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First Department Finds Forum Selection Clause in Earlier Agreement Valid Despite Later Agreement Providing for Arbitration

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In a 3-2 split decision, a ***New York*** appellate court determined that a forum selection clause providing for litigation in New York courts had not been explicitly terminated and thus trumped agreements to submit to arbitration in London provided in later contracts that cancelled the previous one. Thus, the appellate panel for the First Department in New York reversed a lower court decision and directed the parties in *Garthon Business, Inc., et al. v. Stein, et al.*, to proceed with their claims in court as opposed to arbitration in London.

Garthon Business, Inc. ("Garthon") sued Kirill Ace Stein ("Stein") in December 2014 in New York County Supreme Court alleging that in 2009, Stein, who had several consulting agreements with Garthon spanning several years, had advised it to make unsecured loans to Youseff Hares so that Hares Engineering could complete construction of a steel plant for SBS Steel in Kazakhstan. Garthon accepted the advice and extended interest-free loans to Youssef Hares totaling $16 million, which were never repaid. Garthon claimed that Stein breached fiduciary duties and promises made under certain consulting agreements.

In April 2015, the Supreme Court granted Stein's motion to compel arbitration in London, as required by a majority of the consulting agreements from later in the relationship between Garthon and Stein. Garthon appealed, asserting that the claims it had alleged related to consulting services under a separate, earlier agreement that provided for disputes to be litigated in a New York court. Stein countered that the earlier agreement had been terminated by the later agreements. The majority of the First Department panel agreed with Garthon, finding that the New York forum clause itself was not explicitly terminated by the later agreements and so it remained in effect. "At best, this language indicates that the parties intended only to arbitrate disputes that arose after July 1, 2009, the effective date of those agreements," the majority held. "It does not indicate a clear manifestation that the forum selection clause in the [earlier agreement] had been abandoned." The First Department further stated:

Although this court does not appear to have directly addressed the issue, the other Departments

have held that, where some of a group of claims are covered by an arbitration agreement, it is appropriate to litigate the entire group in court if all of the claims were already asserted in court and the claims not subject to arbitration would be "inextricably bound together" with the claims that are subject to arbitration . . . Here, one could argue that all of the claims in the complaint arose under the Quennington Agreement, since, notwithstanding that two of the loan agreements with Hares were executed after the termination of that agreement, plaintiffs allege that Stein first advised them to loan money to Hares personally in spring 2009, when that agreement was unquestionably in effect. In any case, even if some of the claims could be said to arise out of the Quennington Agreement, and others out of the Second Aurdeley Agreement, they are cut from the same cloth, and are, unquestionably, inextricably bound together and therefore should be litigated in court.

A dissenting opinion noted that jurisdictional issues – namely, whether the dispute should be heard in arbitration or in court – should be decided by an arbitrator where the parties have so provided in their agreement.

New York practitioners should note this decision and, as long as this this is the law in New York, make sure that the arbitration clause expressly applies to the entire relationship or to prior versions of the parties' agreement. In addition, practitioners should be sure to include an express provision agreeing that covered claims must be arbitrated even if other related claims are determined to be subject to litigation.

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