

GARIBALDI ADR INN OF COURT

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October 10, 2019



CASE LAW UPDATE

GE Energy Power Conversion SAS v. Outokumpu Stainless USA

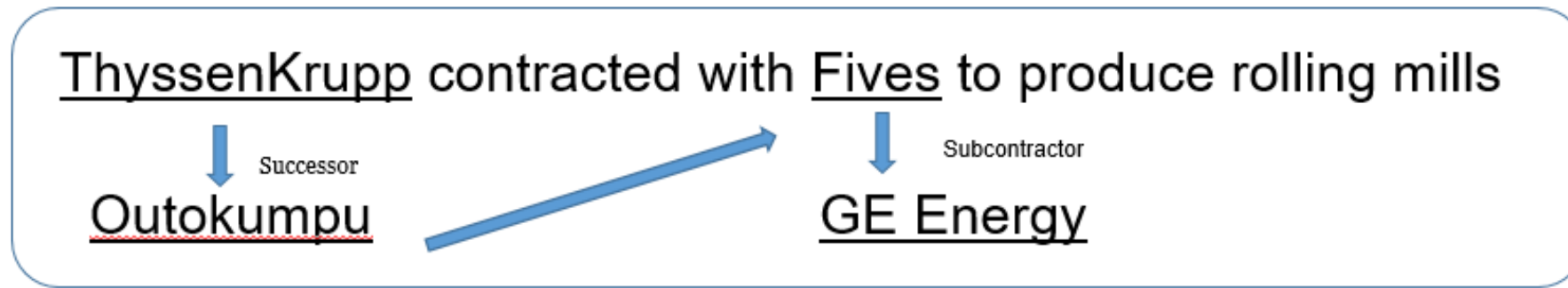
Docket No. 18-1048

- **Petition for Certiorari Granted:** US Supreme Court in June 28, 2019
- **Question Presented:** Does the New York Convention permit a nonsignatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel?
- **Facts:** Outokumpu (US-Alabama) sued GE Energy (French) in Alabama state court alleging that motors built for a steel plant were defective
 - GE Energy and Outokumpu did not have a direct contractual relationship



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- Outokumpu and Fives arbitration clause:
 - Arbitration to take place in Dusseldorf, Germany
 - In accordance with the substantive law of Germany



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- GE Energy removed the case to federal court, and:
 - Filed a motion to compel arbitration by invoking the arbitration clause between Outokumpu and Fives
 - Argued Outokumpu was equitably estopped from avoiding arbitration because their dispute with GE Energy “arose out of” the contract with the arbitration clause
- GE Energy prevailed before the District Court, but the 11th Circuit Court of Appeals Reversed



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- The 11th Circuit held there was not a sufficient “agreement in writing” that was “signed by the parties” as required by the New York Convention

“Private parties...cannot contract around the Convention’s requirement that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration.”

Under the *FAA*, parties can compel arbitration through estoppel, and US courts allow non-signatories to compel arbitration because the *FAA* does not expressly restrict arbitration to the specific parties to an agreement. However, the Convention imposes such a restriction.

- Where there is a conflict between the *FAA* and the Convention, the terms of the Convention prevail.



CASE LAW UPDATE

New Jersey State Law – Required Waiver and Preemption

Atalese v. U.S. Legal Services Group, L.P., 219 N.J. 430 (2015)

Itzhakov v. Segal, 2019 WL 4050104, (NJ Super. App. Div. August 28, 2019)

“Like any contract, an arbitration agreement “must be the product of mutual assent,” which “requires that the parties have an understanding of the terms to which they have agreed” (citing *Atalese*).... a contractual waiver of the right to pursue a claim in court must be “clearly and unmistakably established.” The waiver provision must “in some general and sufficiently broad way ... explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute.”



LEGISLATION – GENERAL TRENDS

- **A shift to state legislatures**, because federal legislation hasn't progressed
 - The Arbitration Fairness Act was introduced many times since 2011, but did not gain significant momentum
- Some state legislation attempts to **withstand FAA preemption**.
 - NJ S 121: Provisions in employment contracts that waive any substantive or procedural right are unenforceable, but does not specifically reference arbitration
- However, other state legislation is **clearly preempted by the FAA**, e.g. *Latif v. Morgan Stanley & Co.*, 2019 WL 2610985, (S.D.N.Y. June 26, 2019).
 - “Section 7515 renders agreements to arbitrate sexual harassment claims null and void....”
 - “[A]pplication of Section 7515 to invalidate the parties’ agreement to arbitrate Latif’s claims would be inconsistent with the FAA.” The FAA sets forth a strong presumption that arbitration agreements are enforceable and this presumption is not displaced by Section 7515.”



LEGISLATION – FEDERAL

The Forced Arbitration Injustice Repeal Act (FAIR Act)

H.