

## Enforcement of non-US Arbitral Awards Against Third Parties in the United States

June 18, 2024

### Contact

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### Introduction

In the previous insight, "[Enforcing Foreign \(non-US\) International Arbitration Awards Against Award Debtors in the United States](#)," we discussed whether a party should seek to enforce an arbitration award rendered outside the United States in US courts on the basis that the award debtor had assets in the United States, such as bank accounts or property, that could be used to satisfy the award.

While the award debtor specifically may not have assets in the United States that may be used to satisfy an arbitral award, a related party, such as a corporate affiliate, may qualify as a better target. A comprehensive enforcement strategy should consider these third-party targets who may have assets in the US that could be used to satisfy an arbitral award against the award debtor.

In this client insight, we discuss whether an enforcement strategy should include seeking to enforce an arbitration award against entity who was not a party to the arbitration proceeding and not, strictly speaking, an award debtor, under a variety of legal theories:

- Veil piercing/alter ego
- Incorporation by reference
- Assumption
- Agency
- Estoppel

### Analysis

When employing one of these theories, federal courts apply the state-law theories of contract interpretation established by the state where the federal court is located.<sup>1</sup>

#### Veil-Piercing/Alter Ego

Veil-piercing is the most popular and successful of the theories to enforce an award against a third party. It is an action that binds a parent corporation/corporate shareholder to an agreement entered into by its subsidiary when the two entities are no longer seen as separate entities and one acts as the "alter ego" for the other.<sup>2</sup>

<sup>1</sup> See, e.g., *Shift4 Payments, LLC v. Smith*, No. 5:19-CV-00330-JFL (E.D. Pa. July 17, 2019).

<sup>2</sup> *Bridas S.A.P.I.C. v. Gov. of Turkmenistan*, 447 F.3d 411 (5th Cir. 2006).

Courts will pierce the “corporate veil” when (1) the other entity exerts total control over the award debtor and (2) the control is used to commit fraud or injury to the award creditor. Deciding whether to pierce the veil is a fact-based determination, which requires considering the totality of the circumstances.<sup>3</sup> Factors commonly used in this assessment include:<sup>4</sup>

- The parent and subsidiary have common stock ownership.
- The parent and subsidiary have common directors or officers.
- The parent and subsidiary have common business departments.
- The parent and subsidiary file consolidated financial statements.
- The parent finances the subsidiary.
- The parent caused the incorporation of the subsidiary.
- The subsidiary operated with grossly inadequate capital.
- The parent pays salaries and other expenses of subsidiary.
- The subsidiary receives no business except that given by the parent.
- The parent uses the subsidiary’s property as its own.
- The daily operations of the two corporations are not kept separate.
- The subsidiary does not observe corporate formalities.

For example, an Argentine corporation, as an award creditor, enforced an award against the government of Turkmenistan under a veil piercing theory because the government forced the award creditor to cease working with a Turkmen state-backed oil and gas company.<sup>5</sup> Because the Turkmen government misused the business agreement to destroy the value of the joint venture between the contracting entities, it injured the Argentinian corporation to the extent that it could not execute an award against the assets of the award debtor itself.<sup>6</sup> The Turkmen government’s involvement with the formation and legal rights of the Turkmen company was such that it totally controlled the company, justifying piercing the corporate veil.<sup>7</sup>

#### Incorporation by Reference

An arbitration award could be enforced against a non-signatory if there are references in relevant documents indicating that the non-signatory to a specific contract is also subject to the arbitration agreement therein.

- For example, an award creditor enforced an arbitration clause in an agreement relating to oil drilling operations in Benin against a Beninois petroleum corporation on the basis that the contract in question identified this entity as the guarantor to the award debtor regarding the transaction.<sup>8</sup>

If non-signatory guarantors instead proceed under separate guarantee agreements or do not otherwise manifest an intention to be bound by an arbitration clause in an agreement, however, the award likely will not be enforced directly against them.

#### Assumption

If a non-signatory behaves in a manner indicating that it considers itself to be bound to an arbitration clause or the outcome of an arbitration, it cannot later claim it is not bound by the clause or award because it is a non-signatory.

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<sup>3</sup> *Id.* at 416.

<sup>4</sup> *Id.* at 418

<sup>5</sup> *Id.* at 416.

<sup>6</sup> *Id.* at 417.

<sup>7</sup> *Id.* at 420.

<sup>8</sup> *Bettis Grp., Inc. v. Transatlantic Petrol. Corp.*, Nos. 01-20377, 01-20379, 2002 WL 31933189 at \*9–10 (5th Cir., Dec. 23, 2002).

- When a Brazilian corporate guarantor asserted its arbitration rights in a French litigation regarding the chartering of a Danish ship by a Liberian corporation, it could not later claim that it was not subject to arbitration in a United States arbitration forum.<sup>9</sup>
- When a successor in interest to a Peruvian sporting goods distributor took on the agreements of its predecessor as a “mere continuation” of the predecessor, along with a maintenance of the same personnel in the organization and ownership, the successor assumed itself to be subject to arbitration.<sup>10</sup>

### Agency

To determine whether an arbitration award may be enforced against a third party as the principal/agent of the award debtor, courts will look to whether the contract containing the arbitration clause anticipated the principal’s participation in the arbitration under state contract law.

- When an individual non-signatory signed an arbitration agreement on behalf of his employer, a Florida corporation, he, too, was subject to the arbitration and any resulting award.<sup>11</sup>

If, however, the agency relationship is not explicit, a court may be hesitant to subject the principal/agent to arbitration.

- An Australian solar power equipment and installation company authorized a Nevada company to act as its agent while doing business with a Chinese solar power company, the arbitration could not be enforced against it.<sup>12</sup> The contract only referred to the Australian company as a guarantor.<sup>13</sup> The contract also “expressly exclude[d]” the Australian company from the contract, meaning the arbitration award could not be enforced against them.<sup>14</sup>

### Estoppel

While a difficult means of enforcing an arbitration award, a non-signatory may be estopped (legally prohibited) from avoiding arbitration if they knowingly take advantage of an agreement containing an arbitration clause when they reap the “direct benefits” of that agreement.<sup>15</sup>

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<sup>9</sup> *Id.* at 851

<sup>10</sup> *Ribadeneira v. New Balance Athletics, Inc.*, 65 F.4th 1, 23 (1st Cir. 2023).

<sup>11</sup> *Shift4 Payments, LLC v. Smith*, No. 5:19-CV-00330, 2019 WL 3229201, at \*4, \*9 (E.D. Pa. July 17, 2019).

<sup>12</sup> *Trina Solar US, Inc. v. Jasmin Solar Pty Ltd.*, 954 F.3d 567 (2d Cir. 2020).

<sup>13</sup> *Id.* at 568.

<sup>14</sup> *Id.* at 571.

<sup>15</sup> *Ribadeneira*, 65 F.4th at 21 (citing *Walker v. Collyer*, 9 N.E. 3d 854, 861–62 (Mass. App. Ct. 2014)).