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CASE AT A GLANCE

A 1958 treaty, known as the New York Convention, requires countries to give effect to international arbitration agreements and awards. In this case, the Court must decide whether the Convention allows a non-party to an arbitration agreement to compel arbitration by using the doctrine of equitable estoppel.

GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC
Docket No. 18-1048

Argument Date: January 21, 2020
From: The Eleventh Circuit

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INTRODUCTION

In 1958, the United Nations promulgated the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, more commonly known as the New York Convention. *See* 330 U.N.T.S. 38, 21 U.S.T. 2517, 7 I.L.M. 1046. Today, 161 countries are parties to the Convention, making it one of the most successful commercial treaties ever produced.

The United States acceded to the Convention in 1970. To implement it, Chapter 2 was added to Title 9 of the United States Code. *See* 9 U.S.C. §§ 201–208.

Prior to the addition of Chapter 2, Title 9 had consisted solely of the Federal Arbitration Act (FAA). The FAA was passed in 1925 to "reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts[.]" *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991). Today, the FAA, as amended, constitutes Chapter 1 of Title 9. *See* 9 U.S.C. Sections 1–16. Chapter 1 applies to domestic arbitrations.

Chapter 2 contains a residual application clause (RAC). *See* 9 U.S.C. Section 208. It reads as follows: "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States."

Thus, when confronted with a case subject to the New York Convention, a United States court must consider the Convention; Chapter 2 of Title 9; and, to the extent that it does not cause a conflict, Chapter 1 of Title 9.

As the Eleventh Circuit explained in *Bautista v. Star Cruises,* 396 F.3d 1289 (11th Cir.), *cert. dismissed,* 545 U.S. 1136 (2005), an arbitration agreement is subject to the New York Convention, and therefore Chapter 2, if four elements are present:

> (1) there is an agreement in writing within the meaning of the Convention; (2) the agreement provides for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) 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.

Id. at 1294 n.7.

In the current case, everyone agrees that elements 2 (arbitration in a signatory country—here, Germany), 3 (commercial transaction—here, the sale of machinery), and 4 (at least one non-U.S. citizen—here, a French company) are present. Where the sides disagree, and what the Supreme Court must decide, is whether element 1 (an agreement in writing) is present.

ISSUE

Does the New York Convention allow a non-party to an arbitration agreement to use the doctrine of equitable estoppel to compel arbitration?

FACTS

In May 2007, the German conglomerate Thyssenkrupp AG (TKAG) selected Calvert, Alabama, as the site of its new $4.65 billion carbon and stainless steel factory. Calvert is a suburb of Mobile, Alabama.

On November 25, 2007, Thyssenkrupp Stainless USA, LLC (TKS) TKAG's United States subsidiary, entered into three

contracts—designated 1001, 1002, and 1003—with F.L. Industries, Inc. (FLI), a United States subsidiary of the French conglomerate Fives SA. Pursuant to the contracts, FLI agreed to supply three cold rolling mills (CRMs) to the Calvert factory.

"Rolling" refers to the flattening, shaping, and smoothing of metal by passing it through rollers at high pressure. In cold rolling, the metal is rolled at room temperature; in hot rolling, the metal is heated before being rolled. Cold rolling is both more expensive and more labor intensive than hot rolling, but produces pieces that are stronger and have a better finish.

The contracts gave FLI the right to subcontract the work but specified which subcontractors it could use. *See* Annex A3 of the contracts. On December 18, 2007, FLI entered into a "consortial agreement" with Converteam SAS (CT) and DMS SA, two French companies that were on the list of approved subcontractors. Under the consortial agreement, CT agreed to provide each of the CRMs with three motors.

The TKS-FLI contracts required any disputes to be arbitrated in Düsseldorf, Germany under German law using the arbitration rules of the International Chamber of Commerce (ICC). *See* Sections 23.1, 23.2, 23.5 of the contracts. They additionally described TKS as the "Buyer," FLI as the "Seller," and stated: "When Seller is mentioned it shall be understood as Sub-contractors included, except if expressly stated otherwise." *See* Section 1.2 of the contracts.

