04-0288-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ENCYCLOPAEDIA UNIVERSALIS, S.A.,

Plaintiff-Appellant,

v.

ENCYCLOPAEDIA BRITANNICA, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLEE ENCYCLOPAEDIA BRITANNICA, INC.

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CORPORATE DISCLOSURE STATEMENT

Encyclopaedia Britannica Holding, S.A., is the parent corporation of Appellee, Encyclopaedia Britannica, Inc. Encyclopaedia Britannica Holding, S.A. is privately held. There are no publicly held corporations that own 10% or more of the stock of Encyclopaedia Britannica, Inc.

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GLOSSARY OF ABBREVIATIONS

Britannica	Appellee, Encyclopaedia Britannica, Inc.
CFL	Club Français du Livre
EUSA	Appellant, Encyclopaedia Universalis, S.A.
EU France	Encyclopaedia Universalis France
FAA	Federal Arbitration Act, 9 U.S.C. § 1-16
License Agreement	Literary Property License Agreement, dated November 21, 1966, between Britannica and EUSA (A17-38)
Luxembourg Tribunal	Tribunal de Commerce de Luxembourg
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2517, *reprinted at* 9 U.S.C. § 201
Two Party Agreement	Agreement dated November 21, 1966 between Britannica and CFL (A39-74)

Arbitrators

Danziger	Raymond Danziger, EUSA's appointed arbitrator
Decker	Nicolas Decker, third arbitrator appointed by the Luxembourg Tribunal
Layton	Robert Layton, Britannica's appointed arbitrator

JURISDICTIONAL STATEMENT

Appellee, Encyclopaedia Britannica, Inc. ("Britannica"), agrees with the jurisdictional statement made by Encyclopaedia Universalis, S.A. ("EUSA"). Britannica adds that the District Court had subject matter jurisdiction over this proceeding under 9 U.S.C. § 203, which provides that "[a]n action or proceeding falling under the Convention [on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958] shall be deemed to arise under the laws and treaties of the United States" and that district courts have "original jurisdiction over such an action or proceeding, regardless of the amount in controversy."

PRELIMINARY STATEMENT

This case presents a straightforward issue under the New York Convention: whether the District Court (Scheindlin, J.) properly denied EUSA's motion to confirm the arbitral award here because "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties." Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 ("New York Convention" or "Convention"), art. V(1)(d), 21 U.S.T. 2517, *reprinted at* 9 U.S.C. § 201.

EUSA and Britannica made an agreement to arbitrate disputes arising under a license agreement. They agreed they would each appoint an arbitrator to resolve any contractual dispute and that, if these two arbitrators disagreed, "they shall

choose a third arbitrator." (A53) Either arbitrator could petition the Tribunal de Commerce of Luxembourg (the "Luxembourg Tribunal") to appoint a third arbitrator from an agreed-upon list, but only—and this is the key point—"[u]pon the failure of the two arbitrators to reach agreement upon the choice of a third arbitrator." (A54) That procedure was not followed here.

In 1998, EUSA sought to arbitrate a license agreement dispute with Britannica over the payment of royalties. EUSA appointed Mr. Raymond Danziger, a French accountant, as an arbitrator and Britannica appointed Mr. Robert Layton, a New York lawyer. These two party-appointed arbitrators disagreed over whether any set of procedural rules should apply to the arbitration proceedings; but they never even discussed the choice of a third arbitrator, let alone disagreed over that choice. Instead, without first informing Layton or Britannica, Danziger petitioned the Luxembourg Tribunal to appoint a third arbitrator, thus skipping the parties' agreed-upon step that the party-appointed arbitrators were to first attempt to agree on a third arbitrator. Over Layton's and Britannica's objection, the Luxembourg Tribunal nevertheless appointed a third arbitrator, from EUSA's own jurisdiction of Luxembourg and not from the agreed-upon list or the successor to that list maintained by the London Court of International Arbitration. That third arbitrator and Danziger proceeded to issue an award against Britannica—again, over Britannica's objection and without

Britannica or Layton participating in the arbitral proceeding that they viewed as illegitimate—purporting to terminate the License Agreement and order Britannica to pay EUSA an amount in Euros now equivalent to approximately $4.5 million.

Other facts—fleshed out below—color EUSA's and Danziger's failure to abide by the parties' agreement to arbitrate, but the dispositive legal point under the New York Convention is that EUSA's appointed arbitrator circumvented the agreed-upon procedure for choosing a third arbitrator. The Convention expressly provides that a court may refuse to recognize and enforce an arbitral award where, as here, "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties." New York Convention, art. V(1)(d). The District Court correctly applied this provision and refused to confirm the award issued by an arbitral tribunal that was improperly constituted. The District Court's order should be affirmed.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This appeal presents two issues, the second of which need not be addressed if the Court concludes that the District Court ruled properly on the first.

1. Under the New York Convention, a court may refuse to enforce an arbitral award where "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties." The parties here agreed that their appointed arbitrators could petition the Luxembourg Tribunal to appoint a third arbitrator only "[u]pon the failure of the two arbitrators to reach agreement upon the choice of the third arbitrator." (A53, A30-31) EUSA's

appointed arbitrator petitioned the Tribunal to appoint—and it later did appoint—a third arbitrator before the party-appointed arbitrators discussed, let alone disagreed over, the choice of a third arbitrator. Did the District Court properly deny EUSA's motion to confirm an award issued against Britannica and over its objection by this third arbitrator and EUSA's appointed arbitrator?

2. The parties agreed that their disputes should be referred "for resolution" to a "Board of Arbitration," to be composed of two party-appointed arbitrators. (A53, A30-31) The party-appointed arbitrators were to choose a third arbitrator only "[i]n the event of disagreement." (A53, A30-31) Should the District Court's order be affirmed on the alternative ground that the party-appointed arbitrators never attempted to reach a resolution of the parties' contractual dispute before EUSA's appointed arbitrator petitioned the Luxembourg Tribunal to appoint a third arbitrator?

STATEMENT OF THE CASE

On January 25, 2003, Mr. Nicolas Decker and Mr. Raymond Danziger purported to issue an arbitration award against Britannica and in favor of EUSA. (A98-120) Britannica did not participate in the proceedings that led to the award because it objected that EUSA and its appointed arbitrator—Danziger—had not followed the parties' agreed-upon procedure for choosing a third arbitrator. (A102, A195) For the same reason, the arbitrator that Britannica had appointed, Mr. Robert Layton, did not participate in the proceedings. (A168-69) In the absence of Britannica and Britannica's appointed arbitrator—and over Britannica's objection—Decker and Danziger nevertheless purported to terminate the License

Agreement between EUSA and Britannica and order Britannica to pay EUSA more than three million Euros and 75% of the costs of the arbitration. (A120)

Without notifying Britannica, EUSA unsuccessfully sought to enforce this award in France and then Luxembourg pursuant to the New York Convention. (A143, A229) It thereafter commenced this action by filing a summons and complaint in the District Court (A1, A4-16), even though the prescribed procedure for seeking to confirm an arbitral award under the New York Convention is to file a petition or motion. *See* 9 U.S.C. § 207; *see also Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 18, 23 (2d Cir. 1997). EUSA states that the District Court requested by telephone that EUSA move to resolve this case by summary judgment. (EUSA Br. 6) EUSA did not object to the District Court's request. Instead, it filed a two-part motion for (i) an order under the New York Convention to confirm and enforce the award (the motion called for by 9 U.S.C. § 207); and (ii) for summary judgment under Federal Rule of Civil Procedure 56. (A1)

