No. 17-481

IN THE

Supreme Court of the United States

AMCI HOLDINGS, INC., AMERICAN METALS & COAL INTERNATIONAL, INC., K-M INVESTMENT CORPORATION, PRIME CARBON GMBH, PRIMETRADE, INC., HANS MENDE, AND FRITZ KUNDRUN,

Petitioners,

v.

CBF INDÚSTRIA DE GUSA S/A, DA TERRA SIDERÚRGICA LTDA, FERGUMAR—FERRO GUSA DO MARANHÃO LTDA, FERGUMINAS SIDERÚRGICA LTDA, GUSA NORDESTE S/A, SIDEPAR—SIDERÚRGICA DO PARÁ S/A, SIDERÚRGICA UNIÃO S/A,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Petition for Certiorari – now strongly supported by this country's leading expert on international arbitration – should be granted. Professor Bermann has no dog in this fight, and indeed has not firmly concluded which side is correct on the merits. But he recognizes the need for this Court's intervention. As he carefully explains, the Second Circuit's decision departs from the previously uniform interpretation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, in a manner that has profound implications for how international arbitration awards are enforced. Amicus Br. 7, 9-11. The very purpose of the Convention is to create uniform enforcement procedures. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). The ruling below is also so expansive that such actions are likely to be brought within the Second Circuit, making the ruling a *de facto* national standard and rendering it extremely unlikely that a circuit conflict could arise. Amicus Br. 3. This case thus compares very favorably with *BG Group, PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014), in which certiorari was granted to decide a far less important question, but the ruling under review was similarly inconsistent with the legal rule adopted by other Convention signatories. *See* Pet. 24.

1. Respondents lean heavily on hyperbolic claims that petitioners engaged in misconduct before the arbitrators and the district court. *See* BIO 1. Those are of course bald, breathless assertions, never accepted by any court, and rejected by the ICC itself.

See Pet. 5; C.A. J.A. 158.[1] But all that matters here is that those factual allegations have nothing to with the legal rule adopted by the Second Circuit. The Second Circuit categorically held that the New York Convention provides both jurisdiction in federal court and a right of action to enforce an international arbitration award directly against a non-party. Pet. 12; Pet. App. 28a-31a. By definition, respondents' factual claims do not inform the ruling below.

2. Respondents also err in their other principal argument: that the Second Circuit's decision has no practical consequence. BIO 1, 15, 18. Respondents contend that if this Court agreed with petitioners, the same result would nonetheless be reached – only less efficiently – because an award creditor would simply proceed in two steps rather than one: first securing a court judgment under the Convention by confirming the award against the actual party; then enforcing that court judgment against the third party. In fact, the Convention operates very differently and can produce radically different results. That is of course why respondents have fought so bitterly to rely on the Convention.

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[1] With respect to the arbitration, as noted, the ICC itself rejected respondents' claim of fraud. Even respondents essentially concede that petitioners' representations about the status of SBT were accurate when made. BIO 6. With respect to the district court, the court – which was hearing the case – did not accept any of respondents' allegations of fraud. SBT was removed from the Swiss commercial register in the ordinary course of the bankruptcy, of which respondents were well aware, as was the district court before it ruled. *See* Pet. 11 n.2; Pet. App. 67a. Months earlier, respondents decided not to sue SBT in their initial complaint. *See* Pet. 8.

In many cases, including this one (*see* Pet. 18-19), the award debtor will not be subject to the personal jurisdiction in the United States. Even if the award was properly confirmed against the debtor in the United States or in another country, that judgment could not freely be enforced here against third parties. Absent the Convention, there would be no subject matter jurisdiction over the action. *See id.* 19. In addition, enforcement would be denied with respect to any third party that was not itself subject to suit in the jurisdiction where the award was confirmed. *See* Unif. Foreign-Country Money Judgments Act § 4(b)(2) (2005). Defying the Convention's plain language to permit such an action under the Convention's heavily streamlined enforcement regime thus evades local restrictions on the power of national courts and denies the non-party due process of law.

As Professor Bermann further explains, the result may also be to undermine confidence in arbitration as a dispute resolution mechanism. "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." Amicus Br. 10.

Separately, as the district court correctly recognized (Pet. App. 98a-99a), the Convention's highly streamlined regime is very poorly suited to the highly fact-bound inquiry into whether one party is the alter ego or successor of another. Indeed, just like the district court, the Second Circuit itself

recognized that this action could not proceed with respect to a domestic arbitral award; the court of appeals erroneously concluded that it was *compelled* by the Convention to reach the opposite result here. *See* Pet. 12-13; Pet. App. 29a-30a. Respondents thus have it precisely backwards in arguing that the ruling below merely applies "the standard procedures for enforcement against alter egos." BIO 30; *see* Amicus Br. 5.

That is also why petitioners' argument is not, as respondents argue, a mere "formality." BIO 21. The Convention's distinct enforcement regime – with its limited defenses – is designed to be applied to entities that already participated in the arbitration and therefore have had the opportunity, consistent with due process, to defend the merits of the case. Third parties such as petitioners are indisputably denied any opportunity to take part in the arbitral process that produces the award that would be enforced directly against them.

3. The Petition thus correctly demonstrated (at 21-23) that – as Professor Bermann confirms (Amicus Br. 7, 9-11) and respondents have never seriously disputed and, indeed, conceded below – no other Convention signatory would permit such an action.[2]

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[2] Respondents now say they meant only to concede that no other jurisdiction would permit them to enforce the award against SBT. BIO 19 n.11. That makes no sense. Respondents are trying to enforce the award against petitioners, not SBT. If any other jurisdiction would permit an action under the Convention against third parties, respondents would have brought it directly without regard to SBT. That is just what happened here, and it is what, as a result of the Second Circuit's decision, the U.S. courts now alone permit.

The United States did not doubt that fact either. *See* Pet. 12 n.3. Because the Second Circuit has jurisdiction over New York's hub of commercial and banking interests, the ruling below is an open invitation for prevailing parties in arbitration to evade the restrictions recognized by every other Convention signatory by bringing such third-party actions in the United States. Pet. 21-24; Amicus Br. 9-11.

The *Norsk Hydro* decision from the United Kingdom is a perfect example. *See* Pet. 22-23. Respondents argue that *Norsk Hydro* is distinguishable because they are not attempting to hold "two distinct" entities liable. BIO 19. That is obviously wrong. No one doubts the separateness from SBT of the corporate and individual petitioners. The theory of the award creditor in *Norsk Hydro* was indistinguishable: that the award could be enforced against the third party because of its close relationship to the award debtor.

Respondents see no objection to opening the U.S. courts to cases from around the world because the ruling below is supposedly limited to "cases like this one," which it characterizes as involving bad acts by alter egos and an award debtor that is immune from suit. BIO 17. On that view, the uniform interpretation adopted by every other signatory creates "a fraud-shaped hole" in the Convention's enforcement regime. *Id.* 18. That is wrong, and plainly so: the Second Circuit did not accept – and thus obviously did not rest its decision on – any of respondents' claims that petitioners engaged in misconduct. *See supra* pp. 1-2. The ruling below applies to *any* claim that a third party is an alter ego

or successor of *any* arbitration award debtor. Because the Second Circuit deemed those third parties subject to the Convention, it pronounced that they are subject to suit when they otherwise would not be.

4. The Petition demonstrated that the ruling below seriously errs in its interpretation of the Convention. The Second Circuit reasoned that its decision was compelled by the Convention's elimination of the principle of double *exequatur*. Pet. App. 28a-31a. Respondents tellingly do not defend that rationale. Double *exequatur* required that the award creditor confirm the award against the award debtor in the jurisdiction in which it was issued, then confirm the award again against the debtor in the United States. The first part of the process was burdensome and unnecessary. But nothing in petitioners' argument requires duplicative confirmation against the award debtor or, indeed, changes how an award is enforced against the debtor *at all*. The creditor can invoke the Convention against the award debtor in every jurisdiction in which it previously could and in the same manner. Enforcement under the Convention would be limited with respect to third parties, but that does not implicate double *exequatur*. Moreover, nothing in petitioners' argument requires the creditor to enforce the award against third parties in the jurisdiction in which the award was entered. *See* Pet. 20.

Respondents argue instead that the Convention permits an award to be enforced against third parties "because the Convention talks about a single proceeding ('recognition and enforcement')." BIO 27. The Convention, however, addresses only the

proceeding for enforcement against an award-debtor, and neither respondents nor the Second Circuit contend that the Convention itself contemplates, much less requires, enforcement against third parties. To the contrary, the Convention prohibits such third-party enforcement, carefully providing that only a "party" to the arbitration may be subject to that streamlined proceeding.

The critical point is that petitioners were not "parties" to the arbitration in the relevant sense. The arbitrators determined that petitioners "were not parties to the arbitration." C.A. J.A. 566; Pet. 17. The Second Circuit notably did not assert otherwise. To the contrary, it recognized that the Convention contemplates an enforcement action brought by "the award creditor" against "the award-debtor." Pet. App. 30a. That is correct. If a party wants to subject additional entities to an award, the proper course is to request that the arbitrators deem them parties to the proceeding or at least subject them to the award. It is thus the arbitrators who have control over their own judgment. *See* Pet. 17.

The effect of designating an entity a "party" for purposes of the Convention is to subject them to the award while stripping them of any right to defend the merits of the underlying claim. That result is consistent with principles of due process only if they in fact had the chance to participate in the arbitration. But in the cases to which the Second Circuit's rule applies, the third parties are not parties to the arbitration and are therefore affirmatively *denied* any opportunity to defend the claim in arbitration, even if they wanted to.

Respondents' contrary argument fundamentally puts the cart before the horse. They say it is appropriate to apply the Convention to determine that an entity is the alter ego or successor to an actual "party" to the arbitration, because an alter ego functionally is the same "party." But the use of the Convention's highly streamlined enforcement procedures to *make that determination* in the first instance assumes the conclusion that the third parties are subject to the Convention in the third place. "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." Amicus Br. 4.

No provision of the Convention recognizes – and no other signatory permits – an ancillary procedure to determine whether to subject a third party to the Convention's enforcement regime. Instead, the Convention contemplates that such determinations will be made *ex ante* by the arbitrators or that the award will be applied to the third party in a separate *ex post* action to enforce a court judgment confirming the award against the award debtor. "Bringing in a non-signatory for the first time in summary proceedings for confirmation or enforcement of an award, however, in an altogether different matter." Amicus Br. 4.

Respondents also point to other circumstances in which federal courts subject third parties to arbitration. BIO 22. But there is an obvious difference. In those cases, the court is determining whether the third party in fact agreed to arbitrate, despite not being a formal signatory to the

agreement. Importantly, the third party in those cases is not denied the opportunity to participate in the arbitration. The only post-award enforcement cases respondents can identify are ones in which the award creditor either: (1) first joined the third parties in arbitration and obtained an award against them, affording them the opportunity to defend both on the merits and regarding their non-signatory status therein; or (2) confirmed the award against the actual party, then sought to enforce the court judgment against third parties. These are the processes respondents conspicuously did not follow here.[3]

5. Finally, respondents represent that the Second Circuit adopted the interpretation of the Convention advanced by the United States. BIO 1. That is false. The Second Circuit's double *exequatur* rationale and the rule of law it adopts is actually materially at odds with the government's position, which recognized that, although double *exequatur* has been eliminated under the Convention, a foreign award still must be confirmed prior to a post-judgment execution-type proceeding, and further noted that the Convention does not require signatory states to permit awards to be confirmed against third parties at all, much less that they do so in a single proceeding. U.S. Amicus Submission 6-9. In light of the government's participation below, *see* Pet. 12 n.3,

[3] Respondents' point that the United States can elect through its domestic law to enforce arbitral awards more broadly than the Convention provides (BIO 20) is irrelevant too: the United States has not done that; respondents brought this action under the Convention; and the ruling below is an interpretation of the Convention.

the Court may find it appropriate to solicit the views of the United States.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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