UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SSI (BEIJING) COMPANY LTD.,

Petitioner,

-against-

PROSPER BUSINESS DEVELOPMENT CORPORATION,

Respondent.

18-CV-8408 (VEC) (BCM)

REPORT AND RECOMMENDATION TO THE HONORABLE VALERIE E. CAPRONI

BARBARA MOSES, United States Magistrate Judge.

Petitioner SSI Beijing Company Ltd. (SSI Beijing or the JV), a Chinese joint venture, entered into a commercial contract with one of its members, respondent Prosper Business Development Company (Prosper), an Ohio corporation. The contract contains a dispute resolution clause calling for binding arbitration in Delaware. By letter dated June 11, 2018, Prosper asserted that SSI Beijing was in breach of the contract and demanded arbitration. After initially agreeing that the arbitration would proceed, if at all, in New York – and participating in various preliminary steps, such as selecting the arbitration panel and scheduling the hearing – SSI Beijing filed this action on September 14, 2018, seeking a declaration that the parties' arbitration clause is invalid under Chinese law and an order "enjoining any and all further proceedings" in the arbitration. Prosper counterclaimed for a declaration that the arbitration clause is valid and enforceable and an order compelling SSI Beijing to arbitrate pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, T.I.A.S. No. 6997, 21 U.S.T. 2517 (the Convention) and the Convention's implementing legislation, Chapter II of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 201-08.

Now before me for report and recommendation are: (1) Prosper's motion, made pursuant to Fed. R. Civ. P. 12(c) and 9 U.S.C. § 206, "for judgment on the pleadings and to compel arbitration" (Dkt. No. 19); and (2) SSI Beijing's cross-motion to stay arbitration. (Dkt. No. 23).

For the reasons that follow, I respectfully recommend that Prosper's motion be GRANTED and that SSI Beijing's motion be DENIED.

I. BACKGROUND

Unless otherwise noted, the relevant facts, summarized here, are undisputed.

A. The Parties

Prosper is an Ohio corporation with its principal place of business in Ohio. Petition to Stay Arbitration (Pet.) (Dkt. No. 1) ¶ 7; Counterclaim to Compel Arbitration (Counterclaim) (Dkt. No. 9) ¶ 2. SSI Beijing is a joint venture organized under the laws of the People's Republic of China (PRC). Pet. ¶ 6; Counterclaim ¶ 3. The JV was formed in May 2006 by Prosper, China Guoan Culture & Media Investment Corporation (Guoan), and SSI Netherlands B.V. (SSI), when Prosper, Guoan, and SSI executed an Equity Joint Venture Contract (the JV Contract) in Beijing. Pet. ¶¶ 8-9; Counterclaim ¶¶ 10-11. Guoan is a Chinese company with its principal place of business in Beijing. Counterclaim ¶ 5. According to Prosper, SSI was a "predecessor entity" to SSI Research Now, a "multinational privately-held company with its headquarters in Shelton, Connecticut," which owns 90% of the JV. Counterclaim ¶¶ 4, 6, 10. Guoan owns 7% of the JV, and Prosper owns 3%. Counterclaim ¶ 4. SSI Beijing was formed "to create and grow a China-focused, Internet-based proprietary survey sample panel, and to provide market survey, consultancy, and related services to customers in China." Pet. ¶ 10.

B. The Cooperation Agreement

On June 15, 2006, SSI Beijing, Guoan, and Prosper (through its division Prosper International and its subsidiary Big Research LLC (BIGresearch)) entered into a written Cooperation Agreement (Coop. Ag.), Pet. ¶ 11 & Ex. A (Dkt. No. 1-1); Counterclaim ¶ 11, under which (among other things) SSI Beijing agreed that it would, at no cost to BIGresearch, "make available to certain samples of then existing Members [of its Chinese survey panels] the

questionnaires that have been provided to the Joint Venture by BIGresearch," provided that certain conditions were met. Coop. Ag. § 1(b). In 2011, § 1(b) was amended to substitute "Prosper" for "BIGresearch." Counterclaim ¶ 12 & Ex. 1 (Dkt. No. 9-1).

The Cooperation Agreement, written in English, contains a "Governing Law" clause providing that its "validity, interpretation and implementation . . . shall be governed by the published and publicly available laws of China but, in the event that there is no published and publicly available law in China governing a particular matter relating to this Contract, reference shall be made to general international commercial practice." Coop. Ag. § 9(e). The contract also contains a "Dispute Resolution" clause prescribing a multi-step approach should "a dispute arise[]" concerning the Cooperation Agreement or any party's "performance of obligations" thereunder: "(i) the Parties will try to resolve any dispute themselves through best efforts; (ii) failing resolution, each Party will submit its side of the dispute to a mediator for resolution; (iii) failing that, a written request shall be submitted for binding arbitration in proceedings to be conducted in the State of Delaware." *Id*. § 9(f).

Rather than require arbitration under the auspices of a sponsoring organization or institution (such the American Arbitration Association or the Institute for Conflict Prevention), § 9(f) contemplates an "ad hoc" arbitration subject to ten enumerated rules governing the selection of the arbitrator(s), the timing and length of the arbitration hearing, document exchanges, and the allocation of costs. "Any judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof." Coop Ag. § 9(f)(7). The arbitration clause concludes: "It is the intention of the Parties that the dispute resolution procedures set forth in this Section 9(f) shall constitute the exclusive remedy for all disagreements between the Parties relating to this

Agreement and it is agreed that no Party shall bring any legal action against any other Party except for the purpose of enforcing the provisions of this Section 9(f) of the Agreement." *Id.* § 9(f).

C. The Underlying Dispute

By letter dated June 11, 2018, Prosper asserted that SSI Beijing breached § 1(b) of the Cooperation Agreement by "refus[ing] to supply Chinese panelists to Prosper free of charge on a quarterly basis" so that Prosper could conduct its "China quarterly" survey. Letter dated June 11, 2018 (Demand Ltr.), Pet. ¶¶ 1, 17, 31, & Ex. B (Dkt. No. 1-2) at 2-3. Prosper stated that it had suffered approximately $1.5 million in damages to date, and "plac[ed] SSI Beijing on notice that it is invoking the dispute resolution procedures set forth in Section 9(f) of the Agreement." *Id*. at 2. Prosper asserted that it had already requested an informal resolution of the dispute, without success, and was "willing to proceed directly to binding arbitration." *Id*. The next day, Ashlin Quirk, whom Prosper describes as the JV's general counsel, responded by email, "We should proceed to arbitration." Counterclaim ¶¶ 15-18 & Ex. 3 (Dkt. No. 9-3).

