984 F.2d 58 printed in FULL format.

FILANTO, S.P.A., Plaintiff-Appellant, v. CHILEWICH INTERNATIONAL CORP., Defendant-Appellee.

Docket No. 92-7657

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

984 F.2d 58; 1993 U.S. App. LEXIS 874

November 13, 1992, Argued
January 19, 1993, Decided

PRIOR HISTORY: [**1] Appeal from the May 21, 1992, judgment of the United States District Court for the Southern District of New York (Charles L. Briea ef Judge) directing that the claim asserted in this action by plaintiff be submitted to arbitration in Moscow. 789 F. Supp. 1229

DISPOSITION: Appeal dismissed for lack of appellate jurisdiction

COUNSEL: RICHARD N. CHASSIN, New York, N.Y. (Joseph D. Becker, Michael J. Lan Becker, Glynn, Melamed & Muffly, New York, N.Y., on the brief), for plaintiff-appellant.

ALLEN N. ROSS, New York, N.Y. (Lawrence J. Profeta, Warshaw Burstein Cohen Schlesinger & Kuh, New York, N.Y., on the brief), for defendant-appellee.

JUDGES: Before: NEWMAN, KEARSE, and CARDAMONE, Circuit Judges.

OPINIONBY: JON O. NEWMAN

OPINION: [*59] JON O. NEWMAN, Circuit Judge:

This appeal presents a variation on the recurring issue of whether a distr t's order requiring arbitration is appealable. The precise question is whether such an order is appealable when it is entered in a lawsuit brought c the underlying dispute, the complaint is not dismissed, but the case is nonetheless marked "closed." The issue arises on the purported appeal of Filanto, S.p.A. ("Filanto") from the May 21, 1992, judgment of the District Court for the Southern District of New York (Charles L. Brieant, Chief Judge) 789 F. Supp. 1229 (S.D.N.Y. 1992). [**2] We conclude that the appeal is premature, and accordingly dismiss the appeal.

Background

Defendant-appellee Chilewich International Corp. ("Chilewich") is a New York-based import-export company. In 1989, Chilewich contracted to sell footw to Raznoexport, then a Soviet Government entity. This contract (the "Russian Contract") specified that all disputes would be resolved by arbitration befor the Moscow Chamber of Commerce and Industry. To fulfill its obligations under the Russian Contract, Chilewich contracted with Filanto, the largest Italian manufacturer of shoes and boots. There is some dispute as to the content and time of formation of that contract. Chilewich contends that a March 13, 1990, letter it sent to Filanto contains the essential terms of the contract. This letter provided that the Russian Contract was "incorporated as far as

practicable," and specifically indicated that any arbitration should be in accordance with that contract. Filanto contends that it never accepted these terms, and that a contract was formed only by conduct at a later date. Under applicable principles of international law, Filanto contends, such a contract would not include any arbitration [**3] provisions.

In January 1991, Chilewich refused to accept 90,000 boots, causing Filanto incur a substantial loss. Filanto filed a breach of contract suit in the District Court for the Southern District of New York, [*60] invoking jurisdiction on the basis of diversity of citizenship. Prior to answering, Chilewich moved to stay the proceeding pending arbitration in Moscow. The District Court concluded that various actions by Filanto estopped it from denying the existence of an agreement to arbitrate, and directed the parties t arbitrate their dispute before the Chamber of Commerce and Industry in Moscow, Russia.

Somewhat less clear is whether the District Court then intended to retain jurisdiction or to dismiss the action. In his written opinion, Chief Judge Brieant concluded that he had the power to stay the action, but that "to do so in this case would serve no purpose," and that "accordingly, it is appropriate that a final judgment issue here containing a mandatory injunction to arbitrate." 789 F. Supp. at 1242. But on the separate document submitted for signature as the judgment of the District Court, Judge Brieant drew a line through the sentence [**4] that would have read: "ORDERED, ADJUDGED AND DECREED that plaintiff's complaint be and hereby is dismissed." The judgment, entered, ordered only arbitration and did not dismiss the complaint. The docket entries, however, reflect that the case was "closed" on May 21, 1992.

