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 Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The Rule 29.6 statement in Big Port Service DMCC's petition for writ of certiorari remains accurate.

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INTRODUCTION

China Shipping Container Lines Co. Ltd.'s ("CSCL") brief in opposition is most notable for what it does not dispute.

CSCL offers no response to Big Port Service DMCC's ("BPS") argument (Pet. 26-29)—in line with Eleventh Circuit case law—that there is no cause of action for "wrongful arbitration," and that it was therefore improper for the Second Circuit to affirm the grant of declaratory and injunctive relief against BPS.

Nor does CSCL respond to BPS's argument (Pet. 29-34) that the All Writs Act would not have permitted the anti-arbitration injunction that issued here. Moreover, CSCL does not respond to BPS's argument (Pet. 34-36) that even assuming *arguendo* that courts have a remedial power to enjoin an arbitration, there is no basis for the Second Circuit's rule that automatically grants such relief without consideration of the traditional equitable factors required by this Court's precedents.

Further, CSCL does not seriously dispute that the Courts of Appeals have reached differing conclusions on: (i) whether there is a cause of action for a party seeking to avoid arbitration; and (ii) when a court may issue an anti-arbitration injunction. CSCL's attempts to distinguish BPS's cited cases are unconvincing, as CSCL ignores the pertinent point: the Courts of Appeals apply different standards when determining whether a party seeking to avoid arbitration is entitled to relief. For example, CSCL would not have obtained any relief in the Eleventh Circuit, because the Eleventh

Circuit has squarely held that there is no cause of action for "wrongful arbitration." Moreover, CSCL would not have obtained injunctive relief in the Seventh Circuit, which applies this Court's traditional test in analyzing the propriety of anti-arbitration injunctions. In contrast, because this case arose in the Second Circuit, CSCL was permitted to: (i) commence a summary proceeding; and (ii) obtain declaratory relief and an anti-arbitration injunction without satisfying the requirements mandated by this Court and other circuits. Certiorari should be granted to resolve this circuit split.

ARGUMENT

I. There Is No Cause of Action for a Party Seeking to Avoid Arbitration

As detailed in the petition and as correctly explained by the Eleventh Circuit, there is no cause of action for "wrongful arbitration." Pet. 26 (citing *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1098 (11th Cir. 2004)). Accordingly, there was no basis for recognizing CSCL's suit, which proceeded summarily without the protections (e.g., discovery) afforded by the Federal Arbitration Act ("FAA") and the Federal Rules of Civil Procedure. Pet. 26-29. CSCL says little in response to this argument, aside from incorrectly asserting that BPS has failed to challenge the grant of declaratory relief. Opp. i, 17. Contrary to CSCL's statement, BPS explicitly challenges the grant of declaratory relief, arguing, for example, that "the Second Circuit erred in upholding the district court's decision to entertain CSCL's suit and grant CSCL affirmative relief[,]" and that "the district court should

have declined to issue a declaratory judgment[.]" Pet. 27, 29. As BPS explained, the Second Circuit should not have recognized a *sui generis* summary action for a party seeking to avoid arbitration. Pet. 27-29.

CSCL wrongly argues that BPS is seeking an advisory opinion from this Court. Opp. i, 17. Quite the contrary, BPS seeks a ruling from this Court that the Second Circuit erroneously recognized a cause of action for CSCL's attempt to avoid arbitration, and therefore should not have granted any type of relief—declaratory, injunctive, or otherwise. Such a ruling would allow BPS to pursue arbitration against CSCL, as permitted by the ruling from the Singapore Court of Appeal. Indeed, the fact that there is no cause of action for "wrongful arbitration" demonstrates that: (i) the Second Circuit erred in recognizing a broad remedial power to issue anti-arbitration injunctions; and (ii) an anti-arbitration injunction can be issued only under the All Writs Act—i.e., when necessary for a court to vindicate its own jurisdiction. But even if this Court were to uphold the declaratory judgment, a ruling that the injunction was improper would still provide BPS with meaningful relief, as BPS would no longer be subject to an injunction and the risk of contempt proceedings. Simply put, this case poses no risk of the Court rendering an advisory opinion.

