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ALDA EVENTS B.V.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MATTHIAS PAUL p/k/a PAUL VAN DYK, an individual, and PAUL VAN DYK GmbH, a Company organized under the laws of Germany,

Petitioners,

v.

ALDA EVENTS, B.V., a Company organized under the laws of the Netherlands,

Respondent.

Case No. 2:19-cv-04280-SVW-SS

*Hon. Stephen V. Wilson*

**RESPONDENT ALDA EVENTS B.V.'S OPPOSITION TO PETITION TO CONFIRM ARBITRATION AWARD**

Date: August 5, 2019
Time: 1:30 p.m.
Courtroom: 10A

Action Filed: January 17, 2019
Date of Removal: May 16, 2019

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## I. INTRODUCTION

This Court should deny the Petition to Confirm Arbitration Award of Petitioners Matthias Paul p/k/a Paul van Dyk and Paul van Dyk GmbH ("Petitioners") because recognition and enforcement of the arbitration award is precluded by operation of Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (*entered into force* December 29, 1970) (the "New York Convention," as reflected in 9 U.S.C. § 201 *et seq.*).

Specifically, the arbitration agreement at issue was not agreed to by the parties. Under the particular circumstances of this case, Petitioner Matthias Paul was not a signatory to the contract and did not have standing to issue a claim, to participate in the arbitration, or to be the exclusive beneficiary of the monetary damages granted by the arbitration award (the "Award"). Additionally, Petitioners advanced no proof that that the arbitration agreement at issue extends to tort claims or non-economic damages. The Award also incorrectly applies California law to a variety of issues, despite the fact that the weight of ties, including the location of the accident at issue, is far removed from California. Finally, Alda disputes the validity of the arbitration agreement, which was signed by a signatory with unknown authority on behalf of Petitioner Paul van Dyk GmbH and which lacks any acknowledgment by Alda on the arbitration agreement. These grounds preclude the relief sought by the Petition under 9 U.S.C. § 207.

Despite Petitioners' argument to the contrary, Alda's invocation of its defenses by way of this opposition is timely under the Federal Arbitration Act ("FAA") and New York Convention. As recognized by the Draft Restatement, "a party opposing confirmation of a U.S. Convention award may raise defenses to confirmation, even if the limitations period for seeking vacatur of the award on those grounds has

passed."[1] Draft Restatement of the U.S. Law of Int'l Commercial and Investor-State Arb., § 4.30(e)(Proposed Final Draft, 2019)("Draft Restatement"), Declaration of Marisol Mork ("Mork Decl."), Exh. B at p. 25.[2] Nor has Alda waived any defenses to the Petition by initially raising these issues in the arbitration. *See First Option of Chi., Inc. v. Kaplan*, 514 U.S. 938, 946 (1995) ("merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue"). Alda's defenses to confirmation of the arbitration award are timely and appropriately presented in this opposition.

For these, and other reasons detailed below, the Court should respectfully deny the Petition.

## II. FACTUAL BACKGROUND

On March 8, 2017, Petitioners commenced an arbitration action against Respondent Alda Events B.V. ("Alda") asserting claims for breach of the parties' Booking Agreement dated September 25, 2015 (the "Booking Agreement") and for negligence relating to a fall suffered by Paul van Dyk during an electronic music festival produced by Alda in the Netherlands.

As the Award states, and the Petition confirms, Alda raised certain jurisdictional objections in the course of the arbitration. *See* [D.E. 11-2 (Award) at ¶¶ 4.4-4.35]. After Alda's preliminary objections were denied by the arbitrator on November 10, 2017, Alda did not participate substantively in the arbitral proceedings and did not attend the hearing. [*Id.*, ¶¶ 4.35 and 4.39].

On September 2, 2018, Arbitrator Jeffrey G. Benz of the American Arbitration Association's ("AAA") International Centre For Dispute Resolution ("ICDR") issued a Final Award (the "Award") in favor of Petitioners against Alda. The Award

[1] A "U.S. Convention award" is defined as "an international arbitral award made in the United States that is reasonably related to one or more foreign States." Draft Restatement, § 1.1(j), Mork Decl., Exh. B, p. 24.

