UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| MOLECULAR DYNAMICS, LTD., SDBM LIMITED, and CHAUNCEY CAPITAL CORP.,<br>Petitioners,<br>-v.-<br>SPECTRUM DYNAMICS MEDICAL LIMITED and BIOSENSORS INTERNATIONAL GROUP LTD.,<br>Respondents. | 22 Civ. 5167 (KPF)<br>**REDACTED OPINION AND ORDER** |

KATHERINE POLK FAILLA, District Judge:

Molecular Dynamics, Ltd., SDBM Limited, and Chauncey Capital Corp. (together, "Petitioners") seek an order from this Court vacating two awards issued following an arbitration in Geneva, Switzerland, captioned *Spectrum Dynamics Medical Limited* v. *Molecular Dynamics et al.*, Swiss Arbitration Centre, No. 300438-2018 (the "Arbitration").

On May 18, 2022, after four years of proceedings, a tribunal at the Swiss Arbitration Centre (the "Tribunal") issued a Partial Award (the "Partial Award") in favor of Spectrum Dynamics Medical Limited ("Spectrum") and Biosensors International Group Ltd. ("Biosensors," and together with Spectrum, "Respondents"), concerning the parties' rights under four related contracts. The Partial Award found that Petitioners had breached their licensing agreement with Respondents. As a result, the Tribunal awarded Spectrum $[redacted] plus interest in restitution and awarded Respondents approximately $[redacted] in costs and attorneys' fees. In a Final Award dated July 8, 2022, the Tribunal awarded Respondents additional costs and

attorneys' fees (the "Final Award," and together with the Partial Award, the "Awards").

Petitioners now seek to vacate the Awards pursuant to, among other things, the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 1-16, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or the "Convention"), *id.* §§ 201-208. In response, Respondents challenge the Court's authority to vacate the Awards in the first instance. For the reasons set forth in the remainder of this Opinion, the Court dismisses the case for lack of subject matter jurisdiction.

## BACKGROUND[1]

### A. Factual Background

#### 1. The Parties and the Governing Agreements

Petitioners are various companies directly or indirectly controlled by Professor Shlomo Ben Haim. (Resp. Opp. 5). Petitioner SDBM Ltd. ("SDBM") developed and later sold scanners for nuclear medicine — a branch of medicine that uses advanced techniques for medical imaging. (*Id.*). Petitioner Molecular Dynamics, Ltd. ("MD") is a joint-venture company formed in 2013 by

[1] The facts set forth in this Opinion are drawn from the parties' submissions in connection with Petitioners' motion to partially vacate the arbitral award. The Court primarily sources facts from Petitioners' Amended Petition (Dkt. #27 ("AP")); the Declarations of Scott M. Danner (Dkt. #14 ("Danner Decl.")), Anna Veronique Schlaepfer (Dkt. #34 ("Schlaepfer Decl.")), and Frederick L. Whitmer (Dkt. #57 ("Whitmer Decl."). The Court also relies, as appropriate, on certain of exhibits attached thereto ("[Name] Decl., Ex. [ ]").

For ease of reference, the Court refers to Petitioners' memorandum of law in support of their motion to vacate as "Pet. Br." (Dkt. #9); to Respondents' memorandum of law in opposition to Petitioners' motion as "Resp. Opp." (Dkt. #32); and to Petitioners' reply memorandum of law as "Pet. Reply" (Dkt. #41).

Respondent Bionsensors and Petitioners SDBM and Chauncey Capital Corp. ("Chauncey"). (AP ¶ 13; Pet. Br. 4-5). Biosensors, in turn, is a Singapore-based company that develops, manufactures, and licenses technologies used in cardiological care, which company was acquired in 2017 by Respondent Spectrum. (Resp. Opp. 5; AP ¶ 18).

On May 12, 2013, Biosensors signed an asset purchase agreement with SDBM, resulting in Biosensors acquiring substantially all of SDBM's assets and intellectual property rights. (AP ¶ 12; Resp. Opp. 5). On October 15, 2013, Biosensors entered into four agreements with SDBM and Chauncey — the Joint Venture Agreement, the License Agreement, the Loan Agreement, and the Assistance Agreement (together, the "Agreements") — the result of which was to create a joint venture company, MD, for the purpose of developing a camera in the nuclear medicine field. (AP ¶ 13; Resp. Opp. 5). The Joint Venture Agreement governed the formation of MD and granted it exclusive license to the intellectual property that Biosensors had earlier acquired from SDBM. (AP ¶ 15; Pet. Br. 4-5). The License Agreement defined Biosensors' and MD's respective "fields of use" — *i.e.*, each party's permitted uses of shared intellectual property. (AP ¶ 14). The Loan Agreement and the Assistance Agreement governed loans that Biosensors and Chauncey were to provide to MD, as well as engineering assistance that Biosensors was to provide to MD. (*Id.* ¶ 16; Pet. Br. 4-5).