Discussion

When Congress in 1988 added a new provision governing appeals of orders concerning arbitration, see Pub. L. 100-702, tit. X, @ 1019(a), 102 Stat. 4642, 4670-71 (1988), codified at 9 U.S.C. @ 16 (Supp. III 1991), n1 it endeavored to promote appeals from orders barring arbitration and limit appeals from orders [illegible]cting arbitration. However, Congress did not implement this policy fully. Instead, Congress built upon the distinction the courts had previously recognized between so-called "independent" proceedings and so-called "embedded" proceedings and authorized the following regime for appeals:

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n1 From 1988 to 1990, this provision was codified at 9 U.S.C. @ 15. See P. L. 101-650, @ 325(a), 104 Stat 5089, 5120 (1990) (renumbering 9 U.S.C. @ 15 to 9 U.S.C. @ 16).

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[**5]

(a) If the suit is "independent," i.e., the plaintiff seeks an order compelling or prohibiting arbitration or a declaration that a dispute is arbitrable or not arbitrable, and no party seeks any other relief, a final judgment ending such litigation is appealable at once. 9 U.S.C. @ 16(a)(3); Matter of Chung and President Enterprises Corp., 943 F.2d 225, 227-29 (2d Cir. 1991); Stedor Enterprises, Ltd. v. Armtex, Inc., 947 F.2d 727, 731 (4th Cir. 1991). If arbitration has been ordered, the objecting party [illegible] await th

outcome of the arbitration before challenging the order to arbitrate.

(b) If the suit is "embedded," i.e., a party has sought some relief other than an order requiring or prohibiting arbitration (typically some relief concerning the merits of the allegedly arbitrable dispute), orders denying arbitration are immediately appealable, 9 U.S.C. @ 16(a)(1)(A)-(C), (a)(2); s Haviland v. Goldman, Sachs & Co., 947 F.2d 601, 604 (2d Cir. 1991) (appeal of anti-arbitration order in embedded case), cert. [**6] denied, 112 S. Ct. 1995, 118 L. Ed. 2d 591 (1992); Com-Tech Associates v. Computer Associates International, Inc., 938 F.2d 1574, 1576 (2d Cir. 1991) (same), but orders directing arbitration are not immediately appealable, 9 U.S.C. @ 16(b); n2 se McDermott International, Inc. v. Underwriters at Lloyds Subscribing to Memorandum of Insurance No. 104207, 981 F.2d 744 (5th Cir. 1993) (appeal of pro-arbitration order in embedded case dismissed); Perera v. Siegel Trading C 951 F.2d 780, 784-86 (7th Cir. 1992) (same). In the latter circumstance, the ty opposing arbitration cannot challenge the arbitration requirement until the arbitration has occurred and its result is available for challenge on a motion to confirm or vacate [*61] the award. In effect, the pro-arbitrati tilt of the statute requires that, with respect to embedded actions, the part opposing arbitration must bear the initial consequence of an erroneous distri court decision requiring arbitration.

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n2 An appeal might be specifically allowed pursuant to 28 U.S.C. @ 1292(b (1988). In the absence of certification, however, the barrier to appeal canno be circumvented by the collateral order doctrine, whether the order compels arbitration, see Steele v. L.F. Rothschild & Co., 864 F.2d 1, 3 (2d Cir. 1988 or refuses to stay an action pending arbitration, see McDonnell Douglas Finan Corp. v. Pennsylvania Power & Light Co., 849 F.2d 761, 764 (2d Cir. 1988).

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[**7]

This case presents a classic example of an embedded proceeding. Filanto su on a contract, and Chilewich moved to stay the proceedings pending arbitratio The District Court, having concluded that the parties made an agreement to arbitrate and that the chosen location was not "seriously inconvenient," see Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 16, 32 L. Ed. 2d 513, 92 S. Ct. 1 (1972) (forum selection clauses), directed the parties to arbitrate. Because District Court declined to dismiss the complaint, see Borden, Inc. v. Meiji M Products Co., 919 F.2d 822, 826 (2d Cir. 1990) (district court may retain jurisdiction over action subject to Convention on the Recognition and Enforcement of Foreign Arbitral Awards), cert. denied, 114 L. Ed. 2d 712, 111 Ct. 2259 (1991), its order compelling arbitration is not appealable under 9 U.S.C. @ 16(b)(3). n3

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n3 Had the complaint been dismissed, it is arguable that an appeal would immediately available, though the relief might be limited to vacating the dismissal, reinstating the complaint, and declining to review at that stage t order directing arbitration. But see McCowan v. Dean Witter Reynolds Inc., 88 F.2d 451, 453 (2d Cir. 1989) (reference of claims to arbitration in embedded proceeding unappealable despite District Court's statement that it had grante

motion to dismiss).

