DotC United, Inc. et al v. Google Asia Pacific Pte. Ltd.

2023 | Cited 0 times | N.D. California | April 7, 2023

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

DOTC UNITED, INC., et al.,

Plaintiffs, v. GOOGLE ASIA PACIFIC PTE. LTD.,

Defendant.

Case No. 22-cv-04990-JSC

ORDER RE: PETITIONERS MOTION FOR PRELIMINARY INJUNCTION Re: Dkt. No. 58

Petitioners, DotC United, Inc., and Avazu Inc., challenge an order from an international arbitration panel finding it had jurisdiction over Petitioners, who were non-signatories to the underlying arbitration agreement. Petitioners move under the Federal Arbitration Act (FAA) to finding jurisdiction and Respondent Google Asia cross-moves to confirm the order. (Dkt. Nos. 6, 32. 1

Following a hearing on the cross-petitions, the parties were ordered to submit supplemental briefing. (Dkt. Nos. 49, 55.) A further hearing on the cross- petitions is scheduled for April 19, 2023. In the meantime, Plaintiffs moved for a preliminary injunction to enjoin the underlying arbitration proceedings as to them. (Dkt. No. 58.) Having c Court GRANTS the motion. Petitioners have demonstrated a likelihood of success on the merits, or at a minimum that serious legal issues are raised, and they face irreparable injury if the arbitration proceeds as to them of the arbitration panel jurisdiction award.

1 ECF-generated page numbers at the top of the document.

BACKGROUND The underlying dispute arises out of a Google AdWords Master Services Agreement for advertising services dated April 23, 2016 between non-party Jupiter and Respondent Google Asia. (Dkt. No. 1 at ¶ 16.) The Agreement provides available at the following URL during (Id. at ¶ 18.) Jupiter executed - Id. at ¶ 20.) In 2017, Google Asia modified its Advertising Program Terms to provide they apply Customer or Advertiser, the respective affiliates and parent companies of Customer or Advertiser, and the respective officers directors, employees, agents, predecessors, successors, and assigns of these entities. (Id. at ¶ 23.)

In April it failed to pay approximately $120 million in advertising invoices. (Id. at ¶ 32; Dkt. No. 32 at 17.) A little over a year later, Google Asia applied ex parte for an asset freeze injunction against Petitioners DotC United and Avazu in their place of incorporation, the British Virgin Islands . (Dkt. No. 1 at ¶ 35; Dkt. No. 58-3.) Jupiter is a subsidiary of Avazu DotC United. (Dkt. No. 1 at ¶ 17.) Google Asia sought the freezing order contended the freezing order was necessary because a real ris -3 at 2, 16.) On June 2, 2021, -4.)

Two days later, Google Asia filed a Notice of Arbitration with the International Centre for Dispute Resolution (ICDR) against Jupiter, Avazu, DotC Pte. Ltd., and DotC United. (Dkt. No. 63-16.) Avazu, DotC Pte. Ltd., and DotC United the non-signatories to the arbitration agreement notified ICDR they objected to claims against them. (Dkt. No. 58-5.) Avazu and DotC United simultaneously filed a discharge action with the BVI Court likewise arguing ICDR lacked jurisdiction over them as non-signatories. (Dkt. No. 63-13.)

-6.) The ICDR then

invoiced the parties for services, apportioning the costs in thirds between Petitioners, Jupiter, and Google Asia. (Dkt. No. 58-8.) A month later, Google Asia submitted an opposition to Petitioners BVI Court discharge application, arguing, among other things, arguable case that the arbitrators have the power to rule on their jurisdiction over the BV Respondents in the first because - signatories to arbitrate in order for the (Dkt. No. 58-9 at ¶ 36.) Two months later, the BVI Court denied Petitioners discharge request and issued a continuation of the freeze order pending the arbitration proceedings. (Dkt. No. 58-10.)

Petitioners to bind them to arbitrate. (Dkt. No. 63-19 at ¶¶ 42-46.) The ICDR panel bifurcated the arbitration into two phases: (1) one, in a 2-1 decision, the panel denied the arbitration and held Petitioners are Petitioners had argued that apart from the ICDR d not decide the jurisdictional question because it would be unduly burdensome to require non-signatories to participate in the full arbitration before the jurisdictional question could be reviewed. In response, the panel held:

A finding by an arbitrator that he or she has jurisdiction over a non- party is a final determination of a substantive legal right put at issue by the parties. As such, the decision is not only an award, it is a final award with respect to that issue, providing for immediate recourse should a party so wish. (Dkt. No. 1-4 at 6 (emphasis added).)

which the panel referred, by filing a Petition and accompanying motion in this Court to vacate the p Asia to respond and this Court ordered the parties to stipulate to a briefing schedule on the motion

to vacate. (Dkt. Nos. 7, stipulation noted Google Asia Cross-Petition No. 26.) The Court set the hearing for January 19, 2023.

