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Not a Party, Not a Problem: SCOTUS Rules That Non-Signatories Can Enforce International Arbitration Agreements in U.S. Courts

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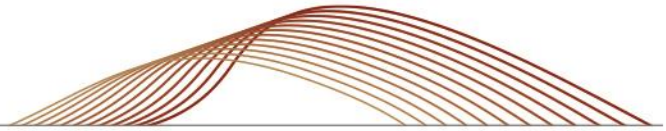
Overview

In *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC*, 590 U.S. __ (2020), the U.S. Supreme Court resolved a long-standing question of often critical importance to international commercial disputes in determining whether a nonsignatory to an international arbitration agreement may enforce that arbitration agreement in U.S. courts under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). In a unanimous decision, authored by Justice Thomas, the Court held that the New York Convention—as implemented in the United States via Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201, *et seq*. ("FAA")—permits nonsignatories to international arbitration agreements to compel arbitration based on domestic-law equitable estoppel doctrines.

The Court's decision resolves a question that has divided lower courts and broadens the reach of international arbitration as a viable dispute resolution mechanism under U.S. law, determining *which parties* may enforce or be bound by an international arbitration agreement. At the same time, the Court left a number of important questions unanswered regarding the application of the nonsignatory doctrine itself—questions that may limit the practical import of the Court's opinion. In the wake of the Court's decision, parties either considering an action to compel arbitration against a nonsignatory or faced with an action to compel arbitration should evaluate carefully both U.S. and foreign law regarding the availability and application of potential legal mechanisms to reach nonsignatories.

Background

In 2007, the U.S. subsidiary of Finnish stainless-steel producer, Outokumpu Stainless Steel USA ("Outokumpu") entered into an agreement with French engineering company, Fives ST Corp ("Fives"), for the purchase and supply of cold rolling mill units, which Outokumpu planned to use to manufacture stainless steel at its plant in Alabama. The supply agreement contained a list of mandatory subcontractors that Fives could use to supply necessary components for the mill units. That agreement also contained an arbitration clause requiring that "all disputes arising between both parties in connection with the performance of the contract" be resolved by arbitration in Dusseldorf, Germany, under German law, and in accordance with the Arbitration Rules of the International Chamber of Commerce.



Three weeks after Fives and Outokumpu executed their supply agreement, Fives entered into a subcontractor agreement with General Electric's French subsidiary, GE Power Conversion France SAS ("GE France")—one of the enumerated vendors in the supply agreement—to manufacture and install nine large electric motors to be used in the cold rolling units at the Outokumpu plant. Between 2011 and 2012, GE France supplied and installed the requisite motors for the plant. Several years later, however, the motors allegedly began to fail.

As a result, in June 2016, Outokumpu and its insurers sued GE France in the Alabama state court, alleging, *inter alia*, negligence and breach of warranty. GE France successfully removed the suit to federal district court under Chapter 2 of the FAA (9 U.S.C. §205), where GE France then sought to compel arbitration of Outokumpu's claims. Although GE France conceded that it was not a party to the overarching Outokumpu-Fives supply agreement, or that agreement's arbitration clause, GE France argued that Outokumpu should nonetheless be required to arbitrate its dispute against GE France based on the common-law doctrine of equitable estoppel. Generally, in the context of arbitration, equitable estoppel allows a nonsignatory to a written agreement containing an arbitration clause to compel arbitration where a signatory to the agreement must rely on the agreement's terms in asserting its claims against the nonsignatory.[1]

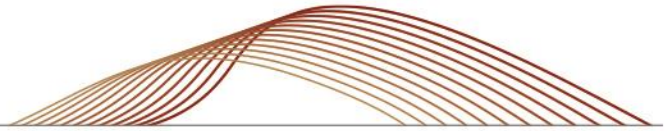
Procedural History

The U.S. District Court for the Southern District of Alabama evaluated GE France's motion to compel under the New York Convention and Chapter 2 of the FAA, the latter of which codified and implemented the New York Convention in the United States. The New York Convention, established in 1958, obligates its signatories, including the United States and approximately 160 other nations, to enforce international arbitration agreements and foreign arbitral awards involving parties hailing from the Convention's member states. The United States ratified the New York Convention in 1970.

