

U.S. Supreme Court Rules on Whether Domestic Doctrines Bind Non-Signatories to Int'l Arbitration Agreement Under New York Convention



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On 1 June 2020, the U.S. Supreme Court (the **Supreme Court**) issued its unanimous decision in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*.

The issue of the case can be summarized as follows: whether the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the **New York Convention**), conflicts with domestic doctrines (such as equitable estoppel) that permit the enforcement of arbitration agreements by non-signatories.

The Supreme Court answered in the negative: the New York Convention does not conflict with such domestic doctrines. Therefore, under the New York Convention, individuals or entities that have not signed an arbitration agreement (*i.e.*,

non-signatories) are allowed to compel arbitration under the domestic doctrine of equitable estoppel.

The decision is important in many aspects. Most notably, the decision reaffirms the New York Convention's pro-arbitration policy and shines light on the symbiotic interaction between Chapters 1 and 2 of the Federal Arbitration Act (the **FAA**).

Factual background

The case has international traits since its inception. It involves a dispute between *GE Energy Power Conversion France (GE Energy)*, a French arm of GE Corporation, and *Outokumpu Stainless USA (Outokumpu)*. Outokumpu filed suit in Alabama. However, GE Energy moved to compel arbitration in Germany.

The factual background of the case is relatively straightforward.

Outokumpu Stainless USA, an American wholly owned subsidiary of a global stainless-steel manufacturer, organized under the laws of Finland, entered into a series of contracts with *Fives St Corp. (Fives)* for the purchase and construction of three cold rolling mills at Outokumpu's stainless-steel manufacturing plant in Alabama. The contracts provided that all disputes arising between the parties should be referred to arbitration in Dusseldorf, Germany, according to the Rules of Arbitration of the International Chamber of Commerce. After the contracts were executed with Outokumpu, Fives entered into a subcontract with GE Energy for the manufacture of the motors for the mills^[1].

After the motors allegedly failed, Outokumpu and its insurers filed a suit against GE Energy in the Circuit Court of Mobile County, Alabama. The case was later removed^[2] to the District Court for the Southern District of Alabama (the **District Court**) and GE Energy moved to compel arbitration despite not being a signatory of the Outokumpu-Fives contracts.

The District Court granted GE Energy's motion to compel arbitration and dismissed the action. The District Court concluded that the subcontractors could not be excluded from the meaning of "*parties*" in the arbitration agreements signed between Outokumpu and Fives. This conclusion was sufficient to compel arbitration and the District Court deemed it unnecessary to address GE Energy's equitable estoppel argument [\[3\]](#).

The U.S. Court of Appeal for the Eleventh Circuit (the ***Eleventh Circuit***) held that GE Energy was not entitled to compel arbitration since there was no arbitration agreement in writing between GE Energy and Outokumpu within the meaning of the New York Convention. According to the Eleventh Circuit, the New York Convention requires the arbitration agreement "*to be signed by the parties before the Court or their privities*". As a result, GE Energy could not compel Outokumpu to arbitrate, as it did not sign the original agreement.

More significantly, the Eleventh Circuit held that although a non-signatory is allowed to compel arbitration through estoppel under Chapter 1 of the FAA, which governs domestic arbitration agreements, "*because Chapter 1 does not expressly restrict arbitration to the specific parties to an agreement*", this was not the case under Chapter 2 of the FAA which concerns international arbitration proceedings and which implements the New York Convention. According to the Eleventh Circuit, the language of the New York Convention "*only allows the enforcement of agreements in writing signed by the parties*".

In doing so, the Eleventh Circuit relied upon a very restrictive interpretation of the New York Convention, thus prohibiting non-signatory enforcement of international arbitration agreements in all circumstances.

The Supreme Court's Ruling

The Supreme Court granted GE Energy's petition for a writ of certiorari in view of the existing split between the Courts of Appeals on this issue.

The question addressed was narrow, albeit significant: whether the New York Convention (and Chapter 2 of the FAA) also permits a non-signatory to compel international arbitration based on the state law doctrine of equitable estoppel. In a 12-page opinion authored by Justice Thomas, the Supreme Court held that equitable estoppel doctrines did not conflict with the New York Convention (and Chapter 2 of the FAA).