The consortial agreement likewise required disputes to be arbitrated using the ICC's rules, but called for the application of French law and made Paris the venue for hearings. In addition, the consortial agreement provided that if TKS and FLI ended up in arbitration, FLI had the right to "join [CT] into the arbitration proceedings with [TKS]…."

In 2011, General Electric purchased CT for $3.2 billion. As a result, CT's name was changed to GE Energy Power Conversion France SAS, Corp. (GE Energy). In 2012, TKAG sold TKS, along with the stainless steel portion of the Calvert factory, to Outokumpu Oyj (OO), a Finnish company, for $3.6 billion. As a result, TKS, which had been renamed Inoxum prior to the sale, became Outokumpu Stainless USA, LLC (OS). In 2013, TKAG sold the carbon steel portion of the Calvert factory to Luxembourg's ArcelorMittal S.A. and Japan's Nippon Steel Corporation for $1.6 billion. In 2014, FLI changed its name to Fives St. Corp.

In 2011, CT/GE Energy began delivering the motors to the Calvert factory; by 2012, all nine had been installed. In June 2014, the motors began to experience problems; by August 2015, all nine had failed. As a result, OS suffered $45 million in damages.

On June 10, 2016, OS, its insurer (Sompo Japan Insurance Company of America), and OO's seven insurers (AIG Europe Limited, AXA Corporate Solutions Assurance SA UK Branch, HDI Gerling UK Branch, MSI Corporate Capital Ltd., Pohjola Insurance Limited, Royal & Sun Alliance PLC, and Tapiola General Mutual Insurance Company) sued GE Energy in the Mobile County Circuit Court. On July 18, 2016, GE Energy, relying on both the New York Convention (9 U.S.C. Section 205) and diversity jurisdiction (28 U.S.C. § 1332), removed the case to the United States District Court for the Southern District of Alabama.

Once in federal court, GE Energy, citing the TKS-FLI contract, moved to compel arbitration in Germany and dismiss OS's lawsuit. On August 17, 2016, OS and the insurers objected to GE Energy's motion and moved to have the case remanded to state court.

On November 22, 2016, United States Magistrate Judge William E. Cassady recommended that OS and the insurers' motion to remand be denied. *See Outokumpu Stainless USA, LLC v. Converteam SAS,* 2016 WL 7423406 (S.D. Ala. 2016). Judge Cassady made no recommendation as to GE Energy's motion: "What is not before the undersigned for decision, and a matter about which the undersigned offers no opinion, is GE Energy's motion to compel arbitration and dismiss."

On December 22, 2016, United States District Judge Kristi K. DuBose adopted Judge Cassady's recommendation to keep the case in federal court. *See Outokumpu Stainless USA, LLC v. Converteam SAS,* 2016 WL 7422675 (S.D. Ala. 2016).

On January 30, 2017, Judge DuBose granted GE Energy's motion to compel OS and its insurer to arbitrate in Germany and dismiss their lawsuit. *See Outokumpu Stainless USA LLC v. Converteam SAS,* 2017 WL 401951 (S.D. Ala. 2017). On February 3, 2017, Judge DuBose similarly granted GE Energy's motion to compel OO's insurers to arbitrate in Germany and dismiss their lawsuit. *See Outokumpu Stainless USA LLC v. Converteam SAS,* 2017 WL 480716 (S.D. Ala. 2017). On March 1, 2017, GE Energy appealed to the United States Court of Appeals for the Eleventh Circuit.

On August 30, 2018, the Eleventh Circuit, in an opinion authored by United States District Judge Beth F. Bloom, sitting by designation, and joined in by United States Circuit Judges Julie E. Carnes and Gerald B. Tjoflat, partially affirmed and partially reversed. *See Outokumpu Stainless USA, LLC v. Converteam SAS,* 902 F.3d 1316 (11th Cir. 2018).

Although the panel agreed with Judge DuBose's decision to deny OS and the insurers' motion to remand, it disagreed with her decision to grant GE Energy's motion to compel arbitration in Germany and dismiss OS and the insurers' lawsuit. On November 9, 2018, in an unpublished order, the Eleventh Circuit denied GE Energy's motions for rehearing and rehearing *en banc.* On February 7, 2019, GE Energy filed a petition for *certiorari* with the United States Supreme Court.