All of the Agreements recite that they are governed in accordance with the laws of New York without regard to principles of conflicts of law, and that

any disputes relating to the Agreements are to be resolved through arbitration seated in Geneva, Switzerland, under the "Swiss Rules of International Arbitration of the Swiss Chambers Arbitration Institution." (AP ¶ 19). One of the Agreements — the License Agreement — contains a forum selection clause that provides:

> On matters of injunctive relief, the parties agree that the courts of New York, New York shall have non-exclusive jurisdiction and are competent courts for the purposes thereof, and on matters of concerning the Chosen Arbitration, the courts of New York, New York will have exclusive jurisdiction thereupon.

(*Id.* ¶¶ 19-20; Danner Decl., Ex. 3 (License Agreement) § 9 (the "Forum Selection Clause")).

**2. The Parties' Disputes and the Arbitration**

Beginning in 2015, disputes began to arise between the parties regarding their contractual obligations under the Agreements. (AP ¶ 22). The disputes persisted, leading Spectrum to terminate the License Agreement on August 18, 2017. (*Id.*).

On April 18, 2018, Spectrum filed its Notice of Arbitration with the Swiss Arbitration Centre (the "Centre"). (AP ¶ 23; Danner Decl., Ex. 10). It claimed that "MD breached the License Agreement by repeatedly failing to notify and deliver to Biosensors any new IP and improvements, and by failing to reasonably cooperate with Biosensors' requests to provide such information." (Danner Decl., Ex. 10 ¶ 31(b)(ii)(1)). Spectrum sought a declaration that it had properly terminated the License Agreement and that it was therefore able to develop and market its camera without restriction. (*Id.* ¶ 31(b)(iii)). On

August 16, 2018, Petitioners filed their answer and counterclaims, adding Biosensors as a party and claiming, among other things, that Respondents had breached the Licensing Agreement by developing a nuclear medicine device to have cancer-related applications, violating Petitioners' "field of use." (AP ¶ 14; Pet. Br. 8).

The Arbitration was held before a three-person panel from April 2018 to May 2022, during which time Petitioners claim that a series of irregularities occurred. (AP ¶¶ 25-26; Pet. Br. 8). The claimed irregularities include fraudulent and perjurious conduct on the part of Respondents; the resignation of the presiding arbitrator in October 2021 in the wake of allegations of bias and conflict of interest; and the Tribunal's refusal to reopen the proceedings after Petitioners submitted what they alleged to be newly discovered evidence. (AP ¶ 26).

Despite Petitioners' protests, the Tribunal issued the Partial Award to the parties on May 20, 2022. (AP ¶ 26). The Partial Award found that Petitioners had improperly invaded Respondents' "field of use" by developing their own nuclear medicine device to incorporate cardiac-related functionality in 2014, and that, as a result, Respondents were released from their contractual obligations thereafter. (Resp. Br. 12; Danner Decl., Ex. 6 (Partial Award) § 12). The Partial Award further ordered Petitioners to pay restitution in the amount of $[redacted] stemming from their breach, plus $[redacted] in Respondents' costs, including attorneys' fees. (AP ¶ 27; Resp. Br. 13). On July 8, 2022, the Tribunal issued the Final Award requiring Petitioners to pay a further

CHF [redacted] and $[redacted] of Respondents' costs. (AP ¶ 28; *id.*, Ex. A (Final Award) § 12).

**B. Procedural Background**

Petitioners commenced the instant action on June 20, 2022, by filing a Petition to Vacate an Arbitral Award and Enter Judgment Thereon pursuant to Section 10 of the FAA, 9 U.S.C. § 10 (the "Petition"). (Dkt. #1). The Petition sought to vacate the Partial Award. On that same day, Petitioners also filed a memorandum of law in support of the Petition. (Dkt. #9). After the Petition was filed, on July 8, 2022, the Tribunal issued the Final Award. Pursuant to the parties' stipulation (Dkt. #25), Petitioners submitted an Amended Petition to seek vacatur of both the Partial Award and Final Award (Dkt. #27).

Respondents filed a memorandum of law in opposition to the Petition on August 18, 2022. (Dkt. #32). On August 30, 2022, Petitioners filed a letter motion for an extension of time to file a reply. (Dkt. #37). The motion was granted on August 31, 2022, and a new filing deadline for the reply was set for October 13, 2022. (Dkt. #39). Petitioners filed their reply on October 13, 2022. (Dkt. #41).

In addition to their reply, Petitioners filed a letter motion for leave to conduct limited discovery regarding Petitioners' motion to vacate. (Dkt. #46). Respondents filed a response opposing Petitioners' motion seeking discovery on October 20, 2022. (Dkt. #50). The Court denied Petitioners' motion seeking discovery, in part because the issues of fraud on which they sought discovery had already been considered in the course of the Arbitration. (Dkt. #55).

## DISCUSSION

### A. Applicable Law

#### 1. The New York Convention

##### a. Overview

The Arbitration at issue in this action arises under the New York Convention, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. The New York Convention "was enacted and opened for signature in New York City on June 10, 1958, and entered into force in the United States after ratification on December 29, 1970." *Yusuf Ahmed Alghanim & Sons* v. *Toys "R" Us, Inc.*, 126 F.3d 15, 18 n.1 (2d Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998). Chapter 2 of the FAA, 9 U.S.C. §§ 201-208, implements the United States' obligations under the New York Convention. *See Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

"The New York Convention only applies to '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' and to 'arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.'" *CBF Industria de Gusa S/A* v. *AMCI Holdings, Inc.*, 850 F.3d 58, 70 (2d Cir. 2017) (quoting N.Y. Conv. art. I(1)). According to the *Restatement (Third) of the U.S. Law of International Commercial Arbitration*, an arbitral award is "made" in the country of the "arbitral seat," which is "the jurisdiction designated by the parties or by an entity empowered to do so on their behalf to be the juridical home of the arbitration."

