No. 20-128

IN THE

Supreme Court of the United States

BIG PORT SERVICE DMCC,

Petitioner,

v.

CHINA SHIPPING CONTAINER LINES CO. LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Arbitration is unquestionably a creature of contract. A party cannot be compelled to arbitrate disputes pursuant to a non-existent arbitration agreement. The courts in this case have already conclusively established there is no contract between the parties much less an arbitration agreement. The Second Circuit thus affirmed the district court's declaratory judgment in favor of Respondent CSCL which judgment held there is no agreement to arbitrate between the parties. (App.9 & 30.) Petitioner BPS does not, indeed cannot, challenge before this Court the grant of declaratory relief. As a result, there is no scenario by which BPS can ever pursue arbitration against Respondent CSCL. BPS only seeks to challenge the injunctive relief issued by the district court and affirmed by the Second Circuit. The injunction was necessitated because, notwithstanding the lack of an arbitration agreement, BPS unabashedly kept trying to progress the arbitral proceedings. CSCL was not "seeking [to] avoid arbitration" (Pet. i.). There was no basis for arbitration in the first place.

The question presented is:

When there is no arbitration agreement between the parties, should this Court issue an advisory opinion on whether and if so under which authority federal courts have the power to enjoin a party from wrongly foisting arbitration on another pursuant to a non-existent agreement, particularly when all circuits to have addressed the issue in this context agree that such injunctive power exists and when the existence or non-existence of this injunctive power makes no difference to the outcome to the present case since BPS cannot arbitrate against CSCL regardless?

RULE 29.6 DISCLOSURE

Respondent China Shipping Container Lines Co., Ltd. is now known as Cosco Shipping Development Co. Ltd. Cosco Shipping Development Co. Ltd. is a Chinese corporation and is listed on both the Hong Kong and Shanghai stock exchanges. Its parent corporation, the China Cosco Shipping Corporation Limited, holds 39.28% of its shares. The parent corporation is not a publicly-held company. No publicly-held company owns 10% or more of these companies. Respondent shall be referred to herein as "CSCL."

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STATUTES AND OTHER AUTHORITIES

STATUTORY PROVISIONS

This case does not involve the application or interpretation of any statutory provisions. The case concerns the question of whether arbitration can be forced on a party who is not bound to an arbitration agreement. Resolution of that issue is clearly left to the district courts for determination, as opposed to arbitrators, under established precedent and involves application of settled principles and doctrines. The suggestion by Petitioner Big Port Services ("BPS") that the case concerns application of the All Writs Act or the scope of an existing arbitration agreement is wrong.

STATEMENT OF THE CASE

1. The genesis of this case is a supply of marine fuel (also known as bunkers) in November 2014 in Russia to CSCL's vessel, the M/V Xin Chang Shu (the "Vessel"). There were at least four different contracts related to the fuel supply, but none was between CSCL and BPS. BPS' presentation of the facts in its Petition is intended to leave this Court with the misimpression that there was a contract between BPS and CSCL with an arbitration provision which the Second Circuit ignored. That is simply not so.

BPS' contract was with an entity which was never a party to these proceedings – O.W. Bunker Far East (Singapore) Pte. Ltd. ("OW Singapore"). The contractual provisions quoted in BPS' Petition are provisions in the contract between BPS and OW Singapore, not any contract with CSCL. The crux of BPS' claim against CSCL and the basis on which BPS sought to compel CSCL into

arbitration was the incorrect premise that OW Singapore was CSCL's agent. BPS has already extensively litigated that premise and lost. As such, much of BPS' recitation in its Petition of the provisions in its contract with OW Singapore can be ignored.

As conclusively established by the courts below and in Singapore, there were four separate and distinct contracts relative to the marine fuel supply. In Fall 2014, CSCL contracted with O.W. Bunker China Ltd. ("OW China") to supply bunkers to the Vessel during a call at Kavkaz, Russia. (A.153.) The contract did not mention OW Singapore or BPS. (A.1488-89.) The innuendo in BPS' Petition that CSCL knew of BPS' involvement based on the sales confirmation from OW China is false. (Pet. 3.) BPS is not referenced anywhere in that sales confirmation. (A.165-166.)

OW China then, on its own volition, entered into a contract with OW Singapore. (A.154.) CSCL was not a party to this subcontract and its terms were unknown to CSCL. (A.154.)

To satisfy its contractual obligations to OW China, OW Singapore allegedly entered into a contract with BPS. (A.155.) According to BPS, this contract was governed by BPS' standard terms which called for arbitration in New York. BPS then apparently subcontracted with another entity to physically deliver the fuel. (A.156, A.1502.) This entity is believed to be a Russian company known as TTK whose name is identified on the fuel delivery receipt. (A.1551.) BPS' name is not mentioned anywhere on the delivery receipt. (*See* A.1551.)

The fuel was delivered to the Vessel at Russia in November 2014. TTK (not BPS) issued a bunker delivery receipt to the Vessel confirming the delivery. The delivery receipt makes no mention of BPS, its alleged contractual terms, or an arbitration agreement. (A.192.) About a week after the fuel was delivered, the OW entities filed for bankruptcy.

2. Rather than seek payment in a bankruptcy proceeding from the entity with which it contracted (OW Singapore), BPS decided to pursue CSCL for payment. BPS' attack assumed fronts in the United States and Singapore, all of which were premised on BPS' false position that OW Singapore was CSCL's agent and therefore bound CSCL to the contract between OW Singapore and BPS.

On December 10, 2014, BPS arrested the Vessel in Singapore (the "Singapore Action"). (A.528-29.) BPS alleged that a direct contract existed between BPS and CSCL. (*Id.*) BPS theorized that OW Singapore entered into the contract with BPS as CSCL's agent and on its behalf. (A.530.) CSCL posted $2.6 million in security to free the Vessel from BPS' arrest. (A.529.) The security was posted without prejudice to CSCL's defenses to the Singapore Action.

On December 14, 2014, BPS served CSCL with a demand for arbitration pursuant to the New York arbitration provision contained in BPS' standard terms and conditions. (A.29-37.) Just like it had alleged in Singapore, BPS alleged in the arbitration demand that CSCL was bound to the arbitration provision in the OW Singapore-BPS contract based on the assertion that OW

Singapore served as CSCL's agent. (*Id.*) CSCL steadfastly rejected the attempt to force it to arbitration with BPS, an entity with whom it had no contract or agreement. (A.18-19.)

Meanwhile back in Singapore, BPS sought a stay of the Singapore Action in favor of the New York arbitration clause. (A.529; A.550-81.) CSCL challenged the requested arbitration stay and also asked the Singapore Court to strike out the Singapore Action as frivolous. (A.529; A.582-83.) CSCL's challenges were based on the lack of any contract between it and BPS, and accordingly, the absence of an arbitration agreement between the parties. (A.530.) CSCL also sought an order setting aside the Vessel's arrest and awarding it damages as a result of BPS' wrongful arrest of the Vessel. (A.529; A.582-83.) The core issue in all three applications filed in Singapore revolved around whether a contract or arbitration agreement existed between the parties. The Singapore courts were thus poised to address whether there is an arbitration agreement between CSCL and BPS.

Notwithstanding CSCL's clear stance that there was no agreement with BPS, BPS moved right along with its improperly commenced arbitration back in the United States. (A.42-80.) BPS relied on a self-appointing provision of the Rules of the Society of Maritime Arbitrators (whose Rules are referenced in BPS' standard terms) and appointed a full three-member panel over CSCL's objection. BPS made clear that it was moving full-steam ahead with arbitration even though the existence of an arbitration agreement between the parties was hotly contested and had been placed before the Singapore Court. (A.42-80.)

In the face of BPS' actions in the United States, CSCL had no choice and commenced proceedings in the federal district court in New York. (A.13-27.) It was not clear the Singapore court had the power to stop BPS' actions in the United States. CSCL thus requested two forms of relief from the district court: (i) a declaratory judgment that there was no agreement to arbitrate with BPS and (ii) an injunction barring CSCL from proceeding with the New York arbitration. Contemporaneously with its petition filing, CSCL moved by order to show cause for a TRO and preliminary injunction to stop BPS from moving forward with its improperly convened panel of arbitrators. (A-92-94.) BPS resisted that application, and its statements to the district court in that opposition are telling.

In its discussion of the proceedings below, BPS neglects to mention to this Court the critical representations BPS made to the district court when it challenged CSCL's declaratory judgment petition. BPS argued to the district court that "[t]he proper court venue for the dispute is Singapore." (A.267.) BPS explained to the district court that the proceedings in Singapore were ongoing "including on the issue of arbitration." (A.263.) BPS also advocated before the district court that a preliminary injunction was not warranted because no harm would result to CSCL if no injunction issued. BPS explained to the district court, "[i]f the [Singapore] High Court decides that the dispute is not arbitrable, CSCL will suffer no irreparable harm because it will not be forced to arbitrate." (A.268.)

Two days before the hearing on CSCL's application for a TRO, BPS requested a stay from the district court pending a decision from the Singapore High Court. (A.337.1-37.2.) BPS neglects this fact too in its Petition

– it was BPS which asked the district court to stay the New York proceedings so that the issues relative to the existence or non-existence of an arbitration agreement could be litigated in Singapore. The district court granted the stay relief requested by BPS. (A.369-370.) The proceedings in the district court remained stayed for nearly two years while the parties litigated the arbitral and contract issues in Singapore.

BPS' Petition to this Court purports to discuss the developments in Singapore in detail but noticeably absent from the record is any declaration or other evidence from BPS' counsel in those proceedings. In contrast, the record contains a sworn declaration from CSCL's Singapore counsel who detailed the developments in Singapore and provided the district court the relevant Singapore submissions. (A.528-1477.) The record evidence and testimony confirmed the following.

Back in Singapore, CSCL and BPS proceeded to litigate before the Singapore High Court and Singapore Court of Appeal (the highest court in Singapore). (A.529-38.) The proceedings in Singapore were extensive with the Singapore courts examining in great detail whether there is a contract between CSCL and BPS. This issue was examined at length in the context of the Singapore courts' evaluation of three different applications: (1) BPS' application to stay the Singapore Action pending New York arbitration (A.550-81), (2) CSCL's application to strike out the Singapore Action as frivolous (A.582-83), and (3) CSCL's application to set aside the Vessel arrest and to award CSCL damages for wrongful arrest (A.582-83).

The issue of whether there was a contract between BPS and CSCL was first presented to the Singapore High Court and considered by the Assistant Registrar (similar to a U.S. magistrate judge) when the three applications were presented for examination. (A.529-30.) Both parties submitted documentary and affidavit evidence, and both parties attended hearings before the High Court where their respective positions were advocated by counsel. (A.530-31.) Detailed written submissions were made by BPS in which it set forth the legal and factual bases purportedly supporting its assertion that OW Singapore contracted with BPS as CSCL's agent. (A.531; A.584-629; A.630-69.) Counsel for BPS also agreed at the hearings that "the existence of an arbitration agreement depends on the existence of [a] contract." (A.631.) BPS consequently conceded that if CSCL's striking out application was granted, it followed that there was no arbitration agreement between BPS and CSCL (*See* A.530-31.)

BPS' agency and contractual arguments were rejected. A detailed decision was issued by the High Court striking out BPS' claims and refusing a stay in favor of arbitration. (A.532; A.584-629.) The Singapore High Court held, *inter alia*, that BPS' claims were both factually and legally unsustainable. (A.532; A.592-608.) Under Singapore law, a claim is legally unsustainable if it is clear as a matter of law that a party is not entitled to the remedy it seeks even if that party were to succeed in proving all the facts that he offers to prove. (A.531.) A claim is factually unsustainable if it is possible to say with confidence before trial that the factual basis for the claim is entirely without substance, for example, if it is beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. (*Id.*)

The High Court noted that BPS had failed to demonstrate an arguable case that BPS and CSCL were parties to a written contract or any New York arbitration agreement. (A.532; A.608-09.) The High Court determined that the marine fuel was sold pursuant to a chain of separate sale and purchase agreements, and that there was no evidence OW Singapore entered into a contract with BPS on behalf of CSCL. (A.532; A.603-04.) The High Court accordingly dismissed BPS' application to stay the Singapore Action in favor of arbitration in New York and granted CSCL's application to strike out the action. (A.532; A.608-09.) The High Court declined to set aside the warrant of arrest or award damages to CSCL for wrongful arrest. (A.532; A.628-29.)

Both BPS and CSCL appealed respective aspects of the High Court's decision. The appeal was considered by Justice Steven Chong of the Singapore High Court. (A.533-34.) After hearings, Justice Chong affirmed the High Court's decision to strike out the proceedings and refusal to stay the matter pending New York arbitration. (A.534; A.757-789.) Justice Chong found the Registrar's decision to be "commendably clear" and held that the evidence clearly established there was "no basis for the court to find that the defendant was bound by the Contract via the agency of OW Singapore." (A.763-65.) BPS' appeals to the High Court were thus not successful.

Undeterred, BPS continued to litigate its claims in Singapore. (A.536.) BPS applied to the High Court for leave to appeal that court's refusal to stay the action in favor of New York arbitration and the court's award of damages to CSCL for wrongful vessel arrest. (A.536; A.796-97.) The High Court dismissed this leave application on May 18, 2016. (A.536; A.798-824.)

BPS then asked the Singapore Court of Appeal for permission to appeal. (A.537; A.825-29.) The Singapore Court of Appeal declined to grant BPS leave to appeal the refusal to stay pending arbitration, but did grant BPS leave to appeal the wrongful arrest damages decision. (A.537; A.830-31; A.832-35.) As a result, the decision by the Singapore courts that there was no agreement between the parties and hence no basis to stay the Singapore proceedings in favor of New York arbitration became final. (A.537.)

BPS later sought permission from the Singapore Court of Appeal to appeal out of time the High Court's decision striking out the vessel arrest action as frivolous. (A.537; A.836-37.) BPS' time to file an appeal from this decision had expired. (A.537.) The application for an extension was dismissed by the Court of Appeal on April 7, 2017. (A.537; A.840-41; A.842-44.) As a result, the decision striking out BPS' vessel arrest action as frivolous became final and unappealable. (A.538.) At the hearing of April 7, 2017, the Court of Appeal stated:

> In so far as BPS' application for an extension of time to appeal the Striking Out Order is concerned, we find that the length of the delay was substantial. We also find that no satisfactory reasons were given for this delay. Given these reasons, as viewed in the context of the precise facts and circumstances of the present case, we are of the view that this application should be dismissed. We are further of the view that, based on the way the case was presented before us, the chances of the appeal succeeding if time for appealing were extended

> were low. However, we stress that our view in this regard is not intended to be a comment on the viability on [BPS]'s claim in arbitration proceedings overseas.

(A.537, 840-41.)

As it did before the district court and the Second Circuit, BPS tries to make much of this last sentence suggesting this sentence detracts from the import of the Singapore courts' prior final decision affirming the lack of an agreement between the parties. BPS has clearly taken the sentence out of context. As testified by CSCL's Singapore counsel,

> Whilst the Court of Appeal clarified that its view was "not intended to be a comment on the viability on [BPS]'s claim in arbitration proceedings overseas" (Exhibit P26, page 2), I should state this clarification was provided after BPS' Singapore counsel had informed the Court of Appeal that there were overseas arbitration proceedings already commenced by BPS against CSCL. Thus, the Court of Appeal's clarification about the weakness of the merits of BPS' claim was not intended to trespass upon such arbitration proceedings.

(A.538). In other words, the Singapore court left for the U.S. bodies the determination of what impact, if any, the rulings in Singapore might have. This is precisely what the parties had envisioned when the New York district court stayed the case before it pending the outcome in Singapore.

3. Given the finality of the Singapore courts' decisions, the district court lifted the stay of the New York proceedings. The district court invited submissions from BPS and CSCL to address, *inter alia*, the petition for declaratory and injunctive relief and CSCL's request that the Singapore decision be recognized and enforced. The briefs also addressed BPS' subject matter jurisdiction arguments. (As an aside, the arguments lodged by BPS in this stage of the case were subsequently found by the district court to have been "questionable" and "contradictory." *China Shipping Container Lines Co. v. Big Port Serv. DMCC*, 2020 U.S. Dist. LEXIS 150137, at *7 (S.D.N.Y. Aug. 19, 2020) (decision on CSCL's application for fees).)

On January 15, 2019, the district court issued its opinion recognizing the decisions from Singapore. The district court granted CSCL's petition for declaratory relief and permanently enjoined BPS from moving forward with the New York arbitration. (App.10-33.) In rendering its decision, the district court relied on well-established law on various topics such as subject matter jurisdiction, venue, comity, collateral estoppel, and *res judicata*. (App.15-32.) Among other rationale, the district court relied on the doctrine of judicial estoppel and held BPS to its prior representations to the court that Singapore was the appropriate forum to determine whether an arbitration agreement exists between the parties, remarking that "permitting BPS's 'opportunistic, last-minute about-face' would unfairly advantage BSP and impose an unfair detriment on CSCL." (App.29.) (internal citation omitted).

After granting the declaratory relief sought by CSCL and finding the lack of any arbitration agreement between the parties, the district court addressed the injunctive relief sought by CSCL. The district court held that it would "permanently enjoin[] the arbitration demanded by BPS because there is no valid arbitration agreement between these parties." (App.29-32.)

4. Undeterred by the district court's comprehensive opinion, BPS appealed to the Second Circuit. Despite the fact that a number of BPS' arguments before the district court contradicted established Second Circuit precedent, BPS continued to advance such arguments on appeal. For instance, BPS argued that subject matter jurisdiction was lacking, a position the Second Circuit recognized was "foreclosed by" its prior decision in *Garanti Finansal Kiralama A.S. v. Aqua Marine & Trading Inc.*, 697 F.3d 59 (2d Cir. 2012). (App.3-4.) The Second Circuit rightly determined that subject matter jurisdiction existed in this maritime dispute.

The Second Circuit went on to affirm the district court's holdings regarding recognition of the Singapore judgments, preclusion, and estoppel. (App.3-8.) The Second Circuit thus affirmed the district court's declaration that there is no arbitration agreement between the parties. This holding and the legal theories on which it is premised rested upon the straightforward application of well-established, binding precedent. (App.3-8.)

The Second Circuit then went on to review the district court's decision to permanently enjoin BPS from proceeding with the New York arbitration. Explaining first that "[f]ederal courts generally have remedial power

to stay arbitration," the court went on to note that "where the court determines . . . that the parties have not entered into a valid and binding arbitration agreement, the court has the authority to enjoin the arbitration proceedings." (App.8.) (internal citations omitted). Because no contract or arbitration agreement existed between the parties, the permanent injunction was proper. (App.8.)

BPS has now petitioned this Court for certiorari.

REASONS FOR DENYING CERTIORARI

Far from violating the policy favoring arbitration, the Second Circuit's decision is consistent with established legal precedent and the policy recognizing that arbitration is a creature of contract. A party cannot foist arbitration on another when there is no arbitration agreement between them in the first place. In the absence of an agreement between the parties, the Second Circuit's decision to affirm the district court's grant of declaratory and injunctive relief was appropriate. Neither the Second Circuit nor the district court was required to send these issues to arbitrators for decision. Further, there is no circuit split in the context presented in this case. Cases involving other types of disputes (e.g., the scope of an existing arbitration agreement) are immaterial. Even if there was such a relevant split among the circuits (of which there is none), this case is not an appropriate vehicle for resolution of that split. There is no scenario by which BPS could ever drag CSCL into arbitration as there is no contract or arbitration agreement binding CSCL to arbitration with BPS.

I. The Federal Policy in Favor of Arbitration is not Implicated.

In the Petition, BPS invokes the federal policy in favor of arbitration as a ploy to persuade the Court that the Second Circuit's decision contravenes important policy goals to a level necessitating the Court's intervention. Specifically, BPS contends that certiorari should be granted because the Second Circuit's "broad rule favoring the issuance of anti-arbitration injunctions…conflicts with the strong federal policy in favor of arbitration." (Pet. at 24). BPS decries that certiorari should be granted because "[a]llowing anti-arbitration injunctions to issue as a matter of course unduly frustrates the strong federal policy in favor of arbitration." (Pet. at 24.) However, nothing about this case or the Second Circuit's decision implicates the federal policy in favor of arbitration, let alone conflicts with or frustrates it.

This Court has made clear that "[a]rbitration under the [Federal Arbitration] Act is a matter of consent, not coercion." *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989); *see also EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). Put another way, the Act "simply requires courts to enforce privately negotiated ***agreements*** to arbitrate." *Volt*, 489 U.S. at 478 (emphasis added); *see also Waffle House*, 534 U.S. at 294 (explaining that the FAA "does not require the parties to arbitrate when they have not agreed to do so"). These pronouncements are consistent with the oft-cited policy in favor of arbitration embodied in the FAA, which this Court has clarified is "at bottom a policy guaranteeing the enforcement of private contractual ***agreements***." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 625 (1985) (emphasis added); *see also Dean Witter Reynolds Inc.*

v. Byrd, 470 U.S. 213, 220 (1985) (explaining that the passage of the FAA "was motivated…by a congressional desire to enforce agreements into which parties had entered"); *Stone v. Doerge*, 328 F.3d 343, 345 (7th Cir. 2003) (Easterbrook, J.) (noting that "[t]here is no denying that many decisions proclaim that federal policy favors arbitration, but this differs from saying that courts read contracts to foist arbitration on parties who have not genuinely agreed to that device").

This public policy is designed to enforce only arbitration agreements, not arbitration wishes. As such, the federal policy in favor of arbitration does not apply in circumstances when, like here, the party resisting arbitration is not a party to any arbitration agreement. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (explaining that the federal policy favoring arbitration applies only when resolving matters "concerning the scope of arbitrable issues"); *Monisoff v. American Eagle Investments, Inc.*, 927 F. Supp. 137, 138 (S.D.N.Y.), *aff'd*, 104 F.3d 356 (2d Cir. 1996) (noting the "federal arbitration policy…cannot create a contract between non-contracting parties"); *McCarthy v. Azure*, 22 F.3d 351, 355 (1st Cir. 1994) (remarking "[t]he federal policy . . . does not extend to situations in which the identity of the parties who have agreed to arbitrate is unclear").

The policy favoring arbitration applies when the parties have agreed to arbitration but dispute the scope of that agreement and whether a particular issue is referable to arbitration.[1] This scenario is not present in this case.

1. Even when the dispute concerns the scope of an arbitration agreement, the court must "look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement." *Waffle House*, 534 U.S. at 294.

This case involved a preliminary, more fundamental question – whether there was an agreement to arbitrate in the first place. As already explained by this Court, "the proarbitration policy goals of the FAA" cannot work to impose arbitration upon a nonparty to an arbitration agreement because "it goes without saying that a contract cannot bind a nonparty." *Waffle House*, 534 U.S. at 294. The federal policy in favor of arbitration does not apply here. As such, one of the key pillars of BPS' certiorari Petition is fundamentally flawed. No policy exists in the FAA or elsewhere favoring the imposition of arbitration on parties that never agreed to arbitrate.

II. The Result BPS Seeks is Irrational, Illogical, and Contravenes Supreme Court Precedent

The result advocated by BPS in its Petition is irrational, illogical, and in contravention of established Supreme Court precedent. The Petition is based upon the fallacy that all cases involving the propriety of arbitration are one in the same. This is not so. As this Court has consistently recognized, there are a number of different potential disputes that can arise concerning whether arbitration is proper. For instance, there may be a dispute over the scope of an existing arbitration agreement and whether a particular substantive issue is arbitrable under the terms of the parties' agreement to arbitrate. *See AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643 (1986). There may be a dispute concerning the arbitrator's ability to rule on a procedural matter such as whether a particular claim is time-barred. *See Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002). Then, like here, there may be a dispute about whether one party is bound to an arbitration agreement.

BPS' Petition must be viewed through this latter lens. Case law addressing other types of arbitral disputes is immaterial. The issue that was presented in this case was whether BPS could be dragged into arbitration pursuant to a non-existent contract and arbitration agreement. Certiorari is inappropriate because if BPS obtains the relief it seeks and the Second Circuit's grant of a permanent injunction is reversed, BSP still cannot foist arbitration on CSCL.

The Second Circuit held as a matter of law that the judgments from the Singapore Action are entitled to preclusive effect and that CSCL is not a party to the contract under which BPS contends CSCL should be bound to arbitrate. (App.4-8.) These portions of the Second Circuit's decision would not be impacted by a reversal of the decision to grant an injunction. As such, the relief sought in the Petition, i.e., a reversal of the injunctive aspects of the Second Circuit's decision, has no bearing on the ultimate outcome. The declaration that no contract exists between the parties still stands. As such, entertaining BPS' Petition would result in an impermissible advisory opinion. As this Court has remarked on numerous occasions, "the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968); *see also Mistretta v. United States*, 488 U.S. 361, 385 (1989) (explaining that the Supreme Court has consistently "refused to issue advisory opinions"). There is no need for this Court to issue a decision as to the standard federal courts should use in determining whether to enjoin arbitration in a case where it has already been determined as a matter of law that the parties are not bound to an arbitration agreement.

In addition, the contention – that the Second Circuit's decision conflicts with the federal policy in favor of arbitration because had the district court allowed the arbitration to proceed, "the dispute would have been adjudicated by a group of arbitrators having expertise in the area of international maritime disputes" – is irrational and conflicts with established precedent. (Pet. at 25.) On this point, BPS alleges that the arbitrators "would have been in an especially good position to analyze the factual details necessary to a determination of whether the Singapore proceedings resulted in a final decision (as CSCL has argued and the district court has held) or merely an interlocutory decision (as BPS maintains)." *Id.* In other words, BPS asserts that the federal policy in favor of arbitration should have required the district court to demur, force CSCL into an arbitration to which it never agreed, and bestow on a panel of arbitrators for decision the legal issues that were placed before the district court. The suggestion is absurd.

This Court has explicitly held that courts, not arbitrators, must decide whether parties agreed to arbitrate "[u]nless the parties clearly and unmistakably provide otherwise." *AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643, 649 (1986). As they must, all circuits follow *AT&T* and hold that the question of whether the parties agreed to arbitrate must be resolved by the court absent unmistakable proof that the parties intended the issue to be resolved by the arbitrators. *See Painewebber Inc. v. Elahi*, 87 F.3d 589, 595 (1st Cir. 1996); *U. S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., Ltd.*, 241 F.3d 135, 146 (2d Cir. 2001); *Bogen Communs., Inc. v. Tri-Signal Integration, Inc.*, 227 F. App'x 159, 161 (3d Cir. 2007); *Cathcart Props. v. Terradon Corp.*, 364 F.

App'x 17, 18 (4th Cir. 2010); *Hous. Ref., L.P. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union*, 765 F.3d 396, 408 (5th Cir. 2014); *Vic Wertz Distrib. Co. v. Teamsters Local 1038, Nat'l Conference of Brewery & Soft Drink Workers*, 898 F.2d 1136, 1140 (6th Cir. 1990); *Brock Indus. Servs., LLC v. Laborers' Int'l Union of N. Am. Constr. & Gen. Laborers Local 100*, 920 F.3d 513, 516 (7th Cir. 2019); *Silgan Containers Corp. v. Sheet Metal Workers Int'l Ass'n, Local Union No. 2*, 820 F.3d 366, 369 (8th Cir. 2016); *Sheet Metal Workers Int'l Asso., Local No. 359 v. Ariz. Mech. & Stainless, Inc.*, 863 F.2d 647, 651 (9th Cir. 1988); *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 779 (10th Cir. 1998); *JPay, Inc. v. Kobel*, 904 F.3d 923, 930 (11th Cir. 2018); *KenAmerican Res. v. Int'l Union, UMW*, 99 F.3d 1161, 1163 (D.C. Cir. 1996).

In the face of this long-standing precedent, BPS' arguments to this Court are strange, albeit not entirely surprising given the questionable nature of many of the arguments that BPS has advanced throughout these proceedings. *Big Port*, 2020 U.S. Dist. LEXIS 150137, at *7 (the district court explaining that BPS "took questionable and, at times, contradictory positions over the course of this litigation"). The suggestion that the federal policy in favor of arbitration would require the district court to refrain from acting and have arbitrators decide the impact of the Singapore judgments and the inextricably intertwined issue of whether CSCL was bound to arbitrate is simply wrong. Equally, the procedure that BPS contends should have been used by the district court (i.e., referring the case to arbitrators) contravenes established law from this Court, as it would permit the arbitrators to decide the issue of whether CSCL was required to arbitrate

when there was no evidence the parties agreed to submit that issue to the arbitrators. *AT&T*, 475 U.S. at 649. BPS' misguided appeal to policy considerations cannot override established Supreme Court precedent.

BPS' argument also portends a procedure whereby an entity which believes it is not a party to an arbitration agreement has two choices: (1) it can fail to participate in the arbitration and run the risk that the other party proceeds full steam ahead with the consent of the arbitrators (which is what was happening here) or (2) it can take part in the arbitration and then move to vacate any adverse award once the arbitration is concluded. (Pet. at 27-28.) Neither of these options is supported under the law or compelled by the policy favoring arbitration. Under BPS' logic, in such a situation the party resisting arbitration would effectively be powerless, as the only relief available would be to conduct the arbitration and then move to vacate. This is nonsense.

First, this result advocated by BPS contravenes the Court's dictate that "[a]rbitration…is a matter of consent, not coercion." *Waffle House*, 534 U.S. at 294. To drag a party into an arbitration proceeding against its will with no recourse other than to wait it out until the arbitration is complete is the very definition of coercion. A result that clearly conflicts with established precedent cannot stand.

Second, the suggestion that an entity such as CSCL would have recourse at the conclusion of the improperly-commenced and progressed arbitration through a petition to vacate under the FAA is also plainly without merit. Section 10 of the FAA sets forth the grounds for the "limited review" available to obtain vacatur of an

arbitration award. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008); *see also* 9 U.S.C. § 10. If one of the limited grounds for vacatur under section 10 is unavailable, the reviewing court "must" confirm the award. 9 U.S.C. § 9; *see also Hall Street*, 552 U.S. at 587. There is no principle of law or reason which requires a party to participate in an arbitration to which it never agreed and then to hope that the limited bases for vacatur will prevail once the matter is concluded. Neither the FAA nor any precedent requires such a procedure. The reason for this absence is simple – arbitration is a matter of contract, and "the FAA does not require parties to arbitrate when they have not agreed to do so." *Volt*, 489 U.S. at 478. BPS' suggestion that a petition to vacate under section 10 of the Act is the proper vehicle for resolving a dispute over whether a party is bound by an arbitration agreement is simply illogical.

The unavoidable conclusion is that the district court was not required to force CSCL to participate in BPS' ill-founded arbitration proceedings and to litigate any issue, much less the issues relative to the existence or non-existence of an arbitration agreement. The district court acted in accord with established precedent which leaves for courts, not arbitrators, the resolution of the gateway question of whether a party is bound to arbitration. The district court did not violate any public policy when it acted. No principle of law or policy supports BPS' suggestion that the district court should have refrained.

III. BPS' Assertions of a Circuit Split are a Pretext.

The main theme of BPS' Petition is that a circuit split supposedly exists regarding "the circumstances under

which a court is permitted to issue an anti-arbitration injunction." (Pet. at 11). In an effort to manufacture a perceived circuit split, BPS points to a variety of circuit court decisions concerning different circumstances when a court was asked to enjoin arbitration. Placing all of these decisions under the same overly-broad umbrella, BPS contends that a circuit split exists on the power of courts to issue anti-arbitration injunctions. This contention is incorrect on a number of levels.

Before examining BPS' claims of a circuit split, it is important to briefly recall the specific factual scenario in this case giving rise to the district court's grant of a permanent injunction. The injunction was issued because the district court found that CSCL was not a party to any arbitration agreement with BPS and as such could not be compelled to arbitrate. (App.8.) Crucially, this case does not involve a factual situation in which BPS and CSCL were undeniably parties to an arbitration agreement but disputed whether certain claims were arbitrable pursuant to such agreement or whether certain claims were previously settled. In the context of this case, the court examined a simple question – was an injunction appropriate to prevent BPS from proceeding with arbitration against CSCL when CSCL was not bound to any arbitration agreement with BPS. Again, BPS' cries of a circuit split should be examined in this context.

