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To Sign or Not To Sign – Is That the Question? The New York Convention's "In Writing" Requirement in U.S. Courts

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A 2018 decision rendered by the U.S. Court of Appeals for the 11th Circuit in *Outokumpu Stainless USA, LLC, et al. v. GE Energy Power Conversion France SAS, Corp* has recently put on the agenda of the U.S. Supreme Court the interpretation of the "in writing" requirement under Article II(2) of the New York Convention in the context of non-signatories.

"Outokumpu", as a buyer, entered into three mill motors supply contracts with "Fives", as a seller. The contracts defined the "Seller" as including Sub-contractors "except if expressly stated otherwise". Appended to the contracts was a subcontractor list that enumerated the "mandatory" suppliers from which the seller could select. One of the suppliers on the list was "GE". Each contract contained an arbitration clause providing for arbitration in Germany. The contracts fell within the purview of the New York Convention. The mill motors under the contracts were supplied by GE, and all of them ultimately failed. Outokumpu commenced a lawsuit against GE, and GE sought to dismiss it and compel arbitration. The District Court granted GE's motion to compel arbitration, reasoning that GE was effectively a party given that the term "Seller" included the subcontractors. Outokumpu appealed.

The Court of Appeals disagreed, holding there was no arbitration agreement "in writing" within the meaning of the Convention between Outokumpu and GE. The Court reasoned that "[p]rivate parties…cannot contract around the Convention's requirement that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration" [emphasis in original]. Since the contracts were signed by Outokumpu and Fives, and GE was then "at most, a potential subcontractor", the Court found that GE was "not a signatory to the Contracts". Accordingly, it reversed the District Court's order compelling arbitration and remanded the case for further proceedings.

The Court of Appeals noted that GE "cannot avoid U.S. and international arbitration law that require that the parties sign an agreement to arbitrate the dispute between them". A detailed discussion of U.S. law in this regard is beyond the scope of this note, but suffice it to say that other U.S. Courts of Appeals have come to the opposite conclusion. For instance, the Courts of Appeals for the First and Fourth Circuits have held that non-signatories can enforce arbitration agreements under the New York Convention on the basis of common law contract principles. The present discussion will focus on the Court's departure from widely accepted international arbitration principles and practice.

Article II(2) of the Convention provides that an "agreement in writing" includes "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams". The Court of Appeals' interpretation of this "in writing" requirement as excluding any party that has not "actually signed" the arbitration agreement conflicts with the internationally accepted liberal approach to this requirement and to the enforcement of arbitration agreements generally.

A good starting point for understanding this approach is ICCA'S Guide *to the Interpretation of the 1958 New York Convention: A Handbook for Judges*. The Guide confirms that "an arbitration agreement only confers rights and imposes obligations on the parties to it". Yet who such "parties" are cannot be defined "solely with regard to the sole signatories of an arbitration agreement. Non-signatories may also assume the rights and obligations arising under a contract, under certain conditions". UNCITRAL has also recommended that Article II(2) "be applied as recognizing that the circumstances described therein [i.e. an arbitration clause or agreement signed by the parties or contained in an exchange of letters or telegrams] are not exhaustive". This broader approach to the "in writing" requirement under Article II(2) of the Convention is warranted in light of the complex nature of modern commercial and business transactions. Indeed, "an inflexible application of the Convention's writing requirement would contradict the current and widespread business usages and be contrary to the pro-enforcement thrust of the Convention".

Additionally, courts in many jurisdictions have consistently interpreted the Convention liberally to mean that a party's consent to arbitration is not necessarily evidenced by a signature. An Australian court, for instance, has held that "Article II does not say that the only agreement to which it refers is one which was formed or concluded by the act of signing". The Israeli Supreme Court has also found that there are circumstances in which non-signatories may be bound by an international arbitration agreement. These include, for instance, where the parties' relationship suggest that the non-signatory agreed to take part in the arbitration, and where the parties should be prevented from evading an arbitration to which they had substantively agreed by relying on formalistic arguments. A Canadian court has also construed the definition of "agreement in writing" liberally, focusing on evidence of the parties' agreement to resolve the dispute by an arbitral process. Another Canadian court has similarly held that "[i]t is a basic principle of law that…parties may be contractually bound without signing documents. Acceptance [of a contract containing an arbitration clause] need not be in writing but may be inferred by conduct".

In contrast, the Court of Appeals in this case found that the Convention "only allows the enforcement of agreements in writing signed by the parties", and accordingly held that to extend the arbitration agreement to GE as a non-signatory would violate the Convention's form requirement. This reasoning, however, contradicts what has long been recognized in international arbitration practice–that binding a non-signatory to an arbitration agreement is not in conflict with the Convention.

Another argument raised by GE in support of its motion to compel arbitration was equitable estoppel, *i.e.* that Outokumpu should be estopped from evading the arbitration agreement it had signed. The Court of Appeals rejected this argument, holding that equitable estoppel is only available under Chapter 1 of the Federal Arbitration Act, which governs domestic arbitration agreements, and not under Chapter 2, which governs arbitration agreements falling under the Convention. This was so, in the Court's view, since the Convention "restrict[s] arbitration to the specific parties to an agreement". This finding similarly flies in the face of the spirit and purpose of the Convention, which allows national courts to rely on more favorable domestic laws when

interpreting Article II(2). Therefore, not only did the Court misinterpret the Convention as restricting arbitration to the actual signatories of the arbitration agreement, it also misconstrued the Convention as setting out rigid standards that national courts cannot derogate from, even where more favorable rules are available. However, the Convention in fact sets a flexible standard, which does not preclude the application of less stringent domestic requirements for applying arbitration agreements to non-signatories, such as legal or equitable doctrines.

National courts determining the validity of international arbitration agreements should ultimately strive to protect the fundamental principle of party consent to arbitration. At the same time, however, courts should also recognize that such consent is not always reflected in an actual signature, nor is it required to be. To claim otherwise is to risk unintended outcomes. For instance, parties who have accepted an arbitration agreement by way of agency or conduct, but have not signed it, would be able to evade arbitration. By the same token, a signatory to an arbitration agreement, such as an agent, could find itself bound by it where that signatory is not in fact a proper party to the agreement. This is clearly not the intention or spirit of the Convention.

Over thirty years ago, the U.S. Supreme Court cautioned that "national courts…need to 'shake off the old judicial hostility to arbitration',…and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal". By attaching an unduly narrow and overly technical interpretation to the "in writing" requirement of the Convention, the Court of Appeals in this case has failed to heed this admonition. The Supreme Court now has another opportunity to impart it and settle this divisive issue.

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