[2] For the Court's ease of reference, copies of cited secondary materials are submitted with the accompanying declaration of Marisol C. Mork.

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purports to require Alda to pay Petitioners the amount of $12,588,643.45, comprising chiefly $5,500,000 in non-economic damages to Petitioner Paul alone and $5,734,464 in economic damages to Petitioners jointly. *See* [D.E. 11-2 (Award) at ¶ 7.1]. Ultimately, issues of merit and quantum were effectively decided without Alda's participation.[3]

In the instant proceedings, Petitioners seek to confirm the Award. Alda opposes the confirmation and enforcement of the Award, for the reasons set forth herein.

## III. ARGUMENT

As described herein, the Award is flawed and should not be confirmed under the FAA or the New York Convention.

### A. The Court should refuse to confirm or enforce the Award

Petitioners concede that at least seven independent grounds in the New York Convention exist that may, in principle, preclude recognition or enforcement of the Award. [D.E. 11 at 19:14-20:16; *see also* 9 U.S.C. § 207 ("The 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 said Convention.")].[4] Those grounds are identified in Article V of the Convention and include: (a) "the [arbitration] agreement is not valid"; (b) the award debtor "was . . . unable to present his case"; (c) the "award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration"; and (d) the "arbitral procedure was not in accordance with

[3] Petitioners' Statement of Facts chronicles post-award proceedings in other jurisdictions, including the Los Angeles Superior Court and in Germany, some of which involve third parties, like insurers. This history purportedly demonstrates Alda's "willful intransigence." [D.E. 11 at 14:7]. Alda disputes charges that it has engaged in conduct that is "vexatious, [in] bad faith, and unjustifiable." [D.E. 14:24-27]. Regardless, these matters are irrelevant to this Court's application of the New York Convention to this dispute.

[4] All cited page numbers for docket entries refer to those generated for document headers by CM/ECF. Page numbers for exhibits attached to the Mork declaration refer to those appearing in the footer of each exhibit page.

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the agreement of the parties." Article V, New York Convention, Mork Decl., Exh. A. Certain of the Article V grounds exist here, and preclude the relief sought by the Petition pursuant to 9 U.S.C. § 207.

*First*, Paul was not a signatory to the contract and therefore did not have standing to issue a claim, or to participate in the arbitration, or to be the exclusive beneficiary of significant portions of the monetary damages granted by the Award. The opening lines of the Booking Agreement confirm that it is an agreement "[b]etween Paul van Dyk GmbH . . . furnishing the services of the artist(s) professionally known as Paul van Dyk . . . and ALDA Events BV". [D.E. 11-2 at 75]. If Paul were a party in his own right, one would expect to see a reflection of that fact in the opening lines of the Booking Agreement. There is none.

Similarly, the signature blocks to the Booking Agreement indicate that it is signed on behalf of "PRODUCER: Paul van Dyk GmbH", on the one hand, as "ARTIST/PRODUCER," and "PURCHASER: Alda Events B.V.," on the other, as "PURCHASER".

The fact that other individuals or entities, like Paul, are mentioned in the Booking Agreement does not, absent other factual circumstances, make them parties to the agreement. *See, e.g., id.*, ¶ 17(a) (listing indemnified third parties, including "managers" and "accountants"). It would strain credulity to suggest that these third party individuals could invoke the arbitration clause or seek damages against Alda based on mere reference in the Booking Agreement. And yet, despite not signing the Booking Agreement, Petitioner Paul was *exclusively* awarded substantial sums of damages.

The fact that Petitioner Paul is a non-signatory and a non-party means that the arbitration agreement does not extend to him, and no agreement to arbitrate exists between him and Alda. The absence of an arbitration agreement constitutes a ground for refusal to enforce an award under Article V of the New York Convention. *See Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 658 (2d Cir. 2005) (in action to enforce

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arbitral award under New York Convention against a non-signatory, U.S. Court of Appeals for the Second Circuit vacated district court's decision to grant petition and remanded the case with instructions that the district court should find whether the non-signatory had agreed to arbitrate the dispute).

