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SCOTUS Rules in *GE* v. *Outokumpu* That Non-Signatories May Enforce an International Arbitration Agreement

SUMMARY

In a unanimous decision, the Supreme Court ruled that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") permits a non-signatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel. Chapter 1 of the Federal Arbitration Act (the "FAA"), which governs domestic arbitration, has been interpreted to allow non-signatories to an arbitration agreement to compel signatories to arbitrate a dispute in certain circumstances. The Court held that this doctrine also applies to Chapter 2 of the FAA, which applies to international arbitrations falling under the New York Convention. The Court rejected prior appellate court decisions that had held that the Convention requirement of a written arbitration agreement, and related provisions, required that all parties to an arbitration have signed the arbitration agreement.

FACTUAL BACKGROUND

F.L. Industries, Inc. entered into three contracts with ThyssenKrupp Stainless USA, LLC for the construction of cold rolling mills in ThyssenKrupp's steel manufacturing plant in Alabama. The contracts contained an arbitration clause providing for arbitration of "[a]ll disputes arising between both parties in connection with or in the performance of the contract." The term "parties" was defined to include subcontractors. F.L. Industries entered into a subcontract with GE Energy Power Conversion France SAS Corporation ("GE Energy") to provide nine motors to power the cold rolling mills. The motors allegedly failed, and ThyssenKrupp's successor Outokumpu Stainless USA, LLC sued GE Energy in Alabama state court. GE Energy successfully removed the case to federal court under 9 U.S.C. § 205, on the ground that the case related to an arbitration agreement subject to the New York Convention.

GE Energy sought to compel arbitration against Outokumpu. While GE Energy was not a signatory to the arbitration agreement between F.L. Industries and ThyssenKrupp, GE Energy relied on the doctrine of equitable estoppel, under which courts have held that a non-signatory to a written agreement that contains an arbitration clause may compel arbitration against a signatory under certain circumstances.

The District Court granted the motion to compel arbitration, but the United States Court of Appeals for the Eleventh Circuit reversed, concluding that the New York Convention allows enforcement of an arbitration agreement only by the parties that actually signed the agreement. The Supreme Court granted certiorari to resolve a Circuit split.[1]

RELATIONSHIP BETWEEN THE FAA AND THE NEW YORK CONVENTION

The New York Convention establishes a regime for the enforcement of international commercial arbitration agreements and awards. Of relevance here, Article II(1) provides, "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them . . . ." Article II(2) states that "[t]he term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." Further, Article II(3) provides, "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration . . . ."

Chapter 1 of the FAA governs arbitration agreements in most domestic contracts. Courts have held that Chapter 1 should generally be interpreted with reference to state-law doctrines related to the enforcement of arbitration agreements, such as equitable estoppel.[2] Under that doctrine, courts have permitted a non-signatory to enforce an arbitration agreement where, for example, the signatory must rely on the contract containing the clause in a claim against the non-signatory. Chapter 2 of the FAA implements the New York Convention and governs the enforcement of arbitration agreements and arbitral awards when the parties are from countries that have adhered to the Convention. Notably, "Chapter 1 applies to actions and proceedings brought under [Chapter 2] to the extent that chapter is not in conflict" with Chapter 2. 9 USC § 208.

SUPREME COURT DECISION

In a unanimous decision delivered by Justice Thomas, with a concurring opinion from Justice Sotomayor, the Supreme Court held that the New York Convention does not conflict with, and thus permits application of, U.S. equitable estoppel doctrines allowing enforcement of arbitration agreement by non-signatories.

The Supreme Court stated that treaty interpretation must begin with the text of the New York Convention. The Court found that the New York Convention "is simply silent on the issue of nonsignatory enforcement."[3] The Court reasoned that only Article II(3) addresses the enforcement of arbitration agreements, and it states

that courts of a contracting state "shall . . . refer the parties to arbitration"; it does not bar contracting states from applying domestic law. Therefore, nothing in the text of the New York Convention conflicts with the application of domestic equitable estoppel permitted under Chapter 1 of the FAA. By contrast, Articles II(1) and (2), which include a requirement that "[e]ach Contracting State shall recognize an agreement in writing," "address the recognition of arbitration agreements, not who is bound by a recognized agreement."[4] Since the three agreements at issue were both written and signed, the agreements were enforceable agreements under the New York Convention; the scope of the persons bound by the arbitration agreement could then be determined by domestic law.[5]

The Supreme Court also considered the negotiation and drafting history of the treaty, as well as the post-ratification understanding of signatory nations, which the Court said "confirms our interpretation of the Conventions' text."[6] Specifically, the Court found that the drafting history "shows only that the drafters sought to impose baseline requirements on contracting states" and that nothing suggested that the New York Convention sought to prevent contracting states from applying their respective domestic laws that permit non-signatories to enforce arbitration agreements in additional circumstances.[7] Further, the Court noted that the courts of numerous contracting nations permit enforcement of arbitration agreements by entities who did not sign an arbitration agreement.[8] The Court remanded the case to the lower courts to determine whether GE Energy can enforce the arbitration clauses under the doctrine of equitable estoppel.

