

Nationalist Stoplights on A New York Convention Autobahn?

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Basic Structure of the Deal

A (Buyer) and B (Seller) contract (contains an arbitration clause)

C is a subcontractor of B (Seller)

Arbitration Clause:

“All disputes arising between both parties in connection with or in the performance of the Contract shall be settled through friendly consultation between both parties. In case no agreement can be reached through consultation after a maximum period of 30 days or as soon as one of the parties involved appeals for the arbitration tribunal the dispute shall be considered as failed and any such dispute shall be submitted to arbitration for settlement.”

“both parties”, ICC arbitration, Place of arbitration:

Dusseldorf, Applicable law in the arbitration clause :

German substantive law

Question the court addresses:

Does the New York Convention conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories?

Amici Curiae in GE vs Outokumpu et al

Amici for GE:

National Association of Manufacturers

United States

North American Branch of the Chartered Institute of Arbitrators

Chamber of Commerce of the United States of America

Professor George A. Bermann et al (4th Restatement group)

Miami International Arbitration Society

Amici for neither party

Public Citizen

Amici for Outokumpu et al

Professor Nader Ibrahim and Me

(And very late) Public Citizen (again!)

**How I thought the New York Convention
Autobahn should generally work when a case
is in a US Court**

Working hypothesis: consent to arbitrate is fundamental and US courts are a more cautious gatekeeper in international commercial arbitration than in the expansive (“wild west”) of domestic arbitration.

For an international commercial arbitration in a US court

	Full speed ahead	Slow down	Stoplight (Not a party)
Signatory	B against A		
Signatory	C as signatory of A-B contract against A		
Nonsignatory	C through succession, subrogation, assignment, or other transfers from B against A	C piercing the corporate veil of B against A	
Nonsignatory	C having B as agent of C against A	C as alter ego of B against A	
Nonsignatory	C as 3PB (intended beneficiary) of A-B contract against A		C as an incidental beneficiary of A-B contract against A
Nonsignatory	C against A through waiver		
Nonsignatory	C against A through estoppel by participating in the arbitration	C against A through prom. estoppel. (never seen it)	C against A through prom. estoppel. (never seen it)
			C using equitable estoppel against A (GE vs Outokumpu)

Miscellaneous Nonsignatory Approaches From Other Countries

	Full speed ahead	Slow down	Stoplight (not a party)
C against A “abus de droit”	?	?	?
C against A “good faith”	?	?	?
C against A Group of Companies	?	?	?

**What the Supreme Court decided 9-0 (Ouch!) June 1,
2020**

Because the Court of Appeals concluded that the Convention prohibits enforcement by nonsignatories, the court did not determine whether GE could enforce the arbitration clauses under principles of equitable estoppel or which body of law governs that determination.

Holds: the New York Convention does not conflict with the enforcement of arbitration agreements by nonsignatories under domestic law equitable estoppel doctrines.

Reversed and remanded to the 11th Circuit for proceedings consistent with this opinion

Justice Sotomayor concurrence emphasizing consent

In the 11th Circuit, opening and supplemental briefing have been completed and oral argument is to be set.

GE filed a motion for a supplemental reply that was opposed by Outokumpu. That motion was denied by the 11th Circuit on October 21, 2020.

So

What body of law governs that determination of whether GE could enforce the arbitration clauses under principles of equitable estoppel.

Varying approaches in the world

Options:

- **Alabama state law version of equitable estoppel**
- **Federal common law (sort of Alabama state law as applied as federal common law or something else)**
- **German law**
- **International law/Transnational principles**

Parties differ on the choice of law and the result of that choice.

Conclusion: Who knows?

N.B. What if there is no choice of law in the arbitration clause or container contract?

My concern about the equitable estoppel: Is it a rabbit hole for the New York Convention?

- **Encourages sloppy negotiation and contract drafting.**
The lawyer full employment result: A contracts with B. B has 1000 subcontractors. Each subcontractor would be able to argue equitable estoppel to bring arbitration against A. Is that really the way the NYConvention Article II is supposed to work? Further delays litigation or arbitration.
- **Two way street? One of the 1000 Non-Signatory subcontractors against a Signatory BUT ALSO Signatory against any of the 1000 Non-Signatory subcontractors? Does that make sense?**
- **Encourages uncertainty in settlement discussions – deeper pockets game.**
- **When do we get to the merits in the arbitration or the court?**
 - Encourages delay in getting to the court or the arbitration (no arbitration commenced as far as I know).
 - Prima facie review of arbitral institutions of whether to set in motion the arbitration. What result in what court if the institution is sued whatever it does?

- **If arbitration in Germany, predominantly Alabama tort law (negligence) claims resolved by arbitrators who will – no matter how wonderful they are – have little understanding of Alabama tort law and its application**
- **What impact on contracts in electronic commerce? Alan and Germaine do a contract with an arbitration clause electronically and Tom, Dick and Mary sign separate subcontracts electronically with Germaine. Does every Tom, Dick or Mary get to go to arbitration with Alan? Does Alan get to go to arbitration with Tom, Dick or Mary?**
- **Award will probably not be set aside or refused enforcement whatever way it comes out I think, but am not sure**
- **NYC Article VII does not seem to be relevant to arbitration clauses in the US courts. US courts use Article VII only as it is written - for arbitral awards. Is this a change? If so, is this good?**

Conclusion?

As a law professor soon to retire from the ivory castle, what do I think will be the answer?

Answer: Who knows? But whatever happens it might go back to the Supreme Court.

Maybe I am just trying to put up a stoplight on the Autobahn. Or maybe I am trying to preserve for international commercial arbitration clauses the express NY Convention autobahn lane of FAA Chapter 2 against the local (domestic) traffic of FAA Chapter 1.

Thank you.