The District Court denied EUSA's motion. (A271-300) The court ruled that the arbitration clause in the parties' License Agreement required the two party-appointed arbitrators—Danziger and Layton—to disagree about the choice of a third arbitrator *before* either one was empowered to invoke a procedure for having the Luxembourg Tribunal appoint a third arbitrator. (A293-99) This procedure

was not followed here. As the District Court determined, Danziger petitioned the Luxembourg Tribunal to appoint a third arbitrator without having first discussed the choice of a third arbitrator with Layton. (A293) The District Court therefore held that the award should not be confirmed because, under Article V(1)(d) of the New York Convention, "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties." (A294-95) The Court further ruled that the Award should not be confirmed because Decker and Danziger exceeded their powers by issuing an award that they had no authority to make because they were an improperly constituted arbitral tribunal. (A298-99) The Court rejected Britannica's other arguments for denying EUSA's motion—including that the License Agreement required the party-appointed arbitrators to attempt to resolve the dispute on the merits before seeking to appoint a third arbitrator—and ordered the case to be closed. (A285-93)

This appeal followed.

STATEMENT OF FACTS

A. The Parties and Their Transaction

Britannica is a well-known publisher and distributor of encyclopedias and other educational texts. In 1966, Britannica sought to obtain the rights to translate and market "Encyclopaedia Universalis," a French-language work EUSA originally owned. To this end, Britannica entered into a Literary Property License

Agreement (the "License Agreement") with EUSA. By the License Agreement, EUSA granted Britannica the rights to translate and sell Encyclopaedia Universalis in any language other than French, and Britannica agreed to pay EUSA royalties based upon Britannica's sales. No non-French editions of Encyclopaedia Universalis were ever published, however. (A191-92)

On the same day that the License Agreement was concluded, Britannica entered into a Two Party Agreement with Club Français du Livre ("CFL"), a company that Britannica believed to be owned in large part by the same family that controlled EUSA. CFL is a book club that markets books by mail in France. Under the Two Party Agreement, Britannica invested in a joint venture, called Encyclopaedia Universalis France ("EU France"), as a 50-50 partner with CFL. At the same time, EUSA transferred all rights in the French language version of the Encyclopaedia Universalis to EU France. EU France was to finish the French-language version, publish it, and sell it. Britannica believed that CFL's distribution lists and experience in mail-order sales would combine well with Britannica's expertise in direct sales and encyclopedia marketing. (A192)

Britannica and CFL continued to work together under essentially the same terms until 1970. In that year, as an accommodation to the principals of its French partner CFL, Britannica entered into an amendment of its License Agreement with EUSA. This document imposed on Britannica a duty to pay an additional 2%

royalty on sales of the French version of the Encyclopaedia Universalis, payable directly to EUSA in Luxembourg. EUSA no longer owned any rights to the French version, however. As noted, it had transferred them to EU France in 1966. From Britannica's perspective, however, the additional 2% royalty was an economic "wash," as it was offset by a 4% fee that CFL was to pay to the jointly-owned EU France. (A192)

In 1996, after changes in Britannica's management, Britannica became concerned about the purpose and effect of the 1970 amendment and, in particular, the reasons it was paying royalties to an entity that did not own the rights to the French version of Encyclopaedia Universalis. (A192-93) As Britannica later explained to EUSA, Britannica wanted assurances that the royalty payments to EUSA are "not part of any scheme or artiface on the part of [EUSA] principals to violate the tax laws of France, Luxembourg or any other country." (A217) Britannica's concern eventually led it to suspend payment of the 2% royalty for French-language editions of the Encylopaedia Universalis. (A192-93) Britannica's suspension of those payments is at the heart of the dispute that EUSA sought to arbitrate.

B. The Arbitration Clauses at Issue

The License Agreement contains an arbitration clause, which incorporates by reference the arbitration clause of the Two Party Agreement. (A30-31) In

pertinent part, the Two Party Agreement provides that "if the parties . . . cannot reach agreement concerning any matter . . ., either party may demand that the matter be referred to a Board of Arbitration *for resolution.*" (A53, emphasis added) The Board of Arbitration is defined in the Two Party Agreement as "composed of two arbitrators," one appointed by Britannica and the other appointed by CFL. (A53) A third arbitrator may also be appointed to the Board, but only in the event that the two party-appointed arbitrators disagree and then only in accordance with the following procedure:

> In the event of disagreement between these two arbitrators, they shall choose a third arbitrator who will constitute with them the Board of Arbitration. Upon the failure of the two arbitrators to reach agreement upon the choice of a third arbitrator, the third arbitrator, who must be fluent in French and English, shall be appointed by the President of the Tribunal of Commerce of the Seine from a list of arbitrators maintained by the British Chamber of Commerce in London at the request of the arbitrator who is first to make such a request.

(A53-54)

The License Agreement provides that "[a]ll disputes arising in connection with the present Agreement shall be finally settled by a Board of Arbitration established and governed by the procedures set forth in the [Two Party] Agreement," except that Britannica is to choose one of the two arbitrators that comprise the Board of Arbitration and EUSA is to choose the other. (A30-31) In

addition, if the two party-appointed arbitrators disagree *and then* also cannot agree on a third arbitrator, the third arbitrator

> shall be selected by the President of the Tribunal de Commerce of Luxembourg from a list of arbitrators maintained by the British Chamber of Commerce in London at the request of the arbitrator who is first to make such a request.

(A31)

In sum, under the License Agreement, either party could demand that a dispute "be referred to a Board of Arbitration for resolution." Each of the parties was to choose one of the two members of the Board of Arbitration. The two arbitrators on the Board of Arbitration were then to resolve the dispute. "In the event of disagreement between these two arbitrators," they could choose a third arbitrator. And, if the two arbitrators "fail[] . . . to reach an agreement upon the third arbitrator," either one could ask the Luxembourg Tribunal to choose an arbitrator from a roster compiled by the London-based British Chamber of Commerce. (A30-31, A53-54)

The arbitrators that purported to resolve the underlying dispute here were not appointed in accordance with these clearly mandated steps.