RESTATEMENT (THIRD) OF THE U.S. LAW OF INT'L COMMERCIAL ARBITRATION § 1-1 (s), (aa) (Am. Law Inst., Tentative Draft No. 2, 2012). Thus, the New York Convention applies to

> arbitral awards made in a foreign country that a party seeks to enforce in the United States (known as foreign arbitral awards), to arbitral awards made in the United States that a party seeks to enforce in a foreign country, and to nondomestic arbitral awards that a party seeks to enforce in the United States.

*CBF Industria*, 850 F.3d at 70 (internal quotation marks omitted).

As discussed in greater detail below, the arbitral awards that Petitioners seek to vacate here were "made" in Switzerland. The parties set the seat of the Arbitration as Geneva, Switzerland (*see* Whitmer Decl., Ex. 22 (Procedural Order No. 3) § 8.1 (stating "[t]he legal seat of the arbitration shall be Geneva, Switzerland")), and the Awards were rendered under Swiss arbitral law (*see* Partial Award 3; Final Award 3).

**b. Primary and Secondary Jurisdiction Under the New York Convention**

Under the New York Convention, a "competent authority" in a country under the laws of which the award is "made" "is said to have *primary* jurisdiction over the arbitration award." *Karaha Bodas Co., L.L.C.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 115 n.1 (2d Cir. 2007) (internal quotation marks omitted) (emphasis in original). "The [New York] Convention specifically contemplates that the state in which, or under the law of which, [an] award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full

panoply of express and implied grounds for relief." *Yusuf Ahmed*, 126 F.3d at 23 (citing N.Y. Conv. art. V(1)(e)); *see also, e.g.*, *Scandinavian Reinsurance Co.* v. *Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 71 (2d Cir. 2012) ("*Scandinavian Re*") ("Because the Award in the St. Paul Arbitration was entered in the United States, however, the domestic provisions of the FAA also apply, as is permitted by Articles V(1)(e) and V(2) of the New York Convention.").

In contrast, "[a]ll other signatory States are *secondary* jurisdictions, in which parties can only contest whether that State should *enforce* the arbitral award." *Karaha Bodas*, 500 F.3d at 115 n.1 (citation omitted) (emphases in original). This process of reducing a foreign arbitral award to a judgment is referred to as "recognition and enforcement." N.Y. Conv. arts. III, IV, V. "Recognition" is the determination that an arbitral award is entitled to preclusive effect; "enforcement" is the reduction to a judgment of a foreign arbitral award. *See* RESTATEMENT (THIRD) OF THE U.S. LAW OF INT'L COMMERCIAL ARBITRATION § 1-1(l), (z) (Am. Law Inst., Tentative Draft No. 2, 2012). "Recognition" and "enforcement" occur together, as one process, under the New York Convention. N.Y. Conv. arts. III, IV, V.

The FAA implements this scheme through Section 207, which provides that any party may, "[w]ithin three years after an arbitral award … is made, … apply to any court having jurisdiction under this chapter for an order confirming the award." 9 U.S.C. § 207; *see also CBF Industria*, 850 F.3d at 72 ("Read in context with the New York Convention, it is evident that the term

'confirm' as used in Section 207 is the equivalent of 'recognition and enforcement' as used in the New York Convention for the purposes of foreign arbitral awards." (internal footnote omitted)). Additionally, Chapter 2 of the FAA provides that "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention" at Article V. *CBF Industria*, 850 F.3d at 72.

Thus, under the New York Convention, courts in countries with secondary jurisdiction may only decline to *enforce* an arbitral award, and do so based "only on the limited grounds specified in Article V [of the New York Convention]." *See Karaha Bodas*, 500 F.3d at 115 n.1 ("Consequently, even though courts of a primary jurisdiction may apply their own domestic law when evaluating an attempt to annul or set aside an arbitral award, courts in countries of secondary jurisdiction may refuse enforcement only on the limited grounds specified in Article V."); *see also OJSC Ukrnafta* v. *Carpatsky Petroleum Corp.*, 957 F.3d 487, 497 (5th Cir. 2020) ("A secondary jurisdiction assesses only whether it can domestically enforce the award; it cannot 'annul' the award."); *Int'l Standard Elec. Corp.* v. *Bridas Sociedad Anonima Petrolera, Indus. y Comercial*, 745 F. Supp. 172, 178 (S.D.N.Y. 1990) ("[S]ince the situs, or forum of the arbitration is Mexico, and the governing procedural law is that of Mexico,

only the courts of Mexico have jurisdiction under the Convention to vacate the award.").[2]

**2. The Federal Arbitration Act**

Petitioners here seek to vacate the Awards, not under the New York Convention, but rather under domestic law, including Section 10 of the FAA. 9 U.S.C. § 10. Under the FAA, there are four statutory grounds for vacatur:

> (i) where the award was procured by corruption, fraud, or undue means;
>
> (ii) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (iii) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (iv) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

*Id.* The burden of proving that an arbitral award must be vacated rests on the party seeking vacatur, who "must clear a high hurdle." *Scandinavian Re*, 668 F.3d at 72 (citing *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010)). "[A] district court will enforce the award as long as there is a

---

[2] Article V of the New York Convention describes the circumstances in which "[r]ecognition and enforcement of the award may be refused" by a court located in a country sitting in secondary jurisdiction. N.Y. Conv. art. V. As relevant here, Article V(1)(e) stipulates that a court sitting in secondary jurisdiction can refuse to recognize and enforce an arbitral award where "[t]he award has … been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." *Id.* at V(1)(e).

barely colorable justification for the outcome reached." *Kolel Beth Yechiel Mechil of Tartikov, Inc.* v. *YLL Irrevocable Tr.*, 729 F.3d 99, 103-04 (2d Cir. 2013) (internal quotation marks omitted).

In addition, the Second Circuit has held that a court may vacate an award if the arbitrator "has acted in manifest disregard of the law," *Porzig* v. *Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F.3d 133, 139 (2d Cir. 2007), or "where the arbitrator's award is in manifest disregard of the terms of the parties' relevant agreement," *Schwartz* v. *Merrill Lynch & Co., Inc.*, 665 F.3d 444, 452 (2d Cir. 2011) (alterations and internal quotation marks omitted). However, a court may vacate on those bases only in "those exceedingly rare instances where some egregious impropriety on the part of the arbitrator is apparent." *T.Co Metals, LLC* v. *Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010).

**3. Summary Judgment Under Federal Rule of Civil Procedure 56**

Courts treat an application "to confirm or vacate an arbitral award as akin to a motion for summary judgment." *City of New York* v. *Mickalis Pawn Shop, LLC*, 645 F.3d 114, 136 (2d Cir. 2011) (quoting *D.H. Blair & Co., Inc.* v. *Gottdiener*, 462 F.3d 95, 109 (2d Cir. 2006).[3] A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.

[3] The Court notes that, here, the parties have not structured their briefing as motions for summary judgment — and, for the sake of efficiency, were not asked to refile their submissions to conform with Rule 56 of the Federal Rules of Civil Procedure. Nevertheless, the Court still construes the parties' submissions through the prism of Rule 56.

R. Civ. P. 56(a). Thus, "[a] motion for summary judgment may properly be granted … only where there is no genuine issue of material fact to be tried, and the facts as to which there is no such issue warrant the entry of judgment for the moving party as a matter of law." *Rogoz* v. *City of Hartford*, 796 F.3d 236, 245 (2d Cir. 2015) (quoting *Kaytor* v. *Elec. Boat Corp.*, 609 F.3d 537, 545 (2d Cir. 2010)). "[A] fact is material if it 'might affect the outcome of the suit under the governing law.'" *Royal Crown Day Care LLC* v. *Dep't of Health & Mental Hygiene of City of N.Y.*, 746 F.3d 538, 544 (2d Cir. 2014) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "[A] dispute is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Negrete* v. *Citibank, N.A.*, 237 F. Supp. 3d 112, 122 (S.D.N.Y. 2017) (quoting *Liberty Lobby*, 477 U.S. at 248). Petitioners' motion must "be examined on its own merits, and … all reasonable inferences must be drawn against the party whose motion is under consideration." *Fireman's Fund Ins. Co.* v. *Great Am. Ins. Co. of N.Y.*, 822 F.3d 620, 631 n.12 (2d Cir. 2016) (internal quotation marks and alteration omitted) (quoting *Morales* v. *Quintel Entm't, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001)).

**B. The Court Lacks Jurisdiction to Vacate the Awards**

Among other bases, Petitioners seek to vacate the Awards under Section 10 of the FAA, claiming that (i) the Awards were secured by fraud and tainted by evident partiality (Pet. Br. 23-31); (ii) the arbitrators committed misconduct (*id.* at 31-34); and (iii) the arbitrators manifestly disregarded the law (*id.* at 34-38). However, Respondents challenge the threshold issue of the Court's

jurisdiction to vacate the Awards. In this regard, Respondents argue that, because the Awards were made in Switzerland under Swiss law, "this litigation presents a classic case of a foreign arbitral award," *CBF Industria*, 850 F.3d at 71, that cannot be vacated in the United States. (Resp. Opp. 14). For the reasons that follow, the Court agrees, and concludes in consequence that it lacks jurisdiction to reach the underlying merits of Petitioners' vacatur claims. *See generally Novel Energy Sols., LLC* v. *Pine Gate Renewables, LLC*, No. 23-1191, 2024 WL 1364702, at *2 (2d Cir. Apr. 1, 2024) (summary order) ("Lacking subject-matter jurisdiction, [a] District Court [does] not have the power to reach the merits [of a claim].").