*Second*, Petitioners have brought no proof that the arbitration agreement at paragraph 24 of the Booking Agreement extends to tort claims or to non-economic damages under the particular circumstances of this case. Given that Paul is not a signatory or party to the Booking Agreement, Alda was justified in the expectation that claims by Paul alone—especially those that were non-contractual—would not be covered by an arbitration agreement in a commercial contract between it and Paul van Dyk GmbH. Even if Paul is deemed a party to the Booking Agreement, or the arbitration clause therein, Petitioners fail to explain how a non-contractual negligence claim, as well as non-economic damages for, *e.g.*, pain and suffering, incurred in the Netherlands fall under the rubric of an arbitration agreement for the Booking Agreement, which addresses the commercial terms on which Alda, as Purchaser, was to engage the services of Paul van Dyk GmbH (as Producer) to "furnish the entertainment presentation herein" and further that provides for resolution of contractual disputes in California. [D.E. 11-2 at 73].

U.S. federal courts have found that, where an arbitral tribunal exceeds the scope of the arbitration agreement, the resulting award may be susceptible to vacatur. *See Raymond James Fin. Servs. v. Bishop*, 596 F.3d 183, 193 (4th Cir. 2010) ("[B]y rendering an award whose underlying legal basis exceeded the bounds of arbitrable employment-related disputes cognizable under NASD Rule 10101 . . . , the panel 'exceeded [its] powers' under 9 U.S.C. § 10(a)(4)"), *cert. denied*, 131 S. Ct. 224 (2010). If such an award is susceptible to vacatur, that same defect precludes its enforcement under the New York Convention. Indeed, Article V(1)(c) of the New York Convention expressly identifies the following situation as one in which recognition or enforcement may be refused: "[t]he award deals with a difference not

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contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration[.]" Article V, New York Convention, Mork Decl., Exh. A

*Third*, the Award incorrectly applies California law to a variety of issues. The scope of the arbitration agreement, for instance, and whether it extended to tort claims, are issues to which the choice of law in paragraph 24 of the Booking Agreement does not directly speak. The arbitrator's selection of California law is flawed where the weight of ties, including the location of Paul's accident, were far removed from California or the U.S.

The Restatement (Second) of Conflict of Laws espouses the general principle that the "rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties[.]" Restatement (Second) of Conflict of Laws, § 145 (1988), Mork Decl., Exh. C. Relevant factors include the place where the injury occurred, the place where the conduct causing the injury occurred, and the domicile, residence, nationality, place of incorporation and place of business of the parties. *Id*. All of these factors point away from California, and towards the Netherlands: the injury occurred, and the place of the alleged tort, was the Netherlands, and Alda's place of incorporation and business is the Netherlands.

*Fourth*, Alda has serious concerns about the formal validity of the arbitration agreement. It is questionable whether Nicole Trigo, the person who signed the contract on behalf of Petitioners, had the legal authority to do so. The Booking Agreement does not explain the nature of this signatory's legal authority and whether the signatory could bind Petitioners to the arbitration agreement. Similarly, Alda did not initial each page. Notably, Alda's signatury does not appear on the last page of the Booking Agreement which is the only page that reflects the arbitration clause.

Federal appellate courts have found that the nonexistence of an arbitration agreement constitutes a ground for denying enforcement under the New York

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Convention. *See China Minmetals Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 286 (3d Cir. 2003) ("[T]he Convention contemplates that a court should enforce only valid agreements to arbitrate and only awards based on those agreements. . . . [A] district court should refuse to enforce an arbitration award under the Convention where the parties did not reach a valid agreement to arbitrate[.]").

In the circumstances, it is clear that multiple provisions of the New York Convention, including Article V(1)(a) and (c) and Article V(2)(b), are implicated. Any one of those is sufficient to deny the relief sought in the Petition.

