims of factual or
13 legal error by an arbitrator in the same manner than an appeals court would review the
14 decision of a lower court.” *Int’l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*,
15 763 F. Supp. 2d 12, 20 (D.D.C. 2011) (internal quotation marks omitted).

16 **B. Motion to Dismiss and Petition to Confirm**

17 Eco-Terr argues that five grounds support dismissing Purus’s petition to confirm
18 the Awards: (1) the Awards deal with differences not contemplated by or falling within
19 the terms of Purus’s submission to arbitration and contain decisions beyond the scope of
20 that submission; (2) the subject of the parties’ difference could not be settled by
21 arbitration under German law, (3) the arbitral procedure was not in accordance with the
22 Agreement, (4) the Awards are not yet final binding on the parties, and (5) the court’s

1 recognition and enforcement of the Awards would contravene the public policy of the
2 United States. (*See* MTD at 9-10.) The court considers each of those grounds in turn,
3 and if none of them support dismissal, the court must confirm the Awards. *See* 9 U.S.C.
4 § 207.

5 1. Differences Not Contemplated by the Agreement to Arbitrate

6 Eco-Terr first argues that the arbitration involved differences not contemplated by
7 the Agreement or falling within the terms of Purus’s submission to arbitration. (*See*
8 MTD at 10.) The crux of this defense is that a party may “attack an award predicated
9 upon arbitration of subject matter not within the agreement to submit to arbitration.”
10 *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L’Industrie Du Papier*
11 (*RAKTA*), 508 F.2d 969, 976 (2d Cir. 1974).

12 Eco-Terr argues that because the Agreement terminated on December 31, 2011,
13 the Awards are unenforceable because “the Parties’ agreement to arbitrate disputes
14 pertaining to the performance or termination of the Agreement only applied to events
15 occurring during that contract period.” (MTD at 11.) Eco-Terr provides no authority for
16 that position. (*See generally id.* at 10-12.) But based on that contention, Eco-Terr argues
17 that the Awards deal with differences not contemplated by the Agreement and contain
18 decisions beyond the scope of the Agreement. (*See id.* at 11.)

19 Eco-Terr too narrowly views the Agreement’s arbitration provision. The law
20 presumes that arbitration clauses survive termination of the underlying contract for
21 disputes arising under that contract. *See Litton Fin. Printing Div. v. Nat’l Labor*
22 *Relations Bd.*, 501 U.S. 190, 205 (1991). If that were not the case, “a party could avoid

1 [its] contractual duty to arbitrate by simply waiting until the day after the contract expired
2 to bring an action regarding a dispute that arose while the contract was in effect.” *Milfort*
3 *v. Comcast Cable Commc’ns Mgmt. LLC*, --- F. Supp. 3d ----, 2018 WL 2455012, at *3
4 (S.D. Fla. Apr. 9, 2018). Here, the arbitration clause stated that “[i]n the event that the
5 parties have differences of opinion over the performance or termination of this
6 Agreement, . . . any party may require that arbitration proceedings be instituted.”⁶
7 (Agreement § N.5.) Thus, Eco-Terr’s contention that the parties’ duty to arbitrate ended
8 upon termination of the Agreement is without merit. (*See* MTD at 11.)

9 However, that conclusion does not end the inquiry because the duty to arbitrate
10 continues only for disputes arising under the relevant contract. *See Litton*, 501 U.S. at
11 205. The court therefore looks to whether a particular claim falls within the scope of the
12 arbitration clause. *See Aviation Alliance Ins. Risk Retention Grp., Inc. v. Polaris Enter.*
13 *Grp.*, No. CV 17-35-M-DWM, 2017 WL 2799151, at *3 (D. Mont. June 27, 2017). The
14 issue of the trademarks was before the arbitral panel. (*See* Agreement §§ H.7, H.8, N.5;