Thereafter, although SSI Beijing repeatedly "reserved all of its rights, including its right to seek an order enjoining, foreclosing, or preventing the ad hoc arbitration from going forward," Pet. ¶ 17; *see also* Counterclaim ¶ 20, the parties "agreed that, if it proceeds, the arbitration will be held in New York City." Pet. ¶ 21; *see also* Counterclaim ¶ 19(e) (the parties "agreed to move the arbitration hearing from the State of Delaware . . . to New York City for the convenience of the parties and counsel"). The parties also took concrete steps towards arbitrating. For example, in accordance with § 9(f) of the Cooperation Agreement, each party designated an arbitrator, and the two party-designated arbitrators selected a third, "neutral" arbitrator to serve as the chair of the panel. Counterclaim ¶ 19; Joint Letter dated Dec. 9, 2019 (Joint Ltr.) (Dkt. No. 35) at 2-3. The parties then participated in two preliminary calls with the panel, on July 30 and August 9, 2018; set a schedule for the submission of their respective statements of claims; negotiated a set of

arbitration rules; and scheduled the arbitration hearing to take place on December 10-11, 2018, in New York. Counterclaim ¶ 19; Joint Ltr. at 3 & Ex. C (Dkt. No. 35-3) (draft arbitration rules).[1]

On August 17, 2018, in accordance with the parties' negotiated schedule, Prosper served its statement of claims on SSI Beijing and submitted it to the three-arbitrator panel. Counterclaim ¶ 21. SSI Beijing's response was due on September 14, 2018. *Id.* ¶ 22. However, on September 7, 2018, "SSI-Beijing unilaterally informed the three-arbitrator panel that it would not proceed with the arbitration." Joint Ltr. at 3. On September 4, 2018, Prosper served another copy of its demand letter on SSI Beijing, Pet. ¶ 17; Counterclaim ¶ 16 & Ex. 2 (Dkt. No. 9-2).[2] On September 14, 2018 – the day its statement of claims was due to the arbitration panel – SSI Beijing initiated this action.

D. The Pleadings and the Motions

In its Petition to Stay Arbitration, SSI Beijing asserts that the Cooperation Agreement's arbitration clause is invalid under Chinese law because it fails to specify an "arbitration institution" to oversee the arbitration, as required by Articles 16(2) and 18 of the Arbitration Law of the

[1] SSI Beijing does not address these events in its Petition. In its portion of the joint letter, SSI Beijing characterizes them somewhat differently, stating that no date for the arbitration was ever "finally" set; no arbitration rules were ever "agreed upon"; the arbitrator that it selected was never "unconditionally designated"; the third neutral arbitrator was never "formally engaged"; and no pre-hearing schedule was ever "agreed upon." Joint Ltr. at 3.

[2] Although the JV was clearly on notice of Prosper's June 11, 2018 demand letter – and promptly retained the New York-based attorneys who now serve as its counsel of record – those attorneys initially took the position that SSI Beijing had not received "proper notice" of the demand letter because it found "no record of having received" a hard copy of the letter at the contractually-specified address in Beijing. Joint Ltr. at 2 n.1; *id.* Ex. B (emails dated July 4, 12, and 16, 2018 from attorney Mary Eaton). On July 20, 2018, SSI Beijing agreed to accept service of the demand letter (while reserving its rights to object on any ground "except for sufficiency of service," Joint Ltr. Ex. C, at 1), only to "withdraw[]" that agreement on August 31, 2018, when it advised Prosper that it would "not consent to any further proceedings" in connection with the arbitration, "on a conditional basis or otherwise," and that it "will not participate therein." Joint Ltr. Ex. D, at 2 (Aug. 31, 2018 email from Mary Eaton).

People's Republic of China (PRC Arbitration Law). Pet. ¶¶ 2, 3, 15-16. SSI Beijing seeks a judgment "declaring that the Ad Hoc Arbitration Provision of the Cooperation Agreement is invalid and unenforceable," and an order "enjoining any and all further proceedings in connection with the arbitration Prosper purported to commence." *Id*. at 7.

In its Counterclaim to Compel Arbitration, Prosper asserts that "the validity of the arbitration agreement is not determined by the law of the People's Republic of China." Counterclaim ¶ 1. According to Prosper, "Articles 16(2) and 18 of the PRC Arbitration Law do not govern the validity of an arbitration clause in a Sino-foreign joint venture agreement" like the Cooperation Agreement. *Id*. ¶ 24. "Instead, under applicable Chinese law, in the absence of the parties' express agreement as to the governing law of the arbitration clause itself, the law of the location of the arbitration will govern the validity of the arbitration provision" even if domestic Chinese law governs the "underlying contract." *Id*. Therefore, Prosper concludes, the arbitration clause here at issue is "valid and enforceable," *id*. ¶ 28, and this Court is required to order arbitration under the Convention and the FAA. *Id*. ¶ 27.

In support of its position, Prosper submits the Declaration of Lin Bai, a lawyer admitted to practice in the PRC and New York, who opines that under Article 13 of the Provisions of the Supreme People's Court on Several Issues concerning Trying Cases of Arbitration-Related Judicial Review (Provisions) and Article 18 of the Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships (PRC Law of Choice of Law), if the parties to an agreement containing an arbitration clause do not specifically select the law applicable to that clause, "the law of the place where the arbitration institution is located or the arbitration takes place shall apply." Bai Decl. (Dkt. No. 9-4) ¶¶ 6-7 & Exs. A-B. Further, according to Bai, in the *Reply of the Supreme People's Court to a Request for Instructions on Determining the Validity of an*

Arbitration Agreement (the 2006 SPC Reply), the highest court in China relied on these provisions to uphold the validity of an ad hoc arbitration clause contained in a Sino-foreign joint venture agreement that was otherwise governed by PRC law, because the clause called for arbitration in Switzerland and because Swiss law, which the SPC applied, does not require the parties to specify an arbitration institution. *Id*. ¶¶ 8-9 & Ex. C. Therefore, Bai concludes, "the laws of the state of Delaware (or the laws of the state of New York if so agreed by the parties), rather than PRC law, will apply to determine the validity of the arbitration clause contained in the Cooperation Agreement." *Id*. ¶ 10.