CSCL argues that the Second Circuit's recognition of CSCL's suit does not implicate the federal policy in favor of arbitration, and suggests that a special rule should apply whenever a party believes that it is not subject to an arbitration agreement. Opp. 13-16, 18-20. But CSCL misses the point: nothing in the FAA, in any

other statute, or in this Court's precedents, permits a party to commence an action to avoid an arbitration, let alone a summary proceeding lacking the protections afforded by the FAA and the Federal Rules of Civil Procedure. The Second Circuit's rule permitting anti-arbitration injunctions to issue as a matter of course is inconsistent with the federal policy in favor of arbitration. Recognition of a cause of action to avoid arbitration also conflicts with this Court's principle that causes of action should not be implied lightly. *Cf. Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 140 S. Ct. 1009, 1015 (2020) (recognizing that "even in the era when this Court routinely implied causes of action, it usually insisted on legal elements at least as demanding as those Congress specified for analogous causes of action actually found in the statutory text."). Regardless, CSCL's view that it was entitled to the relief it obtained is a merits question, and does not support the denial of certiorari.

II. The Circuit Split Is Deep and Acknowledged

CSCL incorrectly dismisses the circuit split as a "pretext." Opp. 21. This characterization would come as a surprise to the Second Circuit, which has explicitly discussed the circuits' differing views on when an anti-arbitration injunction may issue. *See In re Am. Express Fin. Advisors Sec. Litig.*, 672 F.3d 113, 141, 141 n.20 (2d Cir. 2011) (citing *Societe Generale de Surveillance, S.A. v. Raytheon European Mgmt. & Sys. Co.*, 643 F.2d 863 (1st Cir. 1981); *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990); *Klay*, 372 F.3d at 1099; *In re Y & A Grp. Sec. Litig.*, 38 F.3d 380, 382, 382-83 (8th Cir. 1994); *Hartley v. Stamford Towers*

Ltd. P'ship, 36 F.3d 1102, 1994 WL 463497 (9th Cir. Aug. 26, 1994)). Specifically, the Second Circuit noted that: (i) the First Circuit has found the power to issue an anti-arbitration injunction to be a "concomitant" of the power to compel arbitration under the FAA; (ii) the Third Circuit has concluded that an anti-arbitration injunction is automatically required whenever a court finds that the dispute is not arbitrable; and (iii) the Eighth, Ninth, and Eleventh Circuits have measured the propriety of an anti-arbitration injunction under the strictures of the All Writs Act. *Id.* The Second Circuit then adopted a broad rule that seemingly authorizes an anti-arbitration injunction whenever a court finds a dispute not to be subject to arbitration. *Id.* at 141. And if there was a question about the breadth of the Second Circuit's rule, any doubt was eliminated by its decision in this case. Pet. App. 8. Indeed, the Second Circuit found injunctive relief appropriate despite the district court's express refusal to apply the traditional test governing permanent injunctive relief. *Id.* (affirming the district court's grant of injunctive relief); Pet. App. 31-32 n.15 (district court decision stating that under Second Circuit law, courts "do[] not have to satisfy the traditional factors courts consider in granting injunctive relief in order to enjoin the arbitration[,]" and holding that "[a] court's finding that there is no agreement to arbitrate is all that is required to enable it to enjoin an arbitration."). Under this Court's traditional test or under the All Writs Act, an anti-arbitration injunction would not have issued here.

In seeking to minimize the circuit conflict, CSCL wrongly dismisses BPS's cited Seventh Circuit

authority finding that an anti-arbitration injunction is warranted only if the traditional equitable factors (e.g., irreparable harm) are satisfied. Opp. 25 (citing *AT&T Broadband, LLC v. Int'l Broth. of Elec. Workers*, 317 F.3d 758 (7th Cir. 2003)). Specifically, CSCL claims that *AT&T* is inapplicable because it arose under the Norris-LaGuardia Act. Opp. 25. But CSCL ignores the pertinent analysis, in which the Seventh Circuit explained that even "if the Norris-LaGuardia Act were out of the picture[,]" there was no irreparable injury, and therefore "no justification for an injunction." *AT&T*, 317 F.3d at 762. Moreover, CSCL ignores BPS's other cited Seventh Circuit authority (*see* Pet. 17), which found that an anti-arbitration injunction was unwarranted because: (i) there was no irreparable harm; and (ii) any argument that the dispute was not arbitrable could be raised later in "a proceeding under the Federal Arbitration Act to deny enforcement to the award." *Trustmark Ins. Co. v. John Hancock Life Ins. Co. (U.S.A.)*, 631 F.3d 869, 872 (7th Cir. 2011) (Easterbrook, J.) (citing 9 U.S.C. § 10(a)(4)). As *Trustmark* correctly recognized, a party who believes that a dispute is not arbitrable has recourse by way of a proceeding to vacate the arbitrator's award. Specifically, if—as CSCL argues—there was no agreement to arbitrate, any award by the arbitrators would be in excess of their authority, which could be grounds for vacatur of the award. 9 U.S.C. § 10(a)(4) (providing that a district court may vacate an arbitration award "where the arbitrators exceeded their powers"). Had the Second Circuit followed this reasoning, it would have reversed the anti-arbitration injunction that was issued here and permitted the arbitration to proceed. CSCL's disputes about whether