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[**8]

We see no jurisdictional significance to the docket entry marking the case "closed," which we will assume was made for administrative or statistical convenience. See Corion Corp. v. Chen, 964 F.2d 55, 56-57 (1st Cir. 1992) (direction of district court "that the case be 'administratively closed' pendi arbitration . . . [not] equivalent to a final judgment of dismissal"); Campbel v. Dominick & Dominick, Inc., 872 F.2d 358, 360 (11th Cir. 1989) (order closir case for statistical purposes did not render action final). The closing of the case without an adjudication of the complaint did not place the complaint in some sort of jurisdictional limbo and did not render the arbitration order available for immediate appeal. The complaint in the embedded action, not hav been adjudicated, remains within the jurisdiction of the District Court, regardless of the effort to tidy up the docket card.

Conclusion

The appeal is dismissed for lack of appellate jurisdiction.

UNITED STATES COURT OF APPEALS

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No. 402—August Term 1992

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(b) If the suit is "embedded," *i.e.*, a party has sought some relief other than an order requiring or prohibiting arbitration (typically some relief concerning the merits of the allegedly arbitrable dispute), orders denying arbitration are immediately appealable, 9 U.S.C. § 16(a)(1)(A)-(C), (a)(2); *see Haviland v. Goldman, Sachs & Co.*, 947 F.2d 601, 604 (2d Cir. 1991) (appeal of anti-arbitration order in embedded case), *cert. denied*, 112 S. Ct. 1995 (1992); *Com-Tech Associates v. Computer Associates International, Inc.*, 938 F.2d 1574, 1576 (2d Cir. 1991) (same), but orders directing arbitration are not immediately appealable, 9 U.S.C. § 16(b);[2] *see McDermott International, Inc. v. Underwriters at Lloyds Subscribing to Memorandum of Insurance No. 104207*, No. 92-3622 (5th Cir. 1993) (appeal of pro-arbitration order in embedded case dismissed); *Perera v. Siegel Trading Co.*, 951 F.2d 780, 784-86 (7th Cir. 1992) (same). In the latter circumstance, the party opposing arbitration cannot challenge the arbitration requirement until the arbitration has occurred and its result is available for challenge on a motion to confirm or vacate the award. In effect, the pro-arbitration tilt of the statute requires that, with respect to embedded actions, the party opposing arbitration must bear the initial consequence of an erroneous district court decision requiring arbitration.

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We see no jurisdictional significance to the docket entry marking the case as "closed," which we will assume was made for administrative or statistical convenience. *See Corion Corp. v. Chen*, 964 F.2d 55, 56-57 (1st Cir. 1992) (direction of district court "that the case be 'administratively closed' pending arbitration . . . [not] equivalent to a final judgment of dismissal"); *Campbell v. Dominick & Dominick, Inc.*, 872 F.2d 358, 360 (11th Cir. 1989) (order closing case for statistical purposes did not render action final). The closing of the case without an adjudication of the complaint did not place the complaint in some sort of jurisdictional limbo and did not render the arbitration order available for immediate appeal. The complaint in

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the embedded action, not having been adjudicated, remains within the jurisdiction of the District Court, regardless of the effort to tidy up the docket card.

Conclusion

The appeal is dismissed for lack of appellate jurisdiction.

an adjuster were consolidated into the action against Underwriters. The court granted Underwriters' motion to compel arbitration, and McDermott appealed.

