U.S. Department of Justice

United States Attorney
Southern District of New York

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New York, New York 10007

September 12, 2016

By ECF

Hon. Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second Circuit
500 Pearl Street
New York, New York 10007

Re: *DA Terra Siderurgica LTDA v. American Metals International*,
Docket No. 15-1133 (L), 15-1146 (con)

Dear Ms. Wolfe:

By invitation of the Court and pursuant to 28 U.S.C. § 517 and Rule 29(a) of the Federal Rules of Appellate Procedure, the United States respectfully submits this memorandum brief as *amicus curiae*.

Interest of the United States

The United States has a strong interest in ensuring the proper interpretation and implementation of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or "Convention"). Because the United States is a party to the Convention and participated in its negotiation, the government's interpretation of the treaty is "entitled to great weight." *Medellín v. Texas*, 552 U.S. 491, 513 (2008) (quotation marks omitted). The United States also has an interest in encouraging the reliable and efficient enforcement of international arbitral awards in aid of international commerce.

Questions Presented

By letter dated May 20, 2016, this Court requested the views of the U.S. Department of State on two questions:

1. Whether an award-creditor must first "confirm" a foreign arbitral award—as opposed to a U.S. Convention award—governed by the New York Convention and Chapter Two of the FAA, prior to initiating an enforcement action on that award against an award-debtor in U.S. courts; and

2. if not, whether the circumstances are any different if an award-creditor is seeking to enforce a foreign arbitral award against an award-debtor's alleged alter egos or successors-in-interest.

The government's responses, as further explained below, are as follows. First, an award-creditor need not "confirm" a foreign arbitral award governed by the New York Convention before seeking to "enforce" that award against an award-debtor in U.S. courts; the Convention and its implementing legislation, Chapter 2 of the Federal Arbitration Act ("FAA"), contemplate a single-step process of reducing an arbitral award to a court judgment. Second, based on the text and purpose of the Convention and the FAA, as well as recent Supreme Court authority explaining the role of courts in interpreting the scope of arbitral agreements, an award-creditor may seek, in the appropriate circumstances, to confirm a foreign arbitral award directly against alleged alter egos or successors.

Statement of the Case

A. The New York Convention and implementing legislation

The New York Convention is a multilateral treaty that establishes a regime for enforcement in Contracting States of international commercial arbitration agreements and awards. *See* The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518. The United States acceded to the Convention on September 30, 1970, and it entered into force in the United States on December 29, 1970.

In the United States, the Convention is implemented through Chapter Two of the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 201-208. Chapter Two provides subject matter jurisdiction in federal district courts for any "action or proceeding falling under the Convention . . . ." 9 U.S.C. § 203. The scope of "falling under the Convention" is in turn defined by 9 U.S.C. § 202 to include international commercial arbitral agreements and awards.

Consistent with the Convention, the FAA permits a party that has prevailed in international commercial arbitration to seek recognition and enforcement of that award against an award-debtor. *See* 9 U.S.C. § 207; Convention, arts. III, IV. In actions to recognize and enforce an award, the Convention distinguishes between courts of "primary" and "secondary" jurisdiction. Primary jurisdiction lies in the courts of the country in which, or under the arbitration law of which, an award was made (often referred to as the "seat" of the arbitration); secondary jurisdiction lies in the courts of all other Contracting States. *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 115 n.1 (2d Cir. 2007). Courts of primary jurisdiction are "free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief," while courts of secondary jurisdiction "may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention." *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997).

