No. 17-481

In The Supreme Court of the United States

AMCI HOLDINGS, INC., et al.,

Petitioners,

v.

CBF INDÚSTRIA DE GUSA S/A, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF PROFESSOR GEORGE A. BERMANN AS *AMICUS CURIAE* IN SUPPORT OF GRANTING CERTIORARI

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INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae George A. Bermann is the Jean Monnet Professor of EU Law, Walter Gellhorn Professor of Law, and the director of the Center for International Commercial and Investment Arbitration (CICIA) at Columbia Law School. A Columbia Law School faculty member since 1975, Professor Bermann teaches courses in, and has written extensively about, transnational dispute resolution (international arbitration and litigation), European Union law, administrative law, and WTO law. He is an affiliated faculty member of the School of Law of Sciences Po in Paris and the MIDS Masters Program in International Dispute Settlement in Geneva. He is also a visiting professor at the Georgetown Law Center.

Professor Bermann is an active international arbitrator in commercial and investment disputes; chief reporter of the ALI's Restatement of the U.S. Law of International Commercial Arbitration; co-author of the UNCITRAL Guide to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; chair of the Global Advisory Board of the New York International Arbitration Center (NYIAC); co-editor-in-chief of the American Review of International Arbitration; and founding member of the

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the blanket consent letter of petitioners and written consent from all respondents. Respondents were notified of *amicus*'s intent to file this brief more than 10 days prior to its filing date.

governing body of the ICC Court of Arbitration and a member of its standing committee.

Professor Bermann is interested in this case because it represents a significant departure from previous understandings of the scope of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, and accordingly deserves thorough review and scrutiny at the highest level to ensure that such a change is consistent with the Convention, with U.S. law, and, to the extent there is any judicial discretion, with sound public policy concerning international arbitration.

SUMMARY OF ARGUMENT

This Court should grant certiorari in this case because the question presented is of major importance to international arbitration. While *amicus* has not come to a definitive view on the merits of the decision below, he is disturbed by the uncertainty and inconsistency that the decision below creates. Given its importance, the issue ought to be examined and resolved by this Court.

The question presented is important both internationally and domestically for three reasons.

First, by expanding the range of potential defendants in summary enforcement proceedings to non-signatories and non-parties to the underlying arbitration, the decision below creates significant uncertainty regarding the enforcement of arbitral awards.

Second, the decision below subjects to summary enforcement procedures under the New York Conven-

tion on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, a party that was never brought into the arbitration and therefore lacked an opportunity to be heard in that proceeding – either as to whether it is bound by the arbitration agreement or as to the merits of the underlying dispute. It accordingly raises serious due process concerns. The stakes are sufficiently high that this Court should take full briefing on the issue and determine definitively whether the position taken by the Second Circuit is sound.

Third, the ease with which the Second Circuit has allowed courts to conduct alter-ego inquiries in summary enforcement proceedings undermines the critical value of uniformity in interpretation of the Convention. In so opening federal courts to arbitral enforcement actions against parties who were neither signatories nor participants in the arbitral proceeding, the Second Circuit will significantly increase the number and scope of enforcement actions brought in New York. Such a move risks overtaxing the courts and encouraging forum shopping, and should not be undertaken lightly by a single panel of the Second Circuit. The Second Circuit's central role in international commercial issues also means that there will be limited opportunity for further percolation and analysis in other circuit courts, and hence that there is little value in waiting for additional cases. Absent review by this Court, the decision below will be the *de facto* law for the United States. Regardless whether the Second Circuit decision ultimately is deemed correct or incorrect, it is sufficiently important and consequential to deserve this Court's review.

ARGUMENT

I. The Decision Below Creates Serious Uncertainty About the Use of Summary International Arbitration Enforcement Proceedings Against Non-Parties to the Underlying Arbitration and thus Raises a Question of Exceptional Importance that Should Be Decided by this Court.

The decision below is an aggressive reading of the New York Convention, to say the least. In the standard alter-ego case, an arbitral claimant seeks to include the non-signatory to the arbitration agreement early on as a respondent in the underlying arbitration. If the non-signatory is brought in as party to the arbitration, it will have a full opportunity to be heard, not only on the alter-ego issue itself but also, and importantly, on the merits.

Bringing in a non-signatory for the first time in summary proceedings for confirmation or enforcement of an award, however, is an altogether different matter. The non-signatory will not have been heard in the arbitration. Nor will it have a full opportunity to be heard in what is, under the New York Convention, a summary proceeding in which the merits thus may not be reexamined and the defenses to confirmation and enforcement are limited and few. A summary proceeding does not allow a court to conduct the fact-intensive inquiries ordinarily necessary to establish an alter-ego relationship or any other relationship that might potentially justify binding a non-signatory.

These considerations explain why attempts to enforce an award against a non-signatory who was not a party to the underlying arbitration are almost always rejected. Indeed, the Second Circuit itself had long recognized that "[a]n action for confirmation [of an arbitral award] is not the proper time for a District Court to pierce the corporate veil." *Orion Shipping & Trading Co. v. E. State Petroleum Corp. of Panama, S.A.*, 312 F.2d 299, 301 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963). Courts in the Southern District of New York have long followed the Second Circuit's prior admonition, recognizing that a confirmation action

> is one where 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 details of the corporate relationship between a party bound by an arbitration award and its purported alter ego.

Daibo Int'l Shipping Co. v. American Bulk Transp. (BVI) Ltd., No. 12 Civ. 4750 (PAE), 2012 WL 6212674, at *3 (S.D.N.Y., Dec. 13, 2012).

The decision below abandons this prior understanding, and opens the door to precisely the complications that once cautioned against such late efforts at binding non-signatory non-parties. In remanding the case to the district court, without sufficient explanation, to determine whether enforcement against the non-signatory could be had on alter-ego grounds, the Second Circuit has injected considerable confusion and uncertainty into the scope and proper target

of enforcement proceedings. Indeed, all the court said on the matter is that

> it appears that the sole issue at present for the district court to consider on remand pertains to the liability of appellees for satisfaction of appellants' arbitral award as alter egos.

Pet. App. 36a.

This cavalier remand is deeply problematic. Courts either will have to entertain full-blown litigation on such issues under summary procedures not designed for it, or will have to make decisions without the benefit of full consideration of the issues. Neither option is particularly appealing. In the first scenario, what were meant to be streamlined proceedings for recognition and enforcement will lose their efficient character, and the federal court's jurisdiction will have been expanded to a new class of substantial and time-consuming international cases. In the second scenario, parties that did not sign arbitration agreements or participate in the underlying proceedings will be subject to liability, with no real opportunity either to refute their alter-ego status or defend themselves on the merits.

To be sure, the Second Circuit sought to justify its expansive result by citing Article III of the New York Convention's reference to recognition and enforcement proceedings being conducted according to " 'the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles,' " and its arguments require respect and consideration. *See* Pet. App. 33a. But the arguments of error in the Petition are quite pow-

erful and more than enough to raise genuine and serious concern the Second Circuit may have gotten it wrong. *See* Petition at 14-25 (discussing plain language of Convention limiting enforcement actions to those between "parties," the lack of opportunity for non-party defendants to participate in the arbitration, the circumvention of foreign bankruptcy law and U.S. limits on personal and subject matter jurisdiction, and disrupting the expectations of other Convention signatories).

Regardless whether the decision below is right or wrong on the merits, there is no denying that it represents a significant departure from the international understanding of who is a "party" for purposes of enforcement, within the meaning of the New York Convention. Petition at 21. If a thorough consideration of the arguments nonetheless confirms that the Second Circuit correctly interpreted the Convention and United States law, then so be it. But given the momentous consequences of that court's expanded view of the Convention, it is incumbent upon this Court to evaluate and decide the issue itself.

II. Enforcement of Arbitral Awards Against a Party that neither Signed the Arbitration Agreement nor Was Brought in as Respondent in the Underlying Arbitral Proceedings Raises Serious Procedural Due Process Concerns.

Courts should have great pause before applying the New York Convention's summary procedures to enforce an award against a party that had no opportunity in the underlying arbitration to refute its al-

ter-ego status or to defend itself on the merits. Considerations of due process demand nothing less.