**B. Alda's invocation of FAA and New York Convention defenses is timely**

Petitioners allege that Alda has waived the foregoing defenses to confirmation and enforcement because it did not timely seek to vacate the Award. [D.E. at 18:7-12:10]. Relying on non-binding authorities, Petitioners assert that the three-month limitation period applicable to motions to vacate, modify, or correct an award under the FAA applies to similar motions brought pursuant to the New York Convention as well, "because the Convention does not include a limitations period on motions challenging an arbitration award but, pursuant to the its residual clause, defers to the FAA for such provisions that are not in conflict with the Convention." [D.E. 11 at 18:13-19:1]. Petitioners argue that because Alda did not make any motion to vacate, modify, or correct the Award since it was entered, Alda is now, "more than eight months later, precluded from raising any such defense to the Petition." [D.E. 11 at 19:7-10].

This argument mistakes the grounds for this Court to refuse to confirm or enforce the Award pursuant to Article V of the New York Convention, on the one hand, with the grounds for vacatur, modification or correction of an award under other provisions of the FAA, on the other. While the latter may be subject to a time limit, *see* 9 U.S.C. § 12, Petitioners have not established that the time limits for

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motions to vacate should apply to defenses raised in oppositions to motions to confirm arbitral awards, like this present pleading.

Indeed, Petitioners have cited no binding authority for their proposition. The Draft Restatement takes the contrary position, holding that a "party opposing confirmation of a U.S. Convention award may raise defenses to confirmation, even if the limitations period for seeking vacatur of the award on those grounds has passed." Draft Restatement, § 4.30(e), Mork Decl., Exh. B, p. 25; *see also id.*, p. 34 ("[t]he Restatement accordingly takes the position that while affirmative relief in the form of vacatur of an award is barred after three months, the grounds for vacatur may be raised by way of defense to a confirmation action for the full period in which confirmation may be sought . . . ."). This position is supported by jurisprudence from other circuits, as noted in the draft Restatement. *Id.*, p. 34 citing *Jam. Commodity Trading Co. v. Connell Rice & Sugar Co.*, 1991 U.S. Dist. LEXIS 8976 (S.D.N.Y. 1991) and *Hartford Fire Ins. Co. v. Lloyd's Syndicate*, No. 0556 ASH, 1997 U.S. Dist. LEXIS 10858 (D. Conn. 1997).

Any other result would offend reason. On Petitioners' view, any and all challenge to New York Convention awards would be foreclosed after three months. This result would encourage litigants to wait a short time period so as to foreclose any challenge to an arbitral award, and only then seek to confirm or enforce the award in question. Such a result would also offend the legitimate expectations of award debtors, which, as the draft Restatement recognizes, "could reasonably believe that the established defenses to confirmation are available for as long as a confirmation action may be brought." *Id.*, p. 29.

Petitioners' arguments also undermine the text of Article V of the New York Convention, which is incorporated by way of 9 U.S.C. § 207. The two independent grounds contained in Article V(2) may be raised *sua sponte* by the Court, as opposed to the five grounds in Article V(1) (which must be raised by the award debtor—here, Alda). Petitioners cannot possibly be contending that, because Alda did not seek

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vacatur within three months, this Court is precluded from examining serious matters like, for instance, the arbitrability of the dispute under U.S. law or whether the Award infringes public policy. As such, the grounds raised by Alda in the preceding sections—as well as any Article V(2) grounds that may be raised by this Court *sua sponte*—are timely. *See* Draft Restatement at § 4.30(e), Mork Decl., Exh. B, p. 25.

### C. Alda has not waived any jurisdictional defenses or objections by raising them in the arbitration

Finally, Petitioners claim that Alda's grounds for seeking to refuse recognition and enforcement under Article V of the New York Convention are "gateway" issues and, consequently, the arbitrator alone—and not this Court—has the authority to decide them. According to Petitioners, "de novo review of the Arbitrator's decision on these three gateway issues is not appropriate in this case because Respondent and Petitioners agreed that the Arbitrator would interpret their contract . . . ." Petitioners have misunderstood the "gateway" doctrine.