On November 6, 2018, SSI Beijing filed its Answer to Counterclaim (Ans.) (Dkt. No. 17), once again noting that it "reserved all of its rights" during its discussions with Prosper but agreed that the venue for the arbitration – if there were one – would be New York, rather than Delaware. *Id*. ¶¶ 19-20. SSI Beijing pleaded two affirmative defenses – that the Counterclaim "fails to state any claim upon which relief can be granted" and is "barred in whole or in part because the Cooperation Agreement is not valid or enforceable." *Id*. at 7.[3]

On December 18, 2018, Prosper filed its motion for judgment on the pleadings and to compel arbitration. In its supporting brief (Prosper Mem.) (Dkt. No. 20), Prosper argues primarily that § 9(f) of the Cooperation Agreement is enforceable under the Convention and the FAA, which "reflects the strong federal policy favoring arbitration of disputes, particularly in the international context," and that the provisions of the PRC Arbitration Law upon which the JV relies (the substance of which Prosper does not dispute) "simply do not apply" here. Prosper Mem. at 1.

[3] SSI Beijing did not plead that Prosper's demand letter was sent to the wrong address, nor allege the failure of any other contractual preconditions to arbitration. Although it gave "notice that it intends to rely on such other and further defenses as may become available or apparent during pre-trial or trial proceedings in this action," Ans. at 7, SSI Beijing never amended its answer to assert any other or further defenses.

According to Prosper, SSI Beijing's contention that § 9(f) is invalid or unenforceable is an affirmative defense under the Convention and the FAA, which should be "determined by the law of the forum nation." *Id*. at 10. Even if this Court were to apply Chinese law, Prosper argues, China's choice of law rules for international arbitration clauses would point, in turn, to the domestic law of the arbitration forum to determine the validity of § 9(f). *Id*. at 10-11. Thus, Prosper concludes, since neither New York nor Delaware requires the parties to an arbitration agreement to identify an arbitration institution or otherwise "renders the Cooperation Agreement's arbitration provision invalid," this Court must compel SSI Beijing to arbitrate. *Id*. at 13-14.

On January 30, 2019, SSI Beijing filed its cross-motion to stay arbitration, accompanied by a brief (SSI Beijing Mem.) (Dkt. No. 24) reiterating the argument made in its original petition: that the Chinese law choice of law clause in the Cooperation Agreement must be honored, and that it renders § 9(f) invalid because Chinese law requires that an arbitration clause name an institution to oversee the arbitration proceeding. SSI Beijing Mem. at 2-3, 7-9, 13-18. SSI Beijing supports its position with the Declaration of Liyu Jin (Jin Decl.) (Dkt. No. 25), a lawyer admitted to practice in the PRC, who opines that § 9(f) is invalid under domestic Chinese law, specifically Articles 16(2) and 18 of the PRC Arbitration Law, "as it fails to specify an arbitration institution." Jin Decl. ¶¶ 1, 20, 29, 33, 38. Jin cites a number of Chinese judicial decisions in which the court, after applying the PRC Arbitration Law, held an arbitration clause invalid for failure to specify an arbitration institution. *Id*. ¶¶ 34-37. Jin does not deny that under the Provisions, the PRC Law of Choice of Law, and the 2006 SPC Reply, a Chinese court presiding over the same dispute would apply the law of the place of arbitration (here, New York) to determine the validity of § 9(f), and on that basis would uphold it. Jin asserts, however, that, according to the Chinese courts, "the PRC choice of law rules only apply in cases before PRC domestic courts." *Id*. ¶¶ 39-41.

The JV further argues that even if this Court were to apply forum (New York) law, New York's choice of law rules would point, in turn, to the domestic law of China (regardless of China's choice of law rules) to determine the validity of § 9(f). SSI Beijing Mem. at 12-13. Petitioner's brief does not discuss the Convention or its implementing legislation except to assert that nothing in the Convention requires this Court to disregard New York's choice of law rules or use China's. *Id*. at 21. In the alternative, SSI Beijing urges the Court to defer a ruling until the validity of § 9(f) under Chinese law "can be resolved on a fuller record." *Id*. at 22.

On February 13, 2019, Prosper filed a brief in opposition to SSI Beijing's motion and in further support of its own motion. (Dkt. No. 26.) On February 20, 2019, SSI Beijing filed the Supplemental Declaration of Liyu Jin (Supp. Jin Decl.) (Dkt. No. 29), in which he argues that "[n]othing in either Article 16(2) or Article 18 of the PRC Arbitration Law limits its application to arbitrations conducted in China." Supp. Jin Decl. ¶ 4. Moreover, Jin reiterates, China's "choice of law rules" (which, according to Bai, would produce a different result in the case of an international arbitration agreement specifying a foreign arbitral forum) "only apply in determining the governing laws for cases before PRC domestic courts." *Id*. ¶ 5. In its brief in opposition to Prosper's motion and in further support of its own cross-motion, filed the same day (SSI Beijing Reply Mem.) (Dkt. No. 27), SSI Beijing writes: "Prosper is hardly in a position to complain that a Chinese [c]ourt might reach a different conclusion when it elected to commence legal proceedings in this Court and is thus bound by this Court's choice-of-law rules." SSI Beijing Reply Mem. at 9 n.9.[4]

[4] In fact, it was SSI Beijing that chose this forum for the parties' arbitrability dispute. Prosper's counterclaim, seeking to compel arbitration, was a compulsory counterclaim pursuant to Fed. R. Civ. P. 13(a). *See Matter of Arbitration between InterCarbon Bermuda, Ltd. & Caltex Trading & Transp. Corp*., 146 F.R.D. 64, 70 (S.D.N.Y. 1993) (collecting cases).

On November 14, 2019, the Honorable Deborah Batts, United States District Judge, referred the case to me for report and recommendation on the cross-motions. (Dkt. No. 33.) In view of the time that had passed since the cross-motions were submitted, I directed the parties to submit a joint letter updating the Court on "whether the disputed arbitration actually commenced, where or how far it proceeded, or whether the parties have reached any accommodation or resolution regarding the arbitration or their underlying dispute." (Dkt. No. 34.) In their responding letter, the parties disagreed as to whether the arbitration "actually commenced," as discussed above, but agreed that no further activity had occurred in connection with the arbitration and that they had not reached any resolution regarding either the arbitration or their underlying dispute. Joint Ltr. at 1, 4.

Thereafter, following the death of Judge Batts, this action was reassigned, initially to the Honorable Vernon S. Broderick, United States District Judge, and then to the Honorable Valerie E. Caproni, United States District Judge. The reference remained in place.