15
16 ⁶ Although the language of that provision suggests only that arbitration was
17 permissible—not mandatory—that distinction makes no difference here. (*See* Agreement § N.5
18 (stating that the parties could require arbitration)); *see also* *Asus Comput. Int’l v. InterDigital,*
19 *Inc.*, No. 15-cv-01716-BLF, 2015 WL 5186462, at *5 (N.D. Cal. Sept. 4, 2015) (stating that
20 “even when an arbitration clause uses permissive language, the clause still [may] give[] rise to
21 mandatory arbitration”). First, the way the provision is structured first mandates the parties to
22 participate in mediation to settle any dispute, followed by recourse to arbitration if they are
unable to resolve the dispute. (*See* Agreement § N.5.) Viewed in context, the arbitration
provision is best read as mandatory after mediation occurs. (*See id.*); *The Casiano-Bel Air*
Homeowners Assoc. v. Phila. Indem. Ins., No. 2:16-cv-08549-SVW-SK, 2017 WL 3273654, at
*4 (C.D. Cal. Feb. 22, 2017) (concluding that an arbitration clause was mandatory even though it
used the word “may” because once a party opted to demand arbitration, the clause became
mandatory). Second, the issue before the court is not whether the parties agreed to arbitrate.
Rather, now that the parties have completed arbitration, the issue before the court is whether to
confirm the Awards.

1 9/8/15 Award.) The relevant contractual provision called for Eco-Terr to apply for
2 registration of those marks with the USPTO and Canadian Intellectual Property Office
3 within six months after the parties executed the Agreement. (Agreement § H.7.) In
4 addition, the parties agreed that Eco-Terr would transfer the marks to Purus upon
5 termination of the Agreement. (*Id.* § H.8.) Thus, because the arbitration centered on
6 Eco-Terr’s lack of compliance with those contractual provisions, the parties’ dispute
7 arose under the Agreement and therefore was subject to arbitration.

8 Eco-Terr’s focus on the arbitral panel’s consideration of trademark-related events
9 that occurred after the Agreement ended is misplaced. (*See* MTD at 11-12; *see also*
10 Christian Decl. ¶ 4 (stating that “Eco-Terr presented the three arbitrators . . . with clear
11 proof that at no time during the Agreement . . . were there ever goods bearing either the
12 HOOFGRIID or STABILIGRIID trademark that could have been submitted to [the
13 USPTO] or the Canadian Intellectual Property Office”).) Specifically, Eco-Terr takes
14 issue with the panel’s decision that Eco-Terr’s “2012 business efforts to design,
15 manufacture, and offer for sale a new United States-made product . . . entitled Purus to
16 obtain ownership of the trademarks and the sales channel data for the new United States-
17 made product.” (MTD at 12.) Eco-Terr further contests that the panel granted “Purus
18 ownership of Eco-Terr’s ‘word’ trademark registrations when the Agreement only
19 addressed ‘design’ trademarks,” and applied the Agreement to United States-made
20 products.⁷ (*Id.*) Eco-Terr essentially “attempt[s] to secure a reconstruction in this court

21
22 ⁷ In any event, it is not clear from the Agreement that it pertained only to design
trademarks. (*See* Agreement § H.7.) The Agreement states that “[t]he design of the trademarks

1 of the contract—an activity wholly inconsistent with the deference due arbitral decisions
2 on law and fact.” *Parsons*, 508 F.2d at 976; (see also Christian Decl. ¶¶ 5 (“Each of the
3 arguments raised in Eco-Terr’s Motion to Dismiss . . . was raised in Eco-Terr’s
4 objections to the Arbitration Panel.”), 6 (“The Arbitration Panel erroneously assumed that
5 because Eco-Terr was entitled to apply for trademark registration in 2012, it was equally
6 entitled to apply for trademark registrations . . . in 2008.”). Thus, the court inquires no
7 further into the arbitral panel’s decision and concludes that Eco-Terr fails to demonstrate
8 this ground for refusing confirmation of the Awards.