C. The Parties' Appointment of the Board of Arbitration

In December 1996, EUSA wrote to Britannica and invoked the arbitration provision of the License Agreement. EUSA wrote that it was appointing François

Tripet as "arbitrator, in charge of representing the EUSA's interests." (A193) Tripet was then and continues to be EUSA's French counsel in this very dispute. (A193) Britannica strenuously objected to this improper appointment of an arbitrator with a patent bias. (A198) It insisted that Tripet could not possibly serve as an independent and impartial arbitrator after having so long been EUSA's advocate and having expressly been "charged" with representing EUSA's interests. (A198) In response, Tripet denied that the obvious conflict of interest presented any problem at all—although he admitted, "I would be more closely connected to the party that appointed me"—and insisted that he would serve as an arbitrator. (A201) Britannica followed with a further letter of protest to Tripet, and the correspondence concerning arbitral procedure fell silent for about a year. (A204-05, A193)

Then, in February, 1998, Britannica received a letter from Raymond Danziger, a French citizen and an accountant residing in Paris. Danziger's letter stated that EUSA had appointed him as an arbitrator in the dispute and asked Britannica to appoint an arbitrator in accordance with the License Agreement. But Britannica had not received any communication from EUSA either setting forth its claims against Britannica or notifying Britannica of its appointment of an arbitrator. Accordingly, Britannica did not appoint an arbitrator in response to Danziger's unusual request. (A193-94)

Two months later, Danziger sent another letter to Britannica. This time, he threatened to petition the Luxembourg Tribunal to appoint a second arbitrator if Britannica did not appoint an arbitrator within three weeks. (A194, A206) Britannica had still not received any notice of Danziger's appointment from EUSA, however, nor had EUSA provided any description of a dispute that EUSA sought to arbitrate. (A194, A207-08) Britannica thus responded to Danziger's letter by stating that Britannica would appoint an arbitrator only "if an arbitration is properly initiated by [EUSA] and [Britannica] is informed in detail of the subject matter of the dispute." (A208)

EUSA finally wrote to Britannica directly about the arbitration in May, 1998, and asked Britannica to appoint an arbitrator. (A194, A209) EUSA attached a letter, dated February 12, 1998, that it had provided to Danziger. (A194, A211-13) No copy of that letter had previously been sent to Britannica. (A194) This *ex parte* letter to a would-be arbitrator set forth EUSA's claims and its view, in light of its own version of the facts and the License Agreement, that EUSA's damages on the royalty claim should be fixed at "not less than five times" the royalties allegedly due. (A212)

Britannica wrote to EUSA the next month in an attempt to settle the dispute. (A194, A217) Britannica promised to "promptly resolve the disagreement in a manner . . . acceptable to you" if EUSA would identify its past and current

beneficial owners and simply certify that the royalties it sought from Britannica are not part of any scheme to violate the tax laws of France, Luxembourg or any other country. (A217) EUSA wrote back that this condition was "absolutely unacceptable," because it reflected a suspicion that EUSA was incorporated for the purposes of evading tax laws. (A219) Shortly thereafter, Britannica notified EUSA that it had appointed New York lawyer Robert Layton as an arbitrator in the parties' dispute. (A194-95)

D. Danziger's Efforts to Have a Third Arbitrator Appointed

Danziger and Layton, the members of the two-person Board of Arbitration provided for in the License Agreement, corresponded in September and October 1998, attempting to find a time when they could discuss initial procedural matters. (A166) The two arbitrators eventually spoke by telephone on October 19, 1998. (A166) During this conversation, Layton suggested to Danziger that the Board of Arbitration should adopt the UNCITRAL Rules on International Commercial Arbitration, because the parties in their agreement had not specified any procedural rules to govern the arbitration. (A166, A174) Danziger rejected this suggestion out of hand; he stated in a letter to Layton that "there is no need to refer to any international rules." (A175) Then, sporadically during November and December, 1998, the two arbitrators exchanged brief faxes, which discussed in very general terms what the issues were to be in the arbitration. (A166) But the arbitrators

never discussed, let alone attempted to agree upon, any resolution of these issues. (A166) Nor did either of the arbitrators suggest any names for a future third arbitrator, should one be required. (A166)

Nevertheless, on March 30, 1999, Danziger petitioned the Luxembourg Tribunal to appoint a third arbitrator. (A177-78) He did this without first consulting or informing Layton and even though Danziger had not attempted to reach an agreement with Layton as to either (i) a resolution to the parties' dispute, or (ii) who would be the third arbitrator. (A166-67) To persuade the Luxemborg Tribunal to appoint a third arbitrator, however, Danziger falsely asserted that "the two arbitrators have not been able to agree on the nomination of a third arbitrator." (A166, A178) Danziger further informed the tribunal that "the agreement . . . provides for the designation of an arbitrator drawn from the list maintained by the British Chamber of Commerce in London . . . . [H]owever, . . . such a list is currently non-existent; . . . as a result, it is appropriate to choose another competent arbitrator." (A178) Danziger did not inform Layton of his petition to the Luxemborg Tribunal until two weeks later, on April 15, 1999, nor did Danziger ever send a copy of his petition to Britannica. (A166-67, A195)

Upon receiving Danziger's letter, Layton—through a Luxembourg law firm—informed the Luxemborg Tribunal that he would respond to Danziger's petition. (A167) And, on April 28, 1999, Layton sent a letter to the Tribunal,

objecting to Danziger's petition as "premature." (A182) Layton explained that the two arbitrators had "never had opportunity to confer as between ourselves regarding the selection of a Chairman by consent" and that "[t]he parties plainly intended that such a cooperative attempt to agree on an arbitrator take place." (A181) He insisted that the arbitrators "are required *first* to attempt to agree upon this important subject" and that "[i]t is not appropriate to skip over this step." (A181, emphasis in original) He asked the Luxembourg Tribunal to deny Danziger's request so that the two arbitrators could attempt to follow the procedures set forth in the License Agreement for choosing a third arbitrator. (A182)

Although Layton had never discussed the issue with Danziger, Layton also offered a suggestion that, because the License Agreement was governed by New York law, the third arbitrator should be "well-versed in the laws of New York." (A182) Layton pointed out, however, that "a person knowledgeable as to the laws of New York may undoubtedly be located in London, thus carrying out the wishes of the parties to have the Chairman chosen from a list maintained by an English institution." (A182) He offered the London Court of International Arbitration as a possible source for "lists similar to that provided in the contract between the parties." (A182)

Despite having been advised that Layton was preparing a response to Danziger's petition, the President of the Luxembourg Tribunal appointed the third arbitrator on April 22, 1999, without waiting to receive Layton's response. (A168) The third arbitrator was Mr. Nicolas Decker, a local Luxembourg lawyer from EUSA's home jurisdiction.

E. Danziger's Attempt to Manufacture an After-the-Fact Disagreement Over the Appointment of a Third Arbitrator

On May 5, 1999, the Tribunal "suspended" all "arbitration operations by Me Decker," but without removing Decker as the third arbitrator. (A100) Then, in response to Layton's objection to the Luxembourg Tribunal, Danziger attempted to manufacture a disagreement with Layton over the choice of the third arbitrator. He wrote a May 27, 1999 letter to Layton and referred (inaccurately)[1] to Layton's suggestions to the Luxembourg Tribunal regarding the general criteria that might be used for selecting a third arbitrator:

> Dear Bob,
>
> In the letter you sent to the President of the Tribunal de Commerce of Luxemburg on April 28 1999, you suggest that the third Arbitrator should be a lawyer, presumably a resident of the city of New York, -or at least located in London-, and well versed in the laws of New York. Recommending the London Court of International

[1] Layton did not suggest that the requirement that the third arbitrator be fluent in French and English should be ignored, as Danziger's May 27 letter suggests. (A181-82)

> Arbitration, you wish an English speaking Arbitrator, but not necessarily a French speaking one.