II. ANALYSIS

A. Subject Matter Jurisdiction

"[F]ederal courts have a duty to inquire into their subject matter jurisdiction *sua sponte*," even where no party raises the issue. *Hermes of Paris, Inc. v. Swain*, 867 F.3d 321, 324 n.3 (2d Cir. 2017) (quoting *F5 Capital v. Pappas*, 856 F.3d 61, 75 (2d Cir. 2017)). "Accordingly, before this action proceeds to a determination on the merits, the question of subject matter jurisdiction must be resolved." *Windward Dev., Inc. v. Thomas*, 2018 WL 2272771, at *3 (D. Conn. May 17, 2018) (finding "no discernable basis for [the] exercise of federal subject matter jurisdiction" over cross-petitions to confirm and vacate arbitration awards).

In its petition, SSI Beijing alleges that it has raised a claim "under [this] Court's diversity jurisdiction pursuant to 28 U.S.C. § 1332 . . . and otherwise under the Court's jurisdiction pursuant

to [the FAA], 9 U.S.C. § 1, *et seq*." Pet. ¶ 4. SSI Beijing is mistaken in invoking § 1332. "For diversity purposes, the citizenship of a joint venture is the citizenship of each of its members." *Schiavone Constr. Co. v. City of New York*, 99 F.3d 546, 548 (2d Cir. 1996). One of SSI Beijing's members is Prosper, which is a citizen of Ohio. Pet. ¶¶ 7-8. Thus, the JV is also a citizen of Ohio, meaning that the parties are not diverse as required by § 1332(a)(1).

Petitioner is also mistaken to the extent it believes that this Court has federal question jurisdiction pursuant to Chapter I of the FAA, 9 U.S.C. §§ 1-16. Chapter I applies to actions brought under the Convention to the extent that its provisions do not conflict with the Convention or with Chapter II. 9 U.S.C. § 208; *Farrell v. Subway Int'l, BV*, 2011 WL 1085017, at *3 (S.D.N.Y. March 23, 2011). However, while Chapter I "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate," it "does not create any independent federal-question jurisdiction." *Odeon Capital Grp., LLC v. Ackerman*, 149 F. Supp. 3d 480, 482 n.4 (S.D.N.Y. 2016) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 25 n.32 (1983)). Thus, a litigant seeking relief under Chapter I of the FAA "must satisfy the requirements of jurisdictional amount and diversity of citizenship, or demonstrate the existence of some other independent basis of subject matter jurisdiction, before the court may validly entertain an application for any remedy authorized by the statute." *DaPuzzo v. Globalvest Mgmt. Co., L.P.*, 263 F. Supp. 2d 714, 722 (S.D.N.Y. 2003).

In this case, the "independent basis of subject matter jurisdiction" is found in Chapter II of the FAA, 9 U.S.C. § 203, which is expressly invoked by Prosper. *See* Counterclaim ¶ 7. Section 203 gives federal district courts original jurisdiction over any action or proceeding "falling under the Convention." A contract "falls under the Convention," and thus comes within the jurisdiction of the federal courts, when it "aris[es] out of a legal relationship . . . which is considered as

commercial," 9 U.S.C. § 202, unless the contract is "entirely between citizens of the United States," does not involve property, performance, or enforcement abroad, and has no other "reasonable relation with one or more foreign states." *Id*. Applying the statutory language, courts in our circuit have articulated four basic "jurisdictional prerequisites" for enforcement of an international arbitration agreement under the Convention: "(1) there must be a written agreement; (2) it must provide for arbitration in the territory of a signatory of the convention; (3) the subject matter must be commercial; and (4) it cannot be entirely domestic in scope." *Dumitru v. Princess Cruise Lines, Ltd*., 732 F. Supp. 2d 328, 335 (S.D.N.Y. 2010) (quoting *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.,* 198 F.3d 88, 92 (2d Cir. 1999)). *Accord U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 146 (2d Cir. 2001); *Apple & Eve, LLC v. Yantai N. Andre Juice Co.*, 499 F. Supp. 2d 245, 247 (E.D.N.Y. 2007), *vacated on other grounds,* 610 F. Supp. 2d 226 (E.D.N.Y. 2009).

The Cooperation Agreement easily satisfies these factors. It is in writing; it provides for arbitration in the United States; its subject matter is commercial; and it is international in scope, in that it is an agreement among two Chinese entities and a U.S. corporation calling for performance in both nations and arbitration, in the event of a dispute, in the United States. *See Apple & Eve*, 499 F. Supp. 2d at 248. This Court therefore has subject matter jurisdiction over the parties' dispute pursuant to 9 U.S.C. § 203, and "may direct that arbitration be held in accordance with the agreement at any place therein provided for." 9 U.S.C. § 206.[5]

[5] Section 206 does not, by its terms, empower the courts to stay arbitrations, and the Second Circuit has not provided clear guidance as to whether, in the absence of express statutory authority, the courts nonetheless have that power. *See Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 391 (2d Cir. 2011) (concluding that the court "need not resolve" the question because no stay was necessary in that case). Among the district courts, there is "some disagreement" on the point. *Farrell*, 2011 WL 1085017, at *2 (collecting cases). Because I conclude that Prosper's motion to

B. Venue

Where subject matter jurisdiction is based on § 203, venue is proper in any federal district court in which:

> save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

9 U.S.C. § 204. There is no venue clause in the Cooperation Agreement itself (presumably because the parties contemplated that any disputes would be resolved through arbitration in accordance with § 9(f)), and it is by no means obvious that, absent the arbitration clause, Prosper could have sued the JV in the Southern District of New York concerning an alleged breach of the parties' contract. Moreover, the "place designated in the agreement as the place of arbitration" is Delaware, not New York. 9 U.S.C. § 204. However, the parties later agreed to arbitrate in New York if at all. Pet. ¶¶ 5, 21; Counterclaim ¶ 19. To the extent they thereby amended the Cooperation Agreement to designate New York as the "place of arbitration," they also rendered venue appropriate here pursuant to § 204.

In any event, neither party has raised any objection to venue in this district. To the contrary: both have affirmatively alleged that venue is proper here, albeit for different reasons. *See* Pet. ¶ 5 (invoking 28 U.S.C. § 1391); Counterclaim ¶ 8 (invoking 9 U.S.C. § 204). Unlike subject-matter jurisdiction, "the right to attack venue is personal to the parties and waivable at will." *Inteliclear, LLC v. Victor*, 2016 WL 5746349, at *4 n.16 (D. Conn. Oct. 3, 2016) (quoting *Concession Consultants, Inc. v. Mirisch*, 355 F.2d 369, 371 (2d Cir. 1966)); *see also* Fed. R. Civ. P. 12(h)(1)

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compel arbitration should be granted, I do not reach the question whether this Court would have the power, under the Convention or otherwise, to grant SSI Beijing's cross-motion to stay.