it was a party to the contract, whether it communicated directly with BPS prior to getting the bunkers, and whether it was required to pay for the marine bunkers that it undisputedly consumed, therefore would have been decided by the arbitrators in the first instance. And if the arbitrators issued an award in favor of BPS, CSCL would be free to seek vacatur of the award under 9 U.S.C. § 10(a)(4) if it believed that the arbitrators lacked the authority to make the award.

Moreover, CSCL wrongly dismisses the import of Eleventh Circuit's *Klay* decision because that case involved a question about whether a particular dispute was arbitrable rather than whether the parties had entered into an arbitration agreement. Opp. 23-24. But *Klay* did not hinge upon this distinction. Rather, as detailed in the petition (Pet. 13-16), *Klay* analyzed three types of injunctions ("traditional" injunctions, "statutory" injunctions, and All Writs Act injunctions), and concluded that an anti-arbitration injunction can be upheld only under the All Writs Act. *See Klay*, 376 F.3d at 1104. Contrary to CSCL's suggestion, *Klay* broadly held that "'[w]rongful arbitration' . . . is not a cause of action for which a party may sue[,]" and therefore concluded that a traditional injunction is not a viable way to enjoin an arbitration. *Id.* at 1098. Moreover, CSCL's reliance (Opp. 24) on *Hull v. Norcom, Inc.*, 750 F.2d 1547 (11th Cir. 1985) is misplaced because in that pre-*Klay* case, it appears that the parties did not dispute that injunctive relief would be proper if the court found the underlying contract to be unenforceable. Here, and in *Klay*, the propriety of injunctive relief as a remedy is squarely disputed.

In sum, the courts of appeals are divided as to when an anti-arbitration injunction may be issued. Certiorari should be granted to provide guidance on this important issue.

III. CSCL Does Not Dispute that the All Writs Act Would Not Have Permitted the Issuance of an Anti-Arbitration Injunction Here

In addition to CSCL's failure to contend that there is a cause of action for a party seeking to avoid arbitration, CSCL offers no response to BPS's argument (Pet. 29-34) that the All Writs Act would not have permitted the issuance of an injunction here. This silence is telling, because there is no viable argument that the All Writs Act would permit the issuance of an anti-arbitration injunction simply to recognize the Singapore decision. As the Eleventh Circuit recognized:

> [A]n All Writs Act injunction is predicated upon some other matter upon which a district court has jurisdiction. Thus, while a party must "state a claim" to obtain a "traditional" injunction, there is no such requirement to obtain an All Writs Act injunction—it must simply point to some ongoing proceeding, or some past order or judgment, the integrity of which is being threatened by someone else's action or behavior.

Klay, 376 F.3d at 1100. This discussion is consistent with the text of the All Writs Act, which permits United States federal courts to issue "all writs necessary or appropriate in aid of *their* respective

jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (emphasis added). Nothing in the All Writs Act permits the issuance of an injunction against an arbitration that in no way affects a United States federal order, judgment, or ongoing proceeding. An All Writs Act injunction would be especially unsuitable where—as here—the Singapore decision explicitly states that it is not making "a comment on the viability" of BPS's "claim in arbitration proceedings overseas." A-841.[1] Simply put, there can be no dispute that under the All Writs Act standard, an anti-arbitration injunction never would have been issued against BPS. Certiorari should be granted to determine when an anti-arbitration injunction may be issued.