(A258) Danziger then made the perfunctory statement—which the District Court described as an "*ex post facto* attempt to redefine the procedural requirements of the License Agreement" (A294-95)—that "I do not agree with these suggestions or wishes. Therefore, there is no doubt that we failed to reach an agreement upon the choice of the third Arbitrator." (A258)

F. Britannica's and Layton's Repeated Objections to the Appointment of the Third Arbitrator

Britannica considered Decker's appointment by the Luxembourg Tribunal to be illegitimate and challenged the appointment. (A195) After a brief hearing in December, 1999, however, the Luxembourg Tribunal denied Britannica's request to remove Decker. (A195) And, in February, 2000, the Tribunal wrote to Decker and re-confirmed his appointment as the third arbitrator. (A183) The Tribunal's letter gave no reasons for overruling Britannica's objections and did not mention that the two party-appointed arbitrators failed to discuss or disagree on either a resolution to the parties' dispute or the identity of a third arbitrator before Danziger asked the Luxembourg Tribunal to appoint a third arbitrator. (A183)

Following the confirmation of his appointment, Decker wrote to Danziger and Layton and insisted that the arbitration begin. (A185) Layton responded that he would not participate because he, and Britannica, viewed the tribunal as

illegitimate and as having been composed contrary to the parties' agreement. (A187) Layton once again explained that Danziger "disregarded the requirements of the Agreement between the parties that the two appointed arbitrators *attempt to agree on a Chairman.*" (A187, emphasis in original) Layton further objected to the appointment of a third arbitrator from Luxembourg as contrary to the intent of the License Agreement:

> The parties clearly sought a level playing field on neutral ground and the selection of a Chairman from a neutral territory and from a list maintained by a British organization, equipped to interpret New York law, as plainly set out in the Agreement. A Chairman has now been chosen from a country where one of the two parties [EUSA] is located, in plain disregard of any pretention of neutrality . . . .

(A189)

In a letter dated June 20, 1999, Decker asked Britannica to appoint another arbitrator in light of Layton's refusal to participate. (A195) Britannica refused, objecting that the entire process was illegitimate because Decker was appointed in violation of the License Agreement's arbitration clause. (A195)

G. The Arbitration

The arbitration proceedings began in the Fall of 2000, with Danziger and Decker sitting as the only arbitrators. (A98, A101) Tripet, the lawyer whom EUSA first attempted to appoint as an arbitrator, represented EUSA. (A101) Britannica did not participate in the proceedings and informed EUSA, Decker, and

Danziger that it maintained its objections to the composition of the arbitral panel and would view any award it might issue as a nullity. (A195) On January 25, 2002, Decker and Danziger issued an award (the "Award") that purported to terminate the License Agreement and order Britannica to pay EUSA approximately 3.1 million Euros, plus interest from the date the Award was issued, and 75% of the costs of the arbitration. (A120)

H. The District Court's Order

The District Court denied EUSA's motion to confirm the Award. (A299) The Court ruled that the License Agreement imposed a three-step process for appointing a third arbitrator: (1) the party-appointed arbitrators "must 'disagree' before appointing a third arbitrator," (2) they "must then attempt to choose a third arbitrator," and (3) "upon the failure of the two party-appointed arbitrators to agree on a third arbitrator, the [Luxembourg Tribunal] must appoint an arbitrator from the Chamber of Commerce list." (A291)

On the first step, the District Court rejected Britannica's argument that the License Agreement required the two party-appointed arbitrators to attempt to agree on a resolution of the parties' dispute before seeking to appoint a third arbitrator. (A291-93) But the Court ruled that the parties "disagreed on at least one issue relevant to the arbitration proceedings": what, if any, procedural rules would govern. (A292) In support, the Court reasoned that "the purpose of the arbitration

clause itself—to provide for effective arbitration of disputes—would be stymied if . . . solely procedural disagreement between the two arbitrators could never be remedied by a third arbitrator." (A292)

Addressing the second and third steps, the District Court ruled that the undisputed evidence showed that the two party-appointed arbitrators never attempted to agree on a third arbitrator. (A293-94) Instead, Danziger (EUSA's appointed arbitrator)—over Layton's "vehement objections"—"skipped directly to requesting the [Luxembourg] Tribunal to appoint [a third arbitrator]." (A294)

EUSA argued to the District Court—as it does on appeal—that Danziger and Layton did in fact disagree over the identity of a third arbitrator, as purportedly evidenced by Danziger's letter to Layton that Danziger sent only *after* he had already petitioned the Luxembourg Tribunal to appoint a third arbitrator. (A294) The District Court determined that Danziger's letter—in which he stated, without elaboration, "I do not agree with [Layton's] suggestions or wishes"—was an insufficient attempt to "construct a process of deliberation and deadlock after the fact" and noted that "[c]ondoning [Danziger's] behavior would effectively eviscerate the specific requirements of the arbitration clause." (A294-95) The Court also rejected the notion that Danziger's failure to abide by the agreed-upon procedures for appoint a third arbitrator was somehow cured by the fact that the Luxembourg Tribunal held a hearing before re-confirming Decker's appointment.

(A295-97) The Court pointed out that Danziger's premature petition to the Tribunal "created an artificial negotiating environment" because, as a practical matter, "Danziger had the option of refusing to agree with Layton on the identity of a third arbitrator, knowing that such disagreement would likely lead to Decker's reaffirmation." (A297)

The District Court therefore declined EUSA's motion to confirm the Award under Article V(1)(d) of the New York Convention (A293-95), which provides that recognition and enforcement of an award may be refused if "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties." The Court also denied EUSA's motion for the related reason that Danziger and Decker exceeded their powers by issuing an award that, because the arbitral tribunal was improperly composed, they had no authority to issue. (A298) Finally, in a ruling that EUSA does not challenge on appeal, the District Court held that (i) Decker and Danziger are disqualified from any further arbitration proceeding in this matter, (ii) Britannica may reappoint Layton as an arbitrator, and (iii) if the two party-appointed arbitrators fail to agree on any matter important to the arbitration and cannot agree on a third arbitrator, the Luxembourg Tribunal shall appoint an arbitrator from a list maintained by the London Court of International Arbitration. (A297-98)

SUMMARY OF THE ARGUMENT

I.A. The District Court properly denied EUSA's motion to confirm the arbitral award under the New York Convention. Both the Convention and the Federal Arbitration Act, which applies to the extent it is consistent with the Convention, provide that a court may refuse to recognize and enforce an arbitral award where the arbitral tribunal was not composed in accordance with the parties' agreement. Here, the third arbitrator—Decker—was not appointed in accordance with the procedures set forth in the parties' License Agreement. Specifically, EUSA's appointed arbitrator petitioned the Luxembourg Tribunal to appoint a third arbitator without first disagreeing over the choice of a third arbitrator with Britannica's arbitrator, as the License Agreement required.

I.B. EUSA tries to persuade the Court that the party-appointed arbitrators did in fact disagree over the choice of a third arbitrator, but the letter it invokes as support for this argument was written by EUSA's appointed arbitrator *after* he had already petitioned the Luxembourg Tribunal to appoint a third arbitrator and without first discussing the choice of a third arbitrator with Layton. By that time, the Luxembourg Tribunal had already appointed the third arbitrator and the process for appointing him had been irrevocably tainted. As the District Court correctly ruled, the letter upon which EUSA relies was an insufficient "attempt[] to construct a process of deliberation and deadlock after the fact." (A294)

I.C. The failure to abide by the agreed-upon procedures for appointing the third arbitrator was not trivial, as EUSA argues. When the Luxembourg Tribunal appointed an arbitrator from EUSA's home jurisdiction that both Layton and Britannica vehemently objected to, Danziger had succeeded in creating what the District Court aptly called an "artificial negotiating environment," because any failure to agree on the choice of a third arbitrator would very likely lead (as it eventually did) the Luxembourg Tribunal to simply confirm its appointment of Decker as the third arbitrator. (A297) In any event, there is no support under either the New York Convention or the Federal Arbitration Act for EUSA's argument that a failure to adhere to procedural requirements for the appointment of arbitrators should be treated differently from substantive aspects of an agreement to arbitrate.