9 2. Subject Matter Capable of Settlement by Arbitration

10 Eco-Terr next argues that the court should refuse to confirm the Awards because
11 the trademark issues could not have been settled by arbitration under German law. (*See*
12 MTD at 12-13.) This ground “authorizes a court to deny enforcement . . . of a foreign
13 arbitral award when the subject matter of the difference is not capable of settlement by
14 arbitration under the law of” the country where confirmation of the award is sought.
15 *Parsons*, 508 F.2d at 974. The provision “only covers disputes which under domestic
16 law would be ‘entrusted to the exclusive competence of the judiciary.’” *Changzhou*
17 *AMEC E. Tools & Equip. Co., Ltd. v. E. Tools & Equip., Inc.*, No. EDCV 11-00354 VAP
18 (DTBx), 2012 WL 3106620, at *10 (C.D. Cal. July 30, 2012) (quoting *Parsons*, 508 F.2d
19 at 974). Thus, a party contesting confirmation fails to establish this ground for relief

20
21 _____
22 HOOFGRIID, STABILIGRIID[,] and HOMEGRID shall be adapted to the design of the
trademarks ECORASTER and ECOGRID. The design of the trademarks shall require the prior
written approval of [P]urus” (*Id.*) On its face, that language does not necessarily
demonstrate that Agreement’s trademark provision extended only to design marks. (*See id.*)

1 when “[t]here is no special national interest in judicial, rather than arbitral, resolution of
2 the . . . claim underlying the award.” *Parsons*, 508 F.2d at 975.

3 Eco-Terr argues the subject matter of the parties’ dispute was not capable of
4 settlement under German law and that the panel improperly “assigned German law to
5 matters exclusively governed by United States and Canadian trademark laws.”⁸ (MTD at
6 13.) In support of this argument, Eco-Terr submits its letter to the panel asserting that the
7 German Trademark Act does not apply to the Agreement. (*Id.* (citing Christian Decl.
8 ¶ 22, Ex. 15 at 1-2).)

9 As an initial matter, Eco-Terr misunderstands the defense. (*See id.* at 13.)
10 Although Eco-Terr focuses on whether the parties’ dispute could be settled under German
11 law, the defenses implicates the law of the country in which confirmation is sought—
12 here, the United States. *See Admart*, 457 F.3d at 308. Article V of the Convention states
13 that a court may refuse to confirm an arbitration award “if the competent authority in the
14 country where recognition and enforcement is sought finds that . . . [t]he subject matter of
15 the difference is not capable of settlement by arbitration under the law of that country.”
16 *Id.* Thus, “that country” refers to the country in which the court asked to recognize the

17 //

18
19
20
21
22
⁸ Eco-Terr’s arguments in this regard rehash Eco-Terr’s position that the panel could not address conduct occurring after the Agreement terminated. (*See* MTD at 13 (“While it is true that the [p]arties selected German law to govern the Agreement, it is simply not the case that German law or the Agreement’s arbitration provision applied to Eco-Terr’s 2012 conduct or trademarks obtained after the Agreement was terminated in 2011.”).) In addition, Eco-Terr rests in part on its position that the arbitral panel incorrectly decided the issues. (*See id.* at 14.) Such arguments fail for the reasons discussed above. *See supra* § III.B.1.

1 | award sits. *See id.* Thus, Eco-Terr’s arguments regarding German law are beside the
2 | point.

3 | Moreover, United States law does not require the judiciary to resolve contract
4 | disputes involving trademark issues. Rather, parties may agree to arbitrate those issues.
5 | *Cf. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985)
6 | (stating that the Federal Arbitration Act “provides no basis for disfavoring agreements to
7 | arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability”);
8 | *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 725 (9th Cir. 2007) (“Contractual
9 | arbitration agreements are equally applicable to statutory claims as to other types of
10 | common law claims.”). Eco-Terr makes no showing otherwise by, for example,
11 | demonstrating that Congress intended only for judicial resolution of trademark issues.
12 | (*See* MTD at 13-14 (failing to address any congressional intent to exempt trademark
13 | issues from arbitration)); *Lozano*, 504 F.3d at 725-26 (stating that the party asserting a
14 | statutory claim may not be arbitrated has the burden of showing congressional intent to
15 | that effect); *see also Mitsubishi*, 473 U.S. at 628 (stating that Congress must “evinced[] an
16 | intention to preclude waiver of judicial remedies for the statutory rights at issue”). The
17 | fact that the parties’ dispute is, at bottom, based on contractual provisions regarding
18 | trademarks further supports concluding that the dispute need not be judicially resolved.

