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SECOND CIRCUIT REVIEW

'The Resource Group International v. Chishti'

By Martin Flumenbaum and Brad S. Karp
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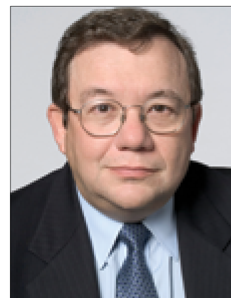
In *The Resource Group International v. Chishti*, 91 F.4th 107 (2d Cir. 2024), the U.S. Court of Appeals for the Second Circuit considered the propriety of a pending arbitration and whether being improperly forced to arbitrate can satisfy the requirements for a preliminary injunction.

In a unanimous opinion of the court, authored by Circuit Judge Myrna Pérez and joined by Circuit Judges Guido Calabresi and Eunice Lee, the circuit vacated and remanded the district court's order denying a motion for preliminary injunction that would have stayed the arbitration, holding that the appeals court had jurisdiction to review the matter based on New York law, and that forced arbitration of inarbitrable claims may constitute an irreparable harm.

Facts and the District Court's Ruling

In March 2023, Judge Louis Stanton of the Southern District of New York denied a motion by Plaintiffs The Resource Group International Limited, TRG Pakistan and several affiliates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and directors (together TRGI) for a preliminary injunction to enjoin a JAMS arbitration proceeding brought against them by defendant Muhammad Ziaullah Khan Chishti, a shareholder and the former chairman and director of TRGI.

In 2005, in connection with an investment by affiliates of American International Group (AIG), a Stock Purchase Agreement (SPA) was executed by TRGI, Chishti and AIG. The SPA required Chishti to vote his shares in a manner that placed two directors chosen by AIG on TRGP's board, as well as an arbitration provision providing that "[a]ll disputes and controversies arising under or in connection with [the SPA] shall be settled by arbitration…governed by, and shall be enforceable pursuant to, the Uniform Arbitration Act as in effect in the state of New York."

In 2021, Chishti resigned his TRGI chairmanship after allegations of sexual assault against

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him became public. Concerned Chishti would not vote his shares in accordance with the SPA and elect his family members to the TRGI board instead of AIG's nominees in an upcoming board election, AIG and TRGI offered to repurchase Chishti's shares in exchange for voting his shares in favor of AIG's nominees.

This release agreement also required that Chishti refrain from commencing litigation or other proceedings against TRGI, provided all disputes under the release agreement would be heard in New York courts, and contained a merger clause stating the release agreement "constitute[s] the entire agreement among the parties with respect to the subject matter hereof and supersede[s] all prior arrangements or understandings."

On March 1, 2023, TRGI filed suit in the Southern District of New York, claiming Chishti violated the release agreement by filing for arbitration.

As part of an extensive campaign to regain control of TRGI, Chishti then initiated a JAMS arbitration against TRGI and others, alleging contractual, fiduciary and derivative claims relating to an alleged scheme to take over TRGI, purportedly in violation of the SPA and the laws of Bermuda and Pakistan.

On March 1, 2023, TRGI filed suit in the Southern District of New York, claiming Chishti violated the release agreement by filing for arbitration (instead of, as required for disputes under the release agreement, in suit in a New York court). Among other things, TRGI sought a temporary restraining order and preliminary injunction staying the arbitration.

Stanton denied the motion for a preliminary injunction, holding TRGI was unlikely to succeed on the merits of their claims, because the forum selection clause in the release agreement did not supersede the arbitration clause in the SPA and the plaintiffs failed to demonstrate that they would suffer irreparable harm if arbitration went forward.

The Second Circuit Opinion

Before reaching the merits, the panel examined if it had jurisdiction. Ordinarily under the FAA, interlocutory appeals are not permitted on orders declining to enjoin arbitration. 9 U.S.C. §16(b)(4). The panel noted, however, that the Supreme Court has observed that the FAA does not "prevent the enforcement of agreements to arbitrate under different rules than those set forth in the [FAA] itself." *Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989). Thus, for an arbitration proceeding under New York law, a party is permitted to "apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with," NY CPLR §7503(b), and under CPLR §5501(a), such a ruling is an appealable final order.

The panel held that the CPLR's allowance of such an appeal was a substantive rule of law, not a procedural rule that would implicate the doctrine of *Erie Railroad v. Tompkins*. The court conceded that while "neither we nor the Supreme Court has answered the specific question before us, a provision within a statute that withholds jurisdiction where it would otherwise have existed," as Section 16 of the FAA does, is substantive, so must be the rule *granting* jurisdiction in the CPLR.

This conclusion stands in some tension with typical Second Circuit (and Supreme Court) pronouncements that 28 U.S.C. §1291, not state law, determines appellate jurisdiction in federal diversity cases such as this one. *See, e.g.*, *Liberty*

Synergistics v. Microflo., 718 F.3d 138, 147 (2d Cir. 2013) ("Whether a particular order falls within the collateral order doctrine is an issue of federal law, even when the order itself relates to a state-law issue"); *Santander Bank N.A. v. Harrison*, 858 F. Appx. 408, 411 (2d Cir. 2021) (citing *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 198-99 (1988)).

The panel held the SPA arbitration clause's specification that arbitration would be "governed by, and shall be enforceable pursuant to" New York law meant the CPLR's rule allowing an appeal must be applied. In so holding, the court applied ordinary New York rules of contract interpretation, honoring the objectively manifested intent of the parties, which called for New York law to be applied to arbitration between the parties, despite the fact that there is in fact no "Uniform Arbitration Act" in New York.

Next, the panel examined the district court's preliminary injunction holding. The panel held plaintiffs were likely to succeed on the merits, because the release agreement's provision for "the exclusive jurisdiction of the state and United States federal courts located in the state of New York," to hear disputes, coupled with a merger clause stating "[t]his letter agreement and the other writings referred to herein or delivered pursuant hereto constitute the entire agreement among the parties with respect to the subject matter hereof and supersede all prior arrangements or understandings" potentially obviated the arbitration clause in the SPA for some of Chishti's underlying contractual, fiduciary and derivative claims.

Expanding on prior Second Circuit precedents, the court noted "there is no requirement that the forum selection clause definitively mention arbitration…even where the parties' release agreement, like here, did not explicitly discuss arbitration." *See, e.g.*, *In re American Express Financial Advisors Securities Litigation*, 672 F.3d 113, 139 (2d Cir. 2011) (holding settlement agreement modified a "prior expansive commitment to arbitrate," and a decision on "[t]he scope of an agreement to arbitrate is a question of arbitrability within the purview of the court").

Finally, the panel held that the district court should reconsider on remand if being forced into arbitration is truly an irreparable harm, which the district court appeared to erroneously conclude was never the case. The Second Circuit's holding in *Maryland Casualty Company* v. *Realty Advisory Board on Labor Relations*, 107 F.3d 979, 985 (2d Cir. 1997) was also given "clarification," interpreted to mean that while there is generally no per se irreparable injury from forced arbitration, arbitration can cause an irreparable injury if the forced arbitration is not compensable, that is, whether attorneys' fees and arbitration costs would not be available to a prevailing party at the arbitration's conclusion.

The Second Circuit remanded the case to the district court to determine which of Chishti's claims are covered by the release agreement, and reconsideration of all four prongs of the preliminary injunction analysis as applicable.

Conclusion

The Second Circuit's opinion illustrates an unusual exception to the *Erie* doctrine based on state substantive law, and shows the Second Circuit's willingness to enforce arbitration agreements as written. Most importantly for practitioners and drafters, *The Resource Group* warns that merger clauses in agreements may inadvertently obviate pre-existing agreements to arbitrate.

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