(defense of improper venue is waived if not raised in a responsive pleading or a Rule 12 motion). Here, as in *Republic of Ecuador v. ChevronTexaco*, 376 F. Supp. 2d 334, 350 (S.D.N.Y. 2005), any objections to "the appropriateness of venue in the Southern District of New York" have been waived.

C. Legal Standards Applicable to the Parties' Motions

"The standard for granting a Rule 12(c) motion for judgment on the pleadings is identical to that of a Rule 12(b)(6) motion for failure to state a claim." *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001). Thus, for purposes of Prosper's motion for judgment on the pleadings, the Court must accept all well-pleaded factual allegations in the Petition as true, *id.*, and may consider the documents referenced therein, *see Hughes v. Lillian Goldman Family, LLC*, 153 F. Supp. 2d 435, 439 (S.D.N.Y. 2001), but need not (and indeed may not) "accept as true a legal conclusion," even if "couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

The standard for granting a motion to compel or stay arbitration, or to enjoin an ongoing arbitration, is "similar" to the standard used to determine a summary judgment motion. *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003) (motion to compel arbitration); *Kwatinetz v. Mason*, 356 F. Supp. 3d 343, 347 (S.D.N.Y. 2018) (motion to enjoin arbitration).

> If there is a genuinely disputed factual issue whose resolution is essential to the determination of the applicability of an arbitration provision, a trial as to that issue will be necessary; but where the undisputed facts in the record require the matter of arbitrability to be decided against one side or the other as a matter of law, we may rule on the basis of that legal issue and "avoid the need for further court proceedings."

Wachovia Bank, Nat. Ass'n v. VCG Special Opportunities Master Fund, Ltd., 661 F.3d 164, 172 (2d Cir. 2011) (quoting *Bensadoun*, 316 F.3d at 175).

In this case, although the parties hotly dispute the legal principles applicable to their cross-motions – including the question of what law to apply – there is no dispute as to any factual issue material to the pending motions. Nor do they disagree as to the most fundamental predicate for both the Petition and the Counterclaim: that they are both parties to, and bound by, the Cooperation Agreement. *See* Pet ¶ 11 & Ex. A; Counterclaim ¶ 11. "[W]here the parties do not dispute that a contract has been formed, but rather quarrel over the legal effect of the uncontested contractual language – i.e., whether their contract's language binds them to arbitrate – the case involves contract construction and therefore requires a legal determination." *Illinois Union Ins. Co. v. Teva Pharm. USA, Inc.*, 2013 WL 5594716, at *6 (E.D. Pa. Oct. 11, 2013) (internal quotation marks omitted). Therefore, there is no "need for further court proceedings," *Wachovia Bank*, 661 F.3d at 173, before this Court can decide the cross-motions.

D. Legal Standards Applicable to Disputes Arising Under the Convention and Its Implementing Legislation

The goals of the Convention are "to promote the enforcement of arbitral agreements in contracts involving international commerce so as to facilitate international business transactions," *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.,* 923 F.2d 245, 250 (2d Cir. 1991), *cert. dismissed*, 501 U.S. 1267 (1991), and to "unify the standards by which agreements to arbitrate are observed." *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 520 n.15 (1974). *See also Smith/Enron*, 198 F.3d at 92 ("The adoption of the Convention by the United States promotes the strong federal policy favoring arbitration of disputes, particularly in the international context."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 (1985) (under the Convention, "it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration"). Thus, "the strong federal policy that favors

arbitration of disputes applies with equal force to international transactions." *Apple & Eve*, 499 F. Supp. 2d at 247.

Consistent with these goals, the treaty requires any "court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article," to "refer the parties to arbitration" at the request of any of them, unless the court "finds that the said agreement is null and void, inoperative, or incapable of being performed." Conv. Art. II § 3. This language requires a court to "compel arbitration of any dispute falling within the scope of the agreement pursuant to the terms of the agreement," *U.S. Titan*, 241 F.3d at 146, unless the party resisting arbitration can establish that "one of [the] Convention's affirmative defenses applies." *Dumitru*, 732 F. Supp. 2d at 335; *see also Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1018 (2d Cir. 1993) (if the jurisdictional requirements are met, the district court "must order arbitration unless it finds the agreement 'null and void, inoperative or incapable of being performed'") (quoting Conv. Art. II § 3); *Moskalenko v. Carnival PLC*, 2019 WL 1441127, at *4 (E.D.N.Y. Mar. 29, 2019) ("If the Court finds that the jurisdictional prerequisites have been met and none of the Convention's affirmative defenses apply, then the court must order arbitration.").

The party resisting arbitration bears the burden of proof as to any defense asserted under the Convention. *See Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RAKTA)*, 508 F.2d 969, 973 (2d Cir. 1974) (the Convention "clearly shifted the burden of proof to the party defending against enforcement"); *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408, 412, 442 N.E.2d 1239 (1982) (the Convention "eased the difficulty in enforcing international arbitration agreements by minimizing uncertainties and shifting the burden of proof

to the party opposing enforcement").[6] Moreover, the defenses – often lumped under the rubric "null and void" – are to be construed narrowly, so as not to undermine the goals of the Convention and the FAA. *See*, *e.g.*, *Belship Navigation, Inc. v. Sealift, Inc.*, 1995 WL 447656, at *6 (S.D.N.Y. July 28, 1995) ("'[N]ull and void' must be construed narrowly so as to further the Convention's goal of promoting the enforcement of arbitration agreements."); *Linon Imports, Inc. v. Tehnoforestexport*, 1993 WL 187892, at *2 n.3 (S.D.N.Y. May 19, 1993) ("The 'null and void' language of the Convention must be read narrowly, for the signatory nations have declared a general policy of enforceability of agreements to arbitrate."); *Rosgoscirc on Behalf of SOY/CPI P'ship v. Circus Show Corp.*, 1993 WL 277333, at *4 (S.D.N.Y. July 16, 1993) ("[T]he Convention's 'null and void' exception is to be narrowly construed.").

"[A]n agreement to arbitrate is 'null and void' only (1) when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver, *see Ledee v. Ceramiche Ragno,* 684 F.2d 184 (1st Cir. 1982); *I.T.A.D. Associates, Inc. v. Podar Brothers,* 636 F.2d 75 (4th Cir. 1981), or (2) when it contravenes fundamental policies of the forum state." *Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazoni v. Lauro*, 712 F.2d 50, 53 (3d Cir. 1983). *See also Bautista v. Star Cruises,* 396 F.3d 1289, 1302 (11th Cir. 2005) (quoting *DiMercurio v. Sphere Drake Ins. PLC,* 202 F.3d 71, 80 (1st Cir. 2000)) ("The limited scope of the Convention's null and void clause 'must be interpreted to encompass only those situations – such as fraud, mistake, duress, and waiver – that can be applied neutrally on an international scale.'").