Justice Sotomayor joined the Court's opinion, but added a separate concurrence noting that the application of domestic doctrines, such as equitable estoppel, "must be rooted in the principle of consent to arbitrate."[9] Justice Sotomayor suggested that neither the FAA nor the New York Convention would countenance the application of doctrines under which a signatory might be compelled to arbitrate a dispute with a party that was not within the scope of the signatory's consent.[10]

IMPLICATIONS

The Supreme Court's decision opens the door to the application of domestic equitable doctrines allowing non-signatories to enforce international arbitration agreements in the U.S. This is particularly important where a transaction may involve multiple related contracts and sub-contracts with different parties, not all of which contain arbitration agreements.

As a result, when including an arbitration clause in an international contractual agreement, or considering disputes with parties related to a contract containing an arbitration clause, it is important to consider the governing law of the contract, where it can be enforced, and the circumstances in which those jurisdictions may permit non-signatories to enforce arbitration agreements. For instance, the Fifth and Eleventh Circuit Courts of Appeals have applied an intertwined-claims test, in which a non-signatory can compel arbitration in two different circumstances: (i) "when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory";

and (ii) "when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract."[11] Individual state laws vary. In all cases, the application of equitable estoppel is a fact-intensive determination.

Further, Justice Sotomayor's concurrence suggests a limitation on the expansion of arbitrations to include non-signatories: courts must still examine whether the signatory consented to arbitrate the particular dispute with the particular non-signatory. In cases where, as here, a non-signatory is compelling arbitration against a signatory who agreed to arbitrate disputes arising out of the contract and specifically envisioned arbitration with the non-signatory, there is a strong case for finding consent to arbitrate. In other situations, however, a signatory's consent could be more narrowly construed to be an agreement to arbitrate only with the other signatory, or an agreement to arbitrate only disputes arising out of a particular subject matter. In addition, circumstances in which a *signatory* seeks to compel a *non-signatory* to arbitrate a dispute raise entirely different questions not addressed by today's opinion.

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ENDNOTES

[1] The Ninth and Eleventh Circuit Courts of Appeals had denied a non-signatory's ability to compel arbitration against a signatory under the New York Convention. *See Yang* v. *Majestic Blue Fisheries, LLC*, 876 F.3d 996 (9th Cir. 2017); *Outokumpu Stainless USA, LLC* v. *Converteam SAS*, 902 F.3d 1316 (11th Cir. 2018). The First and Fourth Circuit Courts of Appeals had allowed a non-signatory to compel arbitration in such circumstances. *See Aggarao* v. *MOL Ship Mgmt. Co.*, 675 F.3d 355 (4th Cir. 2012); *Sourcing Unlimited, Inc.* v. *Asimco Int'l, Inc.*, 526 F.3d 38 (1st Cir. 2008).

[2] *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 630-31 (2009) (Arbitration agreements may be enforced by non-signatories through "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.") (internal quotations and citation omitted).

[3] *GE Energy Power Conversion France SAS* v. *Outokumpu Stainless USA, LLC*, No. 18-1048, 2020 WL 2814297, at *5 (June 1, 2020).

[4] *Id.* at *7. In other words, Articles II(1) and II(2) address the creation of arbitration agreements, not the enforcement of arbitration agreements.

[5] *Id.* The Court expressly did not address whether the language in Article II(2) that the term "agreement in writing" (defining arbitration agreements entitled to recognition) "shall include an arbitral clause . . . signed by the parties" means that a signed agreement is required. *Id.* n.3.

[6] *Id.* at *7.

[7] *Id.* at *6.

[8] *Id.* at *6 (*citing* 1 G. Born, International Commercial Arbitration § 10.02, pp. 1418–1484 (2d ed. 2014)).

[9] *Id.* at *8.

[10] *Id.*

[11] *See, e.g.*, *MS Dealer Serv. Corp.* v. *Franklin*, 177 F.3d 942, 947 (11th Cir. 1999); *Grigson* v. *Creative Artists Agency L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000).

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