

Footprint Power Salem Harbor Dev., L.P. v Iberdrola Energy Prods., Inc.
2018 NY Slip Op 30794(U)
May 1, 2018
Supreme Court, New York County
Docket Number: 651963/2018
Judge: Barry Ostrager
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 61

-----X

FOOTPRINT POWER SALEM HARBOR DEVELOPMENT, L.P.

INDEX NO. 651963/2018

Petitioner,

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

IBERDROLA ENERGY PRODUCTS, INC.,

DECISION AND ORDER

Respondent.

-----X

The following e-filed documents, listed by NYSCEF document number 2, 19, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this application to/for Stay Arbitration

HON. BARRY R. OSTRAGER:

Before the Court is a special proceeding commenced to stay an arbitration. Petitioner Footprint Power Salem Harbor Development, LP (“Footprint”) is the owner and developer of a power station in Salem, Massachusetts. Respondent Iberdrola Energy Projects, Inc (“Iberdrola”) is the construction company that agreed to build the power station (the “Project”) pursuant to an Engineering, Procurement and Construction Contract (“EPC Contract”). In connection with the EPC Contract, Iberdrola provided an Irrevocable Performance Letter of Credit, established by Deutsche Bank AG (“Letter of Credit”), with Footprint as beneficiary. On April 15, 2018, Footprint terminated the EPC Contract for cause and provided notice to Iberdrola of its intent to draw on the full amount of the Letter of Credit. On April 20, 2018, Iberdrola commenced an arbitration proceeding before the International Centre for Dispute Resolution (“ICDR”),

purportedly in accordance with the arbitration provision in the EPC Contract. Iberdrola seeks to arbitrate whether Footprint can draw on the Letter of Credit.

On April 23, 2018, Footprint filed this petition to stay arbitration and an order to show cause on motion for a preliminary injunction and temporary restraining order seeking to enjoin Iberdrola from proceeding with arbitration on the basis of another provision in the EPC Contract. That provision reads: “An arbitration proceeding seeking relief on the merits of any Dispute may be commenced *only after* completion of the Project[.]” (emphasis added).

Petitioner thus argues that completion of the Project is a condition precedent to arbitration and that, because the Project has not been completed, there is no valid arbitration agreement at this time. Further, Petitioner argues that a determination of whether a condition precedent to an arbitration agreement exists is an issue of contract interpretation solely within the province of the Court to determine.

Respondent, in opposition, argues that an enforceable agreement to arbitrate exists that vests the ICDR with the power to determine matters of procedural arbitrability. Respondent points to the line of cases that have held that where the terms of the parties’ arbitration agreement incorporate specific rules governing arbitration between the parties, and such rules give the arbitrators the authority to rule on their own jurisdiction or arbitrability, the issue of whether a dispute is arbitrable is for the arbitrator to decide.

The Court finds Respondent’s position persuasive. Section 17.2 of the EPC Contract states that “arbitration shall be administered by the International Centre for Dispute Resolution (ICDR) of the American Arbitration Association (“AAA”) in accordance with its International Arbitration Rules in effect at the time of the arbitration, except as they may be modified herein or by mutual agreement of the Parties.” There is no indication that the parties subsequently

modified this arbitration provision by agreement, nor is there any other provision of the EPC Contract that can be interpreted as modifying the relevant ICDR Rules.

Petitioner argues that this “modifying” language can be found in Section 17.2 of the EPC Contract which states that the parties agreed “to the jurisdiction of the United States District Court for the Southern District of New York for the *limited purpose of enforcing [the] agreement to arbitrate.*” (emphasis added). Petitioner argues that this language demonstrates that the parties agreed that New York courts, and not the arbitral panel, would determine issues of enforceability relating to the arbitration agreement. This is not so. This language merely enables either party to move to compel arbitration or enforce an arbitral award in New York courts; it does nothing to modify the clear ICDR Rules which vest arbitrability issues with the arbitrator.

Article 19 of the ICDR Rules provides: “The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement(s)” and that “[i]ssues regarding arbitral jurisdiction raised prior to the constitution of the tribunal shall not preclude the Administrator from proceeding with administration and shall be referred to the tribunal for determination once constituted.” On this point, the decision by the First Department in *Life Receivables Trust v Goshawk Syndicate 102 at Lloyd’s*, 66 A.D.3d 495 (2009) is instructive.

The Appellate Division in the *Life Receivables* case was interpreting a provision in the American Arbitration Association Rules which, like the ICDR Rules at issue here, empowered the arbitration tribunal to rule on its own jurisdiction. The Court stated: “Although the question of arbitrability is generally an issue for judicial determination, when the parties’ agreement specifically incorporates by reference the AAA rules, which provide that ‘[t]he tribunal shall have the power to rule on its own jurisdiction, *including objections with respect to the existence.*

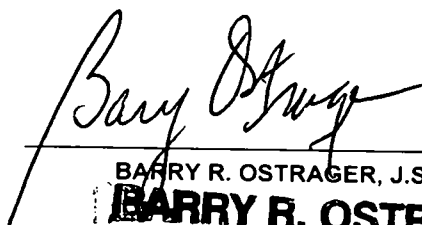
scope or validity of the arbitration agreement,' and employs language referring 'all disputes' to arbitration, courts will 'leave the question of arbitrability to the arbitrators.'" 66 A.D.3d at 496, quoting *Matter of Smith Barney Shearson v Sacharow*, 91 N.Y.2d 39, 47 (1997) (emphasis added). Thus, even if this Court were to accept Petitioner's assertion that the arbitration agreement is not valid because a condition precedent to arbitrate has not occurred, such an issue would necessarily be within the purview of the arbitrator to determine given the arbitration agreement's incorporation of ICDR Rules regarding the arbitrability of validity issues.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition to stay the pending arbitration is denied.

The Clerk is directed to enter judgment accordingly.

5/1/2018
DATE


BARRY R. OSTRAGER, J.S.C.
BARRY R. OSTRAGER
JSC

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

DO NOT POST

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE