No. 21-1097

In the
Supreme Court of the United States

VINOD KUMAR DAHIYA,
Petitioner,
v.

TALMIDGE INTERNATIONAL, LTD., NEPTUNE SHIPMANAGEMENT SERVICES (PTE) LTD., AMERICAN EAGLE TANKERS, INC., LTD., AMERICAN EAGLE TANKERS AGENCIES, INC. AND THE BRITANNIA STEAMSHIP INSURANCE ASSOCIATION, LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF

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Petitioner Vinod Kumar Dahiya replies to the opposition filed by the Vessel Interests. The opposition seems more calculated to distract from than to respond to the legal merit of the issues presented by Dahiya. It fails to convey any meaningful basis to dispute that the issues presented by Dahiya satisfy Rule 10 criteria.

At the outset, Dahiya observes that much of the Vessel Interests' recitation seems intended to convey that Dahiya is a bad person. Dahiya is blamed for the extent of the litigation proceedings over the several decades it has taken him to overcome the Vessel Interests' resistance to his partial recovery for the catastrophic burn injuries he suffered in 1999. The case has been vigorously contested by both sides. The Vessel Interests do not mention that they were the instigator of a majority of these proceedings. It was the Vessel Interests who exhausted appeals in both the federal and state court systems from the rulings which originally denied their requested arbitration relief (before they became the beneficiary of an intervening change in the jurisprudence).

One might expect that, having imposed an egregiously adhesionary employment contract on an 18 year old aspiring sailor, Neptune might be hesitant to characterize the young seaman as a villain for seeking compensation for his injuries. Apparently not. And, having imposed upon the employee their preselected corrupt and/or incompetent arbitrator, whose biased ruling caused a ten year detour into the Indian courts

in order to obtain appointment of an impartial arbitrator, one might expect that the Vessel Interests would be hesitant to blame Dahiya for delay. Apparently not. The Vessel Interests make no effort to justify their preselected arbitrator's conduct, but show no remorse for the consequences of his appointment. Instead, they make misleading and vaguely xenophobic representations that Dahiya's injury had no relationship to the U.S. But none of this is germane to the Court's review.

Dahiya returns to the issues relevant to the pending application for certiorari.

CONVENTION ARTICLE II(2)

What is not in the Vessel Interests' brief in opposition is revealing. The opposition does not contest the existence of a circuit split regarding the Convention's definitional requisite of bilateral signatures to constitute an arbitration agreement subject of the Convention. Nor does it offer any argument or justification in support of the outlier holding of the Fifth Circuit precedent.[1] It does not take issue with Dahiya's contention that there was an erroneous exercise of federal jurisdiction pursuant to the Convention. Nor does the opposition offer any comment or argument regarding the subsidiary circuit split over whether the lack of bilateral signatures constitutes a jurisdictional or merits defect pursuant to the Convention. Nor is there disagreement that the circuit split issue is worthy of granting certiorari.

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[1] Sphere Drake Insurance, PLC v. Marine Towing, Inc., 16 F.3d 666 (5th Cir. 1994).

The Vessel Interests instead attempt a diversionary argument, attempting to deflect the Court into considering only issue preclusion. The first reason this fails is that compliance with the Convention is the basis for the threshhold necessity of federal question jurisdiction. Further, the assertion that the 2006 state court ruling had preclusive effect under state law is plainly erroneous and in direct conflict with the state Supreme Court's holding (as discussed infra). Another is that 2006 decision did not even address the bilateral signatures issue of Sphere Drake, such that there is no "issue actually litigated and determined" which could serve as the basis for preclusion. Upon recognition of the inapplicability of issue preclusion, all that remains to enable the exercise of federal jurisdiction is the Fifth Circuit's alternative reliance on Sphere Drake.

The 2006 state appellate court decision[2] which directed that Dahiya's case be stayed pending arbitration was premised on the contemporary Fifth Circuit Convention jurisprudence. It cited and applied the superficial criteria adopted by the Fifth Circuit in Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co. (Pemex), 767 F.2d 1140 (5th Cir. 1985). Sedco held that "the Convention contemplates a *very limited inquiry* by courts when considering a motion to compel arbitration...". 757 F.2d at 1144 (italics added). The state court appellate decision states (App. 22, at 38):

> Finally, the Convention contemplates a limited inquiry by courts when considering whether to

[2] Dahiya v. Talmidge International, Ltd., 2005-0514 (La. App. 4th Cir. 5/26/06), 931 So.2d 1163.

> compel arbitration. The inquiry questions (1) is there an agreement in writing to arbitrate the dispute; in others words, is the arbitration agreement broad or narrow; (2) does the agreement provide for arbitration in the territory of a Convention signatory; (3) does the agreement to arbitrate arise out of a commercial legal relationship; and (4) is a party to the agreement not an American citizen. If these requirements are met, the Convention requires the courts to order arbitration. Sedco, Inc., 767 F.2d. at 1144-45; Ledee v. Ceramiche Ragno, 684 F.2d 184, 185-186 (1 Cir. 1982).
>
> We find that Mr. Dahiya's arbitration clause easily meets all four requirements of the Convention. . .

