No. 17-___

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

PETITION FOR A WRIT OF CERTIORARI

Kevin P. Lucas
Alexandra P. West
BUCHANAN INGERSOLL & ROONEY PC
One Oxford Centre
301 Grant Street
20th Floor
Pittsburgh, PA 15219
(412) 562-8800

Thomas C. Goldstein
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Avenue
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com

QUESTION PRESENTED

May a foreign arbitration award be enforced directly against a non-party under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding.

AMCI Holdings, Inc., does not have a parent company, and no publicly traded company owns 10% or more of any of its stock.

The parent corporation of K-M Investment Corporation is AMCI Holdings, Inc. No publicly traded company owns 10% or more of either of their stock.

The parent corporation of American Metals & Coal International, Inc., is K-M Investment Corporation, and its parent is AMCI Holdings, Inc. No publicly traded company owns 10% or more of any of their stock.

The parent corporation of Primetrade, Inc., is AMCI Holdings, Inc. No publicly traded company owns 10% or more of either of their stock.

The parent corporation of Prime Carbon GmbH, is AMCI Euro-Holdings B.V., the parent of which is AMCI Worldwide S.a.r.l., the parent of which is AMCI Worldwide Limited, the parent of which is AMCI Worldwide Holdings, a portion of which is owned by 2010 FRK CRT Investments Ltd., the parent of which is 2010 FRK CRT Holdings, LLC, a portion of which is owned by 2010 FRK CRT Management Inc. No publicly traded company owns 10% or more of any of their stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners AMCI Holdings, Inc., American Metals & Coal International, Inc., K-M Investment Corporation, Prime Carbon GmbH, Primetrade, Inc., Hans Mende, and Fritz Kundrun respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 850 F.3d 58. An opinion of the district court (Pet. App. 73a-105a) is reported at 14 F. Supp. 3d 463. Other opinions of the district court (Pet. App. 43a-61a, 62a-72a) are unreported but are available at 2015 WL 1190137, and 2015 WL 1191269, respectively. A prior opinion of the court of appeals was reported at 846 F.3d 35 but withdrawn from publication because it was vacated and superseded on rehearing.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2017. A timely petition for rehearing was denied on May 1, 2017. Pet. App. 106a-07a. On July 5, 2017, Justice Ginsburg extended the time to file this petition through August 29, 2017. No. 17A29. On August 14, 2017, Justice Ginsburg further extended the time to file this petition through September 28, 2017. *Id.* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 203 of Title 9 of the United States Code provides:

> An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

Section 207 of Title 9 of the United States Code provides:

> Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

Section 208 of Title 9 of the United States Code provides:

> Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

STATEMENT OF THE CASE

Respondents are Brazilian entities that secured a $50 million award against a Swiss defendant in a French arbitration over the delivery of goods in Brazil. Respondents then came to the U.S. seeking to recover the award directly from petitioners, which are strangers to both the arbitration agreement and the arbitration award. The federal courts, however, lack personal jurisdiction over the arbitration defendant and also lack subject matter jurisdiction over a suit against petitioners. Respondents sought to evade those obstacles by suing petitioners directly under the treaty governing enforcement of international arbitration awards. Respondents concede that no other signatory nation to the treaty would recognize their claim, because petitioners are not "parties" to the arbitral award. The Second Circuit rejected that prior consensus, becoming the first court of appeals in the world to permit such an action.

1. Respondents are Brazilian entities that produce and supply so-called "pig iron," which can be further refined into steel or wrought iron. Respondents entered into contracts (the "Contracts") to sell pig iron for delivery in Brazil to a Swiss company – Steel Base Trade, AG ("SBT").[1]

Respondents allege that SBT failed to buy enough pig iron when the global economic crisis caused the price of commodities to collapse in 2008. The Contracts provide for the parties to resolve any

[1] Respondents assert that some of the Contracts called for delivery of iron in the United States. But that assertion is false on the face of the agreements, and neither of the lower courts relied on it.

disputes in arbitration "under the rules of Conciliation and Arbitration of the International Chamber of Commerce, Paris" (the "ICC"). Respondents initiated arbitration in France against SBT alone – not any SBT affiliate, shareholder, or officer. That was entirely appropriate because, as recognized by the Second Circuit:

> Only [respondents] and SBT are signatories of the Contracts; none of the [petitioners] are signatories. . . . The Contracts did not provide that they were entered into on behalf of any other party or specify that they are binding on successors-in-interest or assigns.

Pet. App. 7a-8a.

In the arbitration, SBT denied respondents' claim. Respondents allege that, soon after, roughly $126 million in assets and $130 million in liabilities of SBT – but none of SBT's alleged liabilities to respondents – were transferred from SBT to a second Swiss corporation, Prime Carbon GmbH ("Prime Carbon").

SBT soon declared bankruptcy in its home country, Switzerland. In the Swiss bankruptcy proceedings, respondents filed a claim for the damages they asserted in the French arbitration.

Swiss law permitted only the bankruptcy administrator or SBT's creditors to step into SBT's shoes and defend against respondents' claims in the arbitration. The administrator and SBT's creditors declined to do so, because SBT had insufficient assets to pay respondents' claims, which were unsecured and entitled only to low priority in bankruptcy in any event. The bankruptcy administrator therefore advised the ICC that SBT would not present a defense.

Respondents ensured that no entity was present in the arbitration to defend against their claims. Prime Carbon, its shareholders, officers, and affiliates – as well as those of SBT – had no right to participate in the arbitral proceedings either on their own behalf (because they were not signatories to the arbitration agreements) or on behalf of SBT (because they were barred from doing so by Swiss bankruptcy law). For their part, respondents did not attempt to join any of them as a defendant in the arbitration, such as on the theory that they stepped into the shoes of SBT as its alter egos or successor.

Respondents did seek to reach the assets of Prime Carbon and others, not by adding them as arbitration defendants but instead by invoking theories of corporate veil-piercing and the liability of SBT's shareholders and affiliates, as well as alleged fraud. But those requests were denied. The ICC determined that respondents did "not introduce[] sufficient evidence in the present proceedings to demonstrate the existence of fraud." C.A. J.A. 158. It further determined that it lacked jurisdiction over the assets of Prime Carbon and other "non-SBT entities because such entities were not parties to the arbitration." C.A. J.A. 566.

The arbitrators granted respondents a default award (the "Award") against SBT alone for approximately $50 million.

2. After the ICC entered the Award in favor of respondents and against SBT, respondents did not request that either the ICC or the French courts (which have jurisdiction over the forum) modify the Award to bind Prime Carbon or any of the other

entities or individuals allegedly involved in transferring SBT's assets.

Respondents did sue Prime Carbon and others in Switzerland. But they did not utilize the procedure under Swiss bankruptcy law for a creditor to recover for the debtor's damages arising from any preferential transactions that seek to deplete the assets of the estate. In such an action, the creditor recovers its own debt and costs, returning any remaining proceeds to the estate. A single creditor of SBT – but notably not respondents – requested and received an assignment of the rights of SBT's estate to challenge the transfers.

Instead, in Switzerland, respondents sued Prime Carbon and others, seeking to hold them responsible for the same underlying damages that respondents had asserted in the arbitration. They did not even attempt to include a claim to enforce the Award, because Switzerland (like every other Convention signatory) does not permit awards to be enforced against non-parties to the arbitration. However, because of the assignment in the bankruptcy of SBT's rights to challenge the transfer to another creditor, respondents lacked standing to pursue their direct claims, and they subsequently abandoned the action.

3. Respondents then came to this country and brought this action in the District Court for the Southern District of New York. They sought to recover the Award directly from the assets of Prime Carbon, various alleged corporate affiliates of SBT, and their two ultimate shareholders – all petitioners here. Respondents moreover sought to keep any recovery entirely for themselves, rather than returning any assets to the estate of SBT.

a. Respondents could not establish jurisdiction over such an action by suing the actual party to the Award – SBT. The district court lacked personal jurisdiction over SBT, a Swiss entity without operations in the United States, much less in the Southern District of New York. *See Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (general personal jurisdiction exists only where a corporate defendant is essentially "at home").

Nor could respondents sue petitioners directly in federal district court, which lacks subject matter jurisdiction over such a claim. Without more, an action to enforce an arbitral award raises no federal question. *See Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 71 (2d Cir. 2012).

Even if respondents could identify a U.S. court with jurisdiction over an action against petitioners, they could not merely invoke the arbitration award and recover $50 million. Rather, they would be required to prove the merits of their case. Respondents do not allege that petitioners are signatories or named parties to either the arbitration agreement or the arbitration award, and thus do not maintain that petitioners themselves consented to having their rights and liabilities determined in arbitration rather than in court or had any opportunity to contest the merits of respondents' claims.

b. Respondents sought to evade all these obstacles here and abroad by suing petitioners under the international treaty governing the enforcement of international arbitration awards: the New York Convention on the Recognition and Enforcement of

Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (the "New York Convention" or "Convention"). The Federal Arbitration Act (the "Act") grants federal district courts subject matter jurisdiction over an action to enforce an award subject to the Convention. 9 U.S.C. § 203. The action is subject to the forum's ordinary "rules of procedure," so long as those rules are consistent with the overriding "conditions laid down in" the Convention. Conv. art. III.

Respondents proceeded directly against petitioners "presumably because of SBT's unavailability in th[e] forum." Pet. App. 101a. Respondents' legal theory is that petitioners are liable for the Award because they are SBT's alter egos and – with respect to Prime Carbon – its *de facto* successor.

c. Respondents assert that they may enforce the Award directly against petitioners in the same way that they would against SBT itself: under the Convention's streamlined enforcement regime. The award creditor merely provides the court with a copy of the award and the underlying arbitration agreement. Conv. art. IV. "The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207.

On their view, once respondents establish that petitioners are the alter egos and/or successor to SBT, they need only present a copy of the arbitration agreement and award, while petitioners can avoid liability only if they can prove one of the defenses specified by the Convention. According to respondents, the Convention thus:

(1) makes it unnecessary for them to sue SBT (over which there is no personal jurisdiction);

(2) establishes subject matter jurisdiction in federal district court;

(3) allows them to enforce the $50 million default award directly against petitioners;

(4) places on petitioners the burden of proof to avoid enforcement;

(5) eliminates many of the traditional defenses available to defendants, including the opportunity to contest the merits of the underlying claims; and

(6) allows them to retain the entire recovery, without it being instead treated as an asset of the SBT estate in Switzerland.

Petitioners moved to dismiss the action on the ground that the enforcement provisions of the Convention and the Act apply exclusively to the actual "parties" to an arbitration. *See, e.g.*, Conv. art. V. "Within three years after an arbitral award falling under the Convention is made, any *party to the arbitration* may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other *party to the arbitration*." 9 U.S.C. § 207 (emphases added). In turn, "*the party* against whom [the award] is invoked" may avoid enforcement only if it carries its burden of proving one of a small number of precisely defined non-merits defenses. *See, e.g.*, Conv. art. V (enforcement may be denied if the "parties to the agreement were under some incapacity"; the agreement "is not valid under the law to which the parties have subjected it"; the "party against whom the award is invoked was . . . unable to

present his case"; the tribunal was not composed "in accordance with the agreement of the parties"; or the "award has not yet become binding on the parties").

For their part, respondents candidly urged the federal district court to recognize their claim on the ground that every other Convention signatory would forbid the action. That ironic argument did not persuade the court, which dismissed the suit. The district court held that under the Convention a party may not seek to hold a non-party directly liable for an arbitration award as an alter ego or successor in these circumstances. Pet. App. 95a-98a.

The district court believed, as a formal matter, that the Convention itself would not necessarily prohibit confirming an award against a party's alter ego or successor. The court reasoned that determination could be the equivalent of confirming the award against the party itself. *Id.* at 92a-95a.

But the district court further recognized that in most cases the Federal Arbitration Act – which both parallels the Convention and applies to actions under the Convention – prohibits using the Convention's confirmation procedure to make such a determination. *Id.* at 95a-102a (citing, *inter alia*, *Orion Shipping & Trading Co. v. E. States Petroleum Corp. of Pan., S.A.*, 312 F.2d 299 (2d Cir. 1963)). That is so because the confirmation proceedings would be complex and record-intensive, not susceptible of the streamlined process the Convention contemplates. The court explained that "an alter ego or successor-in-interest determination" in this case would be "factually complex" and require "significant evidentiary exploration." *Id.* at 98a-99a. Here, as in most such cases, "[b]oth Plaintiffs and Defendants contest many

. . . factual issues," such as whether the transfer of SBT's assets and Prime Carbon's assumption of liabilities involved a fair value exchange. *Id.* at 99a.

The district court recognized that award creditors such as respondents may still seek to recover an arbitral award from the assets of third parties such as petitioners. The prevailing party cannot, however, co-opt the Convention to secure that result. Instead, it may first confirm the award under the Convention's streamlined procedures in a court with jurisdiction over the party against whom it was entered. *Id.* at 60a, 102a. It may then use ordinary judicial procedures outside the Convention to enforce the court's judgment against third parties. *Id.* at 102a. Or it can seek relief in other fora, such as by requesting that the arbitrators or courts of the seat of arbitration modify the Award to apply directly to the third parties. *Id.* at 91a-92a.[2]

4. The Second Circuit reversed, holding that respondents were permitted to enforce the Award

[2] In response to the district court's ruling, respondents filed a different complaint under the Convention seeking to confirm the Award directly against SBT. The district court dismissed that complaint as well, without regard to the court's lack of personal jurisdiction. Pet. App. 72a. The court explained that during the pendency of the initial complaint in which respondents chose not to sue SBT, SBT had been liquidated and removed from the Swiss commercial register by the bankruptcy administrator in the ordinary course. SBT therefore no longer existed and could not be sued. *Id.* at 67a. The Second Circuit dismissed respondents' appeal of that ruling as moot, holding that respondents were not required to confirm the Award against SBT at all. *Id.* at 41a. The correctness of the district court's ruling that SBT's liquidation made it not subject to suit is not before this Court.

directly against petitioners under the Convention. Pet. App. 30a, 41a.[3]

Preliminarily, the court of appeals recognized that the Act would ordinarily bar the direct enforcement of an arbitration award against third parties. The award creditor would instead proceed in a court with jurisdiction to confirm the award against the award debtor. Then it would separately seek to enforce the court judgment against third parties. *Id.* at 29a-30a.

But the Second Circuit reasoned that this procedure is inconsistent with – and therefore overridden by – the New York Convention's elimination of the two-step process of double *exequatur*, which was the accepted method of enforcement prior to the Convention's enactment. *Id.* at 28a-31a. Under that scheme, the prevailing party had to reduce a foreign arbitral award to judgment in two steps in two places: the courts of the arbitral forum; and then also the courts of the jurisdiction

[3] The Second Circuit solicited the views of the U.S. government, which submitted a letter asserting that the district court had jurisdiction to enforce the arbitral award directly against petitioners. C.A. Doc. 133 (Sept. 12, 2016). The government did not doubt that no other Convention signatory would permit such an action. But it reasoned by analogy to the U.S. procedural rule under which a court has the presumptive power in the absence of an agreement by the parties to determine whether a non-signatory to the agreement – such as a corporate subsidiary – is bound to arbitrate. In an initial opinion, the court of appeals accepted that view. 846 F.3d 35, *withdrawn on reh'g*, 850 F.3d 58. The Bar Association of the City of New York submitted an *amicus* brief supporting rehearing, urging the Second Circuit to reject that rationale. C.A. Doc. 166 (Feb. 27, 2017). The court of appeals then issued an amended opinion, omitting the government's rationale. Pet. App. 6a.

where enforcement was sought. By contrast, the court of appeals explained, "[t]he New York Convention and Chapter 2 of the [Federal Arbitration Act] require only that the award-creditor of a foreign arbitral award file one action in a federal district court to enforce the foreign arbitral award against the award-debtor." *Id.* at 30a. Despite the fact that no petitioner is an "award-debtor," *id.*, the court of appeals did not identify any provision of the Convention or Act – or any precedent under those provisions – applying that streamlined enforcement procedure directly against a third party that was not a party to the arbitral award.

Although this case involves Swiss and Brazilian entities arbitrating in France – regarding events that have nothing to do with this country – the court of appeals held that "the law of the enforcing jurisdiction, here the Southern District of New York," governs the determination whether "a third party not named in an arbitral award may have that award enforced against it under a theory of alter-ego liability, or any other legal principle concerning the enforcement of awards or judgments." *Id.* at 33a.

The court of appeals finally instructed regarding these claims that, if the district court determined on remand that petitioners were the alter egos and/or successor of the arbitration defendant, petitioners would not be permitted to contest the merits or invoke the merits defenses ordinarily available under U.S. law to the enforcement of an arbitral award. Instead, petitioners would be required to carry the burden of establishing one of the defenses set forth in the Convention's streamlined enforcement regime or a

failure to comply with U.S. procedure applicable thereunder. *Id.* at 34a-36a.[4]

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision is irreconcilable with the plain meaning of the New York Convention and the implementing provisions of the Federal Arbitration Act. By extending the Convention's streamlined enforcement regime beyond the "parties" to the arbitral award, the ruling below permits an action that (as respondents admit) every other Convention signatory would reject. The Second Circuit's decision thus provides an irresistible incentive for prevailing parties in arbitration to bring enforcement actions in this country, evading the applicable legal regimes of other Convention signatories and the defenses available under U.S. law, in circumstances in which our courts lack personal and/or subject matter jurisdiction. Certiorari should be granted to prevent that abuse of the U.S. courts' jurisdiction and to restore the uniform regime for enforcing international arbitral awards that is the very purpose for which the United States and other nations adopted the Convention.

1. Respondents invoke the subject matter jurisdiction of the U.S. courts under the terms of the New York Convention, as implemented by the Federal Arbitration Act. "The interpretation of a treaty, like the interpretation of a statute, begins with its text."

[4] The Second Circuit separately reinstated a fraud claim brought by respondents against petitioners, reasoning that the record was inconclusive on what preclusive effect to grant the ICC's finding that the respondents had not proved fraud. Pet. App. 37a-40a. That claim does not arise under the Convention and is not the subject of this petition.

Medellin v. Texas, 552 U.S. 491, 506 (2008). "'An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.'" *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006) (quoting 1 Restatement (Third) of the Foreign Relations Law of the United States § 325(1) (1986)).

Each relevant provision of the Convention and the Act applies only to the "parties" to the arbitration award. *See, e.g.*, Conv. arts. IV, V; 9 U.S.C. § 207. Indeed, the Second Circuit candidly acknowledged that the Act and Convention exclusively contemplate that an enforcement action will be brought by "the award creditor" against "the award-debtor." Pet. App. 30a. No provision states that an award may be enforced directly against a third party.

The Act provides: "Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration." 9 U.S.C. § 207. In that action, "the party applying for recognition and enforcement shall, at the time of the application, supply" the arbitration agreement and arbitral award. Conv. art. IV(1). In turn, "the party against whom [the award] is invoked" may attempt to prove a limited number of defenses. *Id.* art V. These include that "[t]he parties [were] under some incapacity"; the "agreement is not valid under the law to which the parties have subjected it"; the "party against whom the award is invoked was . . . unable to present his case"; "[t]he party against whom the award is invoked was not given proper notice";

"[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties"; and "[t]he award has not yet become binding on the parties." *Id.*

The Act and the Convention apply only against "parties" for important reasons. The Convention provides only one enforcement mechanism: a streamlined proceeding in which the court hearing the action is forbidden from reviewing the merits of the underlying claims. *See* Conv. arts. IV, V. That regime is consistent with due process – as well as the principle that arbitration is strictly a matter of consent – only if enforcement is restricted to the entities that have already had the opportunity to contest the merits.

Moreover, permitting enforcement against third parties through the Convention's summary enforcement procedure: overlooks that consent to arbitrate is a threshold determination, not one made after the arbitration concludes; overrides the arbitrators' control over the proceedings; and amounts to a modification of the arbitral award itself.[5] The arbitrators determine in the first instance who has consented to arbitrate and the parties to their award. Not only did the ICC arbitrators not determine that petitioners were parties to the Award, but to the

[5] This rule is not only a matter of international norms followed by every other Convention signatory, but was expressly agreed to by respondents here in their arbitration agreements with SBT, which expressly incorporate "the rules of Conciliation and Arbitration of the [ICC]" (the "ICC Rules") providing that questions of arbitrability are for the arbitrators to decide. *See* ICC Rules art. 6, https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration; C.A. J.A. 649 (producing the version of ICC Rules art. 6 in effect at the time of the arbitration).

contrary, they expressly found that they lacked jurisdiction to reach the assets of Prime Carbon and other "non-SBT entities because such entities were not parties to the arbitration." C.A. J.A. 566.

A participant in the arbitration can seek to apply the award to another person or entity in several ways, such as by naming it as a party from the outset, adding it to an ongoing arbitral proceeding, commencing a separate arbitral proceeding against it and seeking to have it consolidated with the ongoing arbitral proceeding, or potentially requesting that the courts of the arbitral seat modify an existing award. In none of those circumstances does a foreign court enforcing the award exercise control over the award's contents. Rather, the court takes the award as the arbitrators issued it.

This case is a perfect example. Respondents initiated arbitration against the other party to the Contracts – SBT – not petitioners. Petitioners were not parties to the Contracts and therefore could not enter the arbitration to defend the claims themselves. Swiss bankruptcy law affirmatively prohibited petitioners from intervening to take over SBT's defense. Respondents did not ask the arbitrators or the courts of the forum to modify the Award to apply to petitioners. Thus, in this summary enforcement proceeding, respondents seek to enforce against petitioners a default $50 million award. They moreover seek to deprive petitioners of any opportunity to protect their interests by defending the merits of respondents' claims, while overriding the arbitrators' authority to determine the scope of their own award.

Adhering to the Convention's plain text also prevents the evasion of both limits on the jurisdiction of the enforcing court and the powers of other legal systems to adjudicate the rights of their citizens. The Convention overrides only those domestic rules that conflict with the Convention's own terms. Conv. art. III. Signatory nations accordingly subscribe to the Convention on the understanding that they will create a limited font of subject matter jurisdiction for a streamlined action against a losing "party," not throw open the courthouse doors to claims against third parties. Convention signatories expect that limitations on their courts' personal jurisdiction will be respected, not evaded by naming separate entities as debtor when the actual losing "party" to the arbitration could not lawfully be haled into court. Convention signatories also expect that their citizens and other litigants may invoke the ordinary defenses to a claim, except with respect to the party that actually had the opportunity to dispute the merits of that claim once already in arbitration.

Again, this case is a perfect example. Respondents started but abandoned an action in Switzerland where the losing "party" was incorporated. There, they would not have been permitted to evade the scheme established by Swiss bankruptcy law under which SBT's claims were assigned to another creditor, or to enforce the Award directly against third parties.

So they came here. But the U.S. Constitution and federal law create courts of limited jurisdiction. U.S. Const. art. III; 28 U.S.C. § 1331. Respondents could not have sued the "party" against which they prevailed in arbitration, because that party was not subject to

personal jurisdiction. They also could not have sued petitioners by simply invoking the Award, because the district court would lack subject matter jurisdiction over such an action. The result is that, absent the Second Circuit's unprecedented interpretation of the Convention, respondents would be requesting the U.S. courts – applying U.S. law – to assert jurisdiction to enforce an award entered in France with respect to events in Brazil, against defendants that were forbidden from participating in any way in the arbitration.

Even if the language of the Convention could be stretched to deem petitioners "parties" to the arbitration, this action is barred by the Federal Arbitration Act. As the Second Circuit recognized, it has long been settled that the Act forbids a confirmation action in circumstances like these. Pet. App. 30a-31a. Respondents' argument that petitioners are the alter egos and/or *de facto* successor to SBT implicates significant factual disputes and requires developing a significant evidentiary record over numerous disputed factual issues, such as whether there was a fair exchange of value in the transfer of SBT's assets and Prime Carbon's assumption of SBT's liabilities. *Id.* at 98a-99a. Those distracting and complex proceedings are irreconcilable with the straightforward, efficient regime that the Act (like the Convention) contemplates for enforcing arbitral awards. *Id.*

The provisions of the Act apply fully so long as they are consistent with the Convention. Conv. art. III; 9 U.S.C. § 208. Here they are. Nothing in the text of the Convention *requires* extending the concept of "party" so far. Not even the Second Circuit thought so.

Instead, the court of appeals held that the Convention implicitly overrides the Act by indirection, because it eliminated the prior regime of double *exequatur*. Pet. App. 28a. That is not correct. The signatories to the Convention rejected double *exequatur* because in every case in which enforcement was sought abroad it required the award creditor to conduct duplicative proceedings against the same party in two countries: the courts of the arbitral forum and the courts of the enforcing jurisdiction. *See* U.S. C.A. Letter Br., *supra* note 3, at 8-9; Pieter Sanders, *The Making of the Convention*, *in* Enforcing Arbitration Awards Under the New York Convention 4 (1999) (Ex. B to Petr. C.A. Letter Br., C.A. Doc. 114 (June 24, 2016)); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Message from the President of the U.S., Exec. E, 90th Cong., 2nd Sess. (1968), *reprinted in* 7 I.L.M. 1042, 1058 (1968) (transmitting report of the Secretary of State) (Ex. C to Petr. C.A. Letter Br.)). That determination does not remotely forbid *ever* requiring an award creditor to proceed in two stages when – as here – it seeks to enforce an award against third parties that did not participate in the arbitration.

Nor does adhering to the international consensus generally cause the award creditor to proceed in two countries. Instead, it would simply proceed in two steps in the same courts. *See, e.g.*, *GE Transp. (Shenyang) Co. v. A-Power Energy Generation Sys., Ltd.*, No. 15 Civ. 6194, 2016 WL 3525358, at *6 (S.D.N.Y. June 22, 2016) (citing *Sea Eagle Mar., Ltd. v. Hanan Int'l, Inc.*, No. 84 Civ. 3210, 1985 WL 3828 (S.D.N.Y. Nov. 14, 1985)). That procedure was not available in this case only because the federal court

lacked personal jurisdiction over SBT. But that result is mandated by the Due Process Clause of the Fourteenth Amendment, and neither the Act nor the Convention could compel a contrary result.

An award creditor has other, non-burdensome avenues to proceed against the assets of third parties that would avoid abuses of the Convention's procedures. Most appropriately, it can request that the arbitrators determine that the award should be applied to third parties. If it does not, then under the Convention, it can secure confirmation of the award in the courts where enforcement is sought or, if jurisdiction is lacking, other forums such as the courts of the arbitral forum, where the debtor is incorporated or where it conducts substantial business. The award creditor then can bring an action to enforce the resulting judgment against third parties in any court in which they are subject to jurisdiction.

2. Certiorari is also warranted because the Second Circuit's ruling creates an enormous incentive for prevailing parties in arbitration to invoke the same gambit to establish jurisdiction in the U.S. courts and evade the limitations applied by other nations. No one disputes that no other Convention signatory would permit this action to go forward. Indeed, respondents affirmatively invoked that fact as a basis for the district court to recognize their claims, after they abandoned their Swiss action and instead sued here. That conflict directly contradicts the Convention's essential purpose, which is 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). The ruling below thus creates

precisely the disuniformity the signatories worked so carefully to avoid.

A similar action brought in the United Kingdom, *Norsk Hydro ASA v. State Property Fund of Ukraine* [2002] EWHC 2120 (Comm), provides another perfect example of how other Convention signatories faithfully adhere to the treaty's text. There, the plaintiff (Norsk) had prevailed in arbitration against "The State Property Fund of Ukraine, being an agency of the Government of Ukraine." *Id.* ¶ 3. Norsk brought an action under the Convention in the U.K. courts seeking to enforce the award not only against "The State Property Fund of Ukraine" but also directly against "The Republic of Ukraine, through the State Property Fund of Ukraine." *Id.* ¶ 6. A trial court granted the request.

The High Court of Justice reversed. It reasoned:

> There is an important policy interest, reflected in this country's treaty obligations, in ensuring the effective and speedy enforcement of such international arbitration awards; the corollary, however, is that the task of the enforcing court should be as "mechanistic" as possible. Save in connection with the threshold requirements for enforcement and the exhaustive grounds on which enforcement of a New York Convention award may be refused (ss. 102-103 of the 1996 Act), the enforcing court is neither entitled nor bound to go behind the award in question, explore the reasoning of the arbitration tribunal or second-guess its intentions. . . .

> Viewed in this light, as a matter of principle and instinct, an order providing for enforcement of an award must follow the award. No doubt, true "slips" and changes of name can be accommodated; suffice to say, that is not this case. Here it is sought to enforce an award made against a single party, against two separate and distinct parties. To proceed in such a fashion, necessarily requires the enforcing court to stray into the arena of the substantive reasoning and intentions of the arbitration tribunal. . . . The right approach is to seek enforcement of an award in the terms of the award.

Id. ¶¶ 17-18.

Award creditors will have a strong incentive to invoke the jurisdiction recognized for the first time by the Second Circuit whenever an entity or person in this United States has a close relationship to an award debtor, and thus is susceptible to a claim that it is the debtor's alter ego or successor. That will often be true because international arbitrations are frequently conducted between large corporate entities with numerous affiliates, shareholders, and officers. Moreover, those related entities frequently have assets located in the United States, which is the world's largest economy, and within the Second Circuit's jurisdiction over the nation's largest commercial center. *See, e.g.*, *Sistem Muhendislik Insaat Sanayi Ve Ticaret, A.S. v. Kyrgyz Republic*, No. 12-CY-4502, 2016 WL 5793399 (S.D.N.Y. Sept. 30, 2016); *GE Transp. (Shenyang)*, 2016 WL 3525358; *Daum Glob. Holdings Corp. v. Ybrant Dig. Ltd.*, No. 13 Civ. 03135, 2014 WL 896716 (S.D.N.Y. Feb. 20, 2014);

Thai-Lao Lignite (Thai.) Co. v. Gov't of the Lao People's Democratic Republic, No. 10 Civ. 5256, 2011 WL 3516154 (S.D.N.Y. 2011), *judgment enforcing award vacated*, 997 F. Supp. 2d 214 (S.D.N.Y. 2014).

The grounds for granting certiorari are substantially stronger than in the most analogous case, *BG Group, PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014). *BG Group* involved a relatively narrow question: under a certain form of foreign investment treaty, do courts review *de novo* the arbitrators' conclusion that a party properly exhausted its claim in the local courts? The D.C. Circuit – which was the only U.S. court of appeals to have considered the question – held that courts determine compliance with the local litigation requirement. That ruling, however, was "at odds with standards followed by other major international arbitration jurisdictions," Cert. *Amicus* Br. of Am. Arbitration Ass'n 6, and "out of step with the legal approach taken in many other jurisdictions," Cert. *Amicus* Br. of U.S. Council for Int'l Business 23 & n.11. As a result it threw "open the doors to this nation's courts to hear challenges to the results of years-long international arbitrations." Cert. Reply 11. This Court granted certiorari "[g]iven the importance of the matter for international commercial arbitration," 134 S. Ct. at 1205, and reversed.

This case, unlike *BG Group*, is not limited to the subset of arbitrations that arise under international investment treaties containing local litigation requirements and the still smaller subset of *those* proceedings that involve disputes over whether the investor properly filed its claim in court. Rather, the Question Presented by this case is implicated by a

huge proportion of international arbitration awards, which (as noted) are entered against parties that have significant relationships to entities with assets in the United States.

Given the conflict with international norms created by the ruling below, and the importance of the Question Presented, certiorari should be granted.

CONCLUSION

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

Respectfully submitted,

Kevin P. Lucas
Alexandra P. West
BUCHANAN INGERSOLL & ROONEY PC
One Oxford Centre
301 Grant Street
20th Floor
Pittsburgh, PA 15219
(412) 562-8800

Thomas C. Goldstein
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Avenue
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com

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