B. Factual and procedural background

The following facts are taken from the plaintiffs' allegations, which are assumed to be true. *See, e.g., Freidus v. Barclays Bank PLC*, 734 F.3d 132, 135 (2d Cir. 2013).[1]

[1] As the Court is aware, this appeal consists of two consolidated actions—the "Enforcement Action" and the "Confirmation Action." (Appellants' Br. 1 n.1). For the convenience of the

In 2008, plaintiffs contracted to sell pig iron to Steel Base Trade, AG ("SBT"), a now-defunct Swiss corporation, but SBT breached its obligations by October of that year. (Joint Appendix ("JA") 783, 792). As the contracts required all disputes arising under the contract to be arbitrated before the International Chamber of Commerce ("ICC"), plaintiffs initiated arbitration. (JA 784, 793). Plaintiffs claim that, while arbitration was pending, the defendants in this case transferred virtually all of SBT's assets to a new corporate entity, Prime Carbon. (JA 784).

Approximately four months after transferring its assets to Prime Carbon, SBT declared bankruptcy in Switzerland in April 2010. (JA 798). Because SBT was financially unable to mount a defense to the arbitration, SBT did not participate in the arbitration proceedings to defend against the claims. (JA 799). SBT's creditors also declined to defend against the claims as an assignee of SBT, and the court-appointed bankruptcy administrator subsequently admitted plaintiffs' arbitral claims against SBT in the bankruptcy proceedings. (JA 799-800). The final arbitral award, issued on November 9, 2011, awarded plaintiffs approximately 50 million Swiss francs. (JA 800). The arbitral panel did not order any relief against any individual or corporation other than SBT. (JA 141). On September 30, 2013, approximately one year after the conclusion of its bankruptcy proceedings, SBT was struck from the Swiss Commercial Register consistent with Swiss law. (JA 873).

Plaintiffs brought suit in the Southern District of New York on April 18, 2013; the parties refer to this suit as the "Enforcement Action." (JA 34). In the Enforcement Action, plaintiffs sought to confirm the arbitral award against SBT's alleged alter egos, and also brought fraudulent transfer claims. (JA 808). The district court (Sweet, J.) granted defendants' motion to

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Court, citations in this brief for plaintiffs' allegations are to the amended complaint in the Enforcement Action. (JA 782-812).

dismiss, principally on the ground that the award was not "enforceable" against alleged alter egos or successors in interest without first being "confirmed." *CBF Industria de Gusa S/A/ v. AMCI Holdings, Inc.*, 14 F. Supp. 3d 463, 478-79 (S.D.N.Y. 2014).

Plaintiffs then both filed an amended complaint in the Enforcement Action and brought a new suit seeking confirmation of the award against SBT; the parties refer to this second action as the "Confirmation Action." (JA 912). Defendants again moved to dismiss in both cases, and the district court granted the motions in separate opinions. *CBF Industria de Gusa v. AMCI Holdings, Inc.*, No. 13 Civ. 2581, 2015 WL 1190137 (S.D.N.Y. Mar. 16, 2015); *CBF Industria de Gusa S/A v. Steel Base Trade AG*, No. 14 Civ. 3034, 2015 WL 1191269 (S.D.N.Y. Mar. 16, 2015).

In the Enforcement Action, the district court again held that plaintiffs could not seek to "enforce" an arbitral award against any party other than the award-debtor, SBT, without first "confirming" the award against SBT. 2015 WL 1190137, at *8. The court reasoned that the arbitral panel had not entered an award against any alleged alter egos of SBT, and that to permit the suit against the alter egos would require the court to disturb the arbitral tribunal's determination, which, as a court sitting in secondary jurisdiction, it could not do. *Id.* at *9. The district court further reasoned that a factually intensive inquiry would undermine "the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *Id.*

In the Confirmation Action, the district court held that because SBT had been struck from the Swiss corporate register, it lacked capacity to be sued under Federal Rule of Civil Procedure 17(b)(2). 2015 WL 1191269, at *3.

Plaintiffs appealed the decisions in both actions, and the appeals were consolidated. This Court heard oral argument on March 2, 2016. Following argument, the panel ordered the parties

to submit supplemental briefs on the questions above; the Court also invited the U.S. Department of State to submit an *amicus* brief on the same questions.

