



# Non-Signatories Before and After Arbitration: Compelling Arbitration and Enforcing Awards

## Panel II – Enforcing Awards

Speakers:

**Teddy Baldwin**, Steptoe & Johnson LLP

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**William H. Taft, V**, Debevoise & Plimpton LLP

Moderated by:

**Nancy M. Thevenin**, FCI Arb

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# Enforcing Awards Against Non-Parties

*A Review of CBF Indústria de Gusa v. AMCI*

William H. Taft, V

18 November 2020

**Debevoise  
& Plimpton**

## ***CBF Indústria de Gusa v. AMCI***

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- Gusa entered sales contracts with Steel Base for purchase of pig iron.
- Gusa commenced ICC arbitration after Steel Base suspended purchases.
- Steel Base transferred assets to Prime Carbon, a shell entity under common ownership, and filed for bankruptcy.
- ICC award rendered for Gusa in the amount of US\$48 million.



## Procedural Background

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- Gusa sought enforcement of the award in New York against non-party Prime Carbon, its owners, and companies allegedly under their control, as alter egos of the award debtor.
- District Court dismissed for failure to seek confirmation prior to enforcement.
- Two issues on appeal:
  - Is it necessary to confirm a New York Convention award prior to enforcement?
  - What is the legal framework for enforcing an award against third parties?

## Enforcement Against Non-Parties: A False Start

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- Second Circuit initially applied a *First Options* analysis, seeking to determine the intent of the parties to the contract containing the arbitration agreement with respect to third party enforcement.

“[A] court must begin by deciding whether the parties before it clearly and unmistakably committed to arbitrate questions regarding the scope of their arbitration agreement.” *CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.*, 846 F.3d 35, 54 (2d Cir. 2017), *vacated and superseded on rehearing*.

- Framework appropriate for analyzing awards against non-signatories to a contract, but not for enforcing awards against non-parties to the arbitration.

## Enforcement Against Non-Parties: A Clearer View

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- *De Gusa* filed motion for reconsideration, giving NYCBA opportunity to file an *amicus* brief.
- In amended opinion, Second Circuit clarifies that enforcement against non-parties governed by forum's law of alter ego, veil piercing and vicarious liability.
- Decision presents claimants with strategic question: whether to join non-signatories to arbitration proceedings, or seek to enforce award against non-parties after the fact.

**Victoria Shannon Sahani**

**Associate Dean and Professor of Law, Sandra Day O'Connor College of Law**

# **U.S. Law on Executing Awards By or Against Non-signatories**



**18 November 2020**

# Agenda



**The Frankenstein Framework  
Bringing Frankenstein to Life  
How Fraud Affects Frankenstein  
Implications and Conclusions**



# The Frankenstein Framework

**Constitutional Due Process: U.S. Constitution, Amendment V**

**New York Convention: Article V, public policy exception**

**Federal Arbitration Act (FAA): Ch. 2 on NY Convention (9 U.S.C. §§ 203, 207)**

**Note:** ICSID Awards are excluded from FAA: see 22 U.S.C. § 1650-1650a

**State Arbitration Laws: only if seat is in U.S. and no conflict with FAA or NY Convention**

**Restatement (Third) of Int'l Commercial Arb.: §§ 1.1, 1.3, 4.24, 4.29, 4.36, 4.8**

# **The Frankenstein Framework**

**U.S. Supreme Court and Federal Circuit Court Cases interpreting FAA**

**U.S. Government's Interpretation of NY Convention**

**Federal Rule of Civil Procedure 17: the “Real Party in Interest” Rule**

**State/Local Law on Enforcing Judgments: after confirmation/enforcement**

**State/Local Law on Remedies: piercing corporate veil is an equitable remedy**

**Foreign Sovereign Immunities Act (FSIA): 28 U.S.C. § 1605(a)(6)**

## Bringing Frankenstein to Life using *de Gusa*

- **primary** jurisdiction (seat of arbitration) vs. **secondary** jurisdiction (place of enforcement) over arbitral award (Restatement §§ 1.1, 1.3)
- award creditor files for confirmation/enforcement under secondary jurisdiction in U.S. federal court (SDNY)
- secondary jurisdiction court invokes FAA and NY Convention Art. V through 9 U.S.C. § 207 and analyzes grounds for refusing to enforce
- **under ordinary circumstances**, court finds under NY Convention Art. V that non-signatory is not bound by agreement or award
- ***de Gusa*** case presents **unusual circumstances**

## Bringing Frankenstein to Life using *de Gusa*

- court applies FRCP 17 to dismiss action **unless an equitable remedy applies** (see Restatement §§ 4.29, 4.36)
- equitable remedies are drawn from law of local jurisdiction in which enforcing court is located (see Restatement § 4.8)
- SDNY is a federal court in the Second Circuit
- confirmation/enforcement of international arbitration award is a **federal question case** under FAA, so no state law applies (9 U.S.C. § 203)
- apply only Second Circuit law in this case (**but note:** a Circuit may apply state law in some circumstances)

## Bringing Frankenstein to Life using *de Gusa*

- piercing the corporate veil is an equitable remedy under Second Circuit law
- court then applies elements of veil piercing under Second Circuit law
- if veil piercing is successful and if **foreign government** is revealed, then analyze under **FSIA** to determine whether the foreign government must pay (28 U.S.C. § 1605(a)(6))

## How Fraud Affects Frankenstein

Fraud **during the arbitration proceedings** can lead to a **procedural due process argument** under the U.S. Constitution and/or an applicable State Constitution similar to a denial of justice claim or claim for mistreatment in host state's courts in investment arbitration when exhausting local remedies (here, involving ICC Arbitration instead of host state courts)

**No issue preclusion** because fraud during the business dealings prior to arbitration is a separate claim from fraud during the arbitration proceedings (see Restatement § 4.24)

**Supports veil piercing** even if foreign sovereign is revealed (FSIA)

# Implications and Conclusions

- Playing a "cat and mouse game" by hiding assets when a party realizes it is losing the arbitration may give rise to either:
  - **a new and independent fraud claim** that may be litigated at the confirmation or enforcement stage, or
  - **a valid veil-piercing claim** under the law of the enforcing jurisdiction.
- NY Convention public policy exception remains a **formidably high hurdle** to overcome when trying to thwart enforcement, and rightly so.
- NY Convention public policy exception **applies only to enforcement of award** – not to enforcement of underlying contract or arbitration agreement.



**Thank You**

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# Enforcing Awards Against Non-Signatory Sovereigns

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Teddy Baldwin  
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# Scenario 1

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- Claimant signs contract with state-owned oil company
- Claimant has facts to arguably show that state itself should be bound by arbitration agreement
- Claimant can seek to bring state into arbitration proceeding or to later seek enforcement against the state in court

# Scenario 2

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- Claimant signs contract with state itself
- The state does not likely have assets outside of its territory
- Claimant could seek to bring the arbitration against a state-owned gas company (in addition to the state) if facts to support binding gas company as party to the agreement
- Claimant can bring enforcement action against gas company in court even if the entity was not a party to the arbitration

# Scenario 3

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- Claimant signs contract with state-owned gas company
- The Claimant wants to ultimately enforce the award against the state-owned airline
- Claimant could bring the arbitration against the gas company
- Claimant could then bring enforcement action against state as an alter ego. And, assuming facts to support it, the claimant could also show that the airline is the alter ego of the state



Q&A



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