Kluwer Arbitration Blog

New York Arbitration Week Revisited: Non-Signatories Before And After Arbitration, Closing In On An International Approach?

Travis Gonyou (Binder & Schwartz LLP) · Thursday, December 3rd, 2020

Day three of New York Arbitration Week 2020 featured a panel discussion on non-signatories in arbitration sponsored by the Chartered Institute of Arbitrators New York Branch and the New York International Arbitration Center (NYIAC). The session was broken into two parts: compelling arbitration (before arbitration) and enforcing an award (after arbitration), each framed by the relevant Articles of the New York Convention. This post highlights key takeaways from both panels and provides additional thoughts.

Panel One: Compelling Arbitration By A Non-Signatory

The first panel session was led by **Eric A. Schwartz**, an independent arbitrator and co-chair of the NYIAC Global Advisory Board. The panelists were:

- **Benjamin G. Davis**, Professor, University of Toledo College of Law
- **Teresa Giovannini**, Senior Counsel, LALIVE (Geneva)
- **Richard Kreindler, FCIArb**, Partner, Cleary Gottlieb Steen & Hamilton (Frankfurt)

A Consistent Outcome, But A Variety of Approaches

The discussion was framed by the recent U.S. Supreme Court decision in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020) (which was previously discussed on the Blog). After being sued for damages related to the failure of motors it provided, GE Energy Power Conversion France SAS, Corp.—a subcontractor—moved to compel arbitration pursuant to the main construction contract as a non-signatory under the domestic doctrine of equitable estoppel. The Supreme Court ultimately held that the New York Convention does not conflict with the domestic equitable estoppel doctrine thereby allowing a non-signatory, like GE Energy Power Conversion France SAS, Corp., to enforce an arbitration agreement even though it was a non-signatory.

Although the panelists all agreed that most courts would ultimately compel arbitration in such a

circumstance, they analyzed the approaches of different countries which differ considerably. Article II does not explicitly state that non-signatories can enforce arbitration agreements. This creates a vacuum, which has been filled by a patchwork of domestic doctrines and substantive law.

Professor Davis began by framing the pathway to arbitration as the Autobahn, with the court's role as gatekeeper. While many cases—such as those between two signatories—are allowed an express lane to arbitration by U.S. courts, others—such as *Outokumpu*—face a stoplight, delaying traffic to arbitration by analyzing substantive claims such as equitable estoppel. **Prof. Davis** was concerned that the Supreme Court's decision creates a rabbit hole within the New York Convention which will result in further delays to reaching arbitration. This framework would give each subcontractor a route to arbitration, adding cost and uncertainty in settlement discussions. **Prof. Davis** thus argued the need to preserve an "express lane" for international commercial arbitration clauses in which the court was more of a "gate opener", while allowing greater court involvement in a "local lane" for domestic arbitrations.

Mr. Kreindler offered a German perspective, which is apt given that Germany was both the seat and the choice of substantive law in *Outokumpu*. **Mr. Kriendler** explained that the outcome of *Outokumpu* would have been similar had a German court been asked to compel arbitration under the same circumstances. German courts have interpreted Article II to allow enforcement of arbitration agreements at the request of a non-signatory, with the operative question being whether the signatories had an intent to extend the agreement to non-signatories. Further, under German case law and commentary, Article VII(1) does not limit a court's analysis to domestic law. Thus, in cases such as *Outokumpu*, a German court could apply a foreign doctrine—such as equitable estoppel—that is more permissive in extending jurisdiction to a non-signatory, even if that doctrine was disfavored by German courts.

Finally, **Ms. Giovannini** concluded with competing European perspectives on the *Outokumpu* question. The Swiss Federal Supreme Court has held that Article II does not prevent extension to third parties. The court applied Swiss substantive law, finding that a clause can bind individuals who have not signed the contract. Comparatively, the English and French courts would look to the law of the seat, rather than substantive domestic law. Regardless, most courts would find that Article II is not a barrier and extend the arbitration clause's jurisdiction to non-signatories.

The key takeaway from this panel was that courts around the world consistently find that Article II of the New York Convention is not a barrier to enforcing arbitration agreements by or against non-signatories to the agreement. It is rather a question of domestic law that provides the vehicle to enforcing an arbitration agreement in relation to a non-signatory. This is where courts diverge in their approach.

