CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

U.S. Supreme Court Holds that the New York Convention Does Not Displace Domestic Doctrines Permitting Nonsignatories to Enforce Arbitration Agreements

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On June 1, 2020, the Supreme Court unanimously held that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or Convention) does not conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories. The Court interpreted the text of the Convention as being silent on the issue of enforcement by nonsignatories and thus leaving this issue to domestic law. The Court noted that some postratification practice (including the recommendation of a UN commission) and the views of the executive branch were consistent with its conclusion, but it did not determine how much weight should be accorded to these sources.

In 2007, two companies entered into three contracts whereby one would provide the other with certain steel manufacturing equipment.[1] All three contracts between the supplier and the purchaser included arbitration clauses stating: "'[a]ll disputes arising between both parties in connection with or in the performances of the Contract[s] . . . shall be submitted to arbitration for settlement.'"[2] The contracts further provided that this arbitration would take place in Germany.[3]

After the formation of these contracts, the supplier subcontracted with GE Energy Power Conversion France SAS, Corp. (GE Energy) for the "design, manufacture, and supply" of the motors for this equipment.[4] In 2016, the purchaser's successor company, Outokumpo Stainless USA, LLC, sued GE Energy in Alabama state court, alleging that GE Energy's motors had failed and resulted in substantial damages.[5] After removing the case to federal court, GE Energy filed a motion to dismiss and compel arbitration, invoking the arbitration clauses that were in the original three contracts.[6]

The federal district court granted this motion, but the U.S. Court of Appeals for the Eleventh Circuit reversed. It concluded that the original three contracts were sufficiently transnational in nature that their arbitration provisions could fall within the ambit of the New York Convention[7]—an international agreement that, while mostly focused on the recognition and enforcement of arbitral awards, also includes an article imposing certain obligations on states with respect to the recognition and enforcement of written arbitration agreements.[8] The Eleventh Circuit further found, however, that the arbitration provisions

[1] GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637, 1642 (2020).

[2] *Id.* (quoting the contracts) (first alteration in original).

[3] Outokumpu Stainless USA, LLC v. Converteam SAS, 902 F.3d 1316, 1321 (11th Cir. 2018).

[4] *GE Energy Power*, *supra* note 1, at 1642.

[5] *Id.*

[6] *Id.*

[7] *Outokumpu Stainless*, *supra* note 3, at 1324–25 (reaching this finding in establishing subject matter jurisdiction).

[8] The United States ratified the New York Convention on September 30, 1970, and the Convention entered into force on December 29, 1970. *See* UN Commission on International Trade Law, Status: Convention on the

in the original three contracts did not give GE Energy a right to arbitration. In reaching this conclusion, it observed, as a subcontractor, GE Energy was "undeniably not a signatory to the [c]ontracts" and stated that the New York Convention "require[s] that the parties actually sign an agreement to arbitrate their disputes in order to compel arbitration."[9] In essence, the Eleventh Circuit read the New York Convention as prohibiting GE Energy from invoking domestic equitable estoppel principles that might otherwise have provided it with a pathway to enforcing the arbitration provision despite its status as a nonsignatory.[10]

On June 1, 2020, the Supreme Court unanimously reversed the Eleventh Circuit. In an opinion authored by Justice Thomas, the Court held that the New York Convention does not conflict with domestic equitable estoppel doctrines allowing for the enforcement of arbitration by nonsignatories.[11] The Court reached this conclusion by using "familiar tools of treaty interpretation," first considering the text of the treaty and then turning to other interpretive aids.[12]

With respect to text, the Court concluded that the language of the New York Convention was silent on the issue of enforcement by nonsignatories. Article II of the New York Convention provides:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.[13]

The Court read this language as meant only to "provide[] that arbitration agreements must be enforced in certain circumstances" but "not [to] prevent the application of domestic laws that are more generous in enforcing arbitration agreements."[14] The Court stated:

> The text of the New York Convention does not address whether nonsignatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel.

Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), *at* https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

[9] *Outokumpu Stainless*, *supra* note 3, at 1326.

[10] *See id.* at 1326–37. Domestic equitable estoppel principles "allow[] a nonsignatory to a written agreement containing an arbitration clause to compel arbitration where a signatory to the written agreement must rely on the terms of that agreement in asserting its claims against the nonsignatory." *GE Energy Power*, *supra* note 1, at 1644 (quoting RICHARD LORD, WILLISTON ON CONTRACTS § 57:19 (4th ed. 2001)).

[11] *GE Energy Power*, *supra* note 1, at 1648.

[12] *Id.* at 1644–45. The Court invoked its prior case law in identifying these tools and did not cite to the Vienna Convention on the Law of Treaties at any point in its analysis. *See id.* at 1645–48.

[13] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. II, June 10, 1958, 21 UST 2517, 330 UNTS 38.

[14] *GE Energy Power*, *supra* note 1, at 1645.