Before the Court heard the petitions, it asked for supplemental briefing on the finality of the ICDR Google Asia authority that when an award disposes of a separate and independent claim, particularly where the parties and the arbitrators agreed to bifurcate the arbitration into phases, the award can be (Dkt. No. 47.) And Google urged the Court to consider the jurisdiction decision final and thus resolve the pending motions. (Id.) The Court held oral argument on January 19, 2023 as scheduled. At the hearing, the Court asked for supplemental briefing to address:

(a) whether the Court should vacate the underlying arbitration award on the grounds that the arbitration agreement did not delegate the question of arbitrability to the arbitrators; and arbitration award, whether the Court should give any deference to the factual findings of the arbitration panel and what procedures the Court should use in conducting that review. (Dkt. No. 55 at 2.) The parties agreed to a briefing schedule which had the continued motion being heard on April 13, 2023, which the Court moved to April 19, 2023. (Id.)

The ICDR scheduled to commence May 9, 2023. (Dkt. No. 58-2 at ¶ 16.) Google has refused to stay the merits proceeding, and the ICDR

determination of whether the panel had jurisdiction to require Petitioners to arbitrate.

JURISDICTION Petitioners contend this Court has original jurisdiction under 9 U.S.C. § 203 because this is a civil action concerning an arbitration falling under the Convention on the Enforcement and (Dkt. No. 1 at ¶ 13.)

. Allstate Ins. Co. v. Hughes, 358 F.3d 1089, 1093 (9th Cir. 2004).

arise out of a legal relationship (2) which is commercial in nature and (3) which is not entirely

Ministry of Def. of Islamic Republic of Iran v. Gould Inc., 887 F.2d 1357, 1362 (9th Cir. 1989); see also LaPine v. Kyocera Corp., No. C 07-06132 MHP, 2008 WL

egal relationship, whether contractual or not, which is

must involve property or performance abroad or have some other reasonable relation with a foreign cou

several district courts have

concluded that a court has subject matter jurisdiction under 9 U.S.C. § 203 to determine whether it can enjoin or stay an arbitration proceeding that falls under the New York Convention. Wang v. Kahn, No. 20-CV-08033-LHK, 2022 WL 36105, at *8 (N.D. Cal. Jan. 4, 2022) (collecting cases). he question of remedy is distinct from the Court s subject matter jurisdiction under the New York

Convention. Id. at *10; see also Al-Qarqani v. Chevron Corp., 8 F.4th 1018, 1025 (9th Cir. -frivolous claim that an arbitral award is covered by the Convention, the court must assume subject matter jurisdiction and hear the merits of the case. If the court concludes that the award is not covered, the appropriate disposition is to deny enforcement, not to dismiss the petition for lack of subject-

Because this Court has jurisdiction under the New York Convention, it has jurisdiction to provide the relief sought here namely, a stay of arbitration proceeding as to Petitioners.

DISCUSSION E. Bay Sanctuary Covenant v. Barr, 964 F.3d 832, 844-845 (9th Cir. 2020) (internal

ceed on the merits, (2) they

and (4) an injunction is in the public interest Id. (citing Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)). a preliminary injunction may still issue

hardships tips sharply Short v. Brown, 893 F.3d 671, 675 (9th Cir. 2018) (emphasis in original) (quoting Shell Offshore, Inc. v. Greenpeace, Inc., 709 F.3d 1281, 1291 (9th Cir. 2013)).

A. Likelihood of Success/Serious Legal Issue To satisfy the first factor, the movant must make Leiva-Perez v. Holder, 640 F.3d 962, 966 (9th Cir. 2011) (cleaned up). [the petitioner] must show that [there is] a Id. However, the standard does not require the petitioners to show it is more likely than not that they will win on the Id. Petitioners insist they have demonstrated a likelihood of success or at least serious legal issues; in particular, they maintain the ICDR panel lacked jurisdiction to decide Petitioners are bound by the arbitration agreement.

Gateway questions of arbitrability, such as whether parties are bound by an arbitration clause, . Portland GE v. Liberty Mut. Ins. Co., 862 F.3d 981, 985 (9th Cir. 2017). parties may delegate the adjudication of gateway issues to Id.; see also Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 68- arties have agreed to arbitrate or whether their agreement ; First Options of Chicago, Inc., 514 U.S. 938, 944 y .

Here, the parties agree the arbitration agreement does not contain clear and unmistakable language delegating to the arbitrators the question of whether Petitioners are bound by the arbitration agreement. (Dkt. No. 56 at 4.) Thus, even if Petitioners were signatories, the question of arbitrability is a question for the courts not arbitration. The ICDR panel did not find otherwise; instead, it concluded it could still decide whether Petitioners are bound by the arbitration clause subject to de novo review. It did not matter Petitioners had not agreed to submit arbitrability to the arbitrators and that they had moved to dismiss the arbitration on that very ground. The ICDR panel reasoned in effect that even if a court would not have compelled arbitration of the arbitrability question, it could still deny the request to dismiss the arbitrability arbitration proceedings because a court could later decide the arbitrability question anew. (Dkt. No. 1-4 at 5.) The dissent recited that under binding

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United States Supreme Court law, a court, and not an arbitration panel, must decide whether Petitioners are bound by the arbitration agreement and so the ICDR request to dismiss the arbitration. (Dkt. No. 1-5.)

Petitioners have met their preliminary injunction burden. They have shown it is likely they will prevail on their claim the ICDR panel should have granted their request to dismiss the arbitration as to them as a court must answer that question First Options, 514 U.S. at 943. Indeed, Google Asia agrees this Court must decide arbitrability independently. But, Google Asia appears to argue that because a court can review the jurisdictional decision independently after the entire arbitration is complete, this Court cannot review it now.

, violates Federal Rules of Civil Procedure 1, and is See Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1923 (2022)

(cleaned up)). Petitioners appeared at the arbitration and requested it be dismissed because they had not agreed to arbitrate, including arbitrate arbitrability. By defending the ICDR Google is suggesting arbitrators are not bound by First Options or Rent-a-Center because a court can later independently review the entire decision, including jurisdiction to decide arbitrability.

While a party may agree to have the jurisdictional question reviewed at the very end of the arbitration, that is not what happened here. Petitioners appeared and requested the panel dismiss the arbitration as to them. The ICDR panel denied the dismissal request. But in doing so, it should a party so wis -

First Options, the Supreme Court expressly recognized a party can get an independent court decision on the question of arbitrability before having to arbitrate the merits First Options, 514 U.S. at 946; see also Nat'l Ass'n of Broad. Emps. & Technicians v. Am. Broad. Co., 140 F.3d 459, 462 (2d Cir. 1998) (holding that if the party opposing arbitration desires a court to

Logan & Kanawha Coal Co., LLC v. Detherage Coal Sales, LLC (same). This is precisely the relief Petitioners seek.

To the extent Google Asia argues Petitioners have waived their right to enjoin the arbitration because they participated in the phase one arbitrability proceedings, the Court is unpersuaded. Petitioners participated by moving to dismiss the arbitration on the grounds arbitrability was a question for a court. Google Asia cites no case that suggests Petitioners only option was to refuse to participate at all. Further, the arbitration panel told Petitioners they could seek immediate recourse and Google Asia argued to this Court that it was final and reviewable now. Thus, if it is too late for anything, it is too late for Google Asia to argue this Court cannot

s suggestion that its interpretation is most consistent with pro- arbitration policies is unavailing.

arbitration agreements, like other contracts, are enforced according to their terms, and according to First Options, 514 U.S. at 947 (1995) (cleaned up); see also Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 303 (2010) (favoring arbitration, in FAA and in labor cases, only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and best construed to

B. Irreparable Harm To satisfy the second factor for a stay pending appeal, the movant must show that Leiva-Perez, 640 F.3d at 968. Nken v. Holder, 556 U.S. 418, 434 - 35 (2009).

Petitioners insist (1) being required to arbitrate a dispute that they did not agree to arbitrate is per se irreparable harm, and (2) if they are required to arbitrate, they will incur fees and expenses they may never be able to recover. Google Asia counters that raising these issues and their participation in the underlying proceedings undermines any claim of irreparable harm.

Generally, weighing t Lydo Enterprises, Inc. v. City of Las Vegas, 745 F.2d 1211, 1213 (9th Cir. 1984); see also Oakland Trib., Inc. v. Chron. Pub. Co., 762 F.2d 1374, 1377 (9th s long delay before seeking a preliminary injunction implies a lack of Google Asia maintains that if the harm was real, Petitioners would have immediately moved to stay the arbitration.