19 | Eco-Terr also makes a number of ancillary arguments—none of which change the
20 | court’s conclusion. First, Eco-Terr argues that the arbitral panel applied German
21 | trademark law. (*See* MTD at 13 (pointing to no specific portion of the panel’s decision in
22 | making that assertion).) Even assuming that the arbitral panel should not have done so, it

1 does not appear that the panel in fact applied German *trademark* law. (See 9/8/15 Award
2 at 21-28 (applying German law regarding contract construction)).

3 Second, Eco-Terr contends that “the Award is unenforceable as issued because it
4 lacks full consideration of the practicality of complying with United States, Canadian,
5 and German laws.” (MTD at 14.) However, Eco-Terr’s ability to comply with the
6 Awards is not a valid reason to deny confirmation. See *TMCO Ltd. v. Green Light*
7 *Energy Sols. R&D Corp.*, No. 4:17-cv-00997-KAW, 2017 WL 5450762, at *4 (N.D. Cal.
8 Nov. 14, 2017) (stating that whether the party was able to perform in accordance with the
9 final foreign arbitration award was irrelevant and not a basis for denying confirmation).

10 For those reasons, the court concludes that Eco-Terr fails to establish this defense.

11 3. Arbitral Procedure in Accordance with the Parties’ Agreement

12 Eco-Terr next argues that the procedure the panel used contradicted the
13 Agreement. (See MTD at 16.) The Convention provides a defense to enforcement when
14 “the arbitral procedure was not in accordance with the agreement of the parties.” *Admart*,
15 457 F.3d at 307-08. But the defense applies only if the asserted procedural violation
16 “worked substantial prejudice to the complaining party.” *Karaha Bodas Co., L.L.C. v.*
17 *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F. Supp. 2d 936, 945
18 (S.D. Tex. 2011) (quoting *Compagnie des Bauxites de Guinee v. Hammermills*, No.
19 90-0169, 1992 WL 122712, at *5 (D.D.C. May 29, 1992)), *aff’d*, *Karaha Bodas Co.*,
20 *L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th
21 Cir. 2004); see also *Calbex Mineral Ltd. v. ACC Res. Co., L.P.*, 90 F. Supp. 3d 442, 462
22 (W.D. Pa. 2015). The court examines the language of the arbitration agreement to

1 “determine whether the procedure used was contrary to the parties’ agreed arbitral
2 procedures.” *Polimaster*, 623 F.3d at 836.

3 Eco-Terr argues that the defense applies because the arbitration panel conducted
4 the proceedings in German rather than English. (*See* MTD at 16.) According to
5 Eco-Terr, English should have been used because (1) the parties and the panel were
6 fluent in English, and Eco-Terr was not fluent in German; and (2) the use of German
7 contravened the “consistent course of conduct” between the parties. (*Id.*; *see also* Baker
8 Decl. ¶ 15.) Eco-Terr further contends that using German instead of English amounts to
9 a due process violation.⁹ (*Id.* at 16-17.)

10 The court first addresses whether the parties agreed to arbitrate using the German
11 language. Eco-Terr states that the Agreement does not specify which language would
12 apply to an arbitration, and therefore contends that using German contradicts the
13 Agreement. (*Id.* at 16 (citing Agreement §§ M-N).) Purus counters that the parties
14 agreed to the rules of arbitration of the Nuremberg Chamber of Commerce, which
15 incorporates the rules of the *Deutsche Institutionen für Schiedsgerichtsbarkeit e.V.* (“the
16 DIS Rules”). (*See* Resp. at 24; 2d Helkenberg Decl. (Dkt. # 17) ¶ 6.) The DIS Rules
17 allowed the panel to “determine the language or languages to be used in the
18