Through its ruling in *Arthur Andersen v. Carlisle*, the Supreme Court had already determined that Chapter 1 of the FAA permitted courts to apply domestic doctrines related to the enforcement of domestic arbitration agreements. Accordingly, in Chapter 1 cases, a non-signatory could invoke state law equitable estoppel doctrines—and other “*traditional principles of state law*”—to enforce a domestic arbitration agreement. The Supreme Court now had to decide whether the doctrine of equitable estoppel could also be applied to agreements subject to the New York Convention.

Faced with that issue, the Supreme Court recognized that the text of the New York Convention was “*simply silent*” and did “*not address whether non-signatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel*”. The Supreme Court concluded that the “*silence is dispositive*” and that, in general, “*a matter not covered is to be treated as not covered*”.

Consequently, the Supreme Court held that the text of the New York Convention does not prevent the application of domestic laws and doctrines—as equitable estoppel—that are “*more generous*” in enforcing arbitration agreements. In other words, the New York Convention only established “*baseline requirements*” indicating the types of agreements that Contracting States must recognize; it sets a floor, not “*a*

ceiling that tacitly precludes the use of domestic law to enforce arbitration agreements".

Interpreting the New York Convention's negotiation and drafting history, the Supreme Court found that nothing prohibited Contracting States *"from applying domestic law that permits non-signatories to enforce arbitration agreements in additional circumstances"*. The Supreme Court also resorted to the post-ratification *"understanding"* and *"conduct"* of other New York Convention signatories and governments of Contracting States to reach the conclusion that the application of domestic law was not prohibited.

The Supreme Court, however, did not decide whether the equitable estoppel doctrine was applicable to the case under analysis, directing the Eleventh Circuit to address on remand whether GE Energy can compel international arbitration based on the state law doctrine of equitable estoppel.

In her concurring opinion, Justice Sotomayor acknowledged that the New York Convention did not prohibit the application of domestic doctrines that may allow the enforcement of arbitration agreement by non-signatories. However, Justice Sotomayor found that *"applicable domestic doctrines must be rooted in the principle of consent to arbitrate"* and that courts must determine, on a case-by-case basis, *"whether applying a domestic non-signatory doctrine would violate the FAA's inherent consent limitation"*.

Conclusion

The Supreme Court decision puts an end to a circuit split on the application of traditional principles of state law to arbitration agreements falling under the New York Convention.

Therefore, non-signatories may be bound by or enforce international arbitration agreements through traditional principles of state law, such as assumption, piercing the corporate veil, alter ego, incorporation by reference, third-

party beneficiary theories, waiver and estoppel, as decided in *Arthur Andersen LLP v. Carlisle*.

However, it is important to note that the non-signatory enforcement of arbitration agreements through traditional principles of state law remains an exception. Ordinarily, only those who have formally executed an international arbitration agreement (signatories) remain bound by or may enforce an international arbitration agreement.

[1] The parties had different names when they entered the original contracts/subcontracts. Outokumpu was formerly known as *ThyssenKrupp Stainless USA, LLC*; Fives was called *F.L. Industries, Inc.*; and GE Energy was then known as *Converteam SAS*.

[2] The case was removed to Federal Court at GE Energy's request pursuant to 9 U.S.C. § 205 (which authorizes removal of an action where the subject matter of the suit relates to an arbitration agreement falling under the New York Convention).

[3] The District Court held that all four jurisdictional prerequisites articulated in *Bautista v. Star Cruisers*, 396 F.3d 1289 (11th Cir. 2005) were met. Under *Bautista*, a party may compel arbitration if: (i) there is an agreement in writing signed by the parties or contained in an exchange of letters or telegrams; (ii) the agreement provides for arbitration in the territory of a signatory of the New York Convention; (iii) the agreement arises out of a legal relationship which is considered commercial; and (iv) a party to the agreement is not an American citizen, or that the commercial relationship has some reasonable relation with one or more foreign states.

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