Petitioners counter they had valid reasons for waiting to challenge the ICDR authority; namely, the BVI freeze order. They maintain they

Petitioners from the case, the freezing order would have been dissolved, and Petitioners could That is, because the BVI freeze order is tied to the arbitration proceedings, had Petitioners failed to appear in the arbitration proceedings their default could have resulted in the loss of their assets. (Dkt. Nos. 58-4; 58-10.) However, Petitioners objected to the ICDR jurisdiction over them at every juncture. (Dkt. Nos. 58-5; 58-12; 58-13.) Sarl v. A.M. Todd Co., is therefore inapposite. 2009 WL 2526432, at *5 (E.D. Pa. Aug. 18, 2009) (refusing to stay arbitration proceedings where the party contesting jurisdiction had previously declined to have the court resolve the arbitrability issue).

jury argument, Petitioners urge that being forced to continue to arbitrate a dispute authority to issue is per se irreparable injury. While the Ninth Circuit has not addressed this issue, everal Circuits have held that a party is irreparably harmed by incurring costs arbitrating a dispute that the court has concluded is non- 2

Pension Plan for Pension Tr. Fund for Operating Engineers v. Weldway Const., Inc., 920 F. Supp. 2d 1034, 1049 (N.D. Cal. 2013) (collecting cases); see also id. at 1044-1049; see also Herbert J. Sims & Co. v. Roven, 548 F.

adequate remedy at law to recover the monetary and human capital it would expend defending 3

And, as explained above, the Supreme Court has expressly acknowledged a party can avoid having an arbitrator decide arbitrability when the party has not agreed to do so by moving to enjoin the arbitration. First Options, 514 U.S. at 946. While the procedural posture here is somewhat different from the above cases because Petitioners have already endured arbitration on arbitrability without agreeing they are bound to do so, the Court finds there is still sufficient irreparable harm with proceeding with the remainder of the arbitration until the Court determines whether Petitioners are bound to arbitrate at all.

Postmates is unavailing as there was no dispute there as to Adams v. Postmates, Inc., No. 19-3042 SBA, misclassification claims are arbitrable but that Petitioners should be required to refile their

Camping Const. Co. v. Dist. Council of Iron Workers ror lies in its assumption that unnecessarily undergoing arbitration

2 esta LAWI/CSA Consolidators, Inc. v. Wholesale & Retail Food Distribution, Teamsters Loc. 63, 849 F.2d 1236, 1241 n.3 (9th Cir. 1988). 3 arbitrability.

Petitioners have satisfied their irreparable harm burden. C. Balance of the Equities party of the granting or withholding of the requested relief. Winter, 555 U.S. at 24. whether the plaintiffs have met this burden, the district court has a duty to balance the interests of

Stormans, Inc. v. Selecky, 586 F.3d 1109, 1138 (9th Cir. 2009) (cleaned up).

As discussed above, denial of the preliminary injunction would irreparably harm Petitioners. While Google Asia insists the balance of hardships tips in its favor because may dissipate, Google Asia has not offered evidence which supports this argument. Rather, it relies upon documents that pre-date the BVI freeze order. (Dkt. Nos. 63-39- 63-41.) It also relies on a document indicating that with the BVI Financial Services Commission since August 25, 2022, because it did not pay its fees. (Dkt. No. 63-43.) But Avazu has been subject to the freeze order since June 2, 2021. (Dkt. No. 58-4.) Further, Google Asia does not explain why the freeze order is not sufficient to protect against asset dissolution or why it has not raised these issues with the BVI court if it believed the order was inadequate. Finally, as explained at oral argument, as a condition of the preliminary injunction, the Court will make the freeze order an order of this Court. Google Asia has not shown harm from briefly delaying the arbitration as to Petitioners while this Court considers the issues the parties including Google Asia have asked the Court to decide.

D. Public Interest hen the reach of an injunction is narrow, limited only to the parties, and has no impact on non-parties, the public interest will be at most a neutral factor in the analysis rather than one See Stormans, 586 F.3d at 1138-39. The Court agrees with the parties that the public interest is at

most a neutral factor.

CONCLUSION In sum, the Court finds Petitioners have demonstrated a likelihood of success on the merits or at least that serious legal as non-signatories to an arbitration agreement without a delegation clause. The Court also finds that being required to continue to participate in the arbitration proceedings while this Court resolves the competing Petitions constitutes an irreparable injury such that a stay of arbitration proceedings as to Petitioners is warranted. Accordingly, injunction is GRANTED and the ICDR arbitration as to Petitioners is STAYED pending further order of this Court. The Court expressly incorporates, and makes a part of this Order, the BVI freeze order and continuation of the order.

This Order disposes of Docket No. 58. IT IS SO ORDERED. Dated: April 7, 2023

JACQUELINE SCOTT CORLEY United States District Judge