

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

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2  **Agenda**

The Frankenstein Framework

Bringing Frankenstein to Life

How Fraud Affects Frankenstein

Implications and Conclusions

3  **The Frankenstein Framework**

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

New York Convention, Article V: public policy exception

Federal Arbitration Act (FAA): Chapter 2 – NY Convention (9 U.S.C. § 207)

Note: ICSID Awards are excluded from FAA: 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 International Commercial Arbitration: § 1.1 Definitions

4  **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 Law on Enforcing Judgments: New York

State Law on Remedies: piercing the corporate veil is an equitable remedy

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

5  **Bringing Frankenstein to Life using *de Gusa***

- primary jurisdiction (seat of arbitration) vs. secondary jurisdiction (place of enforcement) over arbitral award
- 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

6  **Bringing Frankenstein to Life using *de Gusa***

- court applies FRCP 17 to dismiss action unless an equitable remedy applies
- equitable remedies are drawn from law of local jurisdiction in which court sits
- 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)

### 7 **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 see FSIA to determine whether the foreign government must pay (28 U.S.C. § 1605(a)(6))

### 8 **How Fraud Affects Frankenstein**

Fraud during the arbitration proceedings can lead to a procedural due process argument under the U.S. Constitution and/or New York 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 Supports veil piercing even if foreign sovereign is revealed (FSIA)

### 9 **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.
- The NY York 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.

### 10 **Thank You**

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