ARGUMENT

POINT I

Neither the New York Convention nor the FAA Requires an Award-Creditor to First "Confirm" an Award Before Seeking to "Enforce" It

The first of the Court's post-argument questions asks whether the winner of a foreign arbitration governed by the New York Convention must first "confirm" the award before seeking to "enforce" it in U.S. courts. The answer is no: both the Convention and the FAA envision a single-step process for reducing a foreign arbitral award to a domestic judgment.

A. The terms employed by the Convention and the FAA

The FAA and the Convention use different terms for two distinct legal processes: (1) the process of reducing an arbitral award to judgment, and (2) the process of executing on that judgment in order to obtain an award-debtor's assets.

Reducing an award to judgment. The term "confirmation" under the FAA and the term "recognition and enforcement" under the Convention both mean the process of applying to a court to enter judgment based on an arbitral award.

In domestic arbitration governed by Chapter 1 of the FAA, the process of reducing an arbitral award to a court judgment is referred to as "confirmation." *See* 9 U.S.C. § 9 ("If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, . . . any party to the arbitration may apply to the court . . . for an order confirming the award . . . ."). Chapter 2 of the FAA also uses the term "confirm," with the same meaning. *See* 9 U.S.C. § 207 ("[A]ny party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any

other party to the arbitration.").

The New York Convention does not employ the term "confirmation." Instead, it refers to "recognition" and "enforcement" of arbitral awards, almost always as part of the single phrase "recognition and enforcement." *See* Convention, arts. III, IV, V. Under the Convention, "recognition" of an award means giving it preclusive legal effect, while "enforcement" means reducing that award to a domestic judgment (which entails "recognition" of the award). *See* Restatement (Third) U.S. Law of Int'l Comm. Arb. (Tentative Draft No. 2) § 1-1(z), (l); *id*. cmts. z, *l*.[2]

The text of section 207 of the FAA demonstrates that the terms "confirmation" and "recognition and enforcement" are synonymous: "The court shall *confirm* the award unless it finds one of the grounds for refusal or deferral of *recognition or enforcement* of the award specified in the said Convention." 9 U.S.C. § 207 (emphases added). Thus, by providing a procedure to reduce arbitral awards to judgment, the "confirmation" proceeding under Chapter Two of the FAA fulfills the United States' obligation under the Convention to provide procedures for "recognition and enforcement" of Convention arbitral awards.

Executing on a judgment. Chapter 2 of the FAA does not specify what further steps may be necessary for an arbitration-creditor to obtain an arbitration-debtor's assets following the entry of judgment. In the United States, however, this latter process is variously referred to as "enforcement of" or "execution on" a judgment, and trial courts have typically applied state-law procedures under Federal Rule of Civil Procedure 69 to order payment or execution against particular assets. *See, e.g*., *Daum Glob. Holdings Corp. v. Ybrant Digital Ltd*., No. 13 Civ. 3135,

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[2] In their post-argument briefs on the two questions, both plaintiffs and defendants appear to agree with the government's understanding of this terminology. *See* Appellees' Post-Argument Br. 2; Appellants' Post-Argument Br. 3-6.

2015 WL 5853783, at *2 (S.D.N.Y. Oct. 6, 2015). This latter meaning of "enforcement" is distinct from the meaning of the term "recognition and enforcement" in the Convention.

The New York Convention is silent as to execution on judgments arising out of arbitral awards. However, the Convention does require that each Contracting State must "enforce [awards] in accordance with the rules of procedure of the territory where the award is relied upon," and forbids the imposition of "substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." Convention, art. III.

B. The New York Convention was designed to avoid a two-step process for confirmation

Thus, the New York Convention does not require an award-creditor to first "confirm" an award before seeking to "enforce" that award through conversion of the award into a court judgment. Rather, "confirmation" and "enforcement" are synonyms in this context. The former is the domestic statutory term, and the latter is the Convention term, but both mean reducing an award to judgment. In addition, regardless of terminology, requiring an award-creditor to proceed through two separate steps before obtaining a judgment would run contrary to one of the purposes of the Convention.