In a landmark 1985 decision, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, the U.S. Supreme Court confirmed that U.S. courts have the power to refer disputes involving foreign parties to arbitration under the New York Convention, via Chapter 2 of the FAA, so long as the Convention's requisite conditions are met.[2] In the present case, because Outokumpu was a domestic party and GE France a foreign party, GE France's motion to compel was governed by Chapter 2 of the FAA—as opposed to Chapter 1, which governs domestic arbitration agreements and awards.

Against this backdrop, the district court granted GE France's motion to compel arbitration, holding that the New York Convention permits a nonsignatory to enforce an arbitration agreement where there exists an "agreement in writing" within the meaning of the Convention's Article II. The district court concluded that such a written agreement existed between Outokumpu and GE France because the supply contract between Outokumpu and Fives included subcontractors such as GE France in its definitions of "Buyer" and "Seller."

On appeal, the U.S. Eleventh Circuit Court of Appeals reversed the decision. The Eleventh Circuit held that, because the New York Convention explicitly requires that "the arbitration agreement be signed by the parties before the Court or their privities," GE France could not compel Outokumpu to arbitrate under Chapter 2 of the FAA. In reaching this conclusion, the Eleventh Circuit joined the Ninth Circuit[3] in establishing a categorical rule prohibiting nonsignatories from enforcing international arbitration agreements under the New York Convention on the basis of equitable estoppel or other related common-law contract doctrines. In contrast, both the First and Fourth Circuits had adopted the



position that the New York Convention's "agreement in writing" requirement did not bar nonsignatories from enforcing otherwise valid international arbitration agreements.[4]

The Supreme Court's Decision

In a relatively concise decision, the Supreme Court held that the New York Convention does not categorically prohibit a party from invoking domestic common law nonsignatory doctrines, such as equitable estoppel, in support of enforcing an international arbitration agreement.

The Court engaged in a careful textual analysis of Article II of the New York Convention. The Court began its analysis with its prior decision in *Arthur Andersen LLP v. Carlisle*,[5] which held that a nonparty to the relevant arbitration agreement may invoke Chapter 1 of the FAA "if the relevant state contract law allows him to enforce the agreement" through doctrines such as "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." The Court explained that, just as *Arthur Andersen* found that Chapter 1 of the FAA did not "'alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)'" in the domestic arbitration context, nothing in the text of the New York Convention "otherwise prohibit[s] the application of domestic equitable estoppel doctrines" to enforce international arbitration agreements.[6] To the contrary; the Court observed that Article II is "simply silent" on the issue of nonsignatory enforcement.[7] That silence, the Court held, "is dipositive."[8]

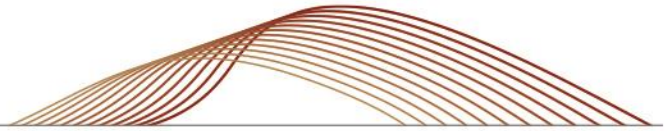
The Court further reasoned that, because the New York Convention was drafted against the backdrop of domestic law, it would be "unnatural" to read the Convention as excluding domestic doctrines such as equitable estoppel from the mechanisms available to enforce arbitration agreements.[9] Rather, the nonexclusive language in Article II of the New York Convention contemplates using domestic contract law doctrines to fill any gaps in the Convention.[10] Accordingly, the Court concluded, the application of domestic equitable estoppel doctrines permitted under Chapter 1 does not conflict with the Convention.

The Court also emphasized that the court of appeals erroneously conflated the formal requirements of an arbitration agreement under the Convention's Article II with the separate question of *who* may be entitled to enforce that agreement. As the Court explained, although Articles II(1) and (2) of the Convention do require that the parties actually sign an agreement to arbitrate their disputes in order to compel arbitration, those provisions only govern what constitutes an arbitration agreement within the meaning of the Convention.[11] Article II(3) of the Convention, on the other hand, speaks to who may request arbitration under that agreement, and "does not prohibit the application of domestic law."[12] The Court then noted that its textual interpretation of the New York Convention accorded with the Convention's drafting history and post-ratification understanding of other contracting states.[13]

In a concurring opinion, Justice Sotomayor underscored that the application of domestic contract law doctrines, such as equitable estoppel, by nonsignatories must remain constrained by the FAA's "basic precept" that arbitration is a matter of consent.[14] Justice Sotomayor cautioned that courts must still "determine, on a case-by-case basis, whether applying a domestic non-signatory doctrine would violate the FAA's inherent consent restriction."[15]

Practical Impact of the Court's Decision

The Court's decision provides much-needed clarity to U.S. courts by resolving a question that has divided lower courts and removing one crucial barrier to the potential enforcement of international arbitration agreements (and ultimately, to arbitration awards) under U.S. law against nonsignatories.



