

IMPORTANT SECOND CIRCUIT DECISION ON ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS

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In a significant recent judgment, *CBF Industria De Gusa S/A v. AMCI Holdings, Inc.* (2d Cir. 2017), the influential U.S. Court of Appeals for the Second Circuit (the **Second Circuit**) considered an arbitral award's preclusive effects and its ability to bind third parties. In the same decision, the Second Circuit also issued valuable guidance to the lower courts on the correct procedure and terminology for the enforcement of New York Convention awards issued abroad.

The Second Circuit handed down its initial opinion in January. However, in a rare move, the Court released a revised opinion earlier this month to "correct" its conclusion on a point of law in the first opinion. This post, unlike much of the online commentary of *AMCI Holdings*, refers exclusively to the Second Circuit's later opinion.

Background

The appellants, a group of Brazilian companies (collectively, **CBF**) entered into a series of contracts with Primetrade AG, a Swiss company, for the purchase and sale of pig iron. After a deadly shipping accident in 2005, Primetrade transferred its assets, including the contracts with CBF, to another Swiss Company (**SBT**), which "began operating with the same officers and directors as Primetrade AG and at the same offices."

In 2007, a company called AMCI International Gmb (**AMCI**) acquired SBT and its U.S. subsidiary. The following year, CBF entered into additional purchase and sale contracts with SBT (the **Contracts**), that notably did not purport to bind any assigns or successors in interest. The Contracts each contained an agreement providing for ICC arbitration in Paris.

In 2008, as commodity prices fell by as much as a third, SBT defaulted on its purchase obligations under the Contracts. CBF submitted the resulting dispute to an ICC arbitration in November 2009 (the **Arbitration**). CBF later alleged that SBT stalled the Arbitration

proceedings in their infancy while it fraudulently transferred its assets to a shell company formed and operated by the principals of SBT (**Prime Carbon**). In April 2010, SBT, by then virtually assetless, filed for bankruptcy in Switzerland.

In March 2011, SBT's bankruptcy administrator informed the ICC tribunal that the company had insufficient funds to participate in the Arbitration and conceded CBF's claims against the company. In November 2011, the tribunal issued a final award in favor of CBF for the amount of \$48 million plus interest and costs (the **Award**). The Award did not grant relief reaching the assets of Prime Carbon or any other third party, as the tribunal held that CBF "did not introduce sufficient evidence . . . to demonstrate the existence of fraud in the bankruptcy proceedings."

SDNY Enforcement Action

In April 2013, CBF commenced an action in the U.S. District Court for the Southern District of New York against various individuals and corporate entities alleged to be the "alter egos" and "successors in interest" of SBT (the **Appellees**). In the ensuing proceedings (the

Enforcement Action), CBF sought both to enforce the Award and to assert various state law fraud claims relating to the underlying dispute.

The District Court dismissed the Enforcement Action, in relevant part, because: (i) the Award had not been first confirmed by a court of competent jurisdiction; and (ii) the fraud claims were barred by the doctrine of issue preclusion (sometimes called "collateral estoppel") because the ICC tribunal had denied similar claims asserted in the Arbitration.

The Second Circuit Reverses

On appeal, the Second Circuit vacated the District Court's judgment on two grounds: (i) the lower court erred by requiring an award debtor to bring a confirmation action at the seat prior to enforcement in a secondary jurisdiction; (ii) CBF's fraud claims were not barred by the doctrine of collateral estoppel. The Court's analysis is devoted in large part to three matters of considerable interest and import for practitioners:

1. No Requirement to Confirm Award at Seat, and Other Guidance to Lower Courts

The Second Circuit identified and reversed the obvious and puzzling error behind the District Court's refusal to enforce a foreign arbitral award for failure to achieve confirmation at the seat. The Second Circuit explained that the New York Convention was devised largely to "eradicate" the old *double exequatur* requirement, which mandated confirmation at the seat as a precondition to the enforcement of arbitral awards abroad. Under the Convention, as implemented by Chapter Two of the Federal Arbitration Act, CBF needed only to commence a summary, singlestep proceeding to achieve recognition and enforcement of the Award in a U.S. court.

Accordingly, the District Court had erred by requiring confirmation at the seat as a condition of enforcement.

However, recognizing persistent "confusion" in the area, the Second Circuit used the opportunity to clarify "the components of and process for [the enforcement of] a

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nondomestic arbitral award." The Court's efforts are valuable in three respects. First, it provides a useful summary of the differences between domestic, nondomestic, and foreign awards and the varying extent courts' oversight with respect to each category.

Second, the Court clarified that the meaning of "confirmation" under Chapter Two of the FAA is coextensive with "recognition and enforcement" under the New York Convention. This is distinct from the meaning of "confirmation" under Chapter One of the FAA, which denotes the process whereby a U.S. court converts an award over which it has primary jurisdiction into a judgment of its own. Third, in summarizing these first principles, the Court referred extensively to the draft Restatement (Third) of the U.S. Law of International Commercial Arbitration. This is an important signal that, at least in the Second Circuit, the forthcoming Restatement will achieve its desired status as a highly persuasive authority in the field of international arbitration.

2. Law of the Enforcing Forum Determines Award's Veil Piercing Effects

Appellees were not named in the Award, a fact giving rise to difficult questions of veil piercing at the enforcement stage. The Second Circuit confirmed that the enforcement of a New York Convention award against purported affiliates or alter egos of the respondent falls to be decided under the law of the secondary jurisdiction. Accordingly, the liability of Appellees for satisfaction of the Award would be determined under the applicable law in the Southern District of New York. The Second Circuit remanded the case back to the District Court for further legal and factual inquiries on the question of veil piercing and alter ego liability.

3. Issue Preclusion Limited by Fraud Accusations

It is well settled that the doctrine of issue preclusion is applicable to issues resolved by a prior arbitration. However, the doctrine's application is not automatic and is constrained by principles of equity. Here, CBF claimed that it was denied a full and fair opportunity to litigate the fraud claims before the ICC Tribunal (a traditional requirement of issue preclusion) because the Appellees deliberately misled the Tribunal as to the extent of their fraud. Accordingly, the Second Circuit held that the grant of issue preclusion was inappropriate and that CBF should be afforded the opportunity to conduct discovery on its fraud claims.

CONCLUSION

Although the case did not break any new legal ground, *AMCI Holdings* contains notable learning on two important questions in the field of international arbitration. First, drawing heavily from the draft Restatement, the Second Circuit set forth its preferred analytical framework for the enforcement of international arbitration awards. Award creditors contemplating enforcement actions in the New York federal courts would thus do well to appreciate the distinctions between domestic, nondomestic, and foreign arbitral awards. Second, the case illuminates an important limit on the application of issue preclusion to arbitration awards: due to principles of equity, the doctrine does not automatically apply where the prior award is alleged to be tainted by the invoking party's fraud.

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Laurence is an international arbitration specialist and a partner in the firm's New York City office.

The New York office comprises seasoned litigators, international arbitration specialists, and projects and infrastructure practitioners. The team's experience is broad-based and encompasses a variety of sectors, especially financial services, energy and consumer products. Our attorneys have a wealth of experience as trial and appellate advocates in courts throughout the US.



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