The issue before the court was whether the order compelling arbitration is interlocutory or final. McDermott contended that the decision was final because "the only jurisdictional basis for the original suit's removal to federal court was the question of arbitrability under the Convention." It denied any relevance to the state law claims raised in the original suit and the other suits that were later consolidated into it. The court disagreed with McDermott's contentions, concluding that because the arbitrability issue is embedded among other claims, the order compelling arbitration cannot be deemed a decision ending the litigation on the merits. It noted judicial precedent which hold that cases that are consolidated become a single judicial unit. The court determined that McDermott's interpretation ignored the broad scope of the consolidation orders and held that the "finality of the arbitration decision depends upon the present posture of the case, not on the narrow context in which the arbitrability question first arose." Since the district court's orders were interlocutory and not final, the appellate court ruled that McDermott's appeal was barred by 9 U. S.C. §16(b). **McDermott International, Inc. v. Underwriters at Lloyds**, Nos. 92-3622 and 104207, 1993 U.S. App. LEXIS 121 (5th Cir. Jan. 6, 1993).

INTERNATIONAL—APPEALS—INTERLOCUTORY ORDER—APPELLATE JURISDICTION—FEDERAL ARBITRATION ACT

A lower court's order requiring arbitration that is entered in a lawsuit brought on the underlying dispute in which the complaint is not dismissed but the case is nonetheless marked "closed" is not appealable order under 9 U.S.C. §16(b).

Chilewich International, an export-import firm based in New York, entered into a contract to sell footwear to Raznoexport, then a Soviet government entity. The contract (Russian contract) contained an arbitration clause providing for arbitration in Moscow. To fulfill its obligation under the Russian contract Chilewich contracted with Filanto, an Italian manufacturer and seller of footwear. They purportedly entered into a memorandum agreement which incorporated by reference the Russian contract. Chilewich refused to accept a shipment, causing Filanto to incur a loss and to file a breach of contract action against it. Chilewich sought to have the matter submitted to arbitration but a question arose as to the context and time concerning the formation of their contract. Finding that Filanto's actions estopped it from denying the existence of an arbitration agreement, the district court directed the parties to arbitrate their dispute in Moscow. Filanto appealed.

The court determined that it did not have appellate jurisdiction. In the case at bar, the judgment that was entered ordered only arbitration; it did not order a dismissal of the complaint. The docket entries, however, reflected that the case was "closed." The court concluded that the proceedings below presented a classic example of an embedded proceeding. Because the trial court declined to dismiss the complaint, the appellate court determined that the order compelling arbitration was not appealable under 9 U.S.C §16(b)(3). The appellate court also assumed that the docket entry was "made for administrative or statistical convenience," thereby rendering no jurisdictional significance to the entry. It reasoned that, regardless of the effort to clean up the docket card, the complaint in the embedded proceeding remained within the jurisdiction of the district court because it was never adjudicated. **Filanto, S.p.A. v. Chilewich International Corp.**, No. 92-7657 (2d Cir. Jan. 19, 1993).

COMMERCIAL—APPEALABILITY—FEDERAL ARBITRATION ACT—INTERLOCUTORY ORDER

An appellate court held that an order directing the parties to proceed to arbitration, which was issued from an embedded proceeding, was an unappealable interlocutory decision under section 16 of the Federal Arbitration Act (FAA).

Esther Perera, along with Alvin Champ, another plaintiff, filed claims against Siegel Trading. Siegel moved for an order compelling arbitration. At the same time, the court had before it Siegel's motion to dismiss the complaint and Perera's motion for class certification. It granted the motion to compel arbitration and, because of its decision, the court did not consider the other motions pending before it. The court subsequently ordered Perera to proceed individually to arbitration and, pursuant to rule 54(b) of the Federal Rules of Civil Procedure, entered judgment on that order. It refused to compel arbitration of Champ's claims. Perera appealed.

Perera's asserted basis for jurisdiction was that the order directing her to proceed to arbitration was a final appealable decision under the FAA. The court determined that Perera was apparently asserting that because the arbitration order is final, all procedural decisions made in the process of reaching that order, including the decision not to certify, are also final and reviewable as part of the final decision. The court, however, disagreed with her assertion. It considered the phrase "final decision" in section 16 and concluded that by using a term of art without providing a definition, "Congress intended to retain its preexisting meaning." In this case, the proceeding below was embedded because the arbitration order was granted in a proceeding for other relief. The