The "gateway" doctrine has no application here. A "gateway" issue is any threshold question that a court, *if asked to do so*, will resolve *at the outset of a case*, rather than refer that question to the arbitral tribunal to decide. If a party asks a court to address a *non*-gateway question at the outset of a case (such as whether a condition precedent to the arbitration has been satisfied), then the court generally will send the question to the arbitral tribunal for resolution in the first instance. If, on the other hand, a party asks a court to address a *gateway* issue at the outset of a case (such as certain attacks on the arbitration agreement specifically), then the court generally will decide the question before sending the remainder of the case to the arbitral tribunal.

Professor George Bermann, chief reporter of the ALI's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration and co-author of the UNCITRAL Guide to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, explains the principle thus:

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> The fact that a particular threshold issue is a gateway issue *(hence for a court to decide if raised at the outset*) does not in the least mean that it is off-limits to the arbitral tribunal, should the issue first be raised before it. No mistake should be made about the fact that arbitral tribunals have authority to decide all threshold questions raised before them (subject to their being bound by the prior determination of a gateway issue by a competent court). What distinguishes gateway from non-gateway issues is that the former may be decided by a court *if brought before it at the outset*. Thus, gateway issues may be addressed either by a court or an arbitral tribunal, whichever is asked first; non-gateway issues are uniquely for the arbitrators to decide *in the first instance*.

George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 Yale J. Int'l L. (2012), Mork Decl., Exh. E at 77 (emphasis added).

The key point, therefore, is that the gateway doctrine is relevant if a party *asks the court* to decide a threshold issue *at the outset of a case*. If neither party makes such a request (as is the typical situation), then the arbitral tribunal simply decides the threshold question in the first instance under the so-called "competence-competence" doctrine (the doctrine that the arbitral tribunal has jurisdiction to decide its own jurisdiction in the first instance). But that has no bearing on whether, *after the arbitral tribunal issues its award*, a court can then apply the standards under Article V of the New York Convention to decide whether to refuse recognition and enforcement of an award.

That only stands to reason. Only national courts, and not arbitrators, can decide whether to enforce arbitral awards under the mechanism in the New York Convention. Indeed, Article V of the New York Convention is expressly addressed to the "competent authority where the recognition and enforcement is sought"—*i.e.*, this Court. The arbitrator issuing the Award was not tasked by the parties with the

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"recognition and enforcement" of an award he had not yet made—nor could he be under U.S. law or the New York Convention.

Unable to refute the foregoing, Petitioners include a few sound-bites from cases to give the appearance of "support" for its position. Petitioners first cite *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). That case *undermines*, rather than *supports*, Petitioners' position. The issue in *First Options* was whether a court should, after an arbitral award has been issued, independently determine whether an arbitration clause bound non-signatories under the FAA. There, the U.S. Supreme Court announced the general rule that the court—*not* an arbitral tribunal—should independently decide the question. The Supreme Court explained that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." Concluding that there was no clear and unmistakable evidence that the parties agreed to arbitrate arbitrability, the Supreme Court held that the federal court should review the question independently.[5]

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[5] Moreover, Professor Bermann notes the following about *First Options*:

> Drawing on somewhat loose language in the Supreme Court's First Options opinion, some courts permit parties to shift authority to the arbitrators even to determine the existence and validity of the arbitration agreement, though other courts and certain scholars disagree as a matter of principle. But at least with respect to the issue of scope, a consensus seems to have developed that the parties may, *by express language*, restrict the courts to making prima facie determinations *at the threshold of arbitration*. The Supreme Court has not yet squarely addressed the matter. *When the Court does, it would do well to endorse this consensus*. By doing so, it would acknowledge that the distinction between gateway and non-gateway issues can be problematic when it comes to determining whether a particular dispute falls within the scope of an arbitration agreement. While nuancing the gateway/non-gateway distinction in this regard complicates the analysis somewhat, doing so serves to improve the balance between efficacy and legitimacy interests that Supreme Court case law appears to have been pursuing.

George A. Bermann, *The"Gateway" Problem in International Commercial Arbitration*, 37 Yale J. Int'l L. (2012), Mork Decl., Exh. E, p. 108.