[6] *See also* Restatement (Third), U.S. Law of International Commercial Arbitration § 2-6(a) (Tent. Draft No. 4, April 17, 2015) ("A person opposing enforcement of an international arbitration agreement bears the burden of establishing one or more of the defenses . . . "); *id.* § 2-9 cmt. c ("Once a party has established prima facie the existence of an arbitration agreement, the other party bears the burden of establishing one or more of the defenses on the basis of which the agreement should not be enforced.").

These formulations have been widely adopted by district courts within our circuit. *See*, *e.g.*, *Apple & Eve*, 499 F. Supp. 2d at 248; *Moskalenko*, 2019 WL 1441127, at *8; *Lucina v. Carnival PLC*, 2019 WL 1317471, at *7 (E.D.N.Y. Mar. 22, 2019); *Meadows Indem. Co. v. Baccala & Shoop Ins. Servs., Ins.*, 760 F. Supp. 1036, 1043 (E.D.N.Y. 1991); *Dumitru*, 732 F. Supp. 2d at 340; *Oriental Commercial & Shipping Co. v. Rosseel, N.V.*, 609 F. Supp. 75, 78 (S.D.N.Y. 1985).

As the Third Circuit explained in *Rhone*, limiting "null and void" defenses to those that are "internationally recognized" is "most consistent with the overall purposes of the Convention," which "presumes the enforceability of agreements to arbitrate. Neither the parochial interests of the forum state, nor those of states having more significant relationships with the dispute, should be permitted to supersede that presumption." 712 F.2d at 53-54 (holding that an arbitration clause falling within the Convention would not be declared void by virtue of the fact that it called for an even number of arbitrators and thus might not be enforceable under Italian law, which governed the parties' contract and which required an odd number). *See also David L. Threlkeld & Co.,* 923 F.2d at 249 (enforcing an international arbitration agreement against a Vermont corporation notwithstanding that the agreement failed to comply with a Vermont statute requiring a "specific acknowledgement of arbitration signed by both parties").

E. The Asserted Invalidity of the Parties' Arbitration Agreement under Articles 16(2) and 18 of the PRC Arbitration Law is Not an Internationally Recognized Defense to Arbitration Under the Convention and the FAA.

SSI Beijing's primary – indeed only – defense to enforcement of the parties' arbitration agreement is its contention that § 9(f) of the Cooperation Agreement is "invalid and unenforceable" under Articles 16(2) and 18 of the PRC Arbitration Law because it fails to specify an arbitration institution. *See*, *e.g.*, Pet. ¶ 23, 34; SSI Beijing Mem. at 1, 7. Thus, the question here presented is not whether the parties agreed to arbitrate, *cf. Motorola Credit Corp. v. Uzan*, 388 F.3d 39 (2d Cir. 2004) (applying Swiss law to conclude that plaintiffs did not agree to arbitrate *with defendants*,

who were not signatories to the arbitration agreements they attempted to invoke); it is whether this Court must decline to enforce an arbitration agreement that the parties concededly made by applying the domestic arbitration law of China, which (apparently alone among the nations of the world) refuses to honor an "ad hoc" arbitration agreement, instead insisting that the parties identify a sponsoring organization before their agreement will be honored. It therefore "must be said that [petitioner] is attempting to invoke the 'null and void, inoperable or incapable of being performed' provision" of the Convention. *Apple & Eve*, 499 F. Supp. 2d at 248.[7] *See also* SSI Beijing Mem. at 6 (arguing that the parties' arbitration agreement is "null and void and inoperable" because it "conflicts with the PRC Arbitration Law").

Since the parties' cross-motions turn on the "null and void" defense, the first question for this Court is not what law to apply to that defense; it is whether the failure to specify an arbitration institution is an "internationally recognized defense such as duress, mistake, fraud, or waiver," *Meadows Indem. Co.*, 760 F. Supp. at 1043, that can be "applied neutrally on an international scale." *Apple & Eve*, 499 F. Supp. 2d at 248 (internal citation omitted).

I conclude that it is not. Articles 16(2) and 18 of the PRC Arbitration Law do not relate to duress, fraud, mistake, waiver, or any similar defense. Due to the "unique circumstances of foreign arbitration," the federal courts have been reluctant to expand that list. *See Bautista*, 396 F.3d at

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[7] In *Apple & Eve*, as here, the parties' contract contained both an arbitration clause and a Chinese choice of law clause. As here, the party resisting arbitration – the plaintiff – conceded "that there is a written agreement, the agreement provides for arbitration in the territory of a signatory, and that the subject matter is commercial and not entirely domestic in scope. Thus, plaintiff effectively concede[d] that there is an agreement in writing to arbitrate the dispute," 499 F. Supp. 2d at 248, but resisted arbitration on the ground that the arbitration clause was invalid because the contract did not identify what plaintiff's Chinese law expert translated as an "arbitration commission," as required by Articles 16(2) and 18 of the PRC Arbitration Law. *Id.* at 250-51. Since there was no dispute as to "the existence of the factors that require this Court to refer the case to arbitration," *id.* at 248, the court properly identified the defense of invalidity as an argument that the parties' agreement "is 'null and void' and thus, 'incapable of being performed.'" *Id.*

1302 (rejecting "unequal bargaining power" as a defense to arbitration under the Convention because "[i]t is doubtful that there exists a precise, universal definition of the unequal bargaining power defense that may be applied effectively across the range of countries that are parties to the Convention"); *Felland v. Clifton*, 2013 WL 3778967, at *7 (W.D. Wis. July 18, 2013) ("because the contract is governed by the Convention, Felland cannot attack the arbitrability clause on the ground of unconscionability").