I.D. EUSA's remaining arguments are misplaced. It argues that the District Court failed to properly apply summary judgment principles. The evidence is undisputed, however, that EUSA's appointed arbitrator did not adhere to the parties' agreed-upon procedure for appointing a third arbitrator. In any event, EUSA moved *both* to confirm an arbitral award under the Convention and for summary judgment, and a district court is permitted to make findings of fact in connection with a motion to confirm an award under the Convention. Finally, EUSA argues that the District Court should not have vacated the award on the

Federal Arbitration Act ground that the arbitral tribunal was improperly constituted and thus the arbitrators "exceeded their powers." This ground for vacating an arbitral award is consistent with the New York Convention, however, and the FAA's coverage overlaps with the New York Convention to the extent that the FAA does not conflict with the Convention.

II. The District Court's order should be affirmed on the alternative ground that the party-appointed arbitrators did not attempt to resolve the parties' dispute before Danziger sought to appoint a third arbitrator. The License Agreement is clear that the parties would submit their contractual disputes to the two party-appointed arbitrators "for resolution" and that these two arbitrators shall only choose a third "[i]n the event of disagreement." (A53, A30-31) That procedure was not followed here—Danziger and Layton never discussed a resolution to the parties' dispute or took any steps to reach a resolution. For this alternative reason, the arbitral tribunal was improperly composed and its award against Britannica should not be confirmed.

STANDARD OF REVIEW

As EUSA acknowledges (EUSA Br. 26), a district court's legal conclusions on an order denying a motion to confirm an arbitral award under the New York Convention are reviewed *de novo* and its findings of fact for clear error. *See Pike v. Freeman*, 266 F.3d 78, 86 (2d Cir. 2001); *see also Yusuf*, 126 F.3d at 23; *U.S.*

Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., 241 F.3d 135, 145 (2d Cir. 2001) ("clearly erroneous" standard controls review of factual findings in connection with motion to confirm arbitral award, even though such findings are "based upon a documentary record"); *see also* Fed. R. Civ. P. 52(a) ("clearly erroneous" standard applies to findings made on the basis of "documentary evidence").

Ignoring that it made a motion *both* to confirm an arbitral award under the New York Convention and for summary judgment, EUSA contends that the District Court was required to apply the legal standard for summary judgment. (EUSA Br. 39-40) If the District Court's order is reviewed as an order denying EUSA's motion for summary judgment, it is subject to *de novo* review to determine whether there is a genuine issue as to any material fact that would preclude judgment as a matter of law for Britannica. *See Muntaqim v. Coombe*, --- F.3d ---, 2004 WL 870474, at *2 (2d Cir. Apr. 23, 2004); *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 182 (2d Cir. 2004); *see also* Fed. R. Civ. P. 56(c). Whether the District Court's order is reviewed as a denial of EUSA's motion to confirm the Award or for judgment in favor of Britannica, the order should be affirmed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED EUSA'S MOTION TO CONFIRM THE AWARD

A. EUSA's Appointed Arbitrator Petitioned for Appointment of a Third Arbitrator Without First Disagreeing with Britannica's Appointed Arbitrator Over the Choice of a Third Arbitrator

The District Court correctly denied EUSA's motion to confirm the Award. The New York Convention unambiguously provides that a court may refuse to recognize and enforce an award where "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties." New York Convention, art. V(1)(d); *see also* 9 U.S.C. § 207 ("[T]he court shall confirm the award *unless* it finds one of the grounds for refusal . . . or enforcement of the award specified in the said Convention.") (emphasis added).

The Convention and the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, also provide "overlapping coverage" to the extent that they do not conflict. *Yusuf*, 126 F.3d at 20 (quoting *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 934 (2d Cir. 1983)); *see also* New York Convention, art. VII(1); 9 U.S.C. § 208 ("Chapter 1 [the FAA] applies to actions and proceedings brought under this chapter to the extent that [the FAA] is not in conflict with this chapter or the Convention as ratified by the United States."). And the FAA, like the New York Convention, provides that "[i]f in the agreement [to arbitrate] provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall

be followed." 9 U.S.C. § 5. Arbitrator selection agreements are enforced "strictly." 3 Ian R. Macneil *et al.*, FEDERAL ARBITRATION LAW § 27.3.1.4 (1999) ("Courts tend to enforce arbitrator selection agreements strictly.") (hereinafter "Macneil, FEDERAL ARBITRATION LAW"); *see also* 1 Martin Domke, DOMKE ON COMMERCIAL ARBITRATION § 24:1, at 24-2 (3d ed. 2003) ("Where the arbitrators are not chosen in the manner provided by the contract, the arbitration award rendered by those arbitrators must be vacated . . . ."). As this Court has succinctly stated, "an award will not be enforced if the arbitrator is not chosen in accordance with the method agreed to by the parties." *Avis Rent A Car Sys., Inc. v. Garage Employees Union, Local 272*, 791 F.2d 22, 25 (2d Cir. 1986); *see also Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25 F.3d 223, 226 (4th Cir. 1994) ("Arbitration awards made by arbitrators not appointed under the method provided in the parties' contract must be vacated."); *Tamari v. Conrad*, 552 F.2d 778, 781 (7th Cir. 1977) ("[An award] will not be enforced if the arbitrator was not chosen in conformance with the agreement of the parties to arbitrate . . . ."); *Waterspring, S.A. v. Trans Mktg. Houston Inc.*, 717 F. Supp. 181, 186 (S.D.N.Y. 1989) ("It is axiomatic that an award will not be enforced if the arbitrators are not chosen in accordance with the method agreed to by the parties.").

In this case, the third arbitrator—Decker—was not appointed in accordance with the arbitration clause in the License Agreement. The License Agreement sets forth what the District Court properly characterized as a "quite specific" procedure for choosing a third arbitrator. (A293) In particular, by incorporating the Two Party Agreement, the License Agreement expressly provides that the two party-appointed arbitrators must fail to agree on the choice of a third arbitrator *before* petitioning the Luxembourg Tribunal to appoint the third arbitrator:

> In the event of disagreement between these two [party-appointed] arbitrators, they shall choose a third arbitrator . . . . Upon the failure of the two arbitrators to reach agreement upon the choice of a third arbitrator, the third arbitrator . . . shall be appointed by the President of the Tribunal of Commerce of the Seine . . . .

