IQVIA RDS Inc. v Eisai Co. Ltd
2018 NY Slip Op 32923(U)
November 14, 2018
Supreme Court, New York County
Docket Number: 655153/2018
Judge: Barry Ostrager

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

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IQVIA RDS INC.

Petitioner,

- v -

EISAI CO. LTD,

Respondent.

INDEX NO. 655153/2018

MOTION DATE Oct. 23, 2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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HON. BARRY R. OSTRAGER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35
were read on this motion to/for STAY ARBITRATION

HON. BARRY R. OSTRAGER:

Petitioner IQVIA RDS Inc. ("IQVIA") commenced this special proceeding pursuant to CPLR § 7503(b) to, *inter alia*, stay an arbitration with Respondent Eisai Co. Ltd. ("Eisai") before the American Arbitration Association ("AAA"). The petition is granted in part for the reasons stated herein.

Background

On May 12, 2010, IQVIA[1] entered into a Master Services Agreement ("MSA") with non-party PharmaBio. Under the MSA, IQVIA agreed to perform subcontracted work related to clinical tests conducted by PharmaBio. The MSA did not specify what type of work IQVIA was

[1] IQVIA was formerly known as Quintiles, Inc. ("Quintiles"), which was a subsidiary of Quintiles Transnational Holdings, Inc. In October 2016, Quintiles Transnational Holdings, Inc. and IMS Health Holdings, Inc. were merged to form QuintilesIMS Holdings, Inc. In November 2017, QuintilesIMS Holdings, Inc. was renamed as IQVIA. Thus, all references to IQVIA shall include references to Quintiles.

to complete, but rather stated that "PharmaBio may engage [IQVIA] and its affiliates from time-to-time to provide services for individual studies" that PharmaBio had previously contracted with Eisai to perform. (Taber Aff. Ex. A [NYSCEF Doc. 4]). Six months prior, in October 2009, PharmaBio had executed a Collaboration Agreement with Eisai to perform clinical trials for new Eisai pharmaceutical products. IQVIA is mentioned in the Collaboration Agreement but was neither a signatory nor a named party to that agreement. (*See* Taber Aff. Ex. B [NYSCEF Doc. 5]).

The Collaboration Agreement contains a Dispute Resolution provision providing for disputes to be submitted to binding arbitration before AAA and conducted in accordance with AAA's Commercial Arbitration Rules. Section 11.1(d) of the Collaboration Agreement provides that PharmaBio and Eisai would each appoint an arbitrator to the panel and that those two arbitrators would, together, appoint a third arbitrator to the panel (the "Arbitration Panel").

Pursuant to the Collaboration Agreement, PharmaBio was to receive "Milestone Payments" from Eisai for work it performed in relation to the clinical trials. By contrast, IQVIA was to receive its compensation from PharmaBio under the MSA.

On February 27, 2017, Eisai filed an arbitration demand against PharmaBio pursuant to the Collaboration Agreement's Dispute Resolution provisions (*See* Schissel Aff. Ex. G [NYSCEF Doc. 27]). Neither Eisai nor PharmaBio named IQVIA as a party to the arbitration. Pursuant to the Collaboration Agreement, Eisai and PharmaBio each selected an arbitrator as members of the three-arbitrator Panel and the two parties commenced arbitration to prosecute their respective claims.

On January 12, 2018, Eisai purportedly served a document subpoena on IQVIA. (Schissel Aff. Ex. H [NYSCEF Doc. 28]). IQVIA has allegedly participated in the on-going arbitration as

a non-party witness by providing document discovery. Recently, Eisai sought addresses of current and former IQVIA employees, presumably in an effort to obtain non-party depositions. Subsequently, the Arbitration Panel suggested that IQVIA be made a party to the arbitration and Eisai responded by moving the Arbitration Panel to join IQVIA as a party. In support of its joinder motion, Eisai submitted a proposed arbitration demand against IQVIA asserting various claims against IQVIA for the first time. Importantly, the proposed arbitration demand relies on the arbitration provision contained in the Collaboration Agreement, to which IQVIA is not a signatory. IQVIA commenced this special proceeding to stay the arbitration and enjoin Eisai from joining IQVIA as a party to the arbitration.

Discussion

"Subject to the provisions of subdivision (c), a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502." CPLR § 7503(b).

IQVIA argues that the arbitration should be stayed as against it because, *inter alia*, IQVIA is not a party to the applicable arbitration provision in the Collaboration Agreement and has not participated in the arbitration within the meaning of CPLR § 7503(b).