Patchwork Doctrines Remain A Barrier

Though courts are consistent in not interpreting the New York Convention as a barrier to binding non-signatories in an arbitration, the reliance on domestic legal doctrines as the pathway to compelling arbitration has made for a bumpy ride. An expanded role for courts as gatekeepers leads to delay, and therefore greater cost. On the other hand, leaving this patchwork of doctrines to arbitral tribunals creates a landscape in which substantive local doctrines are interpreted by international arbitrators with little to no familiarity with this body of law. Either way, the lack of

consensus in doctrine for allowing a non-signatory to compel arbitration remains a problem, and one that still demands an international approach—such as a uniform doctrine of consent—if parties are to avoid getting stuck in the traffic jam of traditional litigation.

Panel Two: Enforcing Arbitral Awards Against Non-Signatories

The second panel session focused on enforcing awards against non-signatories who participated in the arbitration or against those who first become involved at the award enforcement stage. The panel was led by **Nancy M. Thevenin**, FCIArb, an international arbitrator, Adjunct Professor at St. John's University School of Law, and General Counsel at the United States Council for International Business (USCIB). The panelists were:

- **Teddy Baldwin**, Partner, Steptoe & Johnson LLP
- **Victoria Shannon Sahani**, Associate Dean of Faculty Development and Professor, Sandra Day O'Connor College of Law at Arizona State University
- **William H. Taft V**, Partner, Debevoise & Plimpton LLP

U.S. Patchwork of Laws Leaves Open Question For Parties

The panelists agreed that a non-signatory could be bound by an arbitration, in this case after a proceeding. This frequently arises in cases where a party seeks to hide its assets to prevent enforcement of the award. However, unlike the conclusions regarding non-signatories reached by the first panel, the patchwork of laws does not always lead to the same outcome.

Mr. Taft illustrated the U.S. approach to enforcement through a recent U.S. case. In *CBF Industria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58 (2d Cir. 2017), the U.S. Court of Appeals for the Second Circuit, after amending its previous decision partially due to the New York City Bar Association's *amicus curiae* brief, held that the enforcement against non-signatories was governed by the law of the forum, under such doctrines as alter ego, piercing the corporate veil, and vicarious liability.

Professor Sahani next provided a snapshot of the framework of U.S. laws affecting the analysis of enforcing against a non-party. Normally, a U.S. court would find that, under Article V, a non-signatory is not bound by an award. However, Federal Rule of Civil Procedure 17—which is applicable as forum law—allows the court to apply an equitable remedy, such as piercing the corporate veil, instead of dismissing a claim against a non-party in interest. **Prof. Sahani** suggests that when facing fraud such as asset hiding, this could open the door to enforcement against non-signatories.

Mr. Baldwin in turn focused on the application of a claim for piercing the corporate veil when the non-signatory is a sovereign government. This scenario involves the Foreign Sovereign Immunities Act (FSIA), which generally bars a U.S. court's jurisdiction over a foreign sovereign. However, FSIA has an exception in cases confirming an award pursuant to an arbitration agreement. If, at bottom, a party can show that the related entity is so controlled by the sovereign that it would be considered an agent of the state, then it may be entitled to the exception under FSIA. **Mr. Baldwin** explained that courts often interpret this like the doctrine of alter ego, which allows for limited

pursuit of sovereign non-signatories.

The Strategic Choice

Parties are then left with a choice: attempt to join non-signatories to the arbitration proceeding or wait to seek enforcement of the award against the non-signatory (non-party to arbitration). Because the U.S. is not bound by a finding of the arbitral tribunal that the non-signatory is a proper party and because the patchwork legal framework is fraught with uncertainties, it appears that in most cases parties would benefit by taking two bites at the apple: attempting during the proceeding and if denied, taking a second chance during enforcement.

Conclusions

An international principle seems to be emerging from these discussions: the New York Convention will not be a barrier to binding a non-signatory to an arbitration agreement or enforcing an arbitral award against it. However, the shifting landscape of domestic principles that are then used as a pathway forward in compelling or enforcing against a non-signatory can provide strategic advantages to some and costly delay to others. This inconsistency in substantive approach remains a challenge, and one that calls out for an international consensus.

Recordings for all New York Arbitration Week 2020 events are available here, and Kluwer Arbitration Blog's full coverage is available here.

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