At the same time, however, the Court left a number of important questions necessary to resolve the parties' dispute unanswered regarding the application of the nonsignatory doctrine itself.

As the Court noted, because the court of appeals prematurely concluded that the New York Convention prohibits enforcement of international arbitration agreements by nonsignatories, it did not reach the critical questions of whether GE France could actually enforce the arbitration clause against Outokumpu under principles of equitable estoppel, or even which body of law governs that determination.[16] Those difficult questions remain in the case, and will have to be resolved by lower courts.[17]

Critically, it is unclear whether U.S. law even applies in this case.[18] Under the contracts that GE France seeks to enforce against Outokumpu, both the procedural law governing the arbitration (due to the seat of the arbitration) and the substantive law governing the validity and enforcement of the contract (due to the governing law clause) could be German law. Thus, to compel arbitration under the equitable estoppel principles, the courts on remand would have to determine via a conflicts of laws analysis either that U.S. law—not German law—applies to the nonsignatory questions, or that the German law similarly recognizes the doctrine of equitable estoppel.[19]

Consequently, a party that is considering an action to compel arbitration against a nonsignatory, or one that is faced with action to compel arbitration against it, would be well-advised to evaluate both U.S. and foreign law regarding the availability and application of potential domestic and foreign law nonsignatory doctrines under both Chapters 1 and 2 of the FAA.

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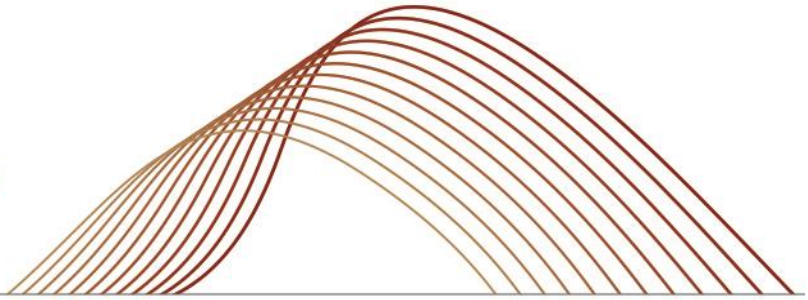

[1] *GE Energy*, 590 U.S. __ (2020) (No. 18-1048), slip op. at 4 (citing 21 Richard A. Lord, Williston on Contracts, § 57:19, at 183 (4th ed. 2001)).

[2] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

[3] *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996 (9th Cir. 2017).

[4] *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 47 n.7 (1st Cir. 2008); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 n.7 (4th Cir. 2000).

[5] *Arthur Andersen LLP v. Carlisle*, 556 U. S. 624, 630 (2009).

[6] 590 U.S. __ (2020) (No. 18-1048), slip op. at 3-4, 6 (quoting *Arthur Andersen*, 556 U. S. at 630).

[7] *Id*.

[8] *Id*.

[9] *Id*. at 7.

[10] *Id*.

[11] *Id*. at 11.

[12] *Id.*

[13] *Id.* at 8-10.

[14] 590 U.S. __ (2020) (No. 18-1048), slip op. at 1 (Sotomayor, J., concurring).

[15] *Id*. at 2.

[16] 590 U.S. __ (2020) (No. 18-1048), slip op. at 12.

[17] *Id*.

[18] 590 U.S. __ (2020) (No. 18-1048), slip op. at 2 (Sotomayor, J., concurring).

[19] *See, e.g.*, Brief for George A. Bermann, et al. as *Amicus Curiae* Supporting Petitioner, *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC*, 590 U.S. __ (2020) (No. 18-1048) at 25-26.