Eisai argues in opposition that IQVIA has waived its right to seek a stay by virtue of IQVIA's participation in the arbitration and, in any event, the Court should allow the Arbitration Panel to decide whether IQVIA can properly be joined as a party to the arbitration.

The Court Determines Arbitrability

The threshold issue in this special proceeding is whether the Court or the Arbitration Panel must decide the arbitrability of the parties' dispute. Ordinarily, "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). However, "a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). Thus, "when the parties' agreement specifically incorporates by reference the AAA rules … and employs language referring 'all disputes' to arbitration, courts will leave the question of arbitrability to the arbitrators." *Life Receivables Tr. v. Goshawk Syndicate 102 at Lloyd's*, 66 A.D.3d 495, 496 (1st Dep't 2009). This exception to the rule applies only when the parties' arbitration agreement "clearly and unmistakably" provides that the question of arbitrability is to be determined by the arbitrator. *Howsam*, 537 U.S. at 83.

Here, Eisai made an arbitration demand on IQVIA pursuant to the Collaboration Agreement to which, notably, IQVIA is not a signatory. While the Collaboration Agreement "clearly and unmistakably" provides that the Arbitration Panel will—in accordance with AAA rules—decide issues of arbitrability, it is not clear and unmistakable that IQVIA is a party to the Collaboration Agreement such that it may be bound by the arbitration provision therein.

To find otherwise would enable Eisai to compel IQVIA to arbitrate—pursuant to an agreement that IQVIA is not a signatory to—the issue of IQVIA's arbitrability before an Arbitration Panel that IQVIA had no role in selecting, and without recourse to a court of competent jurisdiction. The mere existence of an arbitration agreement between two signatories, which provides that the arbitrators determine issues of arbitrability, cannot empower one

signatory to drag a non-signatory into an arbitration before an arbitral tribunal the non-signatory had no role in choosing.

However, Eisai seeks to do just that and more by denying IQVIA recourse in the courts, arguing that IQVIA *must* go before the Arbitration Panel—which IQVIA did not select—for a determination as to IQVIA's arbitrability. The course Eisai seeks to set would result in an untenable deprivation of IQVIA's due process rights; it would bar IQVIA from seeking a remedy in the courts and require an Arbitration Panel of its adversary's choosing to decide the threshold issue of arbitrability. The Court will not abide such a result.

This Court, and not the Arbitration Panel, must determine the arbitrability of Eisai's direct claims against IQVIA under the Collaboration Agreement. IQVIA is neither a signatory to the Collaboration Agreement, nor does the agreement contemplate the inclusion of IQVIA as a party to disputes that arise under the Collaboration Agreement. The dispute resolution provisions of Article 11 specifically provide that any controversy arising out of the Collaboration Agreement be settled by binding arbitration administered by AAA under its Commercial Arbitration Rules. (Taber Aff. Ex. B [NYSCEF Doc. 5]). The arbitration would be conducted "by an independent arbitration panel consisting of three independent arbitrators, one of whom shall be appointed by [PharmaBio] and one of whom shall be appointed by Eisai.... The two arbitrators so appointed shall choose a third arbitrator..." *Id.* Thus, not only is IQVIA not a signatory to the Collaboration Agreement, the Collaboration Agreement does not even provide a method for IQVIA's fair participation in the arbitration provision's scheme selecting arbitrators.

The Collaboration Agreement does not "clearly and unmistakably" provide for the Arbitration Panel to determine the arbitrability of Eisai's direct claims against IQVIA because IQVIA is not a signatory to the Collaboration Agreement nor is IQVIA provided for in the

dispute resolution structure of Article 11 therein. Therefore, "the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986).

IQVIA is Not Bound by the Collaboration Agreement

IQVIA cannot be bound by the Collaboration Agreement's arbitration provisions based on a theory of estoppel. "[N]onsignatories are generally not subject to arbitration agreements." *Belzberg v. Versus Investments Holdings Inc.*, 21 N.Y.3d 626, 630 (2013). "Some New York courts have relied on the direct benefits estoppel theory, derived from federal case law, to abrogate the general rule against binding nonsignatories." *Id.* "Under the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory 'knowingly exploits' the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement." *Id.* at 631 (citing *MAG Portfolio Consultant, GMBH v. Merlin Biomed Group LLC*, 268 F.3d 58, 61 (2d Cir. 2001)). "Where the benefits are merely 'indirect,' a nonsignatory cannot be compelled to arbitrate a claim. A benefit is indirect where the nonsignatory exploits the contractual relation of the parties, but not the agreement itself." *Id.*

Here, IQVIA's compensation was governed entirely by IQVIA's separate MSA with PharmaBio. The MSA between IQVIA and PharmaBio that *did* award work to IQVIA was executed months after the Collaboration Agreement. Indeed, the Collaboration Agreement gave PharmaBio sole discretion to subcontract work to IQVIA or to any other third party of its choosing. Simply put, the Collaboration Agreement conferred no direct benefits to IQVIA. The Collaboration Agreement's permissive language allowed PharmaBio to subcontract work to third parties but did not compel any future agreement—such as the MSA—with IQVIA.

