

UBS Ruling Shows SDNY's Pro-Award Confirmation Stance

By John Conlon, Joe Ryan and Jennifer Huang (January 13, 2025, 5:39 PM EST)

On Oct. 22, an attempt by Egyptian businessman Michel Lakah to set aside a 2018 International Centre for Dispute Resolution award was rejected by the U.S. District Court for the Southern District of New York, marking what the respondent creditors hope will be the end of a saga that has dragged on for nearly 20 years.[1]

Senior U.S. District Judge Loretta A. Preska also granted long-awaited enforcement motions to respondents in Switzerland, the United Arab Emirates and Oman who had initially brought arbitration proceedings in 2006 in response to a default on \$100 million in Eurobonds issued by Lakah Funding, run by brothers Michel Lakah and Ramy Lakah.

This marks the last in a series of challenges by the brothers to resist being held liable in their personal capacities to arbitration agreements in the bond documents and avoid the application of the corporate veil piercing laws available under the laws of New York where the arbitration was seated.

In this article, we outline the background to the dispute and analyze the court's findings and their implications.

Background

On June 8, 2006, the UBS AG, Exporters Insurance Co., National Bank of Abu Dhabi, National Bank of Oman and Arab Banking Corp. commenced an arbitration against the Lakah brothers and other companies, related to the issuance of \$100 million in Eurobonds.[2]

The Lakahs petitioned the Supreme Court of New York to stay the arbitration on the ground that they were not obligated to arbitrate because they did not sign the Eurobond transaction documents in their individual capacities.

The action was removed to the Southern District of New York and the respondents filed a cross-petition to compel arbitration on April 16, 2007, on the basis that the Lakahs should be bound to the arbitration agreements on theories of veil-piercing and equitable estoppel.

The parties then engaged in over nine years of litigation. On the eve of trial, the petitioners moved for recusal of Judge Preska, which was denied. The petitioners thereafter declined to participate in the trial



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and consented to arbitrate the claims.

On Feb. 14, 2017, the court issued its findings of fact and conclusions of law, granting the respondents' cross-petition to compel arbitration, and ruling that the Lakahs are bound to the arbitration agreements by the doctrines of equitable estoppel and piercing the corporate veil.

Arbitration then resumed, with the tribunal ultimately issuing (1) an award holding the petitioners jointly and severally liable in an amount exceeding \$192 million plus interest, and (2) an order dismissing the petitioners' counterclaims and terminating further arbitral proceedings for nonpayment of fees.

In 2019, Michel Lakah moved pursuant to the Federal Arbitration Act to vacate the award and the order, claiming that the tribunal was "guilty of misconduct" in "refusing to hear evidence" and had "exceeded [its] powers."

The Southern District of New York denied both of the petitioner's motions and granted a cross-petition by the respondents.

Court Findings

The petitioners claimed that the tribunal violated fundamental fairness because it (1) gave collateral estoppel effect to the court's findings of fact and conclusions of law, (2) denied them a fundamentally fair hearing, (3) refused to conduct additional evidentiary hearings, and (4) treated the petitioners as parties to the first phase of the arbitration.

The court rejected all of the petitioner's arguments to vacate the award for the following reasons.

Collateral Estoppel

First, the court rejected the petitioner's argument that the findings of fact and conclusions of law did not have a preclusive effect on the tribunal because it was an impermissible judgment on the merits of the arbitration. The court explained that the findings of fact and conclusions of law made determinations about arbitrability based on corporate veil-piercing and equitable estoppel.

To make these determinations, the court was required to conduct a fact-intensive analysis of the record in finding that the Lakahs dominated and controlled the guarantor companies in a manner that harmed the bondholders.

Similarly, the court reviewed the factual record to conclude that the Lakahs exploited the Eurobond agreements to receive direct benefits from them and were therefore bound by the arbitration agreements under the doctrine of equitable estoppel. These factual inquiries were directed to the threshold question of arbitrability and did not constitute a judgment on the merits of the dispute.