**1. Vacatur Jurisdiction Generally**

"[N]either the [New York] Convention nor its enabling statute, 9 U.S.C. §§ 201-08, grant[s vacatur] power with regard to [awards governed by the New York Convention]." *Zeiler* v. *Deitsch*, 500 F.3d 157, 165 n.6 (2d Cir. 2007) (holding that district court improperly applied Article V(1)(d) of the Convention instead of Section 10 of the FAA to vacate an arbitral award arising under the laws of the United States); *see also Lander Co., Inc.* v. *MMP Invs., Inc.*, 107 F.3d 476, 478 (7th Cir. 1997) ("The New York Convention contains no provision for seeking to vacate an award."); *Gonsalvez* v. *Celebrity Cruises, Inc.*, 935 F. Supp. 2d 1325, 1330-31 (S.D. Fla.) (noting that "the Convention does not even authorize actions to vacate arbitration awards"), *aff'd*, 750 F.3d 1195 (11th Cir. 2013).

Under the New York Convention, only a "competent authority" of the country in which, or under the law of which, an award was made, may vacate or annul the award under domestic law. *See* N.Y. Conv., art. V(1)(e). Thus, while "courts of a primary jurisdiction may apply their own domestic law" — such as the FAA — "when evaluating an attempt to annul or set aside an arbitral award," "courts in countries of secondary jurisdiction may refuse *enforcement* only on the limited grounds specified in Article V." *Karaha Bodas*, 500 F.3d at 115 n.1 (emphasis added).

"Whether a tribunal is 'competent' under Article V(1)(e) [of the New York Convention] to entertain an action to set aside an arbitral award is an inquiry that goes to that forum's subject-matter jurisdiction to hear a case." *Int'l Trading & Indus.* v. *Dyncorp Aerospace Tech.*, 763 F. Supp. 2d 12, 23 (D.D.C. 2011); *see also Gulf Petro Trading Co.* v. *Nigerian Nat'l Petroleum Corp.*, 512 F.3d 742, 747 (5th Cir. 2008) ("[A] court sitting in secondary jurisdiction lacks subject matter jurisdiction over claims seeking to vacate, set aside, or modify a foreign arbitral award."). For the reasons that follow, Petitioners fail to demonstrate that the United States, and not Switzerland, constitutes the "primary jurisdiction" in this arbitral action, and thus has jurisdiction to vacate the Awards.

**2. Switzerland Is the Primary Jurisdiction for the Awards**

As an initial matter, the parties do not appear to contest that Switzerland has primary jurisdiction in this action, as the Arbitration was seated in Switzerland and governed by Swiss law. (*See* Resp. Opp. 14 ("[T]he Awards

were made in Switzerland under Swiss law[.]"); Pet. Reply 11 (identifying the Arbitration as conducted in Switzerland and governed by Swiss arbitral law)). Under the New York Convention, the country under the laws of which the award is made "is said to have *primary* jurisdiction over the arbitration award." *Karaha Bodas*, 500 F.3d at 115 n.1 (emphasis in original); *see also Esso Expl. & Prod. Nigeria Ltd.* v. *Nigerian Nat'l Petroleum Corp.*, 40 F.4th 56, 62 (2d Cir. 2022) (identifying the primary jurisdiction as simply "the country in which an arbitral award is rendered"); *accord Iraq Telecom Ltd.* v. *IBL Bank S.A.L.*, 597 F. Supp. 3d 657 (S.D.N.Y. 2022), *aff'd*, No. 22-832, 2023 WL 2961739 (2d Cir. Apr. 17, 2023) (summary order).

In this case, there is no question that the arbitral seat was in Switzerland, and the Awards were made under Chapter 12 of the Swiss Federal Code on Private International Law ("PILA"), the procedural arbitration law that governs arbitrations held in Switzerland. (Pet. Br. 2; Resp Opp. 17-21).[4] The Tribunal, in issuing the Awards, explicitly recited that they were rendered under Swiss law. (*See* Partial Award 3 ("The arbitral tribunal makes this award pursuant to the mandatory provisions of [PILA] and Article 31(1) of the Swiss Rules of International Arbitration ('Rules')."); Final Award 3 (same)).

---

[4] While in theory, it is possible for an arbitration to be governed by the procedural law of a country other than the one in which the arbitration takes place, in practice it is exceedingly rare for this to occur. *See, e.g.*, *Yusuf Ahmed Alghanim & Sons* v. *Toys "R" Us, Inc.*, 126 F.3d 15, 21 n.3 (2d Cir. 1997) ("Although most courts and commentators assume that Article V(1)(e) is applicable to the state in which the award is rendered, we note that Article V(1)(e) specifically contemplates the possibility that an award could be rendered in one state, but under the arbitral law of another state …. This situation may be so rare as to be a dead letter."), *cert. denied*, 522 U.S. 1111 (1998). No party to this action asserts that this case presents this exceedingly rare situation.

