Published on *The National Law Review* https://natlawreview.com

# Enforcement of International Arbitration Agreements: SCOTUS Rules That the New York Convention (and FAA ch. 2) Are Not Preemptively Exclusive

Article By:

Arbitration, Mediation, ADR Practice Group at Mintz Levin

When all was said and done, the U.S. Supreme Court ruled unanimously on June 1, 2020 in effect that the New York Convention (*i.e*., the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards) and the Federal Arbitration Act ("FAA") ch. 2, which implements its enforcement in the U.S., are *not* preemptively exclusive law concerning the enforcement of international arbitration agreements. *See GE Energy Power Conversion France SAS v Outokumpu Steamless USA, LLC,* 2020 U.S. LEXIS 3029 (U.S. June 1, 2020).

In particular, SCOTUS held that a non-signatory to an international arbitration agreement was not barred from compelling arbitration against a signatory on the basis of U.S. state equitable estoppel law because such "domestic" law does not conflict with the New York Convention. *Id*. at *6.

And this suggests that, at least to the extent that the New York Convention and FAA ch. 2 are silent, other domestic laws – at least those favoring arbitrability[1] – may apply to determine which parties may be bound by an international arbitration agreement, just as they currently may apply with respect to domestic arbitration agreements. (Such domestic laws in the U.S. may include principles of contract, agency, estoppel, veil piercing/alter ego, assumption, successor in interest, incorporation by reference, third party beneficiary, waiver, etc.) SCOTUS thus arguably decided among other things that the rules concerning "party arbitrability" – determining which parties may enforce and/or are bound by an arbitration agreement -- are largely the same for an international arbitration agreement as they are for most domestic arbitration agreements.

Most domestic arbitration agreements are subject only to ch. 1 of the FAA. Foreign and international arbitration agreements, on the other hand, are subject to the New York Convention and its implementing legislation, FAA ch. 2. The U.S. Constitution's Supremacy Clause (Art. VI cl. 2) gives international treaties and federal laws preemptive authority over inconsistent state laws. But what if state law is not in conflict with a federal statute or international treaty of the United States? SCOTUS found that that was indeed the case in *Outokumpu*. *See id*. at *12.

Critically in that regard, SCOTUS found that the New York Convention "is simply silent on the issue of non-signatory enforcement," *id.*, and that that silence was "dispositive" because "[n]othing in the drafting history suggests that the Convention sought to prevent contracting states from applying

domestic law that prevents non-signatories to enforce arbitration agreements in additional circumstances," *id*. at *12-*13.

Ultimately, the Court's view appears to be that the New York Convention sets a floor but not a ceiling regarding the enforceability of international arbitration agreements. That is, the New York Convention requires contracting states to enforce international arbitration agreements that satisfy the conditions specified in the treaty, but it does not prohibit such states from enforcing such agreements otherwise – e.g., if they satisfy other conditions. *See id*. at *13.

That said, the Supreme Court left some difficult questions unanswered. While it decided that the New York Convention does not preclude the applicability of other legal principles pertaining to contract enforcement, it did not determine and indeed remanded the case to the 11th Circuit Court of Appeals to determine, (i) which law governs party arbitrability in the case at bar; (ii) whether the governing law includes the equitable estoppel doctrine (as it is understood in U.S., at least by SCOTUS)[2]; and (iii) whether petitioner GE Energy had grounds under applicable equitable estoppel principles (if any) to enforce the arbitration agreement in question. *See id.* at *20.

(Indeed, which law should control with respect to party arbitrability: (a) the law governing the contract as a whole; (b) the law of the seat of arbitration; (c) the law of the forum in which the petition to compel arbitration is brought; or (d) some other law?)

Facts

The motivating dispute concerned a subcontract in a project for the construction of several cold rolling steel mills in Alabama. ThyssenKrupp Stainless USA, LLC contracted with F.L. Industries ("F.L.") for the construction of those mills, and F.L. subcontracted to GE Energy Power Conversion France SAS Corp ("GE Energy") for the provision of several motors for the mills. A few years after their installation, the motors allegedly failed. By that time, Outokumpu Stainless USA, LLC ("Outokumpu"), a U.S. company, had acquired the mills, and it sued GE Energy in Alabama state court for breaches of warranty and negligence. (Outokumpu's status as F.L.'s successor-in-interest does not appear to have been in issue.) GE Energy removed the case to federal court under 9 U.S.C. § 205, and moved to compel arbitration under the principal contracts, *see* 9 U.S.C. § 206, to which it was not a signatory. See 2020 U.S. LEXIS 3029 at *8.

(Those principal commercial agreements provided for arbitration of disputes, *id.* at *6, in Germany under ICC rules. The contractual choice of governing law too was reportedly German. Thus, both the law governing the commercial contract, including its validity, and the procedural law governing the arbitration (based on the situs of the arbitration) were apparently German.)

The District Court granted GE Energy's motion to compel, but the 11th Circuit reversed based principally on its finding that the New York Convention required that parties actually sign an arbitration agreement if they are to be bound by it vis-à-vis each other. If that is the inescapable rule, then a non-signatory like GE Energy could not be an arbitration party.

The Existing Legal Landscape

FAA ch.1, pertaining principally to domestic arbitration, "permits courts to apply state-law doctrines related to the enforcement of arbitration agreements." *See id.* at *8. For example, FAA § 2 provides that a written arbitration agreement shall be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* at *8-*9.

