Docket Nos. 15-1133-cv(L), 15-1146-cv(CON)

United States Court of Appeals

for the

Second Circuit

CBF Indústria de Gusa S/A, Da Terra Siderúrgica LTDA, Fergumar–Ferro Gusa Do Maranhão LTDA, Ferguminas Siderúrgica LTDA, Gusa Nordeste S/A, Sidepar–Siderúrgica Do Pará S/A, Siderúrgica União S/A,

Plaintiffs-Appellants,

– against –

AMCI Holdings, Inc., American Metals & Coal International, Inc., K–M Investment Corporation, Prime Carbon GmbH, Primetrade, Inc., Hans Mende, Fritz Kundrun,

Defendants-Appellees.

AMICUS BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF DEFENDANTS'-APPELLEES' MOTION FOR REHEARING

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 3

III. CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Bell v. Cendant Corp., 293 F.3d 563 (2d Cir. 2002) 3

Daebo Int'l Shipping Co. v. Americas Bulk Transp. (BVI) Ltd., No. 12 CIV. 4750 PAE, 2012 WL 6212614 (S.D.N.Y. Dec. 13, 2012) 7

DuBois v. Macy's Retail Holdings, Inc., 533 Fed. Appx. 40 (2d Cir. 2013).............4

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)...2, 3, 5, 6, 9

GE Transportation (Shenyang) Co. v. A-Power Energy Generation Sys., Ltd., No. 15 CIV. 6194 (PAE), 2016 WL 3525358 (S.D.N.Y. June 22, 2016) 7

Glencore AG v. Bharat Aluminum Co. Ltd., No. Civ. 5251(SAS), 2010 WL 4323264 (S.D.N.Y. Nov. 1, 2010)..6, 7

Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc., 252 F.3d 218 (2d Cir. 2001)...3, 4

Orion Shipping & Trading Co. v. E. States Petroleum Corp. of Panama, S.A., 312 F.2d 299 (2d Cir. 1963)..6, 7

Sarhank Grp. v. Oracle Corp., 404 F.3d 657 (2d Cir. 2005) 2, 5, 6, 7

Schneider v. Kingdom of Thailand, 688 F.3d 68 (2d Cir. 2012) 6

VRG Linhas Aereas S.A. v. MatlinPatterson Global Opportunities Partners II L.P., 717 F.3d 322 (2d Cir. 2013)..5, 6, 7

STATUTES

Federal Arbitration Act, 9 U.S.C. § 207 4

OTHER AUTHORITIES

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 4

Restatement (Third) of U.S. Law of Int'l Comm. Arb. § 1-1 (2010) 4

James H. Carter & John Fellas, INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 1-2 (2d ed. 2016) 2

I. Introduction

On behalf of the Association of the Bar of the City of New York (the "Association") we respectfully submit this *amicus curiae* brief regarding rehearing in *CBF Indústria de Gusa S/A et al. v. AMCI Holdings, Inc.*, 846 F.3d 35 (2017).[1]

The Association urges the Court to clarify or correct its reasoning insofar as that reasoning appears to suggest that the extent to which a valid New York Convention *award* may be enforced against a person or entity that was not party to the arbitration or named in the award turns on the scope of the arbitration *agreement*. The Association refrains herein from seeking to comment on any other aspect of the Court's decision.

An award is like a court judgment and, once made, has its own legal significance even though it arose out of an agreement. The effectiveness or ineffectiveness of an award against third parties therefore does not depend on the intended scope of the arbitration agreement. Any ruling that suggests otherwise threatens to create confusion and impede legitimate award enforcement in what may be the United States' most significant enforcement jurisdiction—by one estimate, at least one-third of all significant international commercial arbitrations

[1] This brief was not authored, in whole or in part, by counsel to a party and no contribution to its preparation or submission was made by any person other than the Association. The Honorable John G. Koeltl took no part in the consideration or submission of this brief.

in the country occur in New York. James H. Carter & John Fellas, INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 1-2 (2d ed. 2016).

The potential confusion arises from this Court's explanation of the bases on which federal courts can refuse to enforce a New York Convention award. The Court applied the logic of previous cases in which an arbitrator had made a non-signatory to the arbitration agreement a party to the arbitration and issued an award that included the non-signatory. In that circumstance, "courts look to 'general principles of contract law,' and will find an agreement to arbitrate when 'the totality of the evidence supports an objective intention to agree to arbitrate.'" *CBF Indústria de Gusa S/A*, 846 F.3d at 54 (quoting *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 662 (2d Cir. 2005)). Hence, those cases present a question about the intent of the arbitration agreement, which, as this Court observed, should be analyzed through the framework established by *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). *CBF Indústria de Gusa*, 846 F.3d at 54.