Additionally, the parties consented to Swiss procedural law governing the Arbitration. (*See* Procedural Order No. 3 § 12.1 ("Subject to the relevant provisions of the Swiss Rules and the PILA, the Tribunal will endeavour to render an Award.")). The Tribunal also confirmed during the proceedings that Swiss arbitral law governed the Arbitration. (Whitmer Decl., Ex. 23 § 3 ("[Respondents] propose to confirm Geneva as the legal seat of the arbitration. [Petitioners] agree[] .... [Respondents] propose to confirm that Article 176 PILA applies to the arbitration. [Petitioners] agree[]."). Because Swiss procedural law governed the Arbitration, the Awards arose "under the law" of Switzerland. N.Y. Conv. art. V(1)(e); *see also M&C Corp.* v. *Erwin Behr GmbH & Co.*, 87 F.3d 844, 848 (6th Cir. 1996) (holding that "under the law of which" in Article V(1)(e) "'refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law under which the arbitration was conducted'" (quoting *Int'l Standard Elec. Corp.*, 745 F. Supp. at 178)); *Jolen, Inc.* v. *Kundan Rice Mills, Ltd.*, No. 19 Civ. 1296 (PKC), 2019 WL 1559173, at *3 (S.D.N.Y. Apr. 9, 2019) ("The law 'under which' the award is made for purposes of Article V(1)(e) is the procedural law of the arbitration.").

This evidence, together with the "strong presumption that designating the place of the arbitration also designates the law under which the award is made[,]" leads the Court to conclude that the Awards were made under Swiss procedural law and, therefore, that Switzerland has "primary jurisdiction over the arbitration award." *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 292 (5th Cir. 2004); *see also*

*Steel Corp. of the Phil.* v. *Int'l Steel Servs., Inc.*, 354 F. App'x 689, 693 (3d Cir. 2009) (unpublished decision) (holding that clause providing that Philippine substantive law governed enforcement of contract did not rebut strong presumption that Singaporean procedural law governed arbitration that occurred in Singapore). Accordingly, Switzerland has the exclusive authority to vacate or annul the Awards. *See* N.Y. Conv. art. V(1)(e); *see also* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 350 (1981) (stating that Articles V and VI of the Convention "unequivocally lay down the principle that the court in the country in which, or under the law of which, the award was made has the exclusive competence to decide on the action for setting aside the award" (emphasis removed)).

**3. Petitioners Fail to Demonstrate That the United States Has Primary Jurisdiction over the Awards**

Undaunted, Petitioners assert that the Forum Selection Clause contained in Section 9 of the Licensing Agreement confers jurisdiction to vacate the Swiss Awards on New York courts. (Pet. Reply 10-12). To review, the Clause states that "the seat of the [arbitration] shall be Geneva Switzerland," and that "on matters of concerning the [arbitration], the courts of New York, New York will have exclusive jurisdiction thereupon." (License Agreement § 9).

As it happens, the language of the Forum Selection Clause specifies neither that it applies to applications to vacate an award, nor that the United States is intended to serve as the primary jurisdiction for the Arbitration. Nevertheless, Petitioners contend that "[b]y specifying [] two 'exclusive'

jurisdictions," in the Licensing Agreement, the parties expressed their intention to bifurcate primary jurisdiction authority: "Swiss arbitral law would govern the conduct of the arbitration, while U.S. arbitral law would govern any post-award proceedings, including to vacate." (Pet. Reply 11).

Petitioners fail to demonstrate that the New York Convention can be circumvented in this manner. Under New York law, which governs interpretation of the License Agreement, "the law in force at the time an agreement is entered into becomes as much a part of the agreement as though it were expressed or referred to therein, for it is presumed that the parties had such law in contemplation when the contract was made and the contract will be construed in the light of such law." *Ronnen* v. *Ajax Elec. Motor Corp.*, 88 N.Y.2d 582, 589 (1996) (alterations and internal quotation marks omitted). The Forum Selection Clause must therefore be interpreted in light of the New York Convention.

While the New York Convention specifically contemplates that a competent authority in the state in which, or under the law of which, the award is made — in this case, Switzerland — "will be free to set aside or modify an award in accordance with its domestic arbitral law," *Yusuf Ahmed*, 126 F.3d at 23 (citing N.Y. Conv. art. V(1)(e)), all other states have only "limited authority" to review arbitral awards, *Karaha Bodas*, 500 F.3d at 115 n.1 ("[C]ourts in countries of *secondary* jurisdiction may [only] refuse [to] enforce[] [an arbitral award] … on the limited grounds specified in Article V." (emphasis in original)). Thus, while it is well-settled that U.S. courts can apply the

domestic provisions of the FAA to vacate an award arising under the New York Convention but entered in the United States, *see, e.g.*, *Scandinavian Re*, 668 F.3d at 71 (finding that Article V of the New York Convention permitted U.S. courts to apply Section 10 of the FAA to vacate an arbitral award entered in the United States); *Zeiler*, 500 F.3d at 165 n.6 (explaining that U.S. courts can apply "Chapter 1 of the FAA to vacate arbitration awards entered in the United States"), Petitioners have identified no decision from a U.S. court in the 54 years since this country acceded to the New York Convention — and the Court is aware of none — holding that a U.S. court can vacate an award made in a foreign state under foreign law.

