ALERT MEMORANDUM

Supreme Court Holds That New York Convention Does Not Preclude Non-Signatories From Invoking State Law Principles To Compel Arbitration

June 3, 2020

On June 1, 2020, the United States Supreme Court held that the New York Convention governing international arbitrations does not bar the application of domestic state law principles when determining whether a non-signatory can invoke or be bound by an arbitration agreement. In so doing, the Court confirmed that there is no distinction between domestic arbitration agreements under Chapter 1 of the Federal Arbitration Act and international arbitration agreements under the New York Convention (which has been implemented by Chapter 2 of the Federal Arbitration Act) in terms of who may enforce these agreements, and held that they may be enforced under domestic law contract or other principles.

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Background

Arbitration depends on consent, and so there is a general presumption that only the signatories to a contract containing an arbitration agreement are bound by, or may invoke, the agreement to arbitrate. However, U.S. courts have found there are some circumstances in which a non-signatory to an arbitration agreement may invoke or be bound by an arbitration agreement.

The U.S. Supreme Court held in 2009 that under Chapter 1 of the Federal Arbitration Act ("FAA"), which governs *domestic* arbitration agreements, "background principles of state contract law" govern whether non-signatories may be considered as having agreed to arbitrate despite not signing the contract containing the arbitration agreement.[1] U.S. courts have recognized various state law bases to bind non-signatories to arbitration agreements arising out of contract, agency, and corporate law principles, including: (1) incorporation by reference; (2) assignment; (3) agency; (4) estoppel; (5) waiver; and (6) veil piercing/alter ego.[2]

Until Monday's Supreme Court decision, Courts of Appeals were split as to the application of these state law principles to *international* arbitration agreements governed by Chapter 2 of the FAA, which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Some courts had held that non-signatories can enforce arbitration agreements using state law principles, while others, focusing on the New York Convention's requirement that an agreement to arbitrate be in writing, ruled that the New York Convention precludes non-signatories from doing so, given their "non-party" status as to such written agreement.[3]

The Supreme Court's Decision

In *GE Energy Power Conversion France SAS Corp. v. Outokumpu Stainless USA, LLC*, the Supreme Court resolved the split. In a unanimous decision authored by Justice Thomas, the Court held that the New York Convention did not preclude a non-signatory – in this case, GE Energy Power Conversion France SAS, Corp. ("GE Energy") – from seeking to enforce an international arbitration agreement by invoking common law principles routinely relied on in domestic arbitration proceedings.[4] The Supreme Court rejected as formalistic the Eleventh Circuit's interpretation of the requirement of New York Convention Article II(2) that an arbitration agreement be "signed by the parties," as meaning that GE Energy as a non-signatory (but a sub-contractor to the contract with the underlying arbitration agreement) could therefore not seek to compel arbitration.[5]

In reversing the Eleventh Circuit, the Court applied "familiar tools of treaty interpretation," concluding that the text of the New York Convention did "not address whether nonsignatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel."[6] Because the plain language of Article II(3) of the New York Convention – the only provision to address the enforcement of arbitration agreements – does not expressly preclude "the application of domestic laws that are more generous in enforcing arbitration agreements," the Court reasoned that "[t]his silence was dispositive."[7] Therefore, the Court determined that there was no categorical bar to the application of state law principles, applicable under Chapter 1 of the FAA, to international arbitrations subject to Chapter 2 of the FAA.

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[1] *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009).
[2] *See id.* at 631; *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995) (stating that the Second Circuit has "recognized five theories for binding nonsignatories to arbitration agreements").
[3] *Compare Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38 (1st Cir. 2008); *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355 (4th Cir. 2012); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000), *with 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), *cert. granted sub nom. GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 139 S. Ct. 2776 (2019).
[4] *GE Energy Power Conversion France SAS Corp. v. Outokumpu Stainless USA, LLC*, 590 U.S. __, No. 18-1048, 2020 WL 2814297, at *2 (2020).
[5] *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1216, 1326 (11th Cir. 2018).
[6] *GE Energy*, 2020 WL 2814297, at *5.
[7] *Id.*

This textual analysis was reinforced by the Court's consideration of the New York Convention's context. The Court identified various ambiguities and undefined terms in Articles II(1) and II(3) of the New York Convention, and from these ambiguities concluded that the New York Convention "does not set out a comprehensive regime," but rather "contemplate[s] the use of domestic doctrines to fill gaps in the Convention."[8] As the Court explained, the provisions of Article II "address the recognition of arbitration agreements, not who is bound by a recognized agreement. . . . Only Article II(3) speaks to who may request referral [to arbitration] under those agreements, and it does not prohibit the application of domestic law."[9]

The Supreme Court therefore remanded to the Court of Appeals to address whether GE Energy could compel arbitration.[10]

In a concurrence, Justice Sotomayor emphasized that, in all cases, the application of state law principles to permit non-signatories to enforce arbitration agreements was subject to the "important limitation" that such "domestic doctrines must be rooted in the principle of consent to arbitrate" which "governs the FAA on the whole."[11] Acknowledging the lack of any "bright-line test for determining whether a particular domestic nonsignatory doctrine reflects consent to arbitrate," Justice Sotomayor advised lower courts that they "must . . . determine, on a case-by-case basis, whether applying a domestic nonsignatory doctrine would violate the FAA's inherent consent restriction."[12]

Implications of the Case

This decision cements the United States' treatment of the New York Convention as setting a "floor" or "baseline" for the obligation to enforce agreements to arbitrate addressed in the New York Convention (*i.e.*, agreements in writing between the parties to the dispute), but does not displace domestic law to the extent such law supports compelling arbitration in circumstances not addressed by the New York Convention. In reaching this conclusion, the Supreme Court's decision was likely informed by its reference to Article VII(1) of the New York Convention,[13] which permits contracting states to apply more liberal rules for recognition and enforcement and may influence courts' enforcement of international arbitration awards in the future.

Because under Chapter 2 of the FAA (but not under Chapter 1), a U.S. court can compel arbitration pursuant to an agreement to arbitrate covered by the New York Convention wherever the arbitration is seated, even if outside the United States, the question of choice of law remains unresolved by the Supreme Court's decision. Specifically, under which law does a U.S. court decide whether doctrines of assignment, agency, or equitable estoppel permit arbitration with a non-signatory? Should that issue be governed by the state contract law of the forum, federal common law, the substantive law governing interpretation of the contract, or the law of the seat of the arbitration (whether domestic or foreign)?[14] U.S. courts have inconsistently applied one or more of these four possible sources of law to the non-signatory issue. This choice of law question can be significant because as Justice Sotomayor observed in her concurrence, "domestic nonsignatory doctrines vary from jurisdiction to jurisdiction."[15] And although this variation exists among different states, the variation may be even more profound in the context of international arbitrations under the New York Convention that are seated abroad when foreign laws may need to be considered and applied.

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[8] *Id*.
[9] *Id.* at *7.
[10] *Id*.
[11] *Id.* at *8 (Sotomayor, J., concurring).
[12] *Id*.
[13] *Id.* at *4 (majority opinion).
[14] *See, e.g.*, *Meena Enters., Inc. v. Mail Boxes Etc., Inc.*, No. DKC 12-1360, 2012 WL 4863695, at *4 n.6 (D. Md. Oct. 11, 2012) (determining that "[f]ederal common law, rather than state law, applies to [the] estoppel argument").
[15] *GE Energy*, 2020 WL 2814297, at *8 (Sotomayor, J., concurring).