The New York Convention was specifically designed to provide a simple, single-step judicial process for recognizing and enforcing arbitral awards. The New York Convention "succeeded and replaced the Geneva Convention of 1927," whose "primary defect . . . was that it required an award first to be recognized in the rendering state before it could be enforced abroad." *Yusuf Ahmed Alghanim*, 126 F.3d at 22. The two-step Geneva Convention procedure, referred to as "double exequatur," proved cumbersome, and the New York Convention was

designed to eliminate it. *See id*. In transmitting the New York Convention to the Senate for advice and consent in 1968, the executive branch specifically noted that the new regime was intended to permit an arbitral award holder "to request recognition and enforcement of his foreign award without having to prove that the award was binding in the country in which it was made." *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Message from the President of the U.S., Exec. E, 90th Cong., 2nd Sess., at 20 (1968), *reproduced* 7 I.L.M. 1042, 1058 (1968).

Accordingly, all an award-creditor must generally do prior to initiating execution, under the Convention and section 207 of the FAA, is apply to a court of competent jurisdiction for the single-step process of reducing its award to a judgment.

POINT II

An Award-Creditor May Also Seek to Confirm a Foreign Arbitral Award Against an Award-Debtor's Alleged Alter Ego or Successor in Interest

The Court's second question asks whether, even if in general there is no requirement of "confirmation" that precedes "enforcement" of a Convention award, the situation is different where an award-creditor seeks to enforce directly against an award-debtor's alleged alter ego or successor, rather than against the award-debtor itself. The New York Convention neither prohibits a Contracting State from allowing an award-creditor to seek enforcement of an award directly against an alter ego or successor, nor obliges a Contracting State to permit such an action. In the view of the United States, however, allowing such an action is consistent with judicial decisions on the interpretation and enforcement of both domestic and international arbitration agreements, as well as the text and purpose of the Convention and its implementing legislation, the FAA.

The United States takes no position on whether, and how, alter ego, successorship, or

similar doctrines of agency or vicarious liability might apply in this or any other individual case. As an initial matter, even understanding which theories might be available in a specific case would require resolving threshold choice-of-law questions, which might vary depending on the specific theory or the point during the arbitral process at which it is invoked. Even after the applicable substantive law is identified, alter ego and successor theories of liability are different doctrines, which would require consideration of different threshold legal and factual questions. Determining whether an entity could be liable as a successor to an arbitral party, for example, might turn on an interpretation of the parties' agreement and its terms under the law governing the agreement. Determining whether an entity could be liable as an alter ego based on a theory of fraudulent conveyance of assets could require a determination as to whether the applicable law would be the law of the place where the assertedly fraudulent conveyance took place, or the law governing the parties' contract, or some other body of law. The United States also takes no position on whether, and if so under what circumstances, an alleged alter ego or successor would have a valid defense to confirmation of an arbitral award under Article V of the Convention.[3]

A. The courts are empowered to decide who is bound by an arbitral agreement in the single-step confirmation proceeding

A court may decide whether a non-signatory to an arbitral agreement is bound by that agreement during the course of the single-step process for confirming a Convention award, just as it may in other arbitral contexts.

An arbitration agreement is a contract. Thus, the question of whether a specific entity has agreed to arbitrate a claim or is otherwise bound by an arbitration agreement is generally

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[3] Because, as explained above, "confirmation" is the domestic term employed in both Chapter 1 and Chapter 2 of the FAA for the process of reducing an award to judgment, the remainder of this brief uses that term, rather than the Convention's "recognition and enforcement."

governed by ordinary principles of contract law. *First Options, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (FAA Chapter 1 case). Under *First Options* and related cases, questions of arbitrability—including questions about whether a non-signatory to an arbitration agreement is bound by that agreement—are for courts to decide, unless the parties have agreed otherwise. *Id.* at 943; *accord Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).[4]

The question of whether an entity is bound by an arbitration agreement may be raised at various stages in the dispute resolution process.