19 ⁹ In this regard, Eco-Terr essentially invokes a sixth ground for refusing to enforce the
20 Awards under the Convention. *See Anatole Stati v. Republic of Kazakhstan*, --- F. Supp. 3d ---,
21 2018 WL 1461898, at *12 (D.D.C. Mar. 23, 2018) (stating that the Convention allows refusal of
22 an award if “the party against whom the award is invoked was not given proper notice of . . . the
arbitration proceeding or was otherwise unable to present [its] case” (quoting Convention,
Article V(1)(b))); *see also Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145-46 (2d Cir.
1992) (noting that Article V(1)(b) “essentially sanctions the application of the forum state’s
standards of due process”).

1 proceedings.” (Resp. at 24 (citing DIS Rules § 22); *see also* 2d Helkenberg Decl. ¶ 6,
2 Ex. 2 (Dkt. # 17-2); *id.* ¶¶ 7 (stating the rule), 9-10.) Specifically, the DIS Rules specify
3 that if the parties do not agree to the language to be used in the arbitral proceedings, “the
4 arbitral tribunal shall determine the language . . . to be used in the proceedings.” (2d
5 Helkenberg Decl. ¶ 6, Ex. 2 §§ 22.1-22.2.) Because the parties’ arbitration agreement
6 was silent as to the language to be used, the DIS Rules filled that gap by allowing the
7 panel to decide the language. (*See id.*; *see also* Agreement § N.5.) Thus, “the arbitral
8 procedure” conformed to the Agreement. (*See* Agreement § N.5); *Polimaster*, 623 F.3d
9 at 836.

10 Moreover, Eco-Terr demonstrates no prejudice arising from the panel’s language
11 decision. (*See* MTD at 16-17 (failing to discuss prejudice).) Eco-Terr again disputes the
12 content of the Awards, but does not tie the outcome of the proceedings to the use of
13 German as opposed to English. (*See id.*) Thus, Eco-Terr fails to demonstrate prejudice.

14 The court also addresses whether proceeding in German violated Eco-Terr’s right
15 to due process. (*See id.* at 16-17 (arguing that the use of German also violated Eco-Terr’s
16 right to due process).) To satisfy the requirements of due process, parties to an
17 arbitration must be given notice of the proceedings and an opportunity to be heard. *See*
18 *Gould*, 887 F.2d at 1365 (“The Convention contains several due process protections
19 requiring notice and the opportunity to be heard as well as a defense to guard against
20 enforcement of awards contrary to public policy.”). When a party is unable to present its
21 case in arbitration, there is a due process violation. *See Research & Dev. Ctr.*
22 “*Teploenergetika*,” *LLC v. EP Int’l, LLC*, 182 F. Supp. 3d 556, 565 (E.D. Va. 2016).

1 The court must deny confirmation of the award if the party challenging it “proves that [it]
2 was not given a meaningful opportunity to be heard.” *Id.* Eco-Terr, however, received
3 such an opportunity.

4 Eco-Terr’s due process argument centers on the fact that Eco-Terr “offered to
5 provide English versions of all submissions to avoid translation errors,” but “could never
6 have known if its translated submissions were accurate or captured the intended
7 meaning.”¹⁰ (MTD at 17 (citing Christian Decl. ¶¶ 7, 18).) In the immigration and
8 criminal contexts, due process may be violated where a translation is “nonsensical” and
9 “subject to doubt.” *See Augustin v. Sava*, 735 F.2d 32, 38 (2d Cir. 1984); *see also*
10 *Davila-Marquez v. City of Pasco*, No. C12-5059LRS, 2013 WL 1136658, at *3 (E.D.
11 Wash. Mar. 18, 2013) (stating that federal courts “hold that the right to an interpreter
12 affects a [criminal] defendant’s Sixth Amendment right of confrontation and the right
13 inherent in a fair trial to be present at one’s own trial”); *cf. Hadjimehdigholi v. I.N.S.*, 49
14 F.3d 642, 649 (10th Cir. 1995) (“INS regulations also contemplate that proceedings and
15 documents in a foreign language will be accurately translated.”). Even if the same
16 standard governed arbitration proceedings—and it is not clear that it does—Eco-Terr
17 makes no showing that any translation was incorrect or that any purported inaccuracy