Nor has petitioner made any showing that the PRC Arbitration Law provisions it invokes are "internationally recognized," *Meadows Indem. Co*., 760 F. Supp. at 1043, or embody widely shared legal principles that can be "applied neutrally on an international scale." *Apple & Eve*, 499 F. Supp. 2d at 248 (internal citation omitted). To the contrary: there is no evidence in the record suggesting that any signatory to the Convention other than China places a comparable barrier in the path of parties seeking to arbitrate. Rather, like the Vermont statute at issue in *David L. Threlkeld*, 923 F.2d at 249 (which required that "any agreement to arbitrate . . . be displayed prominently in the contract . . . and must be signed by the parties"), and the Italian law at issue in *Rhone*, 712 F.2d at 52 (under which "an arbitration clause calling for an even number of arbitrators is null and void"), Articles 16(2) and 18 of the PRC Arbitration law set a "rigorous standard" for enforcing arbitration clauses that "clash[es] with the Convention and with the Arbitration Act," *Threlkeld*, 923 F.2d at 249-50, and serves only to advance the "parochial interests" of a single contracting jurisdiction. *Rhone*, 712 F.2d at 54. I therefore recommend, respectfully, that SSI Beijing's motion be denied, and Prosper's motion be granted, on the ground that petitioner has not interposed any internationally recognized defense to enforcement of the parties' arbitration agreement, nor any defense that can be applied neutrally on an international scale, and therefore

has not raised, much less established, any defense cognizable under the Convention or its enabling legislation.

F. *Motorola* Does Not Require a Different Result.

According to SSI Beijing, "*Motorola* governs here," SSI Beijing Mem. at 9, and requires this Court to evaluate § 9(f) under domestic Chinese law. *Id*. *Motorola* arose from a $4 billion judgment entered in the district court against various members of the Uzan family of Turkey, who fraudulently induced plaintiffs Motorola and Nokia to lend money to certain Uzan family-controlled companies, including Telsim and Rumeli Telefon, and then diluted the shares of those companies in order to destroy the value of the collateral pledged to plaintiffs. 388 F.3d at 42-44. On appeal, the Uzans argued that the district court should have compelled plaintiffs to arbitrate with them in Switzerland pursuant to arbitration clauses contained in the loan agreements that plaintiffs executed with Telsim and Rumeli Telefon. *Id*. at 49. The loan agreements also contained Swiss choice-of-law clauses. *Id*. at 50. However, the Uzans themselves were not signatories to the loan agreements. *Id*. at 51. Applying Swiss law, which "strictly enforces privity of contract," the *Motorola* panel concluded that the Uzans had "no right" to compel arbitration under agreements to which they were not parties. *Id*. at 50, 53.

Although the issue in *Motorola* was the threshold question of "whether the parties agreed to arbitrate," 388 F.3d at 49 (quoting *David L. Threlkeld*, 923 F.2d at 249), petitioner reads the case more broadly, asserting that it is now "settled law in this Circuit" that the law chosen by the parties to govern their contract necessarily governs all questions regarding the validity or enforceability of the relevant contract, "including *'the validity of an agreement to arbitrate*' referenced therein." SSI Beijing Mem. at 7 (quoting *Motorola*, 388 F.3d at 50) (emphasis added by SSI Beijing). Therefore, petitioner argues, this Court should "give effect to the parties' express choice of law" by applying the Articles 16(2) and 18 of the PRC Arbitration Law to § 9(f) of the

Cooperation Agreement (even though a Chinese court would not) and concluding that the agreement to arbitrate is invalid "because it fails to specify the applicable arbitral institution." SSI Beijing Mem. at 8, 16; *see also* SSI Beijing Reply Mem. at 7 (the validity of the arbitration clause is "governed by the law of the People's Republic of China, the parties' chosen law").

Motorola does not bear the weight that SSI Beijing places on it. Its relevant holding – that a federal court should apply the law specified in the contract containing the arbitration clause to determine whether a signatory to that contract can be compelled to arbitrate against a nonsignatory – is considerably narrower than the *dicta* upon which petitioner relies. Moreover, even that narrow holding is in tension with both earlier and later circuit precedent. In *Smith/Enron*, where the question was whether "the Enron petitioners have the right to enforce a contract to arbitrate to which they are not now parties," 198 F.3d at 95, the court applied federal law, reasoning that "[w]hen we exercise jurisdiction under Chapter Two of the FAA, we have compelling reasons to apply federal law, which is already well-developed, to the question of whether an agreement to arbitrate is enforceable." *Id*. at 96.[8] The *Motorola* panel distinguished *Smith/Enron* on the ground that "neither party raised the choice-of-law issue." *Motorola*, 388 F.3d at 51. Less than a year later, however, in *Sarhank Group v. Oracle Corp*., 404 F.3d 657, 661-63 (2d Cir. 2005), a different Second Circuit panel quoted *Smith/Enron* approvingly and held – without mentioning *Motorola* – that a federal district court asked to confirm an arbitration award should apply "American federal

[8] *See also In re Salomon Inc. Shareholders' Derivative Litig.*, 68 F.3d 554, 559 (2d Cir. 1995) (explaining the Second Circuit has "long held that [o]nce a dispute is covered by the [FAA], federal law applies to all questions of interpretation, construction, validity, revocability, and enforceability") (internal quotation marks omitted); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1211 (2d Cir. 1972) ("federal law applies to all questions of interpretation, construction, validity, revocability, and enforceability").

arbitration law," rather than the law specified in the relevant contract, to determine whether a nonsignatory to that contract could be compelled to arbitrate against a signatory.[9]

Given the rocky precedential landscape, district courts within our circuit have struggled to discern when to apply federal law to determine whether a nonsignatory to an arbitration agreement can compel arbitration (or be compelled to arbitrate), and when to apply the law chosen by the parties. *See*, *e.g.*, *Holzer v. Mondadori*, 2013 WL 1104269, at *9-11 (S.D.N.Y. March 14, 2013) (noting that the Second Circuit has "often applied federal arbitrability law to determine whether a non-signatory can compel arbitration," but that more "recent cases," including *Motorola*, "have more readily applied choice-of-law provisions"); *Farrell*, 2011 WL 1085017, at *3 (quoting *FR 8 Singapore Pte. Ltd. v. Albacore Mar. Inc.*, 754 F. Supp. 2d 628, 634 (S.D.N.Y. 2010)) ("Where the choice of law in a Convention case is between the law specified by the choice-of-law clause and federal common law, Second Circuit precedent has been less than crystal clear."); *Storm LLC v. Telenor Mobile Commc'ns AS*, 2006 WL 3735657, at *8 n.4 (S.D.N.Y. Dec. 15, 2006) (noting "inconsistencies in Second Circuit case law on this issue"); *Republic of Ecuador v.*

[9] The contract at issue in *Sarhank Group*, which called for disputes to be resolved by "arbitration under Egyptian law," was executed by Sarhank, an Egyptian corporation, and Systems, a wholly-owned subsidiary of Oracle, a Delaware corporation. 404 F.3d at 658. "Oracle itself was not a signatory to the Agreement." *Id*. Sarhank commenced an arbitration against both Systems and Oracle, and the arbitration panel, applying Egyptian law, deemed Oracle bound by the Sarhank-Systems contract and held both respondents liable to Sarhank for almost $2 million. *Id.* at 658-59. Sarhank sought to confirm the award in the Southern District of New York, where the district court granted its petition. *Id*. The appellate panel, however, held that "[a]n American nonsignatory cannot be bound to arbitrate in the absence of a full showing of facts supporting an articulable theory based on American contract law or American agency law," *id*. at 662, and remanded the case with instructions to "find as a fact," under American law, whether Oracle had agreed to arbitrate with Sarhank. *Id*. at 662-63.