Prior to arbitration, a party may bring an action to compel arbitration against a party that was not a signatory to the arbitration agreement. *See* 9 U.S.C. § 4 (domestic arbitration); 9 U.S.C. § 206 (New York Convention). In such a case, the district court must decide in the first instance whether the non-signatory will be bound by the agreement, and may need to take evidence and resolve disputed facts in order to reach a conclusion. As this Court has held, non-signatories may be bound by an agreement to arbitrate under "ordinary principles of contract and agency," including "(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel." *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 95-97 (2d Cir. 1999) (quotation marks omitted; citing *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995)).

A party to an arbitration agreement may also raise the question of alter ego status (or

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[4] The term "arbitrability," as employed in United States law, diverges from its meaning elsewhere. In international practice, the term is used more narrowly to refer to whether, as a matter of public policy, a particular type of dispute is capable of resolution through arbitration. Other questions that are considered issues of "arbitrability" in the United States—including the existence or validity of the parties' arbitration agreement—are typically referred to elsewhere as matters of arbitral "jurisdiction" or "competence." *See generally* Lawrence Shore, *The United States' Perspective on 'Arbitrability,'* in ARBITRABILITY: INTERNATIONAL & COMPARATIVE PERSPECTIVES 69-83 (Loukas A. Mistelis et al. eds., 2009).

other agency principles) for the first time in arbitral proceedings by asking the arbitral panel to enter an award against a non-signatory to the arbitral agreement. In a subsequent action to confirm an arbitral award against an alter ego, the district court would review de novo the arbitral panel's decisions as to alter ego status—unless the court first determined that the parties clearly and unmistakably intended that arbitrators should decide that question. *See First Options*, 514 U.S. at 943-46 (holding that a court should decide whether the arbitration contract bound parties who did not sign the agreement); *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 661 (2d Cir. 2005) (applying *First Options*/*Howsam* rule to arbitral award governed by the New York Convention); *China Minmetals Materials Import and Export Co. v. Chi Mei Corp.*, 334 F.3d 274, 281 (3d Cir. 2003).

To decide whether (and which) non-signatories are bound by an arbitral agreement in the course of confirming an award against the non-signatory, the district court would need to resolve any factual disputes, conducting evidentiary hearings if necessary. *See, e.g.*, *China Minmetals*, 334 F.3d at 281, 284, 289-90; *Local Union No. 38, Sheet Metal Workers' Int'l Ass'n, AFL-CIO v. Custom Air Sys., Inc.*, 357 F.3d 266, 268 (2d Cir. 2004). Several foreign courts have taken a similar approach, conducting an independent review of an arbitral panel's rulings on alter ego or other agency theories. *See, e.g., IMC Aviation Solutions Pty Ltd. v. Altain Khuder LLC*, [2011] VSCA 248 (Australia, Sup. Ct. Victoria); *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 (Sup. Ct. United Kingdom).

Alternatively, an arbitral award-creditor may bring an action to confirm an award against the award-debtor, and then bring a claim (either by a second action, or as a separate claim in the original action) to execute on the resulting judgment against the assets of an alleged alter ego or successor who was not a party to the original arbitration. *See, e.g., JSC Foreign Econ. Ass'n*

Technostroyexport v. Int'l Dev. & Trade Servs., Inc., 295 F. Supp. 2d 366 (S.D.N.Y. 2003) (following confirmation of a foreign arbitral award, subsequent action by judgment-creditor against alleged alter egos of judgment-debtor). In such an action, the district court will rule on the alter ego question even though that issue was not reached or passed upon by the arbitral panel.

In short, a party to an arbitral agreement can assert that an alleged alter ego or successor should be held liable for its damages in each of these circumstances, with initial or de novo review by a district court of the issue. There is no evident reason that that answer should change because the award-debtor can no longer be sued because it has no legal status following the completion of foreign bankruptcy proceedings.

B. The text of the FAA supports the conclusion that a confirmation action directly against an alleged alter ego or successor is permissible

The text of Chapter 2 further suggests that an award-creditor may seek to confirm an award directly against a non-signatory to the arbitration agreement under legal doctrines such as alter ego or successor liability. Whether in an action to confirm an award (under section 207) or to compel arbitration (under section 206), the courts' authority includes the power to determine whether a non-signatory to the arbitral agreement is bound by that agreement—and (under section 207) is bound by the arbitral award—and, if so, to confirm an award against such a non-signatory.

Judicial authority to decide which entities are bound by an arbitration agreement or an arbitral award derives ultimately from sections 202 and 203 of the FAA. Section 203 grants "original jurisdiction" to federal district courts for an "action or proceeding falling under the Convention." Section 202 states that a matter falls under the Convention when it is "[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or

not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title." Thus, when a district court is asked to exercise jurisdiction against a non-signatory to an agreement, it must analyze the "legal relationship" between the parties to the suit, "whether contractual or not."

Federal courts have exercised that jurisdiction under section 206 of the FAA to compel arbitration by non-signatories to the agreement. Section 206 provides that "[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement." Courts interpret the scope of "the agreement" under section 206 in accordance with the common law principles (such as assumption, alter ego, and estoppel) described in *Thomson-CSF*. *See* 64 F.3d at 776. Courts therefore compel participation in arbitration by entities that have not signed an arbitration agreement when they are nonetheless bound to the agreement for a valid legal reason. *See, e.g.*, *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 47 (1st Cir. 2008); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1065 (2d Cir. 1993).[5]

Federal courts should similarly be understood to have authority under section 207 of the FAA to determine in confirmation actions which entities are bound by an arbitral award. Section 207 of the FAA provides that "any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration." Given that the scope of the "legal relationship" under section 202 and the scope of the "agreement" under section 206 are defined in part by reference to common law or

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[5] Courts also hear suits seeking other relief, such as an anti-suit injunction in favor of arbitration or an injunction to stay pending arbitration, against non-signatories to the arbitral agreement. *See, e.g.*, *CRT Capital Grp. v. SLS Capital, S.A.*, 63 F. Supp. 3d 367, 371-72 (S.D.N.Y. 2014).

comparable principles such as agency and alter ego, it would be anomalous if the analysis of which entities are "party to the arbitration" under section 207 categorically excluded those theories.

Of course, application of such doctrines in an individual case would require a threshold determination as to the substantive body of law that would apply to govern that determination.[6] In addition, a determination that an entity is an alter ego of the arbitral award-debtor would be distinct from, and not necessarily conclusive of, the separate determination of whether that entity had a valid defense to confirmation under Article V of the Convention. An alleged alter ego might argue, for example, that the award should not be confirmed against it because it "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case." Convention, art. V(1)(b). The United States takes no view on how these or similar questions should be answered in these proceedings.

C. Permitting confirmation directly against non-signatories is consistent with the Convention

The Convention does not address explicitly whether a court may directly confirm an award against an entity not specifically named as the award-debtor. Article III provides that each Contracting State must "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon," and that there "shall

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[6] In *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 53 (2d Cir. 2004), this Court held that under some circumstances, the proffered arbitral agreement's own choice-of-law clause may dictate the substantive law applied to the court's analysis of which parties are bound to arbitrate. By contrast, in *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 661-62 (2d Cir. 2005), the Court held that American federal common law, not Egyptian contractual law, applied to the question of whether a non-party could be subject to enforcement. In addition, in *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 95-96 (2d Cir. 1999), the Court held that federal common law, not New York law, applied in a case under the Convention. The question of what substantive law applies to determinations of vicarious liability, however, is beyond the scope of the Court's questions in this case.

not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." Allowing confirmation against a non-signatory does not subject Convention awards to different or more onerous procedures than would be available for confirmation of domestic awards.

The defendants raise arguments to the effect that no other country would countenance an action to enforce the award at issue here against the defendants. (Appellees' Br. 84-85, 88-89). Even assuming that is true, it is not inconsistent with the Convention. The Convention places a floor on the situations in which awards may be recognized and enforced; it does not bar Contracting States from permitting more liberal enforcement. *See* Convention, art. VII ("The provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."); *see also* Albert Jan van den Berg, *The New York Convention of 1958: An Overview*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS 39, 66 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008) (the "Convention is aimed at facilitating recognition and enforcement of foreign arbitral awards; if domestic law or other treaties make recognition and enforcement easier, that regime can be relied upon").

D. This Court's *Orion* decision does not limit the authority to confirm a Convention award against alter egos

Nor does this Court's decision in *Orion Shipping & Trading Co. v. E. States Petroleum Corp. of Panama, S.A.*, 312 F.2d 299, 300 (2d Cir. 1963), limit U.S. courts' authority to entertain an action for confirmation against alleged alter egos or successors. While the district court relied on that decision for its holding to the contrary, *Orion* predates Chapter 2 of the FAA; it has been

limited in important ways by subsequent decisions of this Court; and its conception of which parties are bound by an arbitration agreement or arbitral award is more limited than that reflected in more recent decisions of this Court and the Supreme Court.

The *Orion* decision rejected an argument by the award-creditor that the district court, in an action seeking confirmation of a domestic arbitral award, could properly determine that a parent corporation was an "alter ego" of the award-debtor that could also be held liable for the award. The *Orion* court held that "an action for confirmation is not the proper time for a District Court to 'pierce the corporate veil.' " 312 F.2d at 301. The Court reasoned that a confirmation action under 9 U.S.C. § 9 "is one where the judge's powers are narrowly circumscribed and best exercised with expedition," and the factually intense veil-piercing analysis would "unduly complicate and protract" that proceeding. *Id*. The Court distinguished cases seeking to compel arbitration, seemingly agreeing that in that context it would be appropriate for a district court to engage in a plenary analysis of veil-piercing under 9 U.S.C. § 4. *Id*. Finally, the Court noted that alternatives—such as a suit against the entity that is claimed to be the guarantor or the alter ego of the award-debtor—remained available to the plaintiffs, but that "an action to confirm the arbitrator's award cannot be employed as a substitute for either of these two quite distinct causes of action." 312 F.2d at 301.

As an initial matter, *Orion*—decided more than fifty years ago under Chapter 1 of the FAA, before the United States became a party to the New York Convention—should not govern actions under Chapter 2 of the FAA. Indeed, this Court has already suggested, in dicta, that the traditional principles of contract and agency law identified in *Thomson-CSF* might permit an award holder to bring a Convention action to confirm an arbitral award against an alleged alter ego, though it ultimately decided the case on other grounds. *See In re Arbitration Between*

Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488, 495 (2d Cir. 2002).

Furthermore, *Orion*'s holding has been narrowed in important ways. First, this Court has rejected the proposition that *Orion* categorically bars consideration of all common law or agency theories of liability at the confirmation stage. In *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc*., 23 F.3d 41, 46-47 (2d Cir. 1994), the Court ruled that the district court should consider the question of successorship in interest in a confirmation proceeding because, in that case, successorship was factually straightforward. Second, the Court has already distinguished *Orion* as inapplicable to labor, as opposed to commercial, arbitration, because in labor arbitration, the intent to bind non-signatories is exceptionally clear. *See Gvozdenovic v. United Air Lines, Inc*., 933 F.2d 1100, 1105 (2d Cir. 1991). In addition, *Orion* did not consider whether its general rule should apply even when the original award-debtor itself can no longer be sued directly, making the two-step process urged by the Court unavailable.

More fundamentally, the basic approach of *Orion*—as well as the distinction drawn in *Productos Mercantiles* between "complex" veil-piercing cases and cases in which the application of common law or similar principles of agency, alter ego, or successorship is more straightforward—is inconsistent with the judicial role described by more recent cases such as *First Options* and *Howsam*. Under *First Options*, unless the parties have contracted otherwise, courts are empowered to decide questions of arbitrability de novo, including which parties are bound to an arbitral agreement. 514 U.S. at 943-45; *see Howsam*, 537 U.S. at 84. By contrast, *Orion*, despite reciting a legal rule similar to *First Options*,[7] went on to hold that a district court's

[7] "[A] decision whether parties other than those formally signatories to an arbitration clause may have their rights and obligations determined by an arbitrator when that issue has not been

powers in confirmation actions pursuant to 9 U.S.C. § 9 "are narrowly circumscribed and best exercised with expedition." 312 F.2d at 301. But the *First Options* line of cases does not hold that courts' powers to evaluate who is bound to an agreement are "narrowly circumscribed"—to the contrary, those cases stand for the proposition that these matters lie within the courts' power (unless agreed otherwise by the parties), and nothing in those cases suggests that courts should circumscribe that power or conduct only a narrow inquiry in order to adjudicate those matters. *See, e.g., First Options*, 514 U.S. at 944 (holding that, in a Chapter 1 FAA case, a court should undertake ordinary analysis of state-law contract principles to decide whether parties had agreed to arbitrate); *China Minmetals*, 334 F.3d at 289-90 (in Convention case, remanding for the district court to decide a dispute of fact about whether parties had agreed to arbitrate). Indeed, in *First Options* itself—a post-arbitration confirmation action—the Supreme Court upheld the Third Circuit's lengthy, fact-intensive exploration of whether individuals were bound by an arbitral agreement on the basis of veil-piercing and alter ego theories. *See* 514 U.S. at 946-47.

For all these reasons, *Orion* should not be read to extinguish an award-creditor's right to pursue confirmation against an alleged alter ego, successor, or agent of the award-debtor when the award-debtor itself is defunct.

E. Permitting direct confirmation against third parties prevents award-debtors from avoiding enforcement

Finally, leaving open the possibility in appropriate circumstances of confirmation directly against entities that are not named as award-debtors furthers the policy goal of preventing award-debtors from avoiding legitimate enforcement and collection. In a case where (as alleged here) an award-debtor is defunct and thus immune from suit, but fraudulently transferred its assets to

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submitted to him is not within the province of the arbitrator himself but only of the court." 312 F.2d at 301.

another entity to avoid liability on the arbitral award, it makes little sense to reward that misconduct by requiring the creditor to engage in additional litigation to first confirm its award against the now-nonexistent award-debtor, and only then proceed to suing the award-debtor's alleged alter egos or successor or its transferees. Indeed, that first step may be impossible, given the award-debtor's unavailability for suit; the requirement to sue it then may frustrate the creditor's legitimate ability to collect. Whether, on the merits, the transferee of the defunct entity's assets would be liable for payment of the arbitral award would of course have to be resolved by the court in such a proceeding. But permitting a confirmation action directly against the transferee—in which the transferee can raise the typical defenses to confirmation of the award and can also challenge its alter ego or successor status—minimizes the chance that the arbitral award will be defeated by the debtor's manipulation or concealment. Although, as noted, the United States takes no position on whether and how any common law or comparable theory of liability may apply in this case, there is no reason to categorically bar an arbitral award-creditor from seeking confirmation of an award against a non-party where applicable law provides for a valid claim and other defenses to enforcement do not apply.

Conclusion

The Court should vacate the judgments of the district court and remand for further proceedings in accordance with the interpretation of the FAA and the New York Convention described above.

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Respectfully submitted,

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