The purported circuit split revolves around BPS' contention that a handful of circuits have supposedly issued injunctions against arbitration by referencing the All Writs Act, whereas a handful of other circuits have held that federal courts have the power to issue injunctions against arbitration without resorting to the

All Writs Act. A cursory review of the cases cited by BPS as support for this concocted circuit split reveals that only one circuit court, the Eleventh Circuit, has arguably held that an injunction against arbitration may only be granted when the requirements of the All Writs Act have been met. That decision was issued in a context which is utterly distinguishable from the present case. As such, if the Eleventh Circuit case presented a split of authority (which it does not), the split is utterly immaterial to the present case.

In *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092 (11th Cir. 2004), the Eleventh Circuit examined whether the district court was "empowered to enjoin arbitration of [the plaintiff's] nonarbitrable claims under the All Writs Act." *Klay*, 376 F.3d at 1113. The parties in *Klay* had an arbitration agreement between them; the dispute concerned whether certain claims were subject to that process or not. Noting that arbitration of the non-arbitrable claims would ultimately be a "pointless, fruitless exercise," the court went on to hold that the district court erred utilizing the All Writs Act to enjoin the arbitration. *Id.* at 1112-13. Pertinently, the court stressed that an injunction under the All Writs Act was unavailable because "[i]t is precisely because arbitrating nonarbitrable claims is such a pointless endeavor that it does not threaten or undermine either the district court's existing order or its jurisdiction over the pending cases." *Id.* at 1113.

Tellingly, *Klay* did not involve a situation, like the one in this case, in which the parties disputed whether a binding arbitration agreement existed between them. This is a crucial distinction completely ignored by BPS. When a dispute centers on the existence or non-existence

of an arbitration agreement (as opposed to the scope of an undeniably existent agreement), the courts routinely grant injunctive relief without resort to the All Writs Act. Indeed, prior to deciding *Klay*, the Eleventh Circuit in *Hull v. Norcom, Inc.*, 750 F.2d 1547, 1550 (11th Cir. 1985), affirmed the district court's decision to enjoin an arbitration when no valid arbitration agreement existed between the parties. The Eleventh Circuit's decision in *Hull* makes no reference to the All Writs Act, nor does the later decision in *Klay* suggest that this aspect of *Hull* is no longer good law. *Hull* is the more relevant Eleventh Circuit authority here given the context of this case.

Moreover, none of the other circuit court opinions cited by BPS actually holds that the All Writs Act is the sole ground available for enjoining arbitration. For instance, the Eighth Circuit in *Ewart v. Y & A Grp. (In re Y & A Grp. Sec. Litig.)*, 38 F.3d 380 (8th Cir. 1994), examined whether the district court had authority to enjoin arbitration of a dispute between an investor plaintiff and securities broker defendant. The court did casually remark that the investor's argument-- that the district court did not have the power to enjoin the arbitration -- was "superficially appealing." *Id.* at 382. However, the court recognized that "courts have the power to defend their judgments as *res judicata*, including the power to enjoin or stay subsequent arbitrations." *Id.* This principle was "dispositive of the issue of the district court's power." *Id.* The Eighth Circuit then went on to note, in *dicta*, that "further indirect support for that [injunctive] power" exists in the All Writs Act. *Id.* at 382-83. The case does not stand for the proposition that the All Writs Act is the sole basis of authority for a district court to enjoin arbitration, particularly when there is no arbitration agreement.

Likewise, the Ninth Circuit's unpublished decision in *Hartley v. Stamford Towers Ltd. P'ship*, No. 92-16802, No. 92-56528, 1994 U.S. App. LEXIS 23543 (9th Cir. Aug. 26, 1994), also does not stand for the proposition alleged by BPS. In *Hartley*, the Ninth Circuit held that the broad grant of injunctive authority in the All Writs Act "includes jurisdiction to enforce a class action judgment." *Hartley*, 1994 U.S. App. Lexis 23543 at *12. While the court in *Hartley* happened to use that authority to enjoin an arbitration which threatened to conflict with a class action judgment, it did not hold, as erroneously suggested by BPS, that the sole power to enjoin any arbitration comes from the All Writs Act.

BPS also points to the Seventh Circuit's decision in *AT&T Broadband, LLC. v. Int'l Broth. of Elec. Workers*, 317 F.3d 758 (7th Cir. 2003), for the proposition that "[t]he Seventh Circuit has held that an anti-arbitration injunction is proper only if traditional principles of equity are satisfied." (Pet. 17). BPS' reliance on the Seventh Circuit's decision in *Broadband* is odd given that the very first sentence of the court's opinion states that the case involves "the question whether the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15, forbids a district court to enjoin the arbitration of a labor dispute." *Broadband*, 317 F.3d at 759. The Seventh Circuit held that it would "join the four other circuits [the First, Third, Ninth, and D.C. Circuits] that have understood the Norris-LaGuardia Act to preclude injunctive relief against the arbitration of a labor dispute." *Id*. at 763. Of course, the Norris-LaGuardia Act has no application here whatsoever, and therefore BPS' reliance on *Broadband* to try and create a circuit split is utterly misguided.[2]

2. It is also ironic that BPS uses *Broadband* to attempt to manufacture a circuit split when the opinion is consistent with the

Lastly, the circuit courts which BPS contends "have found that courts have a broad power to issue injunctions against arbitration" acted in accord with precedent from this Court. (Pet. at 18.) For instance, the Second Circuit in *Beland* relied upon this Court's statement in *Volt* that "[a]rbitration under the [FAA] is a matter of consent, not coercion" when holding that "[i]f the parties to this appeal have not consented to arbitrate a claim, the district court was not powerless to prevent one party from foisting upon the other an arbitration process to which the first party had no contractual right." *Anderson v. Beland (In re Am. Express Fin. Advisors Sec. Litig.)*, 672 F.3d 113, 141 (2d Cir. 2011).