The present case is not one of the ordinary cases in which a claimant seeks to bring a non-signatory into the underlying arbitration as a respondent. In such cases, the non-signatory, if brought into the arbitration, will enjoy full participation as a party. Indeed, the New York Convention contemplates enforcement only against a "party" to the arbitration, and rightly so, since only a party to the arbitration will enjoy a full opportunity to be heard on the merits.

Instead, the present case is one in which the non-signatory is brought in only after the arbitral proceedings have culminated in an award on the merits. In the ensuing summary enforcement action, the non-signatory non-party will have no opportunity to defend itself on the merits, since in a Convention enforcement action the merits of a dispute may not be revisited. Enforcement may be denied under the Convention on very limited grounds that studiously avoid the possibility of merits review. Thus, if the non-signatory is, by hypothesis, neither brought into the arbitration nor allowed at the enforcement stage to fully contest the award creditor's alter-ego assertions, it is hard to imagine how such procedures would comport with due process.

In contrast to the due process concerns raised by enforcement against non-signatory non-parties, award creditors have ample alternative opportunities to satisfy their awards, even if they cannot use summary enforcement proceedings against non-parties. For example, an award creditor may bring a plenary

action in any court of competent jurisdiction for enforcement of the award against the non-signatory, arguing that it is liable for the award on alter-ego or other veil-piercing grounds. But at least in that circumstance, the non-party non-signatory will have a full opportunity to be heard on whether application of the alter-ego doctrine or other basis for reaching a non-signatory is justified by the facts and the law.

The serious constitutional concerns raised by the Second Circuit's unexplained readiness to apply the Convention's summary proceedings to these circumstances are themselves sufficient to warrant this Court's review.

III. The Decision Below Undermines International Uniformity in the Enforcement of Foreign Arbitral Awards and Incentivizes Forum Shopping.

In addition to the immediate effects of expanding summary recognition and enforcement proceedings beyond their previously limited scope, the decision below diminishes the consistency and predictability of international arbitration, further undermining the perceived benefits of international arbitration.

"The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n. 15

(1974). Such a unified system adds consistency, efficiency, and foreseeability to dispute resolution, better allowing commercial actors to predict their risks and their potential costs and benefits, and to structure their transactions and businesses accordingly.

By expanding, under questionable circumstances, the range of persons against whom enforcement proceedings may be brought under the Convention's summary procedures, the Second Circuit has reduced the predictability of the system and introduced additional dis-uniformity across the signatories to the Convention. Businesses once drawn to the benefits and efficiency of international arbitration now may be hesitant to place their parent or sibling companies, or their shareholders, at risk by agreeing to arbitrate in light of the Second Circuit's expansion of the reach of summary recognition and enforcement proceedings to non-parties.

Moreover, the decision below will have substantial consequences for the federal courts. As is true whenever the law diverges across geographies or jurisdictions, claimants and award creditors, where possible, will seek out the forum with the most favorable law. Whether the divergence is due to a circuit split, state-law differences, or international disparities, the result is an incentive to forum shop. The decision below, by providing both a forum and summary procedures to expand the reach of an arbitral award beyond the parties to the agreement or the arbitration, provides an unwelcome temptation for award creditors to seek a U.S. forum.

Persons and entities engaged in business around the world often will have a presence in New York,

even if many of the companies in which they have invested do not. Like the game Six Degrees of Kevin Bacon,[2] it rarely takes many steps to find a connection between an arbitration dispute and a potential vicarious defendant in New York. The perception that the Second Circuit is so award-creditor friendly that it is willing to end-run foreign bankruptcy rules and procedures – as petitioners argue it has done in this case – will strongly encourage arbitral award creditors to seek out such defendants in a New York court.

The forum-shopping incentives, as well as the forum-burdening result of those incentives, provide additional reasons for this Court to grant certiorari and ensure that such burdens and incentives are indeed required by law, and not a consequence of an erroneous reading of the Convention.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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[2] https://en.wikipedia.org/wiki/Six_Degrees_of_Kevin_Bacon.

Respectfully submitted,

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