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> The Convention is simply silent on the issue of nonsignatory enforcement, and in general, "a matter not covered is to be treated as not covered"—a principle "so obvious that it seems absurd to recite it."[15]

The Court further observed that, "[g]iven that the Convention was drafted against the backdrop of domestic law, it would be unnatural to read Article II(3) to displace domestic doctrines in the absence of exclusionary language."[16]

After discussing the Convention's text, the Supreme Court looked to the "negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations" as "aids to its interpretation."[17] As to the drafting history, the Court concluded that "[n]othing in [it] suggests that the Convention sought to prevent contracting states from applying domestic law that permits nonsignatories to enforce arbitration agreements in additional circumstances."[18]

As to the postratification understanding, the Court observed that the "courts of numerous contracting states permit enforcement of arbitration agreements by entities who did not sign an agreement" and noted that at least one state—Peru—has legislation to this effect as well.[19] The Court also observed that "GE Energy points to a recommendation issued by the United Nations Commission on International Trade Law that, although not directly addressing Article II(3), adopts a nonexclusive interpretation of Article II(1) and (2)."[20] In reference to these sources, the Court stated:

> These sources, while generally pointing in one direction, are not without their faults. The court decisions, domestic legislation, and UN recommendation relied on by the parties occurred decades after the finalization of the New York Convention's text in 1958. This diminishes the value of these sources as evidence of the original shared understanding of the treaty's meaning. Moreover, unlike the actions and decisions of signatory nations, we have not previously relied on UN recommendations to discern the meaning of treaties.

The Court nonetheless concluded that "to the extent this evidence is given any weight, it confirms our interpretation of the Convention's text."[21]

Finally, the Supreme Court considered the views of the executive branch but declined to decide whether to give deference to these views. In an amicus brief, the executive branch had supported GE Energy's position and claimed that, as "the Branch constitutionally responsible for negotiating and enforcing treaties," the executive's interpretation was "'entitled to great weight.'"[22] The Court stated:

[15] *Id.* (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 93 (2012)).

[16] *Id.* (citation omitted).

[17] *Id.* at 1646 (quoting Medellín v. Texas, 552 U.S. 491, 507 (2008)).

[18] *Id.*

[19] *Id.*

[20] *Id.* at 1647.

[21] *Id.* (citation omitted).

[22] Brief for the United States as Amicus Curiae Supporting Petitioner at 30, *GE Energy Power*, 140 S. Ct. 1637 (No. 18-1048) (citation omitted). *Cf.* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 306(6) (2018) ("Courts in the United States have final authority to interpret a treaty for purposes of

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> We have never provided a full explanation of the basis for our practice of giving weight to the Executive's interpretation of a treaty. Nor have we delineated the limitations of this practice, if any. But we need not resolve these issues today. Our textual analysis aligns with the Executive's interpretation so there is no need to determine whether the Executive's understanding is entitled to "weight" or "deference."[23]

After concluding that the New York Convention did not prohibit GE Energy from enforcing the arbitration clauses, the Supreme Court remanded the case for the lower court to address whether "GE Energy could enforce the arbitration clauses under principles of equitable estoppel or which body of law governs that determination."[24]

State Jurisdiction and Immunity

U.S. Supreme Court Rules that Victims of State-Sponsored Terrorism Can Sue Foreign States for Retroactive Punitive Damages Under the Foreign Sovereign Immunities Act

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In *Opati v. Republic of Sudan*, the Supreme Court upheld a $4.3 billion award of punitive damages against Sudan for its support of the 1998 bombings of U.S. embassies in Kenya and Tanzania. The Supreme Court held that Congress's 2008 amendments to the Foreign Sovereign Immunities Act (FSIA) authorized the plaintiffs to recover punitive damages from state sponsors of terrorism for acts committed prior to the enactment of these amendments. This case is part of a broader trend of U.S. litigation brought against states who are designated sponsors of terrorism or alternatively are deemed responsible for acts of terrorism within the United States.

Following the 1998 bombings of U.S. embassies in Kenya and Tanzania, victims and family members sued Sudan for its alleged facilitation of these attacks.[1] At the time, Sudan had already been designated by the U.S. State Department as a state sponsor of terrorism.[2] Plaintiffs were therefore able to sue Sudan for money damages, as an exception added in 1996 to the FSIA withheld immunity from state sponsors of terrorism in cases alleging their responsibility for the death or personal injury of U.S. citizens through acts like

applying it as law in the United States. In doing so, they ordinarily give great weight to an interpretation by the executive branch.").

[23] *GE Energy Power*, *supra* note 1, at 1647 (citation omitted).

[24] *Id.* at 1648. Justice Sotomayor wrote a concurring opinion, noting: "I agree with the Court that the [New York Convention] does not categorically prohibit the application of domestic doctrines, such as equitable estoppel, that may permit nonsignatories to enforce arbitration agreements. I note, however, that the application of such domestic doctrines is subject to an important limitation: Any applicable domestic doctrines must be rooted in the principle of consent to arbitrate." *Id.* (Sotomayor, J., concurring).

[1] Opati v. Republic of Sudan, 140 S. Ct. 1601, 1604 (2020).

[2] The U.S. State Department designated Sudan as a state sponsor of terrorism on August 12, 1993. 58 Fed. Reg. 52,397, 52,523 (1993). The State Department still maintains this designation. U.S. Dep't of State Press Release, State Sponsors of Terrorism, *at* https://www.state.gov/state-sponsors-of-terrorism [https://perma.cc/3AMY-BB7V]. Recently, Sudan has sought to have this designation removed. Hilary Mossberg & John Prendergast, *Sudan's Push for Removal from U.S. Terror List: Not a Panacea*, Just Security (Jan. 29, 2020), *at* https://www.justsecurity.org/68275/sudans-push-for-removal-from-u-s-terror-list-not-a-panacea.