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JUNE 9, 2020

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Supreme Court Broadens Non-Signatory Enforcement of Arbitration Agreements Under the New York Convention

I. INTRODUCTION[1]

On Monday, June 1, 2020, the Supreme Court of the United States addressed the scope of enforceability by non-signatories of arbitration agreements under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[2] In a 9–0 decision, the court held that the New York Convention does not conflict with domestic equitable estoppel doctrines permitting the enforcement of arbitration agreements by non-signatories, resolving a split amongst the Courts of Appeals, and significantly expanding the scope of non-signatory enforcement under U.S. law.

II. BACKGROUND

In 2007, ThyssenKrupp Stainless USA, LLC contracted with F.L. Industries, Inc. for the construction of cold rolling mills at ThyssenKrupp's steel manufacturing plant in Alabama. F.L. Industries then subcontracted the supply of motors to power the mills to Petitioner GE Energy.[3] After the motors allegedly failed, Respondent Outokumpu Stainless USA, LLC, which had acquired the plant from ThyssenKrupp in 2012, brought claims against GE Energy in Alabama state court. GE Energy removed the case to federal court and moved to compel arbitration on the grounds that the contracts between ThyssenKrupp and F.L. Industries contained arbitration clauses requiring that disputes be resolved by arbitration in Germany under German law.

The United States District Court for the Southern District of Alabama granted GE Energy's motion to compel, concluding that both Outokumpu and GE Energy were parties to the arbitration agreement.[4] On appeal, the Eleventh Circuit reversed, holding that GE Energy, as a non-signatory to the contracts between Outokumpu and F.L. Industries, could not compel arbitration because "the [New York] Convention requires that the arbitration agreement be signed by the parties before the Court or their

privities."[5] The Eleventh Circuit's decision thus enlarged the "circuit split" on the issue of the scope of non-party enforcement of international arbitration agreements under the New York Convention.[6]

III. THE SUPREME COURT'S DECISION

The Supreme Court unanimously reversed, holding that "[t]he New York Convention does not conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by non-signatories,"[7] and remanded to the Eleventh Circuit to determine: (i) whether GE Energy could enforce the arbitration clauses under equitable estoppel principles; and (ii) what body of law governs that determination.[8]

Writing for the court, Justice Thomas began by examining Chapter 1 of the Federal Arbitration Act (FAA), which governs domestic arbitration and permits a non-signatory to invoke state-law doctrines — including assumption, veil-piercing, alter ego, incorporation by reference, third-party beneficiary theories, waiver, and estoppel — to enforce an arbitration agreement.[9] Turning to the text of the New York Convention, the court determined that only one article of the treaty, Article II, addresses arbitration agreements, and only Article II(3) refers to the enforcement of such agreements.[10] The Court found the New York Convention's silence to be dispositive, holding that "nothing in the text of the Convention could be read to otherwise prohibit the application of domestic equitable estoppel doctrines."[11] The Court further explained that such interpretation is consistent with the text of Article II, which contemplates the "gap-filling" role of domestic doctrines by declining to define terms that must be interpreted under domestic law.[12]

Though the Court based its decision on a textual analysis of Article II of the Convention, it also examined two additional sources: (i) the "post-ratification understanding" of other contracting parties to the Convention; and (ii) the Executive branch's interpretation of the Convention. With respect to the former, the Court found that the weight of authority from other contracting states — as reflected in court decisions, domestic legislation, and a 2006 recommendation by the United Nations Commission on International Trade Law — indicates that the Convention permits the application of domestic law in addressing the enforcement of international arbitration agreements, but determined that such evidence from decades after the finalization of the Convention's text in 1958, is less likely to reflect the original shared understanding of the treaty's meaning occurred that these.[13] Finally, because the Executive branch's interpretation aligned with the Court's textual analysis in this case, the Court declined to resolve the issue of whether the Executive's interpretation is entitled to any deference.[14]

IV. PRACTICAL CONSIDERATIONS

Outokumpu harmonizes U.S. arbitration law by both resolving a split within the Courts of Appeals and aligning the approaches governing domestic and international arbitration agreements in the U.S. courts; it also brings the U.S. approach to non-signatory enforcement in line with the law in the overwhelming majority of contracting states to the New York Convention.

However, though *Outokumpu* opens the door to non-signatory enforcement of international arbitration agreements, the question remains: What estoppel doctrine applies? The *Outokumpu* decision leaves difficult choice-of-law questions, which often involve complex and indeterminate balancing tests in both the domestic and international contexts, to the lower courts. Moreover, it remains to be seen whether the courts will seek to impose any constraints on the application of domestic doctrines to permit non-signatory enforcement. In a separate concurring opinion, Justice Sotomayor notes the significant variance in state law equitable estoppel doctrines, and opines that any non-signatory doctrine must reflect the foundational principle underlying the FAA, the consent to arbitrate.[15] Where one party, by definition, is a non-signatory to an agreement to arbitrate, such a limitation would present interesting questions regarding the scope of the rule. Thus, while *Outokumpu* resolves a threshold question concerning non-signatory enforcement, significant questions remain to be sorted out by lower U.S. courts.

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[1] The authors would like to thank Joshua S. Wan, an associate in King & Spalding's Trial & Global Disputes Practice in New York. Joshua's practice focuses on international arbitration and litigation.

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

[3] *Id*. at *2-3.

[4] *Outokumpu Stainless USA LLC v. Converteam SAS*, NO. 16-00378-KD-C, 2017 WL 480716 (S.D. Ala. Feb. 3, 2017).

[5] *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1325 (11th Cir 2018).

[6] Whereas the Ninth and Eleventh Circuits rejected non-signatory enforcement of international arbitration agreements, *Outokumpu*, 902 F.3d at 1326; *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1001-02 (9th Cir. 2017), the First and Fourth Circuits permitted non-signatory enforcement under equitable estoppel principles, *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 375 (4th Cir. 2012); *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 48 (1st Cir. 2008).

[7] *Outokumpu*, 2020 WL 2814297, at *7.

[8] *Id*.

[9] *Id*. at *4 (citing *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631-32 (2009)).

[10] *Id*. at *5.

[11] *Id*.

[12] *Id*. (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639, n. 21 (1985)).

[13] *Id*. at *6-7.

[14] *Id*. at *7.

[15] *Id*. at *8 (Sotomayor, J., concurring).