That analysis, however, is inapt in the circumstance where the award does not by its terms purport to bind non-signatories to the arbitration agreement. Unlike *Sarhank Grp.* and other similar "non-signatory" cases, in a case involving an arbitration that proceeded only against a signatory to the arbitration agreement, there is nothing controversial about the identity of the award debtor. If the award creditor subsequently wishes to try to enforce that kind of award against third

parties, whether it may do so should be determined by legal principles concerning enforcement of awards or judgments under applicable state law, not by New York Convention and Federal Arbitration Act principles concerning the ambit of an arbitration agreement.

Since the Court's recent decision does not clearly draw this important distinction between the analysis applicable to arbitration agreements and the analysis applicable to arbitration awards, the Association respectfully submits that the Court may wish to reconsider and clarify or correct its holding in this respect.

II. Argument

The fundamental difference between an arbitration agreement and an arbitration award requires that the ambit of each be subject to its own kind of analysis.

An arbitration agreement is a creature of contract. *Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir. 2002); *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224 (2d Cir. 2001). It is a way to "resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc.*, 514 U.S. at 941. Well-settled rules govern the question of who decides whether parties agreed to arbitrate a dispute

and whether a dispute falls within the scope of an arbitration agreement. *See id.* at 942; *Louis Dreyfus Negoce S.A.*, 252 F.3d at 224.

In contrast, an arbitration award is a determination on the merits of a dispute that is analogous to a judgment by a court of law. *See* Restatement (Third) of U.S. Law of Int'l Comm. Arb. § 1-1 (2010) ("An 'arbitral' award is a decision in writing by an arbitral tribunal that sets forth the final and binding determination on the merits of a claim, defense, or issue, whether or not that decision resolves the entire controversy before the tribunal."); *DuBois v. Macy's Retail Holdings, Inc.*, 533 Fed. Appx. 40, 41 (2d Cir. 2013) ("[T]he arbitration award constitutes a final judgment on the merits[.]") (summary order).

The New York Convention itself plainly distinguishes between arbitration agreements and arbitration awards. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. I(3), June 10, 1958, 21 U.S.T. 2517 (the "Convention"). Statutory implementation of the Convention in Federal Arbitration Act Section 207 likewise speaks of confirmation as against any other *party to the arbitration*—not any party to the arbitration agreement. *See* Federal Arbitration Act, 9 U.S.C. § 207. An arbitration award thus has its own juridical significance, independent from the arbitration agreement and from the parties' intent in entering into an agreement to arbitrate.

Where a party claims that it was not bound to *arbitrate* a dispute, as was the case in *First Options*, 514 U.S. at 941, then naturally the court or the tribunal deciding the question must find the answer in the arbitration agreement itself. That reasoning logically extends to cases where an award debtor claims that an award should not be enforced against it because it did not agree to arbitration. Such was the case in both *VRG Linhas Aereas S.A.*, 717 F.3d at 322, and *Sarhank Grp.*, 404 F.3d at 658, the two cases upon which this Court primarily relied for its recent holding.

In *VRG Linhas*, an award debtor argued that an award issued against it was not enforceable because the dispute underlying the award was not arbitrable—one of the grounds for not enforcing an award enumerated in the New York Convention. 717 F.3d at 325. This Court held that the enforceability of the award turned on "[w]hether a given dispute is arbitrable" and was "therefore a question to be decided under United States arbitration law." *Id.* To determine whether the dispute with VRG was arbitrable, meaning whether the award debtor had consented in the first place to arbitrate its dispute, the Court held that a *First Options* analysis was necessary. *Id.*

This Court applied a similar analysis in *Sarhank Grp.* There, the arbitral tribunal had rendered an award against Oracle Systems, Inc. and its parent, Oracle Corporation, over Oracle Corporation's objection that it was not a signatory to the

arbitration agreement. *Sarhank Grp.*, 404 F.3d at 658. Oracle Corporation objected to enforcement of the award against it on the same grounds as VRG—that it had not consented to arbitrate and thus the subject matter of the dispute and resulting award was "not capable of arbitration." *Id.* at 661. This Court again applied *First Options* to determine whether Oracle Corporation had consented to arbitration. *Id.* at 662; *see also Schneider v. Kingdom of Thailand*, 688 F.3d 68, 71 (2d Cir. 2012) (same).

Here, in contrast, defendants-appellees do not claim that they were improperly made party to the arbitration, and the award does not name them. Accordingly, the scope of the agreement to arbitrate is not relevant. The question before the Court should be limited to determining against whom the award can be enforced. That, in turn, is solely a question about the liability of third parties for satisfaction of an arbitration award or a judgment resulting therefrom.