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Just like the arbitration clause in *First Options*, the arbitration agreement here shows no "clea[r] and unmistakabl[e]" intent to arbitrate arbitrability. Indeed, Petitioners accept that it is their burden to show that there is "clear and unmistakable evidence" that the contracting parties agreed to "delegate[] these gateway issues to the Arbitrator." [D.E. 21 at 14:25-15:2]. But the arbitration agreement here says absolutely nothing about arbitrating arbitrability. As a result, the default position—this Court decides the issue—remains undisplaced.

Unable to carry their burden to do so, Petitioners point to two pieces of "evidence" for an intent to arbitrate arbitrability: (*i*) the incorporation of the American Arbitration Association Rules in the arbitration clause at issue and (*ii*) the selection of California procedural law. [D.E. 11 at 22:6-23:10]. Neither constitutes "clear and unmistakable evidence."

First, with respect to the incorporation of the arbitral rules, Petitioners cite to the U.S. Supreme Court's recent decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019). In fact, however, *Henry Schein, Inc.* does not support Petitioners' position. Rather, the Supreme Court in that case expressly stated that "[w]e express no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator. The Court of Appeals did not decide that issue." *Id.* at 531. The issue was, however, raised in *amicus curiae* submissions on the matter from Professor George Bermann. In that submission to the U.S. Supreme Court, Professor Bermann observed:

> The ALI Restatement of the U.S. Law of International Commercial and Investor-State Arbitration ("Restatement") has considered in depth the proposition that the presence of a competence-competence provision in the arbitral rules incorporated by reference in an arbitration agreement satisfies the First Options test, as well as the case law on which that proposition is based. ***The Restatement has concluded that the incorporation of arbitral rules like***

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***the AAA rules does not in fact constitute clear and unmistakable evidence of an intention to arbitrate arbitrability as required by First Options.***

Brief for Professor George A. Bermann as Amicus Curiae for Respondent, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), Mork Decl., Exh. D, p. 6. The views of the drafters of the Restatement should be accorded great weight.

The California authorities on which Petitioners rely for this issue—which allegedly stand for the proposition that incorporation of the AAA Rules in the arbitration agreement means that a "gateway" issue is for the arbitral tribunal, and not the court, to decide[6] —are inapposite. None of these cases addressed the standard of post-award review under Article V of the New York Convention. Indeed, if those principles were to apply to post-award actions under the New York Convention, it would turn well-settled law on its head. Almost all international arbitration rules contain a provision, like the AAA Rules, stating that arbitrators have jurisdiction to decide their own jurisdiction (*i.e.*, "competence-competence"). But that does not mean that courts lack jurisdiction to review the arbitrator's decision in a recognition and enforcement action. If it did, then almost all international arbitrations would be immune from judicial scrutiny under many of the provisions of Article V of the New York Convention. Decades of well-established New York Convention jurisprudence from U.S. courts demonstrate that this is not the case.

Indeed, Petitioner's argument, if correct, would mean that simply raising jurisdictional objections before an arbitrator in the first instance would later *preclude* a court from later reviewing the arbitrator's award for compliance with grounds under Article V, such as whether the award complies with U.S. public policy or was even capable of settlement by arbitration. Those types of issues are classic Article V situations, and an arbitrator's decision certainly cannot bind this Court. Even where parties have unambiguously entrusted an arbitrator with deciding the merits of their dispute, courts like this one retain plenary authority to decide whether or not any of

[6] [D.E. 11 at 22:15-23:2].

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the seven circumstances in Article V of the New York Convention are present so as to vitiate any resulting award.

Second, Petitioners' reliance on California law is similarly unavailing. The arbitration clause at issue invokes California law for the construction of the contract. Thus, California *lex arbitri*—such as the California Code of Civil Procedure ("CCP") Section 1297.161 that Petitioners invoke—only conceivably comes into play by virtue of the selection of a Los Angeles place of arbitration. Thus, this strand of Petitioners' argument is even more tenuous: unlike the AAA Rules, which are mentioned by name in the arbitration clause at issue, the CCP is not. And, if the competence-competence language in the AAA Rules does not meet the "clear and unmistakable evidence" test, still less does similar language in the CCP.