Meanwhile, on December 7, 2018, OS and the insurers submitted a new motion to remand. On March 19, 2019, Judge Cassady recommended that it be granted due to the Eleventh Circuit's conclusion that the New York Convention was inapposite. *See Outokumpu Stainless USA, LLC v. GE Energy SAS,* 2019 WL 2158872, (S.D. Ala. 2019) ("The remaining state-law claims are supplemental in nature, and the Court has inherent authority to remand them to [the] state court…which will decide the merits of the case."). On April 18, 2019, now Chief Judge DuBose adopted Judge Cassady's recommendation. *See Outokumpu Stainless USA, LLC v. Converteam SAS,* 2019 WL 1748110 (S.D. Ala. 2019).

On May 17, 2019, GE Energy appealed Chief Judge DuBose's decision to the Eleventh Circuit. On June 28, 2019, the Supreme Court granted GE Energy's petition for *certiorari*. *See GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC,* 139 S. Ct. 2776 (2019).

In an unpublished order dated August 1, 2019, the Eleventh Circuit refused GE Energy's request to stay its proceedings "pending resolution of GE Energy's appeal in the U.S. Supreme Court." As a result, briefing on the motion to remand was completed in the Eleventh Circuit on November 7, 2019, while briefing on the motion to compel arbitration was completed in the Supreme Court on November 22, 2019.

CASE ANALYSIS

Ordinarily, an arbitration agreement is enforceable only against the parties that have signed it. *See United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960). However, in certain instances a non-party either can compel arbitration or be compelled to arbitrate. This is because, as the Court explained in *Arthur Andersen LLP v. Carlisle,* 556 U.S. 624 (2009):

> Neither [§ 2 nor § 3 of Title 1] purports to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them). Indeed § 2 explicitly retains an external body of law governing revocation (such grounds "as exist at law or in equity"). And we think § 3 adds no substantive restriction to § 2's enforceability mandate. "[S]tate law," therefore, is applicable to determine which contracts are binding under § 2 and enforceable under § 3…. Because "traditional principles" of state law allow a contract to be enforced by or against nonparties to the contract through "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel," 21 R. Lord, Williston on Contracts § 57:19, p. 183 (4th ed.2001), the Sixth Circuit's holding that nonparties to a contract are categorically barred from § 3 relief was error.

Id. at 630–31. Thus, if the relevant state law allows it, an arbitration agreement can be used by, or applied against, a non-party.

Carlisle was a Chapter 1 case, and the Supreme Court has not said whether "background contract principles" can be used in a Chapter 2 case. In her opinion finding that GE Energy could use equitable estoppel—which prevents one party from taking unfair advantage of another party—to compel OS and the insurers to arbitrate in Germany, Judge DuBose assumed that background contract principles can be imported into a Chapter 2 case because of Chapter 2's RAC:

> [I]n order for [GE Energy] to be excluded from "Seller" or "Party" when referring to "Seller," or "Parties" when referring to both "Seller" and "Buyer," the Supply Agreement must "expressly state[ ] otherwise." (*Id.*)
>
> Viewing the Supply Agreements as a whole and construing any ambiguities against [TKS] as the drafter, the Court finds that the plain language of the arbitration provisions[ ] supports a reasonable interpretation that subcontractors are not expressly excluded from the meaning of "parties" in the arbitration provisions. There is simply no express statement, as required by the Supply Agreements, whereby the subcontractors are excluded as "Seller" or "parties."

2017 WL 401951, at *4 (footnotes omitted).

In disagreeing with Judge DuBose's conclusion, Judge Bloom wrote:

> The district court determined that GE Energy and [OS] were parties to the Contracts by tracing the definitions of "Buyer" and "Seller," which included subcontractors unless explicitly stated otherwise, and the definition of "parties" as "Buyer" and "Seller." Inserting these definitions into the arbitration clause, the district court found that there was an agreement in writing under the meaning of the Convention which required [OS] and GE Energy to arbitrate.
>
> However, GE Energy is undeniably not a signatory to the Contracts. At the time the Contracts were signed by [TKS] and [FLI], GE Energy was a stranger to the Contracts and, at most, a potential subcontractor. Private parties—here [TKS] and [FLI]—cannot contract around the Convention's requirement that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration. New York Convention, Article II, ¶ 1; *see also Czarina, L.L.C. v. W.F. Poe Syndicate,* 358 F.3d 1286 (11th Cir. 2004) (finding sample wording, not signed by the parties, did not satisfy the "agreement in writing" requirement); *Yang [v. Majestic Blue Fisheries, LLC,* 876 F.3d 996 (9th Cir. 2017)] (finding "agreement in writing" requirement not satisfied to compel arbitration between a non-signatory company and signatory employee). Accordingly, we hold that, to compel arbitration, the Convention requires that the arbitration agreement be signed by the parties before the Court or their privities….
>
> Although parties can compel arbitration through estoppel under Chapter 1 of the FAA, estoppel is only available under Chapter 1 because Chapter 1 does not expressly restrict arbitration to the specific parties to an agreement. *See Arthur Andersen LLP v. Carlisle,* 556 U.S. 624, 630–31, 129 S. Ct. 1896, 1902, 173 L.Ed.2d 832 (2009). But the Convention imposes precisely such a restriction. New York Convention, Article II, ¶ 2 (requiring that an "agreement in writing" be "signed by the parties or contained in an exchange of letters or telegrams"). Thus, GE Energy cannot compel [OS] to arbitrate through estoppel. For this same reason, GE Energy also cannot compel arbitration through a third-party beneficiary theory because, again, the Convention requires that the agreement to arbitrate be signed by the parties (or exchanged in letters or telegrams).

902 F.3d at 1326–27 (emphasis in original; footnote omitted).

As is obvious, Judges DuBose and Bloom read Article II of the New York Convention quite differently. In relevant part, it states:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

As noted by Judge Bloom, the Ninth Circuit (in *Yang*) also reads Article II to preclude importing Chapter 1's background contract principles into a Chapter 2 case. Two other circuits, however, have reached the opposite conclusion.

In *Sourcing Unlimited, Inc. v. Asimco International, Inc.,* 526 F.3d 38 (1st Cir. 2008), the First Circuit wrote: "The fact that the defendants are not signatories is not a basis on which arbitration may be denied."

Likewise, the Fourth Circuit has twice held that an arbitration clause can apply to a non-party in a Chapter 2 case. In *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,* 206 F.3d 411 (4th Cir. 2000), a case with facts remarkably like those in the OS-GE Energy dispute, the court explained:

> International Paper is estopped from refusing to arbitrate its dispute with Schwabedissen. The Wood–Schwabedissen contract provides part of the factual foundation for every claim asserted by International Paper against Schwabedissen. In its amended complaint, International Paper alleges that Schwabedissen failed to honor the warranties in the Wood–Schwabedissen contract, and it seeks damages, revocation, and rejection "in accordance with" that contract. International Paper's entire case hinges on its asserted rights under the Wood–Schwabedissen contract; it cannot seek to enforce those contractual rights and avoid the contract's requirement that "any dispute arising out of" the contract be arbitrated. The district court did not err in so holding.

Id. at 418.

More recently, in *Aggarao v. MOL Ship Management Co.,* 675 F.3d 355 (4th Cir. 2012), the Fourth Circuit decided that using equitable estoppel in a Chapter 2 case is appropriate where the claims against both the defendant that signed the arbitration agreement and the defendant that did not are "based on the same facts," are "inherently inseparable," and "fall within the scope of the arbitration clause."

SIGNIFICANCE

On its face, Article II is quite clear: only the actual parties to an arbitration agreement are bound by it and entitled to take advantage of it. Thus, if the Supreme Court decides to read the Convention literally, OS and the insurers should prevail.

