The Arbitration Newsletter

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas, to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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NEW YORK CONVENTION
(DOMESTIC NONSIGNATORIES DICTA!)

GE ENERGY POWER CONVERSION FRANCE SAS, CORP. v.
OUTOKUMPU STAINLESS USA, LLC (June 1, 2020)[2]

An Alabama steel manufacturing plant contracted for construction of "cold rolling mills" in three construction contracts, each with an identical arbitration clause. The contractor entered into subcontract with GE Energy Power Conversion France SAS, Corp. ("GE Energy") for nine motors for the mills. The subcontracted motors failed approximately three years after delivery to the plant. The plant owner sued GE Energy in Alabama state court but GE Energy removed the case to federal court pursuant to the New York Convention (9 U.S.C. §205) ("NYC"). GE Energy then moved the federal district court to dismiss and compel arbitration under the original three contracts, although GE Energy was a nonsignatory to the original contracts.

The district court granted GE Energy's motion to dismiss and compel arbitration against the plant owner and one of its insurers because they both were "Parties" (i.e., "subcontractors"), as defined in the original contracts. The district court did not address GE Energy's "equitable estoppel" argument in support of its motion.

The Eleventh Circuit reversed the district court based on the circuit court's read of the NYC to require only signatories to be compelled to arbitration. The circuit court also held that the NYC's signature requirement conflicted with state-law equitable estoppel and, therefore, the state-law estoppel doctrine was not applicable to NYC nonsignatories. The U.S. Supreme Court granted certiorari because the Eleventh Circuit's holding conflicted with earlier decisions by the First, Fourth, and Ninth Circuits.

[1] Nothing in The Arbitration Newsletter is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of The Arbitration Newsletter is to inform generally. The application of the comments in The Arbitration Newsletter to specific questions and cases should be discussed with the reader's independent legal counsel.

[2] 207 L.Ed. 2d 1, 2020 U.S. LEXIS 3029 (June 1, 2020).

Justice Thomas, writing for a unanimous court, Justice Sotomayor concurring, described the Federal Arbitration Act ("FAA") as putting arbitration agreements "upon the same footing as other contracts"[3] but not changing "background principles of state contract law" that address who is bound by arbitration agreements.[4] The Supreme Court has previously recognized "that arbitration agreements may be enforced by nonsignatories," according to Justice Thomas, who then lists the recognized enforcement doctrines available to nonsignatories.[5] Equitable estoppel permits nonsignatories to compel arbitration when a signatory must rely on the contract (that contains an arbitration agreement) to assert the signatory's claims and to enforce an arbitration agreement against the nonsignatory.[6]

Justice Thomas then turns to the NYC and summarizes what it provides in Articles I through VII, observing that the NYC "focuses almost entirely on arbitral awards."[7] He then summarizes the NYC as adopted by the United States in 1970 as Chapter 2 of the FAA and asks does Chapter 1 of the FAA (especially its "equitable estoppel doctrines") conflict with Chapter 2 of the FAA.[8]

The Court's answer begins with the observation that Chapter 2 of the FAA "does not address whether nonsignatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel."[9] Quoting Scalia and Garner, Justice Thomas, observes, "a matter not covered is to be treated as not covered."[10] The Court reads Article II (3), the only NYC provision that addresses arbitration agreements, to contain no "exclusionary language" or other limitations on what arbitration agreements are enforceable under the NYC.[11] There are other provisions in Article II that "contemplate the use of domestic doctrines to fill gaps in the [NY] Convention."[12] The nonexclusive language of Article II permits "the use of domestic law to enforce arbitration agreements and, therefore, does not conflict with "the application of domestic equitable estoppel doctrines permitted under Chapter 1 of the FAA."[13] Justice Thomas also considered the drafting and ratification history of the NYC and found nothing that prevented the contracting states from applying domestic law "that permits nonsignatories to enforce arbitration agreements in additional circumstances."[14]

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[3] 2020 U.S. LEXIS 3029, **9; c*iting* Volt Information Systems (489 U.S. 468, 474) and Scherk (417 U.S. 506, 511).
[4] 2020 U.S. LEXIS 3029, **9; c*iting* Arthur Andersen (556 U.S. 624, 630).
[5] 2020 U.S. LEXIS 3019, **9 ("assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary, waiver and estoppel").
[6] 2020 U.S. Lexis 3019, **9; *citing* Williston on Contracts §57:19, pages 183 and 200; and Arthur Andersen, 556 U.S. at 631-32.
[7] 2020 U.S. LEXIS 3019, **10.
[8] 2020 U.S. LEXIS 3019, **12.
[9] 2020 U.S. LEXIS 3019, **12.
[10] 2020 U.S. LEXIS 3019, **12; Scalia and Garner, *Reading Law: The Interpretation of Legal Texts*, 93 (2012).
[11] 2020 U.S. LEXIS 3019, **13.
[12] 2020 U.S. LEXIS 3019, *14.
[13] 2020 U.S. LEXIS 3019, *14.
[14] 2020 U.S. LEXIS 3019, *16.

The Court remanded to the 11th Circuit for consideration of whether GE Energy can enforce the arbitration agreements in question under equitable estoppel and what governing law is applicable.[15]

OBSERVATIONS

1. A unanimous SCOTUS underscores, again, that nonsignatories can enforce arbitration agreements and can be enforced to arbitrate pursuant to domestic U.S. law.

2. The Court recognized "background principles of state contract law" that determine who can be "bound by arbitration agreements."

3. The Court recognized "additional circumstances" in which nonsignatories can enforce arbitration agreements under domestic state contract law.

4. Equitable estoppel doctrines available to and against nonsignatories are described in this opinion as "other circumstances,"[16] "more generous,"[17] and "additional circumstances."[18]

5. The arbitration agreement drafter should be aware of applicable state law regarding arbitration nonsignatories when deciding what governing state law applies to the arbitration agreement.

6. Nonsignatory enforcement of arbitration agreements is a "recognized" principle by SCOTUS.[19]

JUSTICE SOTOMAYOR'S CONCURRENCE

The concurrence focuses on the essential, basic, inherent, and foundational concept of consent in the FAA, chapter 1. The concurrence emphasizes that all doctrines that permit nonsignatory enforcement of arbitration agreements reflect "consent to arbitrate." Justice Sotomayor recognizes the absence of a bright-line test for nonsignatory enforcement because of varying state-law contract doctrines and points to the reality that lower courts determine on a case-by-case basis whether a nonsignatory enforcement doctrine violates "the FAA's inherent consent restriction."

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[15] 2020 U.S. LEXIS 3019, *20 ("We hold only that the New York Convention does not conflict with the enforcement of arbitration agreements by nonsignatories under domestic-law equitable estoppel doctrines.").
[16] 2020 U.S. LEXIS 3019, **13.
[17] 2020 U.S. LEXIS 3019, **13.
[18] 2020 U.S. LEXIS 3019, **16.
[19] 2020 U.S. LEXIS 3019, **9 ("For example, we have recognized that arbitration agreements may be enforced by nonsignatories through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.'"); *citing* Arthur Andersen, 556 U.S. 624, 630 (2009), and 24 R. Lord, Williston on Contracts §57:19, page 183 (4th ed. 2001).