(A53-54, A30-31)

EUSA's appointed arbitrator, Danziger, ignored this provision when he sent an *ex parte* letter to the President of the Luxembourg Tribunal and asked her to appoint a third arbitrator before he ever discussed the choice of a third arbitrator with Layton.[2] (A177-78) After he learned of this letter, Layton objected that the Luxembourg Tribunal had no authority to appoint a third arbitrator under the License Agreement because he and Danziger had not conferred regarding the

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[2] Worse yet, Danziger—evidently well aware of the contractual requirement that he had disregarded—misrepresented to the Luxembourg Tribunal that he had "not been able to agree" with Layton over the choice of a third arbitrator. (A178)

selection of a third arbitrator. (A181) The Tribunal nevertheless appointed Decker. (A168) Thereafter, both Layton and Britannica refused to participate in the "arbitration" before Decker and Danziger and strenuously objected that the Luxembourg Tribunal's appointment of Decker was not in accordance with the procedure set forth in the License Agreement. (A187, A195, A255)[3]

Clearly, "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties" in this case. New York Convention, art. V(1)(d). The District Court therefore properly denied EUSA's motion to confirm the award rendered by Decker and Danziger. *See Hugs & Kisses, Inc. v. Aguirre*, 220 F.3d 890, 893 (8th Cir. 2000) (ordering arbitral award to be vacated where parties had agreed to "negotiate[] in good faith regarding the choice of arbitrator" but one party instead filed an arbitration claim with the National Arbitration Forum without first conferring with the other about the choice of arbitrator); *Avis*, 791 F.2d at 25 (same, where award was rendered by arbitrator

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[3] EUSA contends in a footnote that Britannica "did not object to continuing with two arbitrators." (EUSA Br. 45 n.6) EUSA is wrong. Britannica wrote to Decker on July 19, 2000, before the arbitration proceedings began, to explain that "we cannot permit our company to participate in a proceeding that so plainly departs from the written language that it originally agreed to." (A255, A195; *see also* A101, where the Award notes Britannica's "procedural defence" stated in this letter) In the same footnote, EUSA also contends that Decker's and Danziger's decision to proceed with the arbitration is insulated from judicial review under the German doctrine of "kompetenz-kompetenz." But the very case that EUSA cites as its sole support for this argument notes that this doctrine is applicable only where "the parties agreed to a kompetenz-kompetenz clause," a clause providing that the arbitrators' jurisdictional determination is "insulated from any form of judicial review." *China Minmetals Materials Import & Export Co. v. Chi Mei Corp.*, 334 F.3d 274, 288 (3d Cir. 2003). Neither the License Agreement nor the Two Party Agreement contains any such clause.

not chosen in accordance with agreed-upon procedures of the American Arbitration Association); *see also Cargill Rice*, 25 F.3d at 225-26 (ordering award to be vacated where it was rendered by three-member panel appointed by a trade association in contravention of parties' agreement that "the arbitrators are to be chosen by mutual agreement").

B. The "Disagreement" Cited by EUSA Occurred Only After EUSA's Appointed Arbitrator Petitioned the Luxembourg Tribunal

EUSA concedes, as it must, and as it did before the District Court, that Danziger and Layton did not confer on the choice of an arbitrator before Danziger petitioned the Luxembourg Tribunal to appoint a third arbitrator. That should be the end of the inquiry in this case. As demonstrated above, the License Agreement plainly required the two party-appointed arbitrators, "[i]n the event of disagreement," to confer and disagree on the choice of a third arbitrator before either one was authorized to petition the Luxembourg Tribunal to appoint an arbitrator. (A53, A30-31)

Nevertheless, in the teeth of these dispositive facts, EUSA tries to uphold the Award by insisting that Danziger and Layton did disagree over the choice of a third arbitrator. (EUSA Br. 30, 35-38) EUSA relies on the letter that Danziger sent to Layton *after* Danziger had already petitioned the Luxembourg Tribunal to appoint the third arbitrator. (EUSA Br. 35) The District Court properly rejected

EUSA's argument that this letter triggered the procedure for appointing a third arbitrator. (A294-95)

The key fact is that Danziger had never conferred with Layton about the choice of a third arbitrator *before* Danziger's petition to the Tribunal. (A166) When, two weeks later, Danziger finally informed Layton of the petition, Layton was constrained to write to the Luxembourg Tribunal and object to Danziger's petition. (A181) Having never had the opportunity to discuss the choice of a third arbitrator with Danziger, Layton also set forth some general views regarding how a court might go about choosing a third arbitrator in this case. (A182) In response, Danziger did not contend that he and Layton had in fact conferred and disagreed about the choice of a third arbitrator before Danziger petitioned the Luxembourg Tribunal, as the License Agreement required. Instead, Danziger wrote simply, "I do not agree with these suggestions or wishes [regarding how a court might appoint a third arbitrator]. Therefore, there is no doubt that we failed to reach an agreement upon the choice of the third Arbitrator." (A258)

EUSA uses a host of adjectives to argue that this correspondence shows an "obvious," "plain," "undeniable," and "vehement" disagreement over the choice of a third arbitrator. (EUSA Br. 30, 35, 37) Regardless of how EUSA spins it, however, Danziger's perfunctory reply to Layton shows only—at best for EUSA—a disagreement after Danziger had already petitioned the Luxembourg Tribunal.

The procedure under the License Agreement, however, is that the two party-appointed arbitrators must disagree on the choice of a third arbitrator before either one of them may petition the Luxembourg Tribunal to appoint a third arbitrator. (A53, A30-31) Because that procedure was not followed here, the District Court properly denied EUSA's motion to confirm the Award.[4]

C. The District Court Did Not Err By "Elevating Form Over Substance"

1. Whether Regarded as "Form" or "Substance" the Parties' Agreed-Upon Procedures for Selecting a Third Arbitrator Should be Enforced

EUSA also accuses the District Court of "elevating form over substance" and not giving adequate deference to the parties' agreement to arbitrate. (EUSA Br. 36-38, 42-45) As an initial matter, the New York Convention itself can be said to "elevate" the procedure for appointing arbitrators. It expressly provides that a court may refuse to recognize an arbitral award when the parties' agreed-upon *procedure* for selecting arbitrators is not followed. New York Convention, art. V(1)(d). In any event, under the Convention, a court should hold parties to such a

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[4] EUSA also criticizes Layton's letter to the Luxembourg Tribunal as setting out criteria for a third arbitrator that are not in the License Agreement. (EUSA Br. 30, 32-35) This is a diversion. Layton was not insisting that the License Agreement *required* a third arbitrator fitting the general criteria he suggested. (A182) In any event, the only material fact concerning Layton's letter is that Layton never had the opportunity to confer with Danziger about the choice of a third arbitrator, to discuss either general criteria or specific individuals, before Layton was constrained to write to the Luxembourg Tribunal in response to Danziger's premature request that a third arbitrator be appointed.

procedure regardless of whether it is deemed the "form" or "substance" of their agreement to arbitrate. *See generally* Albert Jan van den Berg, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 330-31 (1981) ("[I]n the case of an agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure[,] the agreement is supreme . . . .").