On the other hand, if the Court takes a more liberal view of Article II's language, then it should have no trouble finding for GE Energy. In its amicus brief, the United States believes this is the correct approach, especially given how other countries are interpreting Article II:

> For example, the Federal Supreme Court of Switzerland recently rejected the argument that Article II of the Convention prohibits a nonsignatory from enforcing an arbitration agreement. See Bundesgericht [BGer], Case No. 4A_646/2018 (Apr. 17, 2019), ¶ 2.4….
>
> Courts in other Contracting States likewise have concluded that the Convention's form provisions in Article II do not bar application of domestic-law doctrines that govern when a nonsignatory may invoke or be bound by an arbitration agreement. *See*, for example, Bundesgerichtshof [BGH] [Federal Court of Justice], Case No. III ZR 371/12 (May 8, 2014)…(decision by the German Federal Court of Justice concluding that the form provisions in Article II would not prevent applying an arbitration clause to a nonsignatory under domestic law doctrines); Phillippe Pinsole, *A French View on the Application of the Arbitration Agreement to Non-signatories, in The Evolution and Future of International Arbitration* (Stavros Brekoulakis et al. eds., 2016) ¶ 12.33, at 214 (providing English translation of Paris Court of appeal cases)….

Id. at 26–28.

In their joint reply brief, OS and the insurers dispute that foreign countries (particularly Germany) recognize equitable estoppel, which they describe as a "unique" U.S. doctrine.

Other amici supporting GE Energy take a different tack. In their view, a decision to read the Convention strictly will make international arbitration less attractive. For example, the Miami International Arbitration Society predicts this will occur because

> [i]nternational transactions often involve multiple parties, subsidiaries, and subcontractors, each with their own contracts and agreements. It would be impossible for parties to extend arbitration agreements to include every potential party as a signatory. The Eleventh Circuit's decision suppresses efficient international contracting by imposing such a requirement on agreements subject to the Convention. Should this Court affirm, international arbitration would lose favor as a viable dispute resolution mechanism.

Id. at 21.

In their joint reply brief, OS and the insurers argue that the exact opposite is true: "[B]y expanding a party's arbitration obligations beyond the scope of the consent expressed in its written arbitration agreement, GE France's position would undermine incentives to enter such agreements in the first place." *Id.* at 49.

As amicus supporting OS and the insurers, the Public Citizen Litigation Group, a consumer advocacy organization, makes the same point:

> Invocation of federal policy supporting arbitration of international disputes cannot justify expanding the Convention's scope beyond what its terms allow. Federal policy favors arbitration only where parties have consented to it. Adhering to the plain terms of the Convention comports with that policy. By contrast, importing expansive notions of equitable estoppel into the Convention threatens to force international businesses, as well as American workers and consumers, to resolve grievances before foreign tribunals in the absence of their consent to do so.

Id. at 2–3.

Public Justice, P.C., a national public interest law firm supporting neither OS and the insurers nor GE Energy, has urged the Court to focus on what it sees as a more pressing issue:

> But the question of whether Chapters 1 and 2 of the FAA provide the same rights to nonsignatories sidesteps an even more fundamental question: what is meant by the "doctrine of equitable estoppel"? That foundational question should not linger in the shadows of this Court's opinion in this case; the Court should address it directly.…
>
> Traditionally, equitable estoppel was a defense that prevented one party from taking unfair advantage of another by making false representations on which the other party detrimentally relied…. Yet [in] arbitration [cases, U.S. courts now] require neither detrimental reliance by the nonsignatory seeking estoppel nor a misrepresentation by the plaintiff that the nonsignatory seeks to estop…. Thus the continued use of these doctrines, both in state and federal courts, is inconsistent with Chapter 1 of the FAA…[and t]his Court should say so expressly now, before the confusion in the law grows any deeper.

Id. at 2–4.

Despite their erudition, the parties and amici all ignore (perhaps purposefully) the two questions they should be asking: why is GE Energy, the subsidiary of a United States company, so eager to arbitrate in Germany? Alternatively, why is OS, the subsidiary of a Finnish company, so eager to litigate in the United States? The answer to both questions, of course, is that an Alabama jury is likely to award much greater damages than a German arbitration panel.

Thus, at the end of the day, what this case really is about is international forum shopping, a subject the Court knows well and a strategy it repeatedly has refused to countenance. *See,* for example, *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,* 515 U.S. 528 (1995) (rejecting attempt to avoid arbitration in Japan); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. 614 (1985) (same); *Scherk v. Alberto-Culver Co.,* 417 U.S. 506 (1974) (rejecting attempt to avoid arbitration in France); *The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972) (rejecting attempt to avoid litigation in England).

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