18
19 ¹⁰ Due process may be violated if a party does not receive notice of the arbitration
20 proceedings in a language the party understands. *See Qingdao Free Trade Zone Genius Int’l*
21 *Trading Co., Ltd. v. P & S Int’l, Inc.*, No. 08-1292-HU, 2009 WL 2997184, at *5 (D. Or. Sept.
22 16, 2009). However, Eco-Terr makes no argument that it did not receive an English-language
notice of the proceedings. (*See generally* MTD; Christian Decl.) More importantly, Eco-Terr
participated in the proceedings, thus demonstrating that it in fact received notice. *Cf. Qingdao*,
2009 WL 2997184, at *2 (stating that the party opposing enforcement of the foreign arbitration
award did not appear at the arbitration proceedings).

1 adversely affected Eco-Terr. Indeed, it appears from Eco-Terr’s phrasing that Eco-Terr
2 takes umbrage with its own translated submissions, over which it had control. (*See* MTD
3 at 17.) In any event, Eco-Terr fails to show any errors or that, even if errors were present,
4 they amount to a due process violation in a private arbitration proceeding.

5 Thus, Eco-Terr fails to show that the arbitration procedure was inconsistent with
6 the Agreement, and this defense provides no basis for denying confirmation.

7 4. Whether the Award Is Final and Binding

8 Eco-Terr next argues that the Awards are not yet final and binding. (MTD at 17.)
9 This defense applies when a party files an action to confirm or enforce an arbitral award
10 before the award is final. *Ministry of Def. & Support for the Armed Forces of the Islamic*
11 *Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1100 (9th Cir. 2011). The award
12 is final when a party has no further recourse in the arbitration proceeding, such as to an
13 appeals tribunal. *Id.* (quoting *Fertilizer Corp. of India v. IDI Mgmt., Inc.*, 517 F. Supp.
14 948, 958 (S.D. Ohio 1981)).

15 Eco-Terr asserts that because the September 8, 2015, Award includes “an
16 undefined monetary award of ‘all damage, which has arisen or will arise in the future,’”
17 the parties have no way to calculate that amount. (MTD at 17.) Yet Eco-Terr fails to
18 show that it has further recourse to challenge the arbitration award and therefore, that the
19 award is not yet final. (*See id.*) Indeed, Eco-Terr provides no information or argument at
20 all on that point. (*See id.*) Rather, as with its other arguments, the crux of Eco-Terr’s
21 contention is that it simply disagrees with the panel. (*See id.* (stating that “these damages
22 are based upon hypothetical trademark registrations that were impossible in 2008 and

1 | could only be calculated by pure speculation’’)). Such disagreement is not a basis for
2 | denying confirmation of the Awards pursuant to the Convention.

3 | And to the extent an open-ended damages award is even relevant to this defense,
4 | the Award here is not as uncertain as Eco-Terr makes it out to be. The Award requires
5 | Eco-Terr to “compensate” Purus a specific amount—€20,000.00—even as the Award
6 | also requires reimbursement for damages that might arise in the future. Thus, the Award
7 | states an ascertainable amount that Eco-Terr must pay Purus. (*See* 9/8/15 Award at 29.)

8 | For those reasons, the Award is final and binding, and this ground provides no
9 | basis for denying confirmation.

10 | 5. Public Policy Defense

11 | Finally, Eco-Terr contends that public policy considerations counsel against
12 | confirming the award. (*See* MTD at 18-21.) The public policy defense “applies only
13 | when confirmation or enforcement of a foreign arbitration award would violate the forum
14 | state’s most basic notions of morality and justice.” *Cubic Def.*, 665 F.3d at 1097 (internal
15 | quotation marks omitted) (quoting *Parsons*, 508 F.2d at 974). The defense is rarely
16 | successful, *see Parsons*, 508 F.2d at 974, because “[t]o read the public policy defense as
17 | a parochial device protective of national political interests would seriously undermine the
18 | Convention’s utility,” *Cubic Def.*, 665 F.3d at 1099 (internal quotation marks omitted)
19 | (quoting *Parsons*, 508 F.2d at 974).