Indeed, all the cases Petitioners cite in support of their argument involve arbitrations that occurred in the United States pursuant to U.S. procedural law. *See, e.g.*, *Scandinavian Re*, 668 F.3d at 71 (finding domestic provisions of the FAA apply, as is permitted by Articles V(1)(e) and V(2) of the New York Convention, because the arbitration was "entered in the United States"); *Zurich Am. Ins. Co.* v. *Team Tankers A.S.*, No. 13 Civ. 8404 (WHP), 2014 WL 2945803, at *3 (S.D.N.Y. June 30, 2014) ("Because the award was entered in the United States, the domestic provisions of the FAA also apply."), *aff'd*, 811 F.3d 584 (2d Cir. 2016); *see also Yusuf Ahmed*, 126 F.3d at 21 (finding that district court can apply the FAA to vacate a arbitral award governed by the New York Convention only where "the arbitral award in this case was rendered in the United States"); *Lander*, 107 F.3d at 478-79 (finding that the district court erred in dismissing vacatur petition for lack of jurisdiction where the

arbitration was entered in New York City pursuant to U.S. procedural law); *Gonsalvez*, 935 F. Supp. 2d at 1330-31 (applying the FAA's statute of limitation to a petition to vacate an arbitral award arising out of arbitration that occurred in Miami, Florida).

The one case Petitioners cite in support of their assertion that a forum selection clause can convey vacatur authority is inapposite. (Pet. Br. 22 n.2 (citing *Zeevi Holdings Ltd.* v. *Republic of Bulgaria*, 494 F. App'x 110, 113 (2d Cir. 2012) (summary order)). In *Zeevi*, the Second Circuit affirmed the district court's decision to enforce a forum selection clause stipulating that an arbitral award could only be *enforced* in Bulgaria, even though the arbitration occurred in France and was governed by French law. *See* 494 F. App'x at 113 ("Here, the agreement has two forum selection clauses, the first of which requires the parties to arbitrate disputes in Paris, as was done here; and the second of which provides that '[t]he execution of an award against the Seller may be conducted only in Bulgaria in accordance with the provisions of Bulgarian law.'"). Contrary to Petitioners' contentions, however, whether parties can contract away the right to invoke a secondary jurisdiction's undisputed authority under the New York Convention to *enforce* a foreign award is a far different question from whether parties can convey to a secondary jurisdiction the authority to *vacate* a foreign award — an authority that it does not otherwise have.

After all, the New York Convention readily permits parties to seek enforcement of an arbitral award in the courts of any country that is a

signatory to the New York Convention. *See* N.Y. Conv. art. III ("Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon[.]"); *see also Karaha Bodas*, 500 F.3d at 115 n.1 ("All [] signatory States [other than the primary jurisdiction] are *secondary* jurisdictions, in which parties can only contest whether that State should enforce the arbitral award." (emphasis in original)). This flexibility makes sense in light of the Convention's goal of "encourag[ing] the recognition and enforcement of commercial arbitration agreements in international contracts and … unify[ing] the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk*, 417 U.S. at 520 n.15 (citing *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, S. Exec. Doc. E, 90th Cong., 2d Sess. (1968)). Thus, as recognized by the district court in *Zeevi*, "[a]n American district court deciding a petition to confirm a foreign arbitral award may … enforce a forum selection clause in the underlying agreement," because it does not "contraven[e] the New York Convention's purpose of 'encouraging the *recognition and enforcement* of commercial arbitration agreements in international contracts.'" *Zeevi Holdings Ltd.* v. *Republic of Bulgaria*, No. 09 Civ. 8856 (RJS), 2011 WL 1345155, at *3-4 (S.D.N.Y. Apr. 5, 2011) (quoting *Scherk*, 417 U.S. at 520 n.15) (alterations omitted) (emphasis added), *aff'd*, 494 F. App'x 110 (2d Cir. 2012) (summary order).

In contrast, Petitioners' proffered interpretation of the Forum Selection Clause contravenes the New York Convention, which reserves the power to vacate foreign awards to courts sitting in primary jurisdiction alone. *See Gulf Petro Trading Co.*, 512 F.3d at 747 ("[A]lthough the Convention permits a primary jurisdiction court to apply its full range of domestic law to set aside or modify an arbitral award, secondary jurisdiction courts may only refuse or stay enforcement of an award on the limited grounds specified in Articles V and VI."). Put simply, expanding the powers of a court beyond the confines set by the New York Convention is not within the parties' power, as there is a "basic difference between the court's power and the litigant's convenience," and no contract can convey to the court the "power to adjudicate" matters which it otherwise could not. *See Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167-68 (1939); *see also Int'l Standard Elec. Corp.*, 745 F. Supp. at 182 ("[T]he [New York] Convention … would [] be [] undermined, if judges sitting in [secondary jurisdiction], were [able] to [inquire] into whether the law the arbitrators said they were using was … properly applied. The plain answer is that the Convention does not … contemplate such a chaos."); *Dyncorp*, 763 F. Supp. 2d at 23 ("[I]t is axiomatic that parties cannot confer subject-matter jurisdiction on a tribunal by way of consent.").[5]

[5] Petitioners advert to the decision in *Molecular Dynamics Ltd.* v. *Spectrum Dynamics Medical Ltd.*, No. 22 Civ. 4332 (PAE), 2022 WL 2901559 (S.D.N.Y. July 22, 2022), to suggest that a court in this District has already "adopted Petitioners' interpretation" of the Forum Selection Clause. (Pet. Reply 5). Using an analysis similar to that used for Petitioners' arguments under *Zeevi*, *supra*, the Court finds that this argument also fails. In *Molecular Dynamics Ltd.*, Petitioners sought to enjoin Respondents from enforcing the arbitral award outside New York. No. 22 Civ. 4332, Dkt. #40 (transcript of proceedings of June 10, 2022). There, Judge Engelmayer initially granted the injunction, finding

