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Filling In The Gaps Left By the US Supreme Court Decision in GE Energy v. Outokumpu: Which Law To Apply?

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The United States Supreme Court's June 2020 decision in *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC* ("**GE Energy**") made clear that, under U.S. law, a non-signatory to an arbitration agreement may invoke equitable estoppel to compel arbitration under Article II(3) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") (for more on GE Energy, see here). The Supreme Court did not, however, decide what law should be applied to determine whether equitable estoppel is available for arbitration agreements under the New York Convention – *i.e.*, whether this should be determined by reference to federal or state law.

Instead, the Supreme Court remanded that question to the United States Court of Appeals for the Eleventh Circuit ("**Eleventh Circuit**"). While the Eleventh Circuit has not yet scheduled the remand hearing in GE Energy, the same question has now arisen before other courts – should federal or state law determine the availability of equitable estoppel?

The case for applying federal law

In a recent decision by the United States Court of Appeals for the Ninth Circuit ("**Ninth Circuit**"), *Balkrishna Setty v. Shrinivas Sugandhalaya LLP* ("**Setty v. Sugandhalaya**"), the majority determined that federal law principles apply to determine whether equitable estoppel is available based on the facts of a particular case.

In that case, two brothers, Balkrishna and Nagraj Setty, signed a Partnership Deed in 1999 agreeing to joint ownership of Shrinivas Sugandhalaya, an incense manufacturing company owned by their late father. The Partnership Deed contained an arbitration clause requiring all disputes in respect of the partnership arising between the partners to be settled by arbitration. After a period of joint operation, the brothers separated and began operating their own incense manufacturing firms, though maintaining the same trademark. Balkrishna, formed Shrinivas Sugandhalaya (BNG) LLP ("**SS Bangalore**"), whereas Nagraj formed Shrinivas Sugandhalaya LLP ("**SS Mumbai**").

After a period of operation, the Plaintiffs-Appellees, Balkrishna and SS Bangalore, commenced litigation against SS Mumbai and its U.S. distributor, claiming that SS Mumbai had committed a number of U.S. federal trademark violations, including having fraudulently obtained trademark registrations. The suit was originally brought in the Northern District of Alabama but was transferred to the Western District of Washington to suit the parties' convenience, pursuant to 28

U.S.C. § 1404(a).

SS Mumbai moved to dismiss or stay the case in favour of arbitration, arguing that the Plaintiffs-Appellees should be equitably estopped from avoiding the arbitration clause contained in the Partnership Deed. Neither SS Bangalore nor SS Mumbai were parties to the Partnership Deed.

The district court for the Western District of Washington denied SS Mumbai's motion, applying generalized estoppel doctrine from Ninth Circuit jurisprudence. On appeal, while the Ninth Circuit affirmed the district court in finding that SS Mumbai could not assert equitable estoppel, it did so on the grounds that as a non-signatory to the Partnership Deed, SS Mumbai was barred from compelling arbitration under Article II(3) of the New York Convention.

SS Mumbai then sought, and was granted, certiorari by the Supreme Court on the basis of the Supreme Court's decision in GE Energy, and the Ninth Circuit's decision was vacated and remanded. On remand, the parties disputed whether the law of India (the choice of law in the Partnership Deed) or federal common law applied to the question of whether a non-signatory can compel arbitration.

The majority held that Indian law did not apply, noting that to resolve a "threshold issue", the Court should not look to the agreement itself. Additionally, because the Partnership Deed's arbitration clause applied to disputes "arising between the partners", it did not apply to third parties such as SS Mumbai.

Instead, the majority held that federal substantive law applies where a case involves the New York Convention and concerns the arbitrability of federal claims by or against non-signatories to an arbitration agreement. This, the majority found, furthered the principle of uniformity in the enforcement of international arbitration agreements, as emphasized by the New York Convention and its implementing legislation, the Federal Arbitration Act ("**FAA**").

The case for applying state law

Interestingly, the case for applying state law was made in a strong dissent to the majority opinion of Setty v. Sugandhalaya. Judge Bea, who authored the dissent, argued that state, not federal law should govern equitable estoppel claims to compel arbitration. Her dissent was grounded in jurisprudence from Chapter 1 of the FAA, which addresses domestic arbitration law (noting that Chapter 2 of the FAA addresses international arbitration law, by incorporating the New York Convention). In essence, Judge Bea stated that jurisprudence from the Supreme Court and Ninth Circuit on Chapter 1 of the FAA had firmly established that the state contract law that governs the arbitration agreement governs equitable estoppel claims to compel arbitration. The fact that the arbitration agreement in this case was under the New York Convention (which is implemented in the United States by Chapter 2 of the FAA) did not merit a departure from this position. Rather, Judge Bea argued, it is in the interests of uniformity that settled FAA law apply to agreements governed by the New York Convention.

Judge Bea relied on the Supreme Court's decision in *Arthur Anderson LLP v. Carlisle*, 556 U.S. 624 (2009), which held that the FAA did not "alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)". (*Id.* at 630). The Supreme Court held that the application of "traditional principles of state law" is permitted under the FAA to allow a contract to be enforced by or against non-parties through a number of principles, including equitable estoppel (Id. at 631). Judge Bea went on to state that "Since Arthur

Andersen, the Ninth Circuit has repeatedly applied state contract law any time a non-signatory has sought to compel arbitration under the FAA." (Setty v. Sugandhalaya at page 13).

In addition, the Restatement on U.S. Law of International Commercial Arbitration and Investor-State Arbitration ("**Restatement**") takes the position that the availability of estoppel is governed by state law (see Comment (c) to §2.3). Though the Restatement is not binding on courts, it has significant persuasive authority such that courts may look to the Restatement to decide which law to apply.

What are the implications of applying federal or state law?

The question of the applicability of federal or state law is not limited to the doctrine of equitable estoppel. In GE Energy, the Supreme Court noted that under the FAA, arbitration agreements can be enforced by non-signatories through "assumption, piercing the corporate veil, alter ego, incorporation by reference, third party beneficiary theories, waiver and estoppel." (*GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1643 (2020)). While the decision in Setty v. Sugandhalaya specifically addressed estoppel, it remains to be seen whether state or federal law will govern these other mechanisms for enforcement of arbitration agreements by non-signatories.

The question of which body of law applies to determine the availability of doctrines like equitable estoppel may have important practical implications. In particular, there may be instances in which the application of federal or state law produces different results when applied to the specific facts of a case. As the case law develops in different courts, parties could take advantage of these inconsistent approaches in determining where to file their claim.

There is therefore high potential for divergence in determining whether a non-signatory can enforce an arbitration agreement. We are likely to see more cases of non-signatories seeking to enforce arbitration agreements concerning the New York Convention in the wake of GE Energy, and it remains to be seen whether federal courts will converge on the methodology for determining the availability of these principles, or whether they will remain divided.

In particular, and as mentioned above, the Supreme Court in GE Energy remanded to the Eleventh Circuit to determine the body of law that governs the enforceability of arbitration clauses under the doctrine of equitable estoppel. It remains to be seen whether the Eleventh Circuit will adopt the same position as the Ninth Circuit in Setty v. Sugandhalaya.

Conclusion

While the US Supreme Court in GE Energy made the important clarification that the New York Convention does not bar non-signatories from asserting equitable estoppel to compel arbitration, gaps remain as to whether state or federal law applies to determine the availability of equitable estoppel on the facts of a particular case. The Ninth Circuit has recently held that federal law applies, albeit with a strong dissent arguing in favor of the application of state law. In light of the important implications arising out of the applicable law, further debate is to be expected.

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