For instance, Section 2.3 of the Collaboration Agreement provides that PharmaBio "in its sole discretion" may subcontract clinical trial work to affiliates or third parties of its choosing. Further the MSA's recitals show that IQVIA had no rights under the Collaboration Agreement and gained no benefits thereunder but for the subsequently executed MSA. The MSA states: "PharmaBio *may* engage Quintiles and its affiliates *from time to time* to provide services for individual studies or projects related to the Collaboration Agreement by executed individual Work Orders [] specifying the details of the services and the related terms and conditions." (Taber Aff. Ex. A [NYSCEF Doc. 4]) (emphasis added).

IQVIA could only benefit *indirectly* from the Collaboration Agreement *if* a subsequent subcontract—such as the MSA—was entered with PharmaBio. "The mere existence of an agreement with attendant circumstances that prove advantageous to the nonsignatory would not constitute the type of direct benefits justifying compelling arbitration by a nonparty to the underlying contract. Also, absent the nonsignatory's reliance on the agreement itself for the derived benefit, the theory would extend beyond those who gain something of value as a direct consequence of the agreement." *Belzberg*, 21 N.Y.3d at 633-34.

Here, the Collaboration Agreement provided an advantageous opportunity for IQVIA that required a subsequent MSA for IQVIA to reap any benefit from. The only benefits flowing directly from the Collaboration Agreement were to PharmaBio in the form of "Milestone Payments." On the other hand, the benefits IQVIA reaped came directly from the MSA it entered with PharmaBio, and only indirectly from the Milestone Payments paid to PharmaBio under the Collaboration Agreement. IQVIA did not receive benefits directly from the Collaboration Agreement and therefore cannot be estopped from denying its purported obligation to arbitrate pursuant to the arbitration provisions thereunder. Had these sophisticated business entities

intended for PharmaBio, Eisai, and IQVIA to all be bound by the same arbitration provision, the parties could have clearly and easily provided such.

IQVIA Has Not Participated in the Arbitration as a Party

IQVIA may seek a stay of arbitration because it has not participated in the arbitration within the meaning of the CPLR. CPLR § 7503(b) provides: "Subject to the provisions of subdivision (c), a party who has not participated in the arbitration … may apply to stay arbitration on the ground that a valid agreement was not made…." A party may be said to participate in an arbitration, so as to waive the right to seek a stay, by affirmatively agreeing to be named as a respondent in the proceeding. *Simon-Equity Jefferson Valley Partnership v. AJC Contractors, Inc.*, 124 A.D.2d 579, 580 (2d Dep't 1986). A party also participates in an arbitration when it files a notice of appearance, selects the arbitrators, and schedules the arbitration hearing. *Home Mut. Ins. Co. v. Springer*, 130 A.D.2d 493, 493 (2d Dep't 1987).

Here, IQVIA's purported "participation" is limited to that of a non-party witness subject to a document subpoena. IQVIA did not participate in the selection of arbitrators and has repeatedly reserved its rights as a non-party to the arbitration. (*See* Taber Aff. Exs. G-H [NYSCEF Docs. 10-11]). IQVIA's compliance with document subpoenas as a non-party to the arbitration does not convert it into a participating party for purposes of CPLR § 7503(b).

Therefore, IQVIA, as a non-participant to the arbitration, may seek a stay pursuant to CPLR § 7503(b), and that stay is now granted for the reasons stated *supra*.

Finally, the Court declines to compel Eisai to compensate IQVIA for its non-party document production. The Court also declines to sign a protective order prohibiting Eisai from seeking depositions of IQVIA witnesses. As stated on the record of October 17, 2018, these are issues the Arbitration Panel is equipped to adjudicate fairly and pursuant to applicable law.

Accordingly, it is hereby

ORDERED that Petitioner's first cause of action seeking a stay of the subject arbitration is granted; it is further

ORDERED that Petitioner's second cause of action seeking reimbursement of discovery costs is denied without prejudice; it is further

ORDERED that Petitioner's third cause of action seeking a protective order is denied without prejudice; and it is further

ORDERED that Petitioner's counsel shall serve a copy of this Decision & Order upon the arbitral tribunal.

11/14/2018
DATE

BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION			
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE