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“Ambiguity” Is Not a Basis to Deny a Petition to Enforce a Foreign Arbitration Award

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The drive in the Second Circuit to clarify the rules regarding confirmation and enforcement of various types of arbitration awards continues. The latest addition is the decision in *BSH Hausgerate GmbH v. Kamhi*, 17 Civ. 5776, 2018 U.S. Dist. LEXIS 34597 (S.D.N.Y. Mar. 2, 2018) (Sweet, J.). Federal district courts have occasionally decided that an arbitration award is ambiguous or incomplete or indefinite, and therefore should be remanded to the arbitrator for clarification rather than confirmed by the court. Judge Sweet seeks to bring clarity to the law concerning the judicial treatment of international arbitral awards in particular, holding that “ambiguity” is not a cognizable basis for refusing to enforce (or “confirm”) such an award.

Recall that, a year earlier, the Second Circuit distinguished various arbitration awards, with respect to how they should be treated by federal courts, as (a) domestic, (b) non-domestic, and (c) foreign. See *CBF Industria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58 (2d Cir. Mar. 2, 2017). An award that is issued outside the U.S. is a “foreign” arbitral award. If the country of origin is a signatory to the New York Convention, then “confirmation” of the award may occur, if at all, in the jurisdiction in which the award was issued, and “enforcement” of the award may be sought in any other Convention country. A court in the country of origin of the award has “primary” jurisdiction; a court in any other country to which the award is brought for enforcement will have “secondary” jurisdiction.

In *Kamhi*, the Court held that when it has “secondary jurisdiction” with respect to a foreign arbitration award, and the New York Convention applies, it “may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention,” *CBF Industria de Gusa*, 850 F.3d at 71, and Article V of the Convention does not include “ambiguity” as an enumerated basis to refuse enforcement.

The petitioner in *Kamhi* sought confirmation of an arbitration award issued by a Swiss tribunal in February 2017. (We note that the Second Circuit indicated in *de Gusa* that an application to a U.S. court by a party in effect seeking enforcement of a foreign arbitral award is a petition for “enforcement,” rather than for “confirmation,” even if Section 207 of the FAA (9 U.S.C. § 207) uses the word “confirm” and its variants rather than enforcement. That is because the U.S. court would be sitting with secondary jurisdiction, and confirmation can only be granted by a court with primary jurisdiction over an award.) Respondent opposed on several grounds, including that a portion of the award was “so ambiguous with regard to the apportionment of costs that it is impossible to enforce.”

The Court opined that when a party seeks confirmation of an award issued in another Convention country (e.g., Switzerland), the Court is bound to grant the petition unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the Convention. (Among other authorities, the Court relied on *Yusuf Ahmed Alghanim & Sons v. Toys ‘R’ Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997).)



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Article V of the Convention specifies seven exclusive grounds upon which courts may refuse to enforce a foreign award. See, New York Convention Arts. V(1), V(2). And a party opposing enforcement of such an award has a heavy burden to show that one of the seven Convention defenses applies to thwart enforcement. *E.g.*, *Albtelecom v. UNIFI Communications, Inc.*, 2017 WL 2364365 at *4 (S.D.N.Y. May 30, 2017).

In the *Kamhi* case, the Respondent's "ambiguity" argument failed for two reasons: (1) the award in question was not ambiguous, according to the Court; and (2) "ambiguity" is not a reason enumerated in Article V of the Convention for refusing enforcement of the award. It is the Court's discussion of the latter point that was of interest.

First, the Court noted that it had "secondary jurisdiction" with respect to the award — that is, it was a court sitting in a different country or applying different law than a court sitting where the arbitral award was made. With that "juridical posture," the Court's power to refuse enforcement was "rigidly circumscribed;" *i.e.*, it could do so only on the grounds explicitly set forth in Article V of the Convention. *CBF Industria de Gusa*, 850 F.3d at 71, quoting *Yusuf*, 126 F.3d at 23.

The Court furthermore distinguished the authorities presented by the Respondent, which authorities had mentioned "ambiguity" of an award as a reason for not confirming it. First, most of those decisions were by courts sitting in a different juridical posture — that is, in primary jurisdiction — and those courts had a "wider range of available adjudicative options." Second, other caselaw discussions of ambiguity were "pre-*Yusuf*" authority "from courts sitting in primary jurisdiction [that] did not address the tension between its opinion and Second Circuit authority like *Yusuf*." Finally, one Second Circuit decision cited by the Respondent — *Ottley v. Schwartzberg*, 819 F.2d 373 (2d Cir. 1987) — did address, in *dictum*, grounds for "remanding" an arbitral award to the arbitral tribunal, albeit under the Federal Arbitration Act, "which permits a wider set of parameters than the Convention in deciding whether to confirm an award." Among many distinguishing elements, *Ottley* considered an award entered in a domestic arbitration. Thus, the *Ottley* court had primary jurisdiction and was drawing only on Chapter 1 of the FAA (in particular, 9 U.S.C. § 9) for its authority with regard to the motion to confirm in that case. Indeed, the Court of Appeals actually held in *Ottley* that the lower court had erred in remanding the matter to the arbitral tribunal for what amounted to a factual determination of an ancillary matter — whether there had been compliance with its award. Moreover, *Ottley* preceded *Yusuf* by a decade, and the District Court opined that "*Yusuf's* clear language on the parameters of confirmation under the Convention controls."

Ultimately, the *Kamhi* Court had little difficulty in granting the purported petition to confirm (read "enforce") the international arbitral award in question. The alleged "ambiguity" of that award was not a basis for denying that relief.

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