20 | In invoking the public policy exception, Eco-Terr simply rehashes its earlier
21 | arguments: (1) that the panel improperly decided the trademark issues, (2) misapplied
22 | United States and Canadian trademark law, and (3) violated Eco-Terr’s due process rights

1 by conducting the proceedings in German. (*See* MTD at 18-21.) The court rejects those
2 arguments for the same reasons articulated above. *See supra* §§ III.B.1-4. In addition,
3 the court rejects them for the independent reason that the panel’s decision—even if based
4 on a misapplication of law—does not violate the United States’ “most basic notions of
5 morality and justice.” *See Cubic Def.*, 665 F.3d at 1097. Thus, this defense also fails.

6 Because the court concludes that Eco-Terr demonstrates none of the asserted bases
7 for denying confirmation of the Awards, the court must confirm the Awards. *See* 9
8 U.S.C. § 207; (*see also* MTD at 9 (stating that the court “must recognize and enforce” the
9 Awards “unless Eco-Terr can prove that at least one of the . . . grounds for refusal
10 exists”). Thus, the court denies Eco-Terr’s motion to dismiss and confirms the Awards.

11 **C. Post-Award, Prejudgment Interest and Attorneys’ Fees**

12 In addition to confirmation of the Awards, Purus seeks post-award, prejudgment
13 interest and attorneys’ fees. (Resp. at 28-30.) Eco-Terr opposes those requests. (Reply
14 at 11-12.) Eco-Terr argues that because the arbitration panel did not award prejudgment
15 interest, it is not available in this action. (*Id.* at 11.) Eco-Terr further argues that
16 attorneys’ fees are unwarranted because it “participated in every aspect of the arbitration”
17 and has not acted in bad faith. (*Id.* at 12.)

18 “[P]ost-award, prejudgment interest is available in an action to confirm an
19 arbitration award under the . . . Convention.” *Cubic Def.*, 665 F.3d at 1102. The purpose
20 of awarding prejudgment interest is to compensate a party “for the loss of use of money
21 due as damages from the time the claim accrues until judgment is entered.” *Schneider v.*
22 *Cty. of San Diego*, 285 F.3d 784, 789 (9th Cir. 2002). The decision whether to award

1 such interest “falls within the district court’s discretion.” *Cubic Def.*, 665 F.3d at 1103.
2 The court must exercise that discretion, however, “consistent with the underlying
3 arbitration award,” and therefore may not award interest “when the arbitration tribunal
4 has determined that such interest is not available.” *Id.* Where an award is silent on
5 whether a party may recover post-award interest, prejudgment interest is consistent with
6 the award. *See Cont’l Transfert Technique Ltd. v. Fed. Gov’t of Nigeria*, 932 F. Supp. 2d
7 153, 164 (D.D.C. 2013) (citing *Cubic Def.*, 665 F.3d at 1103). Courts presume that
8 post-award, prejudgment interest is “appropriate” absent a persuasive showing to the
9 contrary. *See Al Maya Trading Establishment v. Global Export Mktg. Co., Ltd.*,
10 No. 16-CV-2140 (RA), 2017 WL 1050123, at *5 (S.D.N.Y. Mar. 17, 2017); *Waterside*
11 *Ocean Navigation Co. v. Int’l Navigation, Ltd.*, 737 F.2d 150, 154 (2d Cir. 1984) (noting
12 a general presumption in favor of prejudgment interest). The Ninth Circuit generally uses
13 “the interest rate prescribed for post-judgment interest under 28 U.S.C. § 1961 . . . for
14 fixing the rate of pre-judgment interest.” *Asdale v. Int’l Game Tech.*, 763 F.3d 1089,
15 1093 (9th Cir. 2014); *see also W. Pac. Fisheries, Inc. v. SS President Grant*, 730 F.2d
16 1280, 1288 (9th Cir. 1984) (stating that using 28 U.S.C. § 1961(a) is appropriate “unless
17 the trial judge finds, on substantial evidence, that the equities of the particular case
18 require a different rate”); *ESCO Corp. v. Bradken Res. Pty Ltd.*, Civ. No. 10-788-AC,
19 2011 WL 1625815, at *23 (D. Or. Jan. 31, 2011) (stating that the rate of interest specified
20 in 28 U.S.C. § 1961 applied in a case to confirm a foreign arbitration); 28 U.S.C.
21 § 1961(a).