Neither the New York Convention nor federal law requires courts to overlook agreed-upon arbitral procedures in deference to a supposed policy favoring resolution of disputes by arbitration, as EUSA suggests. (EUSA Br. 42 ("[T]hat intent [to arbitrate disputes] should be paramount over the alleged skipping of a step before one of the arbitrators sought the assistance of the Tribunal de Commerce.")) To the contrary, "the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt Info. Sciences, Inc. v. Board of Tr. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476 (1989). "[W]e do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). As this Court has put it, "Courts must treat agreements to arbitrate like any other contract. . . . [I]t is the duty of courts to enforce not only the full breadth of the arbitration clause, but its limitations as well." *New York v. Oneida Indian Nation*,

90 F.3d 58, 62 (2d Cir. 1996); *see also Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte*, 141 F.3d 1434, 1450 (11th Cir. 1998) (noting that the New York Convention, like the FAA, "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms") (quoting *Volt*, 489 U.S. at 478).

Under this settled principle, the District Court was not required to defer to the parties' general intent to arbitrate their dispute and thereby disregard that their agreed-upon procedure for appointing a third arbitrator was not followed. As the Court of Appeals for the Seventh Circuit has held in a related context, agreed-upon procedures for selecting arbitrators do not "command less deference" than substantive aspects of an arbitration clause:

> [T]he agreement is crystal clear, specifying a particular course for the appointment of a second arbitrator . . . . This provision does not command less deference simply because it concerns a procedural rather than a substantive aspect of the parties' decision to arbitrate. On the contrary, the Arbitration Act states in no uncertain terms that contractual provisions for the appointment of an arbitrator "*shall* be followed." 9 U.S.C. § 5 (emphasis supplied).

Universal Reinsurance Corp. v. Allstate Ins. Co., 16 F.3d 125, 129 (7th Cir. 1994). Accordingly, the parties' agreed-upon procedure for choosing a third arbitrator was not an inconsequential matter of "form" that the District Court should have ignored, as EUSA argues.

2. The Failure of EUSA's Appointed Arbitrator to Follow the Procedure for Appointing a Third Arbitrator Was Not Trivial

In any event, Danziger's failure to adhere to the agreed-upon procedure for choosing a third arbitrator was not a trivial matter. "In many respects, selection of one or more arbitrators is the most important decision arbitrating parties make. . . . In arbitration, to a great degree, the arbitrator *is* the process." 3 Macneil, FEDERAL ARBITRATION LAW § 27.1 (emphasis in original). Indeed, "[g]iven the complexities of international arbitration, including cultural and legal differences, the selection of arbitrators is even more important than it is in domestic arbitration." 4 Macneil, FEDERAL ARBITRATION LAW § 44.27.1.1.

As the District Court explained, Danziger's premature petition to the Luxembourg Tribunal "irremediably spoiled the arbitration process." (A295) The Luxembourg Tribunal held a hearing on the appointment of a third arbitrator after Layton objected (A195), but the parties did not agree to any such hearing. They opted, instead, to have their party-appointed arbitrators first attempt to agree on the critical choice of a third arbitrator; but Danziger eviscerated this step. (A53, A30-31) As the District Court pointed out, once the Tribunal appointed Decker, Danziger succeeded in creating an "artificial negotiating environment" in which the party-appointed arbitrators already knew the likely outcome of a failure to reach agreement on who to appoint as the third arbitrator:

> Danziger's premature petition for selection of a third arbitrator, and the Tribunal's subsequent appointment of Decker, created an artificial negotiating environment for the two party-selected arbitrators. Because the Tribunal had already appointed Decker as the third arbitrator, an appointment which Danziger favored and Layton opposed, Danziger had the option of refusing to agree with Layton on the identity of a third arbitrator, knowing that such disagreement would likely lead to Decker's reaffirmation.

(A296-97)

Indeed, the Luxembourg Tribunal never removed Decker from the Board of Arbitration—it only "suspended" proceedings that were to be conducted by him. (A100, A139) The Tribunal later confirmed Decker's appointment, after Danziger and Layton predictably did not agree on the choice of a third arbitrator in the negotiating environment that Danziger created. (A183) But Danziger and Layton never discussed the choice of a third arbitrator at any time when there was uncertainty as to whom the Luxembourg Tribunal would appoint if they disagreed. And that third arbitrator, as Danziger knew well, was one whom both Britannica and Layton vehemently objected to. This failure to abide by the procedures for the consensual selection of the critically important third arbitrator, who would resolve any disagreement between the two party-appointed arbitrators, is hardly a mere matter of "form," as EUSA argues. *See generally* 1 DOMKE ON COMMERCIAL ARBITRATION § 24:4, at 24-11 (noting that "[t]he third arbitrator is usually selected by the other two arbitrators where they are party-appointed"); Steven C. Bennett,

ARBITRATION: ESSENTIAL CONCEPTS 49 (2002) ("Typically, when the arbitrator appointment process includes party-appointed arbitrators, each party will appoint one arbitrator, and the two party-appointed arbitrators will chose the third, neutral arbitrator . . . .").

D. EUSA's Remaining Arguments Are Misplaced

1. The District Court Did Not Make Any Erroneous Findings of Fact

EUSA's remaining arguments are not on point. It argues that the District Court misapplied the standards for ruling on a motion for summary judgment. (EUSA Br. 39)[5] Specifically, according to EUSA, the District Court erred when it noted that Danziger's "*ex post facto* attempt to redefine the procedural requirements of the License Agreement is ingenious but disingenuous." (EUSA Br. 39) This turn of phrase is not, as EUSA characterizes it, an assessment of Danziger's credibility. As the District Court made clear, Danziger's letter to Layton—in which Danziger tersely stated, "I do not agree" with Layton's suggestions to the Tribunal regarding what criteria might be used in choosing a third arbitrator (A258)—was an improper "attempt[] to construct a process of deliberation and deadlock after the fact." (A294) Regardless of whether

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[5] EUSA also suggests that the District Court erred by requesting that EUSA file a summary judgment motion. This argument—to the extent EUSA is making it—has been waived. EUSA never objected to the District Court's request. And, in any event, as set forth above EUSA made a motion *both* to confirm the Award under the New York Convention and for summary judgment under Federal Rule of Civil Procedure 56.

Danziger's letter to Layton was sincere, the undisputed, material fact is that Danziger and Layton never discussed, let alone disagreed upon, the identity of a third arbitrator *before* Danziger petitioned the Luxembourg Tribunal.

In any event, the District Court was not precluded from making findings and weighing the evidence in connection with EUSA's motion. The prescribed procedure for seeking to confirm an award under the New York Convention is to make an application to the District Court, not file an original action by complaint. *See* 9 U.S.C. § 207 (party may "apply to" court to confirm award falling under the Convention); *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 18, 23 (2d Cir. 1997) ("confirmation of an arbitration award is a summary proceeding"; party seeking confirmation of award under the New York Convention proceeded by petition); *Int'l Std. Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial Y Comercial*, 745 F. Supp. 172, 182 (S.D.N.Y. 1990) ("A confirmation proceeding under the Convention is not an original action, it is, rather in the nature of a post-judgment enforcement proceeding.") (alterations and internal quotation marks omitted). And, although EUSA proceeded by filing a complaint, the docket correctly reflects that it later made a two-part motion: for an order (1) "pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. 201, to confirm and enforce the arbitration award dated 1/25/02"; and (2) "pursuant to FRCP 56, for summary judgment on

the ground that there is no issue of material fact." (A1)[6] EUSA's motion could thus properly have been treated as one under 9 U.S.C. § 203 to confirm an arbitral award. And, in connection with such motions, district courts are of course permitted to make findings of fact, which are reviewed on appeal for clear error. *See Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 260, 264 (2d Cir. 2003); *see also Publicis Communication v. True North Communications*, 206 F.3d 725, 728 (7th Cir. 2000).