[1] CSCL attempts to avoid this conclusion by the Singapore Court of Appeal by pointing to a declaration from CSCL's counsel that offers an extra-textual interpretation of the Singapore court's statement. Opp. 10-11. Although BPS strongly believes that the Singapore Court of Appeal's statement unambiguously demonstrates that it was not foreclosing BPS from commencing arbitration in the United States, CSCL's disagreement shows—if anything—that there is a dispute concerning the meaning of the Singapore Court of Appeal's decision, which is properly resolved by the arbitrators in the first instance. *Cf. Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 607 (D.C. Cir. 1983) ("As the affidavits make clear, the determinations of foreign law that would have to be made to evaluate the availability of adequate alternative fora are extremely difficult and would require a great deal of expertise not readily available to us.").

IV. CSCL Does Not Dispute that the Second Circuit's Case Law Providing for the Automatic Issuance of an Anti-Arbitration Injunction Conflicts with This Court's Precedents

CSCL offers no response to BPS's argument (Pet. 34-36) that even assuming *arguendo* that there is a cause of action for a party seeking to avoid arbitration, the Second Circuit's decision permitting the automatic issuance of an anti-arbitration injunction conflicts with this Court's precedents. Nor could it, given the district court's analysis—endorsed by the Second Circuit—stating that anti-arbitration injunctions are not subject to this Court's precedents governing the grant of injunctive relief. Pet. App. 31-32 n.15. There can be no serious dispute that this standard is irreconcilable with this Court's precedents, which make clear that permanent injunctive relief may be granted only if: (1) the plaintiff has suffered an irreparable injury; (2) remedies available at law are inadequate to compensate for that injury; (3) the balance of hardships favors an equitable remedy; and (4) the public interest would not be disserved by the issuance of an injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Tellingly, CSCL does not dispute that there would be no irreparable harm in the absence of injunctive relief here. CSCL's silence is understandable, because, as explained *supra*, any award by the arbitrators would be reviewable by way of a request by CSCL that the award be vacated. For example, if—as argued by CSCL and strongly disputed by BPS—a court determines that CSCL did not agree to arbitrate, then the arbitrators' award would be

subject to vacatur as being in excess of their powers. *See* 9 U.S.C. § 10(a)(4). Accordingly, given the absence of irreparable harm, an anti-arbitration injunction is unwarranted. The Second Circuit's conclusion to the contrary cannot be squared with this Court's precedents.

V. CSCL's Remaining Arguments Do Not Warrant the Denial of Certiorari

Rather than addressing BPS's arguments, CSCL spends much of its brief raising factual disputes about the record before the district court and the Second Circuit. Opp. 1-13. Resolution of these disputes is unnecessary to deciding the Question Presented, and CSCL's arguments therefore do not support the denial of certiorari. For instance, CSCL argues that the Singapore courts reached a final decision, rather than an interlocutory decision. Opp. 9-11. Although the Singapore Court of Appeal's decision shows, by itself, that CSCL is incorrect (*see* A-841), CSCL's factual disagreement only highlights that: (i) arbitrators with subject-matter expertise should have been permitted to decide the parties' dispute in the first instance; and (ii) it was improper for the district court to recognize CSCL's extra-statutory cause of action and summarily issue declaratory and injunctive relief. Moreover, CSCL makes much of the fact that long before the Singapore Court of Appeal's decision, BPS predicted to the district court that the Singapore courts would resolve the parties' dispute. Opp. 5-6, 11. And CSCL emphasizes the district court's finding that BPS's prediction judicially estopped BPS from arguing that the Singapore courts did not ultimately decide the

viability of arbitration in the United States. Opp. 5-6, 11. But BPS's prediction was made long before the Singapore Court of Appeal declined to decide the viability of arbitration in the United States. Accordingly, there is no inconsistency between: (i) BPS's earlier prediction about what the Singapore courts would decide; and (ii) BPS's later arguments to the district court after the Singapore Court of Appeal issued its decision. Therefore, it is unsurprising that the Second Circuit expressly declined to rely on the district court's judicial-estoppel finding as a basis for affirmance. Pet. App. 7-8.[2]

In sum, CSCL's arguments do not support the denial of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

[2] CSCL's suggestion that the Second Circuit adopted the district court's judicial-estoppel finding (Opp. 12) is incorrect.

Respectfully submitted,

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