22 //

1 In addition, the court may award attorneys' fees "when the losing party has acted
2 in bad faith, vexatiously, wantonly[,] or for oppressive reasons." *Cubic Def.*, 665 F.3d at
3 1104 (citing *Int'l Union of Petroleum & Indus. Workers v. W. Indus. Maint., Inc.*, 707
4 F.2d 425, 428 (9th Cir. 1983)). In the context of a petition to confirm a foreign
5 arbitration award, the losing party's unjustified refusal to comply with the award may
6 provide a basis for awarding attorneys' fees. *See id.*; *cf. Landmark Ventures, Inc. v.*
7 *InSightec, Ltd.*, 63 F. Supp. 3d 343, 359 (S.D.N.Y. 2014) (concluding that "[t]his is not a
8 case where [the petitioner] simply failed to abide by the Award" because the petitioner
9 "attempted to vacate the Award").

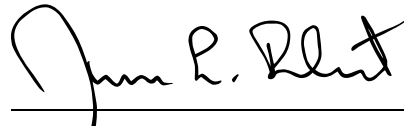
10 Because much of Eco-Terr's motion attempts to relitigate issues before the
11 arbitration panel, the court finds an award of prejudgment interest on the €20,000.00
12 award appropriate. *Cf. ESCO*, 2011 WL 1625815, at *24 (stating that to award
13 prejudgment interest in that case would "discourage parties from asserting objectively
14 reasonable grounds for vacatur"). However, neither party addresses an appropriate rate
15 of prejudgment interest. (*See generally* Resp.; Reply.) The court thus applies the rate
16 from 28 U.S.C. § 1961(a) to the €20,000.00 award from September 8, 2015, to the date of
17 judgment. The court declines, however, to award attorneys' fees. Although Eco-Terr has
18 failed to comply with the Awards despite the passage of nearly three years, Purus has not
19 shown that Eco-Terr was unjustified in its refusal. *See Cubic Def.*, 665 F.3d at 1104.
20 Indeed, Eco-Terr has contested the Awards both before the arbitration panel and here,
21 indicating that it did not simply choose to disregard the Awards. *Cf. Landmark Ventures*,
22 63 F. Supp. 3d at 359. The fact that Purus petitioned the court to confirm the Awards is

1 not itself sufficient to show that Eco-Terr acted in bad faith or vexatiously. (*See* Resp. at
2 29 (citing Reif Decl. (Dkt. # 1-1).)

3 **IV. CONCLUSION**

4 For the reasons set forth above, the court DENIES Eco-Terr's motion to dismiss
5 (Dkt. # 8) and CONFIRMS the Awards (Dkt. # 1). The court further GRANTS in part
6 and DENIES in part Purus's request for post-award, prejudgment interest and attorneys'
7 fees (Dkt. # 16). Accordingly, the court AWARDS prejudgment interest on the arbitral
8 award of €20,000.00, commencing on September 8, 2015, through the date of judgment
9 Such interest shall accrue at a rate equal to the federal post-judgment interest rate, *see* 28
10 U.S.C. § 1961(a), applicable for the calendar week preceding the date of judgment.

11 Dated this 21st day of June, 2018.

12
13 

14 JAMES L. ROBART
15 United States District Judge
16
17
18
19
20
21
22