

Enforcing Awards Against Non-Signatories and Non-Parties: Two Recent Decisions from the Southern District of New York

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In two recent decisions, the U.S. District Court for the Southern District of New York addressed key issues arising out actions to enforce foreign arbitral awards against non-signatories to an arbitration agreement. The decisions, *Alstom Brasil Energia e Transporte Ltda. v. Mitsui Sumitomo Seguros S.A.*¹ and *GE Transportation (Shenyang) Co., Ltd. v. A-Power Energy Generation Systems, Ltd.*,² demonstrate that confirmation and enforcement actions in New York are relatively streamlined and that the court will only undertake a limited review of arbitration awards as required by the New York Convention and the FAA. In addition, *GE Transportation*, in particular, is a reminder that New York courts are willing, where appropriate, to order effective interim or permanent relief in aid of post-award collection, such as worldwide freezing orders.

Enforcement against a Non-Signatory Insurer as Subrogee?

On June 20, 2016, in *Alstom Brasil Energia e Transporte Ltda.*,³ the court considered whether a non-signatory insurer was bound by an arbitration clause signed by its insured. Because the insurer was enforcing its insured's rights as subrogee of the insured under a contract between the insured and a third party, the court found that the insurer was bound by the arbitration clause and, accordingly, enforced the award against the non-signatory.

Background

Two power generation services companies (collectively, "Alstom") entered into a supply contract with an aluminum refiner in Brazil ("Alunorte") to provide steam generation units for a refiner facility. Following a fire in the facility, which arose from a malfunction in the steam generation units, Alstom and Alunorte entered into a compromise agreement, confirming that each party had complied with its contractual obligations and releasing the other from all actual and potential claims.

Alunorte then filed a claim against its insurer ("Mitsui") under a insurance and indemnity contract, seeking to recover its losses from the fire. Mitsui and Alunorte settled the claim, and Mitsui initiated an action against Alstom before the Brazilian courts to recover the indemnity payment made to Alunorte. Alstom invoked the arbitration clause in the supply contract with Alunorte to initiate arbitration before the

¹ 15-cv-08221-AKH, ECF 32 (S.D.N.Y. June 20, 2016).

² 15-cv-06194-PAE, ECF 47 (S.D.N.Y. June 22, 2016).

³ 15-cv-08221-AKH, ECF 32.

International Chamber of Commerce (“ICC”) against Mitsui and to dismiss Mitsui’s action before the Brazilian courts. The arbitration was seated in New York.

The ICC tribunal concluded that it had jurisdiction over all parties and that, under Brazilian law, Mitsui was bound by the arbitration clause in the supply contract, as well as the release given to Alstom by Alunorte. As such, Mitsui could not bring its claims before the Brazilian courts.⁴ The award also dismissed damages claims asserted by both parties and held each party liable for its own costs. Alstom sought to confirm the award in New York,⁵ and Mitsui moved to dismiss, arguing that it was not bound by the arbitration agreement, that the court lacked personal jurisdiction over it, that Alstom failed to effect proper service, and that *forum non conveniens* warranted dismissal.

The Court’s Decision – The Insurer Stands in the Shoes of the Insured

The Southern District rejected each of Mitsui’s arguments and enforced the award against Mitsui, notwithstanding that Mitsui had not signed the arbitration clause itself.

Because Mitsui was not a signatory to the arbitration agreement and had not clearly evidenced an intent to allow the arbitrators to decide questions of jurisdiction, the court conducted its own review of whether Mitsui was bound by the arbitration clause.⁶ The court applied U.S. federal arbitration law to determine whether Mitsui was bound by the clause, in light of the parties’ choice of New York (a U.S. forum) in the arbitration clause as the forum for any dispute.⁷ The court found “clearly established” principles that a party may be bound to arbitrate “even in the absence of a signature” on an arbitration agreement and that “an insurer-subrogee stands in the shoes of its insured.”⁸ Consequently, claims that an insurer pursues on behalf of its insured, which would be subject to arbitration if pursued by the insured, are similarly subject to arbitration when pursued by the insurer.⁹ Because the Mitsui-Alunorte insurance contract gave Mitsui a clear subrogation of Alunorte’s rights and Mitsui knew it was pursuing those

⁴ Although the ICC tribunal rendered a declaration that Mitsui could not bring its claims against Alstom before the Brazilian courts, the Southern District’s decision does not comment on the status of the Brazilian court proceedings.

⁵ Alstom originally petitioned for confirmation in the Supreme Court of the State of New York, but Mitsui removed the action to federal court, as is permitted under the Federal Arbitration Act. See 9 U.S.C. §§ 201, 203, 205.

⁶ *Alstom*, at 5-6. This is consistent with U.S. case law that holds that a question of jurisdiction—or arbitrability, as it is referred to in U.S. courts—is a question for the courts unless there is “clear and unmistakable” intent that the parties intended the question to be submitted to the arbitrators. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 47 (1995).

⁷ *Alstom*, at 7-8.

⁸ *Id.* at 9.

⁹ *Id.*

subrogated rights, Mitsui was bound by the same arbitration clause that would have bound Alunorte.¹⁰ The ICC tribunal, it should be noted, reached a similar conclusion but on the basis of Brazilian law.

The court dismissed Mitsui's arguments that the award should not be confirmed due to lack of personal jurisdiction or incorrect service. The court also rejected Mitsui's inconvenient forum (*forum non conveniens*) argument, finding that the parties' selection of New York as the arbitral forum was entitled to deference and therefore was a significant factor in establishing that New York was not an inconvenient place to confirm the award.¹¹

Judge Alvin K. Hellerstein rendered the Southern District's decision in *Alstom Brasil Energia e Transporte Ltda.* Alstom was represented by Paul R. Koepff of Clyde & Co US LLP in the enforcement action and Peter Hirst and Joshua Fellenbaum of Clyde & Co LLP in the underlying arbitration. Mitsui was represented by Lea Haber Kuck and Betsy A. Hellmann of Skadden, Arps, Slate, Meagher & Flom LLP in the enforcement action and in the underlying arbitration, as well as Pellon & Associados in the underlying arbitration.

Enforcement against Non-Signatory (and Non-Party) Related Entities as Alter Egos?

Just two days later, on June 22, 2016, the Southern District, in *GE Transportation (Shenyang) Co.*,¹² enforced an arbitral award against a signatory parent company but declined to extend enforcement measures to non-signatory affiliates.

Background

A seller and buyer entered into a contract for the purchase of wind turbine gearboxes over a three-year period. The buyer's parent company ("A-Power") entered into a guarantee agreement with the seller, guaranteeing its subsidiary's performance. The buyer eventually defaulted on the contract, and the seller's assignee ("GET") initiated HKIAC arbitration against A-Power, pursuant to the guarantee agreement.

The HKIAC tribunal issued an award in GET's favor and ordered A-Power to pay GET nearly \$360 million plus interest accruing at a rate of approximately \$100,000 per diem. GET obtained confirmation of the award in the Hong Kong High Court. GET then filed a petition against A-Power in the Southern District,

¹⁰ *Id.* at 9-10. Mitsui also claimed it was not subject to the arbitration clause because its action sounded in tort, rather than contract, and it would not be bound by the clause under Brazilian law. The Southern District quickly dismissed these claims, however, finding that the dispute sounded in contract and that, because U.S. federal law applied to determine whether Mitsui was bound to arbitrate, the result under Brazilian law was irrelevant. *Id.* at 10-11.

¹¹ *Id.* at 13-14.

¹² 15-cv-06194-PAE, ECF 47.

seeking confirmation and enforcement of the award against A-Power, as well as a number of its affiliates not party to the underlying arbitration. GET also sought a permanent injunction against A-Power and its affiliates to prohibit the transfer and dissipation of assets. The affiliates were not entered as parties in the Southern District action, nor do they appear to have been parties to the underlying arbitration.

