

INTERNATIONAL COMMERCIAL ARBITRATION – ENFORCEMENT OF FOREIGN ARBITRAL DECREES BY NON-SIGNATORIES IN U.S. FEDERAL COURT: The Ninth Circuit Upholds Removal of State Action to Federal Court under the New York Convention based on Affirmative Collateral Estoppel Defense when Dispute Relates to Foreign Arbitration Agreement in “Any Conceivable Way.”

A non-signatory to an international arbitration agreement under the New York Convention on the Recognition and Enforcement of Arbitral Awards may invoke the subject matter jurisdiction of the United States federal courts to defend against a commercial lawsuit on the grounds that the suit is precluded by a foreign arbitral award.

In *Infuturia Global Ltd. v. Sequus Pharmaceuticals, Inc.*, ___ F.3d ___, 2011 WL 353214 (9th Cir. (Cal.) Feb. 7, 2011),¹ the United States Court of Appeals for the Ninth Circuit held that a dispute concerning an Israeli biotechnology license that included a broad arbitration clause could be removed to federal court under the New York Convention even though the moving party was not a party to the arbitration agreement, since the dispute was “related” in a “conceivable way” to an international arbitration agreement.

In so holding, the Court joined the Fifth Circuit on the issue, making it the second federal appellate court to do so.²

The facts of the *Infuturia* decision were as follows: The plaintiff, Infuturia Global Ltd., had an exclusive worldwide license from Yissum Research and Development Co., an Israeli company which developed a technology for delivering pharmaceuticals to the body using liposomes. Yissum is the commercial exploitation arm of Hebrew University of Jerusalem.³ The license agreement, which was entered into in 1990, included an arbitration clause requiring arbitration in Israel. In 1995, Yissum entered into another licensing agreement with Sequus Pharmaceuticals regarding certain liposome technology (developed by Yissum, Barenholz and Sequus).

In 1998, Infuturia sued Sequus, Hebrew University and Barenholz, but not Yissum, in California state court claiming that Sequus was interfering with its own license agreement with Yissum. Pursuant to its arbitration provision in the Infuturia license, Yissum intervened and petitioned for a stay of litigation pending arbitration, which was granted by the court in 1999. At the conclusion of arbitration, the Israeli arbitrator ruled that Infuturia did not have rights to the technology licensed to Sequus under the latter’s license from Yissum.

The arbitration stay was then lifted in California state court and Infuturia amended its complaint so as not to reference those Sequus products which had been the subject of the Israeli arbitration. Non-signatories Hebrew University and Barenholz then filed a

¹ Available online at <http://www.ca9.uscourts.gov/datastore/memoranda/2011/02/07/09-16378.pdf> or at Westlaw.

² The Ninth Circuit encompasses the states of California, Alaska, Arizona, Nevada, Idaho, Oregon, Washington, and Montana, while the Fifth Circuit encompasses Texas, Louisiana, and Mississippi.

³ The technology had been developed in the 1980s by Hebrew University Professor Yechezkel Barenholz. Both Barenholz and Hebrew University were defendants in the case.

Notice of Removal based on the arbitration agreement between Infuturia and Yissum, claiming by way of an affirmative defense that Infuturia's amended complaint was barred by the Israeli arbitral award on the grounds of collateral estoppel. Infuturia moved to remand back to state court arguing that neither the University, Barenholz or Sequus were parties to the arbitration agreement. In 2009, the district court denied the motion to remand. Infuturia appealed, alleging that the removal to federal court was improper for lack of federal subject matter jurisdiction.

The Ninth Circuit affirmed the district court's holding that because the dispute "related" to a foreign arbitration agreement, 9 U.S.C. § 205 applied and removal to federal court was proper.

AFTER the United States acceded to the New York Convention, Congress enacted 9 U.S.C. § 201 *et seq.* to implement the treaty. Section 205 (Chapter 2 of the Federal Arbitration Act), provides that:

Where the subject matter of an action or proceeding pending in a State court *relates* to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending [emphasis added].

Unlike domestic arbitration cases where Chapter 1 of the Federal Arbitration Act is not itself a source of federal subject matter jurisdiction, Chapter 2 which implements the New York Convention is a source of subject matter jurisdiction. *See e.g., Vaden v. Discover Bank*, 129 S.Ct. 1262, 1272, n. 9.

In 2005, a California federal district court had ruled that in order to invoke federal subject matter jurisdiction under the New York Convention (FAA Chapter 2), a litigant claiming that the dispute "relates to an arbitration agreement or award" had to have been a signatory to the arbitration agreement. *AtGames Holdings Ltd. v. Radica Games, Ltd.*, 394 F.Supp.2d 1252, 1255 (C.D.). The Fifth Circuit, however, in its holding in *Beiser v. Weyler*, 284 F.3d 665, 6659 (2010), gave Section 205 a much broader interpretation than did the California district court in *AtGames*. It held that "relates to an arbitration agreement" means "whenever an arbitration agreement falling under the Convention could *conceivably* affect the outcome of the plaintiff's case." *Id.*, 284 F.3d at 670 (emphasis in original). The Ninth Circuit choose to adopt the Fifth Circuit's interpretation over that of the district court in *AtGames*, which it called "unpersuasive." The Court stated:

The phrase "relates to" is plainly broad, and has been interpreted to convey sweeping removal jurisdiction in analogous statutes [citing decisions which broadly interpreted the phrase in other statutes].

In such a case as this, where the defendant relies on the affirmative defense of collateral estoppel regarding issues already resolved against the plaintiff in arbitration, the arbitral award could 'conceivably affect the outcome' of the case.

Infuturia, 2011 WL 353214, at *3. In addition, the court also held that the phrase in Section 205, “at any time before the trial thereof” meant that the defendant could remove “at any time before the claims raised in the state court action have been adjudicated.” *Id.* at *4-5.⁴

The holdings in both *Infuturia* and *Beiser* are consistent with the strong federal policy favoring arbitration in international commercial agreements and advance the purposes of the New York Convention by assuring that foreign arbitral awards, including those rendered in Israeli arbitration proceedings under the Israel Arbitration Law, 5728-1968, are given full effect in American courts even where non-signatories assert affirmative defenses based on collateral estoppels and res judicata (issue preclusion). Zell & Co.’s Daniel Tauber and Marc Zell have recently completed a comprehensive article on Israel commercial arbitration law to be published in 2011.

⁴ Citing *LaForge Coppee v. Venezolana De Cementos, S.A.C.A.A., C.A.*, 31 F.3d 70, 72 (2d Cir. 1994) and *Pan Atl. Grp., Inc. v. Republic Ins. Co.*, 878 F. Supp. 630, 638-39 (S.D.N.Y. 1995).