ChevronTexaco, 376 F. Supp. 2d at 354 (S.D.N.Y. 2005) (describing the "tension" between *Motorola* and *Sarhank Group*).[10]

This Court, however, need not struggle with that question. Indeed, the issue for decision here is fundamentally different from the signatory-versus-nonsignatory question presented in *Motorola* (and *Sarhank Group*, for that matter), which was a question "of general applicability to contracts." *FR 8 Singapore*, 794 F. Supp. 2d at 454 (applying English law, in accordance with the parties' choice of law clause, to the question whether certain defendants were the "alter egos" of defendant Albacore and thus bound to arbitrate under a contract that Albacore signed but they did not).[11] The *Motorola* panel was not called upon to consider the *content* of the arbitration clause at issue, nor decide any other issue "peculiar to arbitration," *Holzer*, 2013 WL 1104269, at *11, to which the district courts within our circuit continue to apply federal law. *See id*. (applying federal law, rather than Dubai law, as specified in the parties' purchase agreements, where the question was "the scope of the issues that are arbitrable" under the terms of the arbitration clause contained in each purchase agreement); *Farrell*, 2011 WL 1085017, at *3 (applying federal law, rather than Liechtenstein law, "as designated in the Agreement's choice of law provision, to determine the

[10] In *Republic of Ecuador v. ChevronTexaco*, the court attempted to "reconcile *Motorola* and *Sarhank*" by concluding that "a choice-of-law clause will govern where a nonsignatory to a particular arbitration agreement seeks to enforce that agreement against a signatory, but not where a signatory seeks to enforce the agreement against a nonsignatory." 376 F. Supp. 2d at 355. That formulation is of no help here, where both parties are signatories to the Cooperation Agreement.

[11] The same is true of both of the earlier cases cited by *Motorola* as examples of the proper application of the law chosen by the parties to the "validity of an agreement to arbitrate." 388 F.3d at 50. In *Sphere Drake Ins. Ltd. v. Clarendon Nat. Ins. Co.*, 263 F.3d 26, 32 (2d Cir. 2001), the court applied New York and New Jersey law, as specified in the relevant reinsurance agreements, to Sphere Drake's contention that those agreements, and hence their arbitration provisions, "never came into legal existence" because its agent was acting outside the scope of its authority when negotiating and signing the agreements. Similarly, *Int'l Minerals & Res., S.A. v. Pappas*, 96 F.3d 586, 593 (2d Cir. 1996), held that the district court should have applied English law, as specified in the contract containing the arbitration clause, to determine when "contract formation occurred."

enforceability of the arbitrator selection and forum selection" provisions of the parties' arbitration agreement).

Here, as in *Holzer*, "[w]e are not conducting a general contracts inquiry as to whether a party is bound by an agreement." 2013 WL 1104269, at *11. Rather, SSI Beijing, which is concededly a party to the Cooperation Agreement, takes issue only with the arbitration clause, which it contends to be "invalid and unenforceable," Pet. ¶ 3, under a Chinese statute that applies only to arbitration agreements and renders them unenforceable if the parties fail to include the name of an arbitration institution in their contract. It is difficult to imagine an issue more "peculiar to arbitration," *Holzer*, 2013 WL 1104269, at *11, than the question now before this Court. It is also difficult to imagine a "notion[] of arbitrability" more "domestic," *Mitsubishi*, 473 U.S. at 639, or an interest more "parochial," *Rhone*, 712 F.2d at 54, than China's rule requiring domestic arbitrations to be administered by "arbitration commission[s] registered in accordance with Chapter II of the PRC Arbitration Law." Jin Decl. ¶ 25.

Moreover, SSI Beijing "would have the Court use the choice of law provision to invalidate" the parties' arbitration agreement, *Farrell*, 2011 WL 1085017, at *3, even though a Chinese court (free to use Chinese choice-of-law rules) would apparently enforce it, Jin Decl. ¶ 39, thereby undercutting "the strong federal policy favoring arbitration of disputes." *Smith/Enron*, 198 F.3d at 92. In such a case, applying federal arbitrability law "better vindicates the FAA policy favoring the resolution of disputes in arbitration," *Holzer*, 2013 WL 1104269, at *11, discourages forum shopping, *Motorola*, 388 F.3d at 51, and "upholds 'the ordinary and customary expectations of experienced business persons' to be bound by the choices and bargains agreed to in international agreements." *Farrell*, 2011 WL 1085017, at *3 (quoting *Sarhank Group*, 404 F.3d at 662).

Here, the parties chose, unmistakably, to settle their disputes through "binding arbitration." Coop. Ag. § 9(f). Even if the asserted invalidity of § 9(f) were a cognizable defense to arbitration under the Convention and Chapter II of the FAA, nothing in *Motorola* or its progeny would require this Court to analyze that defense under domestic Chinese law or to determine – as petitioner urges – that it the parties' arbitration agreement was illusory from the outset because it failed to identify a Chinese-registered arbitration institution to oversee the parties' New York arbitration. Instead, this Court should analyze the validity of § 9(f) under federal law, which does not require that the parties to such an arbitration agreement identify an arbitration institution.

III. CONCLUSION

For the foregoing reasons, I respectfully recommend that Prosper's motion to compel SSI Beijing to arbitrate be GRANTED and that SSI Beijing's cross-motion to stay arbitration be DENIED.

Dated: New York, New York
July 30, 2020

BARBARA MOSES
United States Magistrate Judge

NOTICE OF PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

The parties shall have fourteen days from this date to file written objections to this Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). *See also* Fed. R. Civ. P. 6(a) and (d). Any such objections shall be filed with the Clerk of the Court, addressed to the Hon. Valerie E. Caproni, United States District Judge. Any request for an extension of time to file objections must be directed to Judge Caproni. **Failure to file timely objections will result in a waiver of such objections and will preclude appellate review**. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Frydman v. Experian Info. Sols., Inc.*, 743 F. App'x 486, 487 (2d Cir. 2018); *Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.*, 596 F.3d 84, 92 (2d Cir. 2010).