

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-7102

September Term, 2017

FILED ON: JULY 10, 2018

VENCO IMTIAZ CONSTRUCTION COMPANY,
APPELLEE

v.

SYMBION POWER LLC,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cv-01737)

Before: ROGERS, GRIFFITH and MILLETT, *Circuit Judges*.

J U D G M E N T

This case comes before the court on appeal from the United States District Court for the District of Columbia's order granting Venco Imtiaz Construction Company's motion to enforce an international arbitration award against Symbion Power LLC. The court has afforded the issues full consideration and has determined that they do not warrant a published opinion. See D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the order of the United States District Court for the District of Columbia be affirmed.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2517 (commonly referred to as the "New York Convention") governs the enforcement in the United States of foreign arbitration awards. Federal law requires that a district court "shall confirm" a foreign arbitration award unless "one of the grounds for refusal or deferral of recognition or enforcement" of awards specified in the Convention applies. 9 U.S.C. § 207. As relevant here, Article V of the New York Convention permits a court to deny enforcement of an award if "recognition or enforcement of the award would be contrary to the public policy of [the enforcing court's] country." New York Convention, art. V(2)(b); see 9 U.S.C. § 207. Out of "appropriate deference to other sovereign nations," the public policy defense is "construed

narrowly” to apply “only where enforcement would violate the United States’ most basic notions of morality and justice.” *Belize Bank Ltd. v. Government of Belize*, 852 F.3d 1107, 1111 (D.C. Cir. 2017) (quotation and alteration omitted).

This case arises out of the United States Agency for International Development’s construction of a power plant in Kabul, Afghanistan in 2008. The Agency tapped the Louis Berger Group/Black & Veatch Special Projects Corporation (“Louis Berger Group”), an American firm, to manage the construction project. The Louis Berger Group then hired Symbion, an American-based construction firm, as its contractor for the project. Symbion, in turn, hired plaintiff Venco Imtiaz Construction (“Venco”), an Afghanistan-based construction company, as a subcontractor to build the portions of the power plant that would host electrical generators.

Symbion and the Louis Berger Group entered into a contract to start construction of the plant, but then the project was delayed. The Louis Berger Group responded by withholding payments owed to Symbion, and Symbion in turn withheld payments owed to Venco. Relations continued to deteriorate, resulting in the Louis Berger Group and Symbion terminating their contract in June 2009.

Symbion then filed arbitration claims against the Louis Berger Group seeking payment for its work. The International Chamber of Commerce’s arbitration panel agreed with Symbion that the Louis Berger Group had breached the contract by withholding payment. But in calculating damages, the panel ruled that Symbion had exaggerated its costs and so it could not rely on its interim invoices as conclusive proof of the work it completed. As a result, the arbitral panel awarded Symbion less than a third of the damages it had sought. J.A. 499.

Venco did not participate in that proceeding. Instead, Venco initiated its own arbitration proceeding against Symbion, which was also before the International Chamber of Commerce. Venco sought damages for, among other things, Symbion’s failure to pay Venco’s billed invoices for completed work. Symbion counterclaimed, alleging breach of contract and tortious interference with contract. Specifically, Symbion alleged that their contract had been orally modified so that Venco had agreed that it would only get paid if Symbion first got paid by the Louis Berger Group. Symbion also argued that, as a matter of collateral estoppel, the decision of the prior arbitral panel that its interim unpaid invoices were inconclusive proof of the value of work performed precluded Venco from relying on its billed invoices as proof of damages.

The arbitral panel ruled almost completely in favor of Venco. The panel found that Symbion failed to prove that Venco ever agreed to a “pay-if-paid” amendment to the contract. J.A. 599. As for what Symbion now calls its collateral estoppel argument, the arbitral panel noted that “both parties” argued “that some of the findings in the Symbion award could be of guidance to the Tribunal, although *not binding* on it.” *Id.* at 573 (emphasis added). The panel further found that “there are not perfect parallels between what was being litigated in the prior arbitration and this one,” as there are “[d]ifferent contracts, different facts, different agreements, different scopes of work.” *Id.* at 731. In particular, Symbion’s arbitration had turned on factual disagreements over “scheduling” and Symbion’s “inadequate progress on the project,” which did not pertain to Venco’s performance. *Id.* at 659 (emphases omitted). The panel then awarded Venco roughly

\$8.5 million in damages and costs. *Id.* at 699-700.