The Association is mindful of the Court's decision in *Orion Shipping & Trading Co. v. E. States Petroleum Corp. of Panama, S.A.,* 312 F.2d 299, 301 (2d Cir. 1963) and subsequent cases interpreting *Orion*, which make clear that there is some debate as to whether a court must conduct an alter ego analysis in a separate proceeding, apart from an enforcement action. *E.g. Glencore AG v. Bharat Aluminum Co. Ltd.,* No. Civ. 5251(SAS), 2010 WL 4323264, at *6 (S.D.N.Y. Nov. 1, 2010) ("[R]equesting that the Court pierce the corporate veil for purposes of

liability during the confirmation proceeding contravenes clear Second Circuit precedent that an arbitration award may not be enforced under an alter ego theory against the parent corporation of the party subject to the award."); *GE Transportation (Shenyang) Co. v. A-Power Energy Generation Sys., Ltd.*, No. 15 CIV. 6194 (PAE), 2016 WL 3525358, at *7–8 (S.D.N.Y. June 22, 2016) (relying on *Orion* in declining to engage in a veil piercing analysis, but recognizing exceptions to the *Orion* rule that would permit such an analysis).

Regardless of what the state of law may be on that issue, neither *Orion* nor its progeny considered that enforcement against a third party alter ego was a question of the scope of the arbitration agreement. *See Orion*, 312 F.2d at 301; *see also*, *e.g. GE Transportation*, 2016 WL 3525358, at *7–8; *Glencore*, 2010 WL 4323264, at *3; *Daebo Int'l Shipping Co. v. Americas Bulk Transp. (BVI) Ltd.*, No. 12 CIV. 4750 PAE, 2012 WL 6212614, at *3 (S.D.N.Y. Dec. 13, 2012).

Consequently, a party hoping ultimately to collect against a non-signatory to an arbitration agreement has two options available to it.

First, it can seek to join the non-signatory to the arbitration proceedings while they are ongoing, so that any award becomes enforceable against the non-signatory as an award debtor. In that case, it may face objections similar to the challenges to enforcement of the award in *VRG* and *Sarhank*.

Second, it can obtain an award against a signatory to the arbitration agreement and subsequently seek to enforce the award against third parties, as plaintiffs-appellants have done here. There may be overlapping analyses in both paths; for example, both may ultimately entail veil-piercing analyses. It is possible that they could lead to the same result—eventual enforcement or non-enforcement against the third party. Nonetheless, they are distinct inquiries that should not be conflated.

The discrete issue the Association raises in this motion is in some respects highly technical, but it is also highly consequential. There are numerous circumstances in which an award creditor, like a conventional judgment creditor, might have a basis to enforce against a third party even if that third party was not properly joined to the original arbitration establishing the liability. For example, if after an arbitration concludes, and a third party becomes a corporate successor of the award debtor, or purchases an asset from the award debtor that had been awarded to the award creditor, or if a third party exercises dominance over an award debtor and strips it of all of its assets, then the award creditor may have a legal basis to cause the third party to satisfy the award-regardless of whether the arbitration agreement had contemplated that such a third party could be joined to the arbitration in the first place. A rule that looks to the intent of the arbitration agreement could invite an award debtor to engage in improper activity with

impunity—such as transferring its assets and striking itself from the corporate registry. As a world-leading financial and commercial center, New York is too important a jurisdiction to permit confusion or inaccuracy in its award enforcement law.

III. Conclusion

For the foregoing reasons, the Association respectfully suggests that the proper instructions to the district court would be to proceed directly to an analysis of whether the award may be enforced against appellees on an alter ego theory of liability, without directing the court to consider the scope of the arbitration agreement under a *First Options* analysis.

Dated: February 21, 2017
New York, New York

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CBF Indústria de Gusa S/A, et al., *Plaintiffs-Appellants,* -against- AMCI Holdings, Inc., et al., *Defendants-Appellees.*	Docket Nos. 15-1133-cv(L), 15-1146-cv(CON)

DECLARATION OF WILLIAM H. TAFT V IN SUPPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK'S MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

WILLIAM H. TAFT V, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am a partner at Debevoise & Plimpton LLP and a member of the bar of this Court. I am acting as counsel for the Association of the Bar of the City of New York (the "Association"). Pursuant to Federal Rule of Appellate Procedure 29(b), the Association moves for leave to file the accompanying brief *amicus curiae* in support of Defendants'-Appellees' motion for rehearing. I submit this declaration in support of that motion.

2. On February 17, 2017, counsel for the Association contacted Plaintiffs-Appellants and Defendants-Appellees by telephone requesting

consent to appear as *amicus curiae* notwithstanding the seven-day time to file set out in Federal Rule of Appellate Procedure 29(b)(5).

3. On February 17, 2017, Plaintiffs-Appellants consented to the Association's appearance as *amicus curiae*. As of today, no response has been received from counsel for Defendants-Appellees.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
February 21, 2017

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