It is self-evident that the Deed is an "agreement in writing." But it is not an "agreement in writing, signed by the parties" unless the rule of Sphere Drake applies. The first "limited inquiry" criteria utilized by the 2006 decision addressed only whether there was an"agreement in writing"; it did not allow for consideration of the qualifying "signed by the parties" requirement of Convention Article II (2).

Sedco reaffirmed that it is for the arbitrator and not the court to determine which factual disputes come within the arbitration clause. It footnoted quotation of City of Meridian, Miss. v. Algernon Blair, Inc., 721 F.2d 525, 528-9 (5th Cir. 1983): "Our sole function is to determine whether arbitration should be commenced; we play no part in determining the strength of claims and defenses presented." The 2006 decision accordingly

effected the Court's sole function, to determine whether arbitration should be commenced.

The Vessel Interests contend that "The Louisiana Court of Appeal thus *specifically* held that there was an *enforceable* written agreement to arbitrate." (Opposition brief at 13, italics added.) Not so. After determining that the Louisiana anti-forum selection statute was preempted and thus did not bar arbitration, the "limited inquiry" of the 2006 decision found only that there was an agreement in writing. Per Sedco, this finding (along with the other three, none of which are disputed) mandated a referral to arbitration. It made no determination that the agreement was enforceable, specifically or otherwise, but simply referred the matter to arbitration. Subsidiary issues of claims and defenses (such as who could enforce the arbitration agreement against whom) were left for the arbitrator to sort out.

The 2006 decision did not address any of Dahiya's defenses to arbitration other than the narrow issue of whether the Louisiana statute invalidating forum selection clauses in employment contracts was preempted by the Convention, an international treaty. Consistent with Sedco, the 2006 decision simply referred the matter to arbitration. It explained the "limited inquiry" it performed. That inquiry did not include addressing the other defenses to arbitration. When Dahiya directly presented the nonsignatory issue to the state Court of Appeal on application for rehearing, that Court left the issue to the arbitrator by simply denying rehearing without further comment. App. 42. The district court similarly rebuffed Dahiya's

effort at obtaining a pre-arbitration judicial determination of the nonsignatories' right to require him to arbitrate, and entered the stay pending further proceedings in arbitration. Despite Dahiya's efforts to obtain a pre-arbitration ruling regarding the nonsignatories, there was no "issue actually litigated and determined" which could serve as the basis for issue preclusion.

PRECLUSIVE EFFECT OF INTERLOCUTORY ORDER COMPELLING ARBITRATION AND STAYING LITIGATION

It is fundamental that an order staying litigation and compelling arbitration is interlocutory and subject to judicial review after conclusion of the arbitration, under federal and Louisiana law. The Vessel Interests' opposition does not contest this. Instead, it advances a series of demonstrably incorrect arguments as to why the U.S. Fifth Circuit might have disregarded the controlling state law[3] and given preclusive effect to the 2006 state court ruling.

The Vessel Interests begin by bizarrely contending that Dahiya "does not even argue that the Fifth Circuit erred in its application of Louisiana state law preclusion principles." (Opposition brief at 12.) But Dahiya directly states that the Fifth Circuit acted in "disregard of controlling state law" (Petition for certiorari at 13) to begin his lengthier explication of that Court's error.

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[3] Collins v. Prudential Insurance Company of America, 99-1423 (La. 1/19/00), 752 So.2d 825.

The Vessel Interests next postulate that Dahiya waived this argument by failing to raise it in the courts below. This is flatly belied by the record. Preclusion was at the heart of the case in the lower courts. The Vessel Interests' motion for summary judgment filed in the district court argued law of the case and issue preclusion based on the 2006 decision. ROA.186-188. Dahiya explicitly opposed the preclusion argument in the district court, pointing out (as he does today) that judicial review of the validity of an arbitration agreement occurs at the award enforcement stage. ROA.415-417. Nonetheless, the district court wrongly ruled that the 2006 decision was a "preclusive determination." App. 73.

When the matter reached the U.S. Fifth Circuit Court of Appeal, among the issues briefed were what the state court's decision actually decided, and whether that decision had preclusive effect. The Vessel Interests contended that the 2006 decision constituted res judicata. Original Brief at p. 29. Dahiya continued to point out that res judicata was inapplicable. Among other reasons, this was because an embedded order compelling arbitration is not final, but subject to review after entry of the Award. Reply Brief at p. 9. The preclusive effect of the 2006 decision is an issue which has been raised and contested at every step of the proceedings, and is preserved for this Court's review.