Nor, as a final matter, does Alda's attempts to raise certain threshold jurisdictional issues before the arbitrator constitute waiver. To the contrary, federal appellate courts applying the New York Convention have made clear that raising jurisdictional objections before the arbitrator does not constitute waiver—even when that party continues to participate in the arbitration. *See China Minmetals Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 289-290 (3d Cir. 2003) ("[U]nder the rule of *First Options*, a party that opposes enforcement of a foreign arbitration award under the Convention on the grounds that the alleged agreement containing the arbitration clause on which the arbitral panel rested its jurisdiction was void ab initio is entitled to present evidence of such invalidity to the district court, which must make an independent determination of the agreement's validity and therefore of the arbitrability of the dispute . . . . We repeatedly have held under the FAA, including in our opinion in *First Options* in which the Supreme Court affirmed our judgment, that a party does not waive its objection to arbitrability where it raises that objection in arbitration[.]"); *see also Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286 (11th Cir. 2004) (refusing to find waiver of New York Convention

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defenses where award debtor's only participation in arbitration consisted of "two short letters" objecting to jurisdiction and merits).

Indeed, Alda's conduct proves the converse point—that no such evidence or intent exists. As the U.S. Supreme Court observed:

> [M]erely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, i.e., a willingness to be effectively bound by the arbitrator's decision on that point. To the contrary, insofar as the Kaplans were forcefully objecting to the arbitrators deciding their dispute with First Options, one naturally would think that they did not want the arbitrators to have binding authority over them.

*First Options of Chi., Inc.*, 514 U.S. at 946. So, too, here.

Accordingly, Petitioners are wrong to argue that "de novo review of the Arbitrator's decision on these three gateway issues is not appropriate . . . ." [D.E. 11 at 21:18-19]. Exactly the opposite, federal courts have consistently held that the "district court . . . must make an *independent determination* of the agreement's validity and therefore of the arbitrability of the dispute." *China Minmetals Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 289 (3d Cir. 2003). The Ninth Circuit has likewise confirmed—also in the context of the New York Convention—that "[w]e review *de novo* a contention that the subject matter of the arbitration lies outside the scope of a contract . . . ." *Management & Technical Consultants S.A. v. Parsons-Jurden International Corp.*, 820 F.2d 1531, 1534 (9th Cir. 1987). For all of these reasons, this Court should make a de novo, independent determination about whether the grounds invoked by Alda under Article V of the New York Convention are satisfied.

**D. The Court should not award Petitioners pre-judgment interest**

Petitioners seek prejudgment interest on the Award from its date (*i.e.*, September 2, 2018) and post-judgment interest on the Award from the date of any judgment in their favor by this Court. [D.E. 11 at 24:1-25:5]. Petitioners concede

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that awarding post-award, prejudgment interest is a matter within this Court's "discretion." [*Id.* at 24:14-15].

It would be inappropriate to exercise that discretion here. First, as established above, there are serious concerns about the Award's enforceability under Article V of the New York Convention. It is legitimate for Alda to seek judicial determination of those issues. Imposing interest effectively penalizes Alda for seeking to defend its interests in these judicial proceedings.

Second, the Award acknowledged that "no pre-judgment interest may be awarded on non-economic damages." [D.E. 11-2, ¶ 6.123]. The Award comprises, in large part, non-economic damages granted to Petitioner Paul. *Id.*, ¶ 7.1(b) ("The Arbitrator awards in favor of Paul and against Alda on his negligence claims the amount of $5,500,000 as ***non-economic damages***." (emphasis added)). Yet, Petitioners seek pre-judgment interest on the entirety of the Award—thus seeking to obtain what they were denied in the arbitration. This Court should not grant that relief.

## IV. CONCLUSION

For each of the foregoing reasons, Alda respectfully requests that this Court deny the Petition in all respects.

Dated: July 15, 2019

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