The District Court therefore did not err if, as EUSA wrongly contends, it evaluated Danziger's credibility in connection with EUSA's motion. Nor did the District Court make a clear error by "finding"—assuming it did—that Danziger and Layton did not discuss or agree upon the choice of a third arbitrator before Danziger petitioned the Luxembourg Tribunal. As set forth above, the evidence is undisputed on this point.[7]

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[6] EUSA's brief to the District Court styled its motion as a "Motion Pursuant to Convention on the Recognition and Enforcement of Foreign Arbitral Awards and for Summary Judgment." (A2 Docket # 14) And EUSA's brief argued two distinct points: (i) that it had complied with the New York Convention's requirement for recognition and enforcement of the Award, and (ii) that it was entitled to summary judgment.

[7] EUSA did not submit any sworn testimony from Danziger in connection with its motion. Layton testified by declaration, however, that he never discussed the choice of a third arbitrator with Danziger before Danziger petitioned the Luxembourg Tribunal. (A166-67) Moreover, Danziger never responded to Layton's statement to the Luxembourg Tribunal that, before Danziger submitted his petition, "Danziger and I have never had opportunity to confer as between ourselves regarding the selection of a Chairman by consent." (A181)

2. The District Court Properly Invoked the Overlapping FAA Ground that Danziger and Decker "Exceeded Their Powers" in Issuing the Award

Finally, EUSA argues that the District Court should not have relied on the ground that Danziger and Decker "exceeded their powers" by issuing an award that they had no power to issue as an improperly constituted arbitral authority. (EUSA Br. 46) The District Court did not err by relying on this ground.

As noted, the Federal Arbitration Act and the New York Convention provide "overlapping coverage," to the extent that they do not conflict. *See Yusuf*, 126 F.3d at 20 (quoting *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 934 (2d Cir. 1983)); *see also* New York Convention, art. VII(1); 9 U.S.C. § 208 ("Chapter 1 [the FAA] applies to actions and proceedings brought under this chapter to the extent that [the FAA] is not in conflict with this chapter or the Convention as ratified by the United States."). The New York Convention provides that a court may refuse to recognize and enforce an arbitral award where "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties." New York Convention, art. V(1)(d). Similarly, under the FAA an agreement "for a method of naming or appointing an arbitrator or arbitrators . . . shall be followed." 9 U.S.C. § 5; *see also* 4 Macneil, FEDERAL ARBITRATION LAW § 44.40.2 ("[T]here can be no question that in domestic law the composition of arbitration panels must comply with the agreement establishing

them, and that awards from panels not so complying will be vacated."). And an award issued by arbitrators who are not appointed in accordance with an agreed-upon procedure may be vacated on the FAA ground that the arbitrators "exceeded their powers" by acting as arbitrators when they had no power to do so. *See Avis*, 791 F.2d at 25 (holding that arbitrator who was not appointed in accordance with parties' agreement was "powerless"); *see also R.J. O'Brien & Assoc., Inc. v. Pipkin*, 64 F.3d 257, 263 (7th Cir. 1995) (arbitrators "exceed[] their powers" by issuing award when they are not chosen "in conformance with the procedure specified in the parties' agreement to arbitrate"); *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 832 (11th Cir. 1991) (reversing confirmation order and ruling that two-arbitrator panel was improperly constituted and exceeded its powers where parties' agreement required arbitration before a three-arbitrator panel).

The FAA and the New York Convention thus overlap in providing that a court may refuse to confirm an award issued by an arbitrator who is not appointed in accordance with agreed-upon procedures. The District Court did not err by relying on this overlapping ground as a reason for denying EUSA's motion.

II. THE DISTRICT COURT'S ORDER MAY BE AFFIRMED ON THE ALTERNATIVE GROUND THAT THE PARTY-APPOINTED ARBITRATORS NEVER DISAGREED OVER A RESOLUTION TO THE PARTIES' DISPUTE

The District Court's order may also be affirmed on an alternative ground. The arbitration clause in the License Agreement requires the two party-appointed

arbitrators to seek to resolve the parties' dispute before invoking the procedure for appointing a third arbitrator. Here, however, Danziger and Layton never even discussed the merits of the parties' dispute, let alone attempted to reach a resolution of it, before Danziger petitioned the Luxembourg Tribunal to appoint a third arbitrator.

The License Agreement provides that all disputes arising under it "shall be finally settled by a Board of Arbitration established and governed by the procedures set forth in the" Two Party Agreement. (A30) Under the arbitration procedure set forth in the Two Party Agreement, "either party may demand that the [disputed] matter be referred to a Board of Arbitration for resolution." (A53) The Board of Arbitration under the License Agreement "shall be composed of two arbitrators of which one shall be appointed by [Briannica] and the other by [EUSA]." (A30, A53) Accordingly, the parties agreed to refer any dispute under the License Agreement to the two party-appointed arbitrators—the "Board of Arbitration"—"for resolution." (A53) And the party-appointed arbitrators are only to choose a third arbitrator to join the Board of Arbitration "[i]n the event of disagreement." (A53)

In accordance with this procedure, EUSA appointed Danziger and Britannica appointed Layton to constitute the Board of Arbitration and resolve the dispute over the payment of royalties that EUSA raised under the License

Agreement. (A194-95, A209) But Layton and Danziger never discussed the merits of the parties' dispute before Danziger made his premature petition to the Luxembourg Tribunal. (A166) Because they failed to take this step, they of course failed to disagree over a resolution to the parties' dispute. For this reason as well, Danziger had no authority to petition the Luxembourg Tribunal to appoint a third arbitrator when he did, Decker's later appointment to the Board of Arbitration by the Luxembourg Tribunal was improper, and the award issued by this improperly constituted Board of Arbitration should not be confirmed. *See* New York Convention, art. V(1)(d).

The District Court did not accept this argument. (A291-93) The court overlooked, however, that the License Agreement expressly provides that the parties agreed to refer their dispute to a two-arbitrator Board of Arbitration "for resolution." (A53) *Cf. Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 312, 315 (2d Cir. 1998) (parties' agreement that disputes under contract were to be "finally resolved" by single arbitrator "stated unambiguously that the arbitration was to finally resolve the dispute"). This requirement reflects the parties' intent to streamline the arbitral process by providing for resolution of a dispute by two arbitrators where possible. It also creates a process that would inform the party-appointed arbitrators' views on what qualifications the third arbitrator, if necessary, should have. Here, however, Danziger failed to adhere to

the parties' agreed-upon process. For this alternative reason, the District Court's order should be affirmed.

CONCLUSION

The Court should affirm the District Court's order.

Dated: May 24, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B)(i). It contains 10,134 words as counted by the word-processing system used to prepare the brief, exclusive of the parts of the brief exempted from the type-volume limitation by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: May 24, 2004

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CERTIFICATE OF SERVICE

Two copies of the foregoing Brief for Appellee Encyclopaedia Britannica, Inc. were served on Appellant, Encyclopaedia Universalis S.A., by hand delivery on May 24, 2004 to the following office of its counsel :

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