The Vessel Interests next hypothesize that the Collins decision is applicable only to trial court orders staying litigation and compelling arbitration, and not to appellate court rulings as occurred in Dahiya's case. But the Louisiana Supreme Court made no such

distinction in Collins. Nor does any other Louisiana statute or caselaw. The Vessel Interests' whimsical contention seeks to invent a distinction which is literally without any basis in Louisiana law.

Certainly, more orders staying litigation and compelling arbitration are entered in trial courts than in courts of appeal. That is to be expected. But, Collins makes clear that what makes an order final or interlocutory for purposes of appealability and preclusive effect is not the happenstance of which level of court entered the order, but the nature of the order: "Louisiana Code of Civil Procedure Article 1841 defines a final judgment as one that determines the merits in whole or in part. A judgment that does not determine the merits but only preliminary matters is an interlocutory judgment. In our review, the district judge's order compelling arbitration in this case was clearly not a final judgment; it did not dispose of the merits of the case in whole or in part." 752 So.2d at 829.

There is no clearer example of a ruling which does not dispose of the merits of the case than one staying litigation and referring the matter to arbitration for decision. The state appellate ruling has no more preclusive effect under Louisiana law than it would have if it were issued in the federal system. It isn't as though some provision of the Napoleonic Code has survived as an anachronistic Louisiana-specific rule. Louisiana's rule is exactly the same as applies in the rest of the United States.

The Vessel Interests' opposition also fails to take issue with this Court's pronouncement that only the

arbitrator has power to determine arbitrability in a circumstance where the arbitration agreement delegates arbitrability to the arbitrator. "When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, the court possesses no power to decide the arbitrability issue." Henry Schein, Inc. v. Archer and White Sales, Inc., ___ U.S. ____, 139 S.Ct. 524, 202 L.Ed.2d 480 (2019). Only the arbitrator had the power to decide whether Dahiya was required to arbitrate with the nonsignatories. Even if the 2006 decision had made such a ruling it would have been a ruling it was without authority to make, and thus could not have preclusive effect.

The Fifth Circuit's holding that the 2006 decision had preclusive effect is thus trebly defective. It directly conflicts with the Louisiana Supreme Court's pronouncement that such rulings are interlocutory and not preclusive. It also disregards this Court's Henry Schein instruction that only the arbitrator has jursidiction to determine arbitrability in this circumstance. And, it misreads what the 2006 decision actually decided when performing its "limited inquiry."

AUTHORITY OF A COURT SITTING IN SECONDARY JURISDICTION TO AMEND THE ARBITRATION AWARD

A court sitting in secondary jurisdiction on an action seeking enforcement of a foreign arbitral award has extremely limited jurisdictional authority. It can only enforce, or decline to enforce, the award. A court sitting in secondary jurisdiction has no authority under

9 USC 207 to amend the award. The opposition brief does not dispute these basic principles.

Instead, the Vessel Interests contend that the courts below did not amend the arbitration award. Well, here's what the district court said in its reasons for judgment:

> The Award is legally binding as between Dahiya and each of the Vessel Interests, and the Court is compelled to confirm it as such under 9 USC §207.
>
> Order and Reasons dated October 14, 2020, App. 75.

The Fifth Circuit affirmed that result, including the associated injunction. App. 14.

Among the Vessel Interests, only Neptune was party to the Award. Decreeing the Award to be legally binding as to nonparties to the Award effects an amendment to the Award, no matter what semantics are utilized. And while the U.S. Fifth Circuit eschewed the legally unsupportable reasoning of the district court and instead discovered a "failure to prosecute" (that went completely unmentioned in the district court's decision), the effect of the ruling is the same. It still amounts to a prohibited amendment of the Award.

Only the arbitrator had the jurisdiction and power to determine whether a failure to prosecute had occurred within the arbitration. Any reviewing court, much less one sitting in secondary jurisdiction, is without power to decide procedural questions such as arbitral waiver, delay or failure to prosecute. Notably, the Vessel Interests also do not contest this

fundamental proposition. They instead retreat again to the preclusion argument, already demonstrated to be in direct conflict with a decision of the state court of last resort.

What makes this case especially cert-worthy is the confusion the Fifth Circuit's opinion creates in arbitration jurisprudence. It is much more than just an incorrect result. It expands the jurisdiction and authority of a court sitting in secondary jurisdiction in a Convention case. It expands the authority of a reviewing court to decide procedural matters in an arbitration. And, it perpetuates an open and acknowledged circuit conflict on the interpretation of the Convention. In so doing, it directly conflicts with decisions of the state Supreme Court, this Court, and multiple circuit courts.

CONCLUSION

The opposition offers no legitimate basis why certiorari should not be granted to resolve the Circuit split on the interpretation of the Convention, or to rectify the failure to comply with this Court's precedents, or the precedent of the Louisiana Supreme Court. The judgment below should be reversed, and the case remanded with instructions to dismiss, either for lack of subject matter jurisdiction under 9 USC 207 or on the merits.

Respectfully submitted,

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