*International Trading & Industrial Investment Company* v. *Dyncorp Aerospace Technology*, 763 F. Supp. 2d 12 (D.D.C. 2011), is informative on this point. In *Dyncorp*, the petitioner sought to confirm an arbitral award rendered in France under French law, despite the fact that the award had previously been vacated by a Qatari court pursuant to what the respondent claimed was a forum selection clause conferring vacatur authority on Qatari courts. *See id.* at 17-18. Ruling in favor of petitioner, the *Dyncorp* court held that

> the Court is obligated to confirm the Award under Article V(1)(e) unless it can be shown that "the award … has been set aside … by a competent authority of the country in which, or under the law of which, an arbitral award is made." No such showing has been made by Respondent, [despite the successful showing that a Qatari court had purported to vacate the award.]

*Id.* at 24 (alterations omitted). The *Dyncorp* court made this finding in part based on its conclusion that the forum selection clause, which stipulated that "Qatari law governed the resolution of any substantive questions in the case[,]" 763 F. Supp. 2d at 17, did not give Qatari tribunals the power to vacate the award. That is, "the only competent tribunals empowered under the New York Convention to set aside the Award [were] those located in France, not Qatar[,]" inasmuch as "the seat of the arbitration was Paris, France, [and] the

---

that the parties had "bargained for the exclusive jurisdiction of the courts of New York[,]" with respect to the issue of *enforceability*. *See id.* at 14:8-9. Thus, similar to the parties in *Zeevi*, Judge Engelmayer held that the parties contracted to require all proceedings concerning the exclusive *enforcement* or *nonenforcement* of the Awards to occur in New York, New York, *see Molecular Dynamics Ltd.*, 2022 WL 2901559, at *5, but said nothing with regard to modification or vacatur of the Awards.

arbitration was governed by the [International Chamber of Commerce (a French business organization that administers arbitrations)] Rules." *Id.* at 21-22.

In sum, in the absence of any case law suggesting that parties can confer vacatur authority upon courts in countries different from the country under whose procedural laws the arbitration was conducted, and in light of case law suggesting that such authority is affirmatively disallowed by the New York Convention, the Court finds that it lacks subject matter jurisdiction over Petitioners' request that it vacate the Awards. *See Gulf Petro Trading Co.*, 512 F.3d at 747 (affirming dismissal of claims that amounted to a collateral attack on an arbitral award issued in Switzerland because "[the New York] Convention bars the litigation of [plaintiff's] claims … in all but the courts of the primary jurisdiction, [and therefore] dismissal for lack of subject matter jurisdiction was appropriate in this case").[6]

Importantly, parties seeking vacatur of foreign arbitral awards governed by the New York Convention are not left without a remedy. Such parties may

---

[6] In further support of their argument that the Court lacks jurisdiction to vacate the Awards, Respondents argue that the Swiss Federal Act on Private International Law (the "Swiss PILA"), which the parties chose as the procedural law that would govern the Arbitration, prohibits parties from contracting for vacatur proceedings to be brought anywhere other than the Swiss Federal Supreme Court, the highest court in Switzerland. (Resp. Opp. 25-26). The translated statute reads, in relevant, part:

> The only appeal authority is the Swiss Federal Supreme Court. The procedures are governed by Articles 77 and 119a of the Federal Supreme Court Act of 17 June 2005.

(Schlaepfer Decl. ¶ 10 (citing *Schweizerisches Zivilgesetzbuch* [ZGB], [Civil Code] Dec. 18, 1987, SR 291, RS 291, art. 191 (Switz.)). Although Respondents present a compelling argument that a plain reading of the text prevents arbitral awards governed by the Swiss PILA from being appealed in any court other than the Swiss Federal Supreme Court, the Court declines to reach this issue in light of its holding that it lacks jurisdiction on other bases.

request relief from tribunals in the primary jurisdiction "in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief." *Yusuf Ahmed*, 126 F.3d at 23 (citing N.Y. Conv. art. V(1)(e)). Additionally, they are free to seek the nonenforcement of an arbitral award in any secondary jurisdiction based on the "on the limited grounds specified in Article V [of the New York Convention]." *Karaha Bodas*, 500 F.3d at 115 n.1.

**CONCLUSION**

For the foregoing reasons, the Court DENIES Petitioners' application to vacate the Partial and Final Awards in light of the Court's lack of subject matter jurisdiction. The Clerk of Court is directed to terminate all pending motions, adjourn all remaining dates, and close this case.

The Court will issue this Opinion in two versions. The Clerk of Court is directed to file the sealed version of this Opinion under seal, viewable to the Court and the parties only, and to file the redacted version of this Opinion on the public docket.

SO ORDERED.

Dated: July 23, 2024
New York, New York

Katherine Polk Failla

KATHERINE POLK FAILLA
United States District Judge