The court further rejected the petitioner's arguments (1) that the tribunal improperly found the findings of fact and conclusions of law binding and exceeded its authority in doing so, and (2) for vacatur under the manifest disregard of the law doctrine, finding that the tribunal applied the relevant law to its decision.

Fundamentally Fair Hearing

The court also rejected the petitioner's three arguments that he was denied a fundamentally fair hearing.

First, the court rejected the petitioner's argument that issue preclusion should not apply to the court's findings of fact and conclusions of law because the petitioner never attempted to appeal the court's denial of that motion, and this failure bars the petitioner from arguing that the tribunal could not apply collateral estoppel to the findings of fact and conclusions of law.

Second, the court ruled that the petitioner did not "effectively default" when he chose not to participate at trial, because he had significant involvement up until the eve of trial. Issues on default are not given preclusive effect. However, here, the petitioner had a high level of involvement in the litigation prior to trial and thus did not effectively default, so that it was not fundamentally unfair for the tribunal to find that the findings of fact and conclusions of law were binding.

Finally, the court held that the petitioner's last-minute consent to arbitration did not make the tribunal's reliance on the findings of fact and conclusions of law a violation of fundamental fairness, as it was necessary to determine the issue of arbitrability as a threshold matter, so the petitioner's consent did not render the findings of fact and conclusions of law unnecessary.

Refusal to Hold More Evidentiary Hearings

In addition, the court held that the tribunal's decision not to hold additional evidentiary hearings after the petitioner chose not to participate at trial did not deny the petitioner a fair hearing. The tribunal decided that the petitioner had ample opportunity to present evidence throughout the litigation, and the petitioner voluntarily and knowingly declined his opportunity to litigate at trial.

Thus, the petitioner risked that the court's findings of fact and conclusions of law would have a binding effect on the tribunal.

Petitioner Treated as Party

Finally, the petitioner argued that he was not a party to the first phase of arbitration and thus could not offer evidence in his defense. However, the court rejected that argument because the petitioner's attorney made numerous appearances on behalf of the petitioner in the first phase of the arbitration.

Order Terminating Arbitration, Dismissing Counterclaims

The petitioner also moved to vacate the tribunal's order terminating the arbitration and dismissing his counterclaims. The court ruled that the order was not an award for purposes of vacatur.

Under the FAA, courts may only vacate an award or adjudicate on the merits. Here, the court reasoned that the termination and dismissal was solely based on nonpayment of fees and did not address the merits of the petitioner's argument. Thus, the court held that it did not have the authority to vacate the order because it was not an award under the FAA.

Implications

This multidecade dispute may finally be at an end, much to the relief of the creditor respondents. But the outcome is a cautionary tale worth heeding by parties who may believe that they cannot be bound

to arbitration agreements by virtue of corporate structuring or refusing to participate in proceedings.

The court has confirmed its "strong presumption in favor of enforcing an arbitration award" in rejecting the petitioner's arguments. This demonstrates how difficult it is for a party to vacate an arbitral award in New York under the theory of a violation of fundamental fairness.

Moreover, the outcome confirms that the use of the corporate veil piercing laws available in New York can be robustly applied by both arbitral tribunals and the courts to parties in arbitrations seated there to bind individuals personally to an arbitration agreement, regardless of whether the individuals involved are foreign or domestic.

It also demonstrates that a failure to pay fees can result in the dismissal of a party's claims with no recourse to obtain a substantive judicial review, and a party's decision to stop participation in proceedings will not be grounds for a defense to enforcement of an award against them.

This case serves as a reminder that New York remains an effective seat for international arbitration with a judiciary that actively supports arbitration and a strong presumption toward binding parties to arbitration agreements and enforcing arbitral awards.

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[1] *Lakah et al. v. UBS AG et al.*, No. 07-CV-2799 (LAP), 2024 WL 4555701 (S.D.N.Y. Oct. 22, 2024).

[2] ICDR Case No. 50-148-T-00251-06.