In that regard, SCOTUS had ruled some years before *Outokumpu* that FAA ch. 1 permitted a non-signatory to enforce a domestic arbitration agreement against a signatory—that is, to compel arbitration—based on state law equitable estoppel principles.[3] *See, Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009). 2020 U.S. LEXIS 3029 at *9-*10.

Notably in that regard, the provisions of FAA ch. 1 apply as well to proceedings under FAA ch. 2 "to the extent that [ch. 1] is not in conflict with [ch. 2] or the [New York] Convention…" FAA § 208; 9 U.S.C. § 208.

The critical provisions of the New York Convention for present purposes were Article II(1)-(3). Article II(1) provides that "[e]ach 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." (Emphasis added.)

Article II(2) provides that "[t]he 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." (Emphasis added.)

Article II(3) provides that "[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an [arbitration] agreement, *shall*, at the request of one of the parties, *refer the parties to arbitration*." (Emphasis added.)

Considering the provisions of the Convention and the Supremacy Clause of the U.S. Constitution, four federal Courts of Appeal had split on the question of whether equitable estoppel principles may be invoked by a non-signatory to an international arbitration agreement. The Eleventh Circuit in *Outokumpu* joined the Ninth Circuit in deciding that question in the negative, contrary to the holdings of the First and Fourth Circuits, which had agreed that equitable estoppel principles could be applied with respect to such international arbitration agreements. *See id.* at *8n.2.

The Supreme's Court Opinion

The Justices were unanimous in *Outokumpu* in holding that the New York Convention does not bar a court's application of domestic law equitable estoppel principles to enable a non-signatory of an international arbitration agreement to enforce that agreement against a signatory.

The Court relied on the following findings: (1) the New York Convention text does not prohibit the application of domestic equitable estoppel laws; (2) the Convention's drafting and negotiation history does not disclose an intention to prohibit the application of domestic laws that would enable a non-signatory to compel arbitration; and (3) post-ratification judicial decisions in various contracting states do not suggest any understanding that the Convention bars the application of domestic laws concerning the enforcement of international arbitration agreements.[4] *See, id.* at *15-*17.

Among other things, SCOTUS decided that Articles II(1) and (2) of the New York Convention concerned criteria for mandatory recognition of an arbitration agreement, but did not concern who is bound by that agreement. *See id*. at *20. That latter issue is addressed, according to SCOTUS, only in Article II(3) of the Convention, *id*. at *14, and Article II(3) does not bar or conflict with the application of local equitable estoppel principles, *see id*. at *20, such as are permitted by FAA ch. 1. That is, Art. II(3) does not suggest that its provisions are exclusive.

Indeed, SCOTUS opined that Art. II of the Convention contemplates - - indeed implicitly invites - - the

use of domestic legal doctrines “to fill gaps in the Convention,” rather than displacing such domestic law. *See id* at. *13-*14.

Conclusion

The door appears to be open in U.S. courts for the application of domestic law principles to the determination of party arbitrability with respect to international arbitration agreements. Consequently, the determination of the law that is applicable in that regard becomes critical. SCOTUS left a difficult conflict of laws issue to be worked out by the lower courts, one that may well be resolved differently depending upon the factual circumstances and procedural posture of the dispute that is presented.

Moreover, after determining the controlling law, a court will have to determine whether that law recognizes a doctrine of equitable estoppel that could be applied to the question of enforceability of an international arbitration agreement by a non-signatory. And finally, the court will have to assess whether the facts before it support the application of that legal principle in the circumstances presented.

Furthermore, while the application of pertinent local law is not barred for the purpose, not all local law will be suitable for such application. As Justice Sotomayor pointed out in a brief concurring opinion, (a) there will be significant variations among the States with regard to their equitable estoppel principles, and (b) any invocation of local law concerning party arbitrability issues must be sensitive to the fundamental FAA principle that consent, not coercion, is the basis for private arbitration. That is, the FAA itself limits the application of state law doctrines to party arbitrability issues in that the fundamental principle of consent to arbitration must be upheld. *See id*. at *21-*22. (We will be interested to see how this appreciation affects Justice Sotomayor’s position the next time SCOTUS addresses a “class arbitration” case.)

[1] Domestic laws disfavoring arbitrability are another matter, and seem more likely eventually to be considered in conflict with the New York Convention.

[2] SCOTUS opined that “equitable estoppel allows a non-signatory to a written agreement containing an arbitration clause to compel arbitration where a signatory to a written agreement must rely on the terms of that agreement in asserting its claims against the non-signatory.” 2020 U.S. LEXIS 3029 at *9.

[3] Indeed, under various “traditional principals of state law,” *see id*. at *9, arbitration agreements that are subject to FAA ch. 1 can be enforced by or against non-signatories under several theories, including assumption, successor in interest, agency, veil piercing/alter ego, incorporation by reference, third-party beneficiary, estoppel, and waiver.

[4] SCOTUS noted that courts in many Convention contracting states had already permitted international arbitration agreements to be enforced by non-signatories. *See id.* at *17. However, such “post-ratification” evidence of the interpretation of the Convention by other contracting states was admittedly less persuasive in connection with an originalist’s (Justice Thomas’s) textual review of the treaty in question. *See id.* at *18.



National Law Review, Volume X, Number 220