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SECOND CIRCUIT REVIEW

Expert Analysis

Enforcing Foreign Arbitral Awards Against Alleged Alter-Egos

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On Jan. 18, 2017, the Second Circuit in *CBF Industria De Gusa S/A v. AMCI Holdings*, 846 F.3d 35 (2d Cir. 2017) (decision amended on March 2, 2017. No. 15-1133-cv(L), 2017 WL 816878 (2d Cir. March 2, 2017)), revisited its holding in *Orion Shipping & Trading Co. v. Eastern States Petroleum*, 312 F.2d 299 (2d Cir. 1963), issued 54 years earlier to the day. In so doing, the Second Circuit held that the Orion Shipping rule—a two-step procedure governing the enforcement of arbitral awards under §9 of the Federal Arbitration Act (FAA)—did not apply to the enforcement of foreign arbitral awards under §207 of the FAA. Although clarifying the procedure that applies to the enforcement of foreign arbitral awards against a debtor named on the award, the decision failed to address what procedure applies when an award-creditor seeks to enforce a foreign arbitral award against an alleged alter-ego of the award-debtor that is not named on the award.

'Orion Shipping'

In *Orion Shipping*, which was decided in 1963, seven years prior to the United States' accession to the New York Convention, the Second Circuit addressed the procedure for confirmation of non-domestic arbitral awards (international awards decided in the United States), pursuant to §9 of the FAA. The decision, authored by Second Circuit Judge Irving R. Kaufman and joined by Judges Charles E. Clark and Paul R. Hays, held that a proceeding to confirm an arbitral award was not the proper occasion to extend the binding effect of an award to an alleged alter-ego. The panel instead reasoned that the award-creditor must first confirm the award, before seeking to impute liability to a third party at a "separate" post-judgment proceeding. 312 F.2d 299 at 301. The Second Circuit's reasoning centered on its concern that alter-ego claims—generally complex and time-consuming—would "unduly complicate and protract" the confirmation of an arbitral award, which is intended to be a streamlined, summary proceeding. Id.

> The Second Circuit's decision in 'CBF Industria' has clarified the procedure that applies to enforcement proceedings under §207 of the FAA against named award-debtors.

Although *Orion Shipping* did not directly concern the enforcement of foreign arbitral awards under the New York Convention, pursuant to §207 of the FAA, the two-step *Orion Shipping* rule has been followed and applied in foreign arbitral enforcement proceedings when the alter-ego theory of liability has been asserted by an award-creditor. See, e.g., *GE Transportation (Shenyang) Co. v. A-Power Energy Generation Systems*, 15 Civ. 6194

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(PAE), 2016 WL 3525358 (S.D.N.Y. June 22, 2016).

Application of the *Orion Shipping* rule in foreign arbitral enforcement cases makes sense given the similarity of the statutory language of §9 and §207 of the FAA. In particular, both provisions contain identical language referring to "an order *confirming* the award." Southern District Judge Robert W. Sweet remarked in *CBF Industria*, when applying the *Orion Shipping* rule in a foreign arbitral enforcement proceeding, that "the difference in the scope between 9 U.S.C. §9 and 9 U.S.C. §207 is *minimal*." 14 F. Supp. 3d 463 at 476 (S.D.N.Y. 2014).

'CBF Industria'

The Second Circuit's decision in *CBF Industria,* authored by Judge Rosemary S. Pooler and joined by Judges Amalya L. Kearse and Robert D. Sack, held that award-creditors may confirm and enforce a foreign award in a single proceeding pursuant to §207 of the FAA. 2017 WL 816878 at *10. In so holding, the panel rejected the district court's conclusion that there was only a "minimal" difference between §9 and §207 of the FAA. The Second Circuit held that the term "confirm" in §207, when "read in context with the New York Convention," is actually the equivalent of the phrase "recognition and enforcement," as used in the New York Convention. Id. The court explained that "recognition and enforcement" refer to the process of reducing a foreign arbitral award to a judgment, and that a single-step procedure was consistent with the primary objective of the New York Convention, which intended to liberalize the enforcement of foreign awards. For example, this procedure eradicates the need for "double exequatur," the requirement under the former Geneva Convention that a court in the rendering state first confirm an award before it can be enforced in a third country. Id. at *11.

While this single-step procedure certainly liberalizes the enforcement of arbitral awards against the named debtor of an award, it is unclear how it applies when the award-creditor seeks to enforce an award against an alleged alter-ego. The Second Circuit did not directly address the district court's analysis of this question. The only guidance offered by the panel was its recitation of Article III of the New York Convention, which holds that the enforcement of a foreign arbitral award must not be "substantially more onerous" than the enforcement of a domestic award. The Second Circuit, however, failed to offer examples of what might constitute a "substantially more onerous" condition, declaring that it was a question "left to the law of the enforcing jurisdiction." Id. at *13.

It remains to be seen whether the District Court, on remand, will determine that attempts to pierce the corporate veil at a §207 proceeding constitute "substantially more onerous" conditions. If so, the District Court could, in effect, apply the two-step *Orion Shipping* rule to §207 proceedings when an alter-ego claim is asserted. This approach will help prevent §207 proceedings from becoming unduly bogged down by alter-ego claims, and is consistent with the objective of the New York Convention to liberalize the enforcement of foreign awards. Such an approach, however, might be viewed as at odds with the Second Circuit's ruling that the precedential value of *Orion Shipping* is limited to the enforcement of non-domestic arbitral awards. Id. at *12.

Alternatively, the Second Circuit may have recognized that the facts of this particular case warrant more searching review. The named award-debtor in *CBF Industria* was "defunct," having been declared bankrupt. Id. at *1. In such circumstances, the court may have concluded that a complex enforcement hearing was inevitable, and effectively carved out a specific factual scenario in which alter-ego claims may be litigated during a §207 enforcement action.

Conclusion

The Second Circuit's decision in *CBF Industria* has clarified the procedure that applies to enforcement proceedings under §207 of the FAA against named award-debtors. It remains to be seen whether the *Orion Shipping* rule will apply when an award-creditor seeks to enforce a foreign arbitral award against an alleged alter-ego that is not named on the award. These authors hope that the Second Circuit will not keep us waiting an additional 54 years before it next revisits *Orion Shipping*.