Symbion challenged the arbitration judgment in the courts of the United Kingdom, arguing now that the prior arbitration decision was binding, and that the Venco arbitration panel was collaterally estopped—bound by that prior arbitration decision—from relying on Venco’s invoices as evidence of completed work. The British court acknowledged the doctrine of issue preclusion. *Symbion Power LLC v. Venco Imtiaz Construction Co.* [2017] EWHC (TCC) 348 at ¶¶ 37-70 (Eng.), reproduced at *Venco Imtiaz Construction Co. v. Symbion Power LLC*, No. 16-cv-1737 (D.D.C. Mar. 20, 2017), ECF No. 22-1 at 11–17 (“U.K. High Court of Justice Opinion”). But the court concluded that Symbion’s challenge failed because (i) “Symbion was unable to point to any particular allegedly binding finding” from the Louis Berger Group arbitration, *id.* at ¶ 41; (ii) the arbitral panel properly took account of Symbion’s argument that the prior arbitral decision “could provide guidance” but was not binding, *id.* at ¶ 51; (iii) the whole collateral estoppel argument is beside the point because it pertains to the use of interim invoices as “conclusive proof,” and the “Tribunal did not treat interim payment certificates * * * as conclusive proof,” *id.* at ¶ 53; and (iv) because of all the differences between the two cases, collateral estoppel “was not reasonably arguable” in this case, *id.* at ¶ 70. The United Kingdom Court of Appeal rejected Symbion’s appeal for both lack of jurisdiction and because it was “strikingly lacking in merit.” *Symbion Power LLC v. Venco Imtiaz Construction Co.* [2017] A1/2017/0911 at 1, reproduced at *Venco Imtiaz Construction Co. v. Symbion Power LLC*, No. 16-cv-1737 (D.D.C. July 11, 2017), ECF No. 31-1 (“U.K. Court of Appeal Opinion”).

Venco then filed suit in the United States District Court for the District of Columbia seeking to enforce its arbitration award against Symbion. Symbion opposed on the ground that enforcement of the award would contravene the most “basic notions of morality and justice,” Symbion Opp’n, *Venco Imtiaz Construction Co. v. Symbion Power LLC*, No. 16-cv-1737 (D.D.C. Sep. 27, 2016), ECF No. 7 at 1, because it would allow for inconsistent arbitral judgments.

The district court granted Venco’s petition to confirm and enforce the award. *Venco Imtiaz Construction Co. v. Symbion Power LLC*, No. 16-cv-1737 (D.D.C. May 31, 2017), ECF No. 26 at 14. In so ruling, the district court found no merit to Symbion’s defense, holding that collateral estoppel did not implicate any overriding public policy of morality and justice. *Id.* at 6. The court also ruled that, even if collateral estoppel enjoyed such stature generally, the doctrine had no application to this case because (i) Venco was not a party to the arbitration proceeding between Symbion and Louis Berger; (ii) the contracts and issues in dispute differed; and (iii) Venco’s interests were not adequately represented by the parties to the Symbion arbitration. As a result, there was no inconsistency in the arbitral judgments.

On appeal to this court, Symbion continues to argue that the Venco arbitration decision flouted principles of collateral estoppel that Symbion views as foundational to the functioning of the judicial system. Like every tribunal before us, we find no merit to that argument.

At bottom, Symbion’s objection is to the arbitral tribunal’s legal conclusion that the prior decision provided only guidance and was not binding, as the collateral estoppel doctrine would require. But as the United Kingdom High Court explained, there is a litany of problems with

Symbion's argument, such as its own argument to the arbitration panel that the prior arbitral decision was only "guidance," the multiple factual and legal differences between the two arbitration cases, and the fact that, in any event, the arbitration panel never relied on the supposedly estopped interim invoices anyhow. U.K. High Court of Justice Opinion at ¶¶ 37-70. So any feared travesty of justice was averted by the arbitral tribunal's application of the very legal rule for which Symbion argues.

For those reasons, the district court correctly entered judgment enforcing Venco's arbitration award. The judgment of the district court is affirmed.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Ken Meadows

Deputy Clerk