The Second Circuit in *Beland* also relied upon the First Circuit's decision in *Societe Generale de Surveillance, S.A. v. Raytheon European Mgmt. & Sys. Co.*, 643 F.2d 863 (1st Cir. 1981), and the Third Circuit's decision in *PaineWebber Inc. v. Hartmann*, 921 F.2d 507 (3d Cir. 1990), both of which are in accord. In *Societe Generale*, the First Circuit, faced with the issue of whether a valid arbitration agreement existed between the parties, held that "to enjoin a party from arbitrating where an agreement to arbitrate is absent is the concomitant of the power to compel arbitration where it is present." *Societe Generale de Surveillance, S.A. v. Raytheon European*

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rulings from all other circuits (including the Eleventh Circuit) that have addressed the precise issue addressed in *Broadband*, *i.e.*, whether the Norris-LaGuardia Act prevents the court from enjoining a labor dispute. *Id.* at 763; *Triangle Constr. & Maint. Corp. v. Our V.I. Labor Union*, 425 F.3d 938 (11th Cir. 2005) (proclaiming "[w]e agree with our sister circuits" in holding that the Norris-LaGuardia Act bars the court from enjoining any labor dispute).

Mgmt. & Sys. Co., 643 F.2d 863, 868 (1st Cir. 1981). Similarly, the Third Circuit in *PaineWebber* held that "[i]f a court determines that a valid arbitration agreement does not exist or that the matter at issue clearly falls outside of the substantive scope of the agreement, it is obliged to enjoin arbitration." *PaineWebber*, 921 F.2d at 511.[3]

Boiled down to the basics, BPS' argument is that there exists a circuit split based exclusively upon the Eleventh Circuit's decision in *Klay*. *Klay* does not however involve the circumstances present in this case, i.e., a non-existent contract and arbitration agreement. Tellingly, BPS cannot point to a single decision from ***any*** circuit which held that a district court is powerless to enjoin arbitration when there is no valid arbitration agreement between the parties. Nor for that matter has BPS pointed to a single circuit court decision in which the court held that a district court may enjoin arbitration in the absence of a valid arbitration agreement between the parties only if the court believes an injunction is warranted under the All Writs Act. In spite of BPS' attempt to paint with such a broad brush, it is clear that no circuit split exists. There is nothing for this Court to resolve in the context of this case.

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3. BPS also points to the Fifth Circuit's decision in *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494 (5th Cir. 1986), as support for the assertion that "[t]he Fifth Circuit…has adopted a broad view of courts' power to issue anti-arbitration injunctions." (Pet. at 21-22.) In *Miller*, the Fifth Circuit simply granted an injunction after finding that a party waived the right to arbitration and in any event that the claims sought to be asserted in the arbitration were barred by res judicata. *Miller*, 781 F.2d at 501.

IV. The Decision Below is Correct.

Finally, review is not warranted because the decision below is plainly correct. Trying to force a party into arbitration is not a matter of right. Arbitration is a creature of contract. Established precedent from each and every one of the circuit courts bestows district courts, not arbitrators, with the power to determine whether an entity is a party to an arbitration agreement.

The Second Circuit's decision that the injunction was proper because CSCL was not a party to any arbitration agreement with BPS (App.8) falls squarely in line with this Court's mandate that "[a]rbitration under the Act is a matter of consent, not coercion." *Volt*, 489 U.S. at 479. BPS' contentions and the result it advocates fly in the face of this established precedent. *See* discussion *supra* at section II. There is just no need for this Court to consider whether the All Writs Act may permit an injunction against arbitration where, as here, there is no arbitration agreement between the parties. The Second Circuit's finding that there was no agreement to arbitrate between BPS and CSCL was the end of the game. Having this Court examine whether resort to the All Writs Act was required would be nothing more than unnecessary overtime.

It also bears repeating that BPS was the one which advocated before the district court that the existence of the arbitration agreement should be litigated in Singapore. BPS litigated that issue extensively in Singapore and through multiple levels of appeal. It lost. When BPS tried to reverse field, the district court closely examined the record and declared the lack of an arbitration agreement between the parties. There is thus nothing to send to

arbitrators. Yet, due to BPS' evident failure to abide by judicial results and its continued efforts to advance an arbitration proceeding which was ill-conceived and initiated, an injunction was necessary. The district court acted appropriately when it enjoined BPS from foisting arbitration on CSCL. The Second Circuit affirmed the district court in all respects. There was nothing erroneous about that decision. The decision was in accord with this Court's precedent and all circuit authority addressing the authority to enjoin a party from continuing with arbitration when there is no agreement to arbitrate otherwise. Any other ruling would turn established precedent on its head. CSCL was not and is not required to arbitrate anything with BPS.

CONCLUSION

The petition for a writ of certiorari should be denied for the foregoing reasons.

Respectfully submitted,

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