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Recent SCOTUS Reversal a 'Boon for International Commerce'

The U.S. Supreme Court's unanimous decision in GE Energy v. Outokumpu has far-reaching implications for international business.

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The U.S. Supreme Court is no stranger to arbitration issues. In 1925, Congress passed the Federal Arbitration Act to overcome widespread judicial hostility to arbitration agreements and establish a strong federal policy favoring arbitration. Since then, the Supreme Court has had many occasions to opine on the scope and effect of the FAA. In recent years, for example, the court has decided questions about which disputes are arbitrable, whether class arbitration is available, and how federal and state arbitration laws interact. Many of these cases were controversial, pro-arbitration, 5-to-4 rulings. And most arose in the same posture: a dispute between a U.S. business that wanted to arbitrate and a U.S. individual (usually a consumer or employee) who did not.

On June 1, the court issued a different kind of arbitration decision, in *GE Energy v. Outokumpu*. (Disclosure: Jones Day represented GE Energy.) The case was the court's first in-depth engagement with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. More commonly known as the New York Convention, it is a multilateral treaty adopted in 1958 to promote arbitration in the international context. The benefits of arbitration are even more pronounced for international commercial disputes than they are for domestic ones, given the uncertainty inherent in litigating before foreign courts. To ensure that international businesses can reliably realize those benefits, the convention requires signatory nations to enforce valid arbitration agreements and arbitral awards. More than 160 nations, including the United States, have signed on. And courts around the world have construed the convention to require that signatory nations provide at least as favorable treatment for agreements between businesses from different countries as they do for agreements between their own citizens.

Before the June 1 ruling, however, some U.S. courts saw things differently. In particular, the U.S. Court of Appeals for the Eleventh Circuit had disfavored international arbitration agreements as compared to domestic ones when it came to enforcement by nonsignatories. Equitable estoppel is one of several common-law doctrines that allow nonsignatories to arbitration agreements to enforce those agreements in appropriate circumstances. For example, equitable estoppel lets a nonsignatory to an arbitration agreement compel a signatory to arbitrate claims that arise from the contract containing the arbitration agreement. The Eleventh Circuit recognized that doctrine in the context of domestic arbitration agreements. It held, however, that the doctrine conflicted with the New York Convention—and thus was unavailable for international arbitration agreements—because, in its view, the convention mandates that the only persons who can enforce an arbitration agreement are those who sign the agreement themselves.

The Supreme Court reversed. In a unanimous opinion by Justice Clarence Thomas, the court emphasized that the convention "is simply silent on the issue of nonsignatory enforcement." So, the court reasoned, it does not displace domestic doctrines that, like equitable estoppel, allow nonsignatories to arbitrate in appropriate circumstances. The court found support for its ruling in the treaty's drafting history and the practice of other signatory nations, most of which understand the convention to allow nonsignatory enforcement consistent with their own domestic laws.

That result is a boon for international commerce. Had the court come out the other way, and taken the Eleventh Circuit's crabbed view of international arbitration, entities that had relied on their ability to arbitrate would have been forced to litigate in foreign courts anyway. That would have particularly disadvantaged subcontracting agreements and distribution chains—both contexts in which the entity performing work is often different from the individual who signed the arbitration agreement. And equitable estoppel would have been only the start. Other nonsignatory enforcement doctrines are fundamental to international commerce—agency (when one party makes an agreement on behalf of another), assignment (when one party assigns an agreement to another) and corporate succession (when a company remains bound by its agreements after changing its name or form). A different ruling in *GE Energy* would have threatened all of those doctrines, which are crucial to the orderly conduct of international business. It would have nullified the convention's enforcement scheme for everyone except those who personally inked their signatures on arbitration agreements. And it would have put international agreements on weaker ground than domestic ones in U.S. courts. That, in turn, would have made the United States an outlier in the world. Transacting business across borders, in other words, would have gotten a lot more complicated.

Thankfully, that isn't what happened. The Supreme Court's decision in *GE Energy* makes clear that nonsignatory enforcement doctrines like agency, assignment, corporate succession and equitable estoppel are available for international agreements, just as they are for domestic ones. Moreover, the court's ruling brings U.S. jurisprudence in line with a strong international consensus that the New York Convention sets a floor, not a ceiling, for enforcing arbitration agreements. That means that signatory nations must do at least as much to enforce arbitral awards and arbitration agreements as the convention requires. But nothing in the convention prohibits them from going beyond that baseline and adopting even stronger pro-arbitration policies.

Going forward, *GE Energy v. Outokumpu* will stand for the important proposition that U.S. courts must treat international arbitration agreements as favorably as domestic ones.

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