The Court's Decision – Alter Ego Liability Not a Question for an Enforcement Action

The court confirmed the award against A-Power in a streamlined procedure. Emphasizing that the Federal Arbitration Act (the "FAA") limits a court's review in such actions, the court found no basis to deny confirmation against A-Power under that "limited review."¹³

In regards to the award debtor's affiliates, however, the court considered that confirming the award against them was beyond the "limited" scope of the confirmation action. As an initial matter, the affiliates were not parties to the action before the Southern District, as GET only initiated the proceedings against A-Power.¹⁴ The court thus concluded that it had no authority to enter judgment against parties not before it in the instant confirmation proceedings.¹⁵

In addition, the court concluded that determining whether the non-signatory related entities were alter egos of A-Power was inappropriate under the FAA in the context of a confirmation action. The court explained that, in a streamlined confirmation action, the "judge's powers are narrowly circumscribed and best exercised with expedition. It would unduly complicate and protract the proceeding were the court to be confronted with a potentially voluminous record setting out the details of the corporate relationship between a party bound by an arbitration award and its purported 'alter ego.'"¹⁶

The court explained that two exceptions to this rule exist: (1) where a separate basis for subject matter jurisdiction exists for enforcement against the alter egos from enforcement against the signatory party and (2) where piercing the corporate veil would not unduly complicate the proceeding.¹⁷ The court found that neither exception applied. First, no independent basis for federal jurisdiction over the alleged alter ego affiliates existed.¹⁸ Second, the court concluded that determining whether the related entities indeed were alter egos of A-Power, the award debtor, would complicate and prolong the proceedings: it required untangling a "web of corporate entities" owned wholly or in part and directly or indirectly by A-

¹³ *Id.* at 9.

¹⁴ *Id.* at 10.

¹⁵ *Id.*

¹⁶ *Id.* at 11 (quoting *Orion Ship. & Trad. Co. v. E. States Petroleum Corp. of Panama, S.A.*, 312, F.2d 299, 301 (2d Cir. 1963)).

¹⁷ *Id.* at 12, 14.

¹⁸ *Id.* at 12-13.

Power.¹⁹ Consequently, confirming the award against the alleged non-signatory alter egos was not appropriate in the limited confirmation action. Significantly, the court left GET free to initiate a separate action against the related entities for liability on the judgment entered against A-Power, leaving open the possibility that the award will be enforced against them and their assets.²⁰

While the award was confirmed against A-Power alone at this juncture, the court granted a wide-ranging injunction against A-Power that arguably impacted its affiliates. Namely, the court restrained A-Power from transferring or otherwise dissipating its assets “wherever they are located, whether in its own name or not, and whether solely or jointly owned, or directly or indirectly controlled,” pending full payment of the judgment to assure GET of “fulsome relief.”²¹ That being said, the court observed that formally extending the permanent injunction to A-Power’s affiliates was not appropriate in the present limited action.²² Nonetheless, the order was broadly-worded because, as the court acknowledged, A-Power had attempted to avoid GET’s collection efforts by use of its officers and subsidiaries.

Judge Paul A. Engelmayer rendered the Southern District’s decision in *GE Transportation (Shenyang) Co.* GET was represented by Brian James Wheelin and Joseph L. Clasen of Robinson & Cole LPP and Gregory James Bennici of Zeldes Needle & Cooper, P.C. in the enforcement action and by John Savage and Simon Dunbar of King & Spalding LLP and Linfei Liu and Zhenyong (Allan) Ye of Jun He Law Offices in the underlying arbitration. A-Power was represented by Hongwen (Catherine) Zhu and Weidong (Victor) Yang of Sunshine Law Firm and Justin D’Agostino, Simon Chapman, Helen Tang, and Tracy Wu of Herbert Smith in the underlying arbitration.²³

¹⁹ *Id.* at 14-16. The court also noted that instances in which the second exception apply typically involve much simpler corporate relationships, such as that of successors and assigns. *Id.* at 14-15 (citing *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 43, 46-47 (2d Cir. 1994)).

²⁰ *Id.* at 17.

²¹ *Id.* 19-20.

²² *Id.* at 18-19.

²³ According to the award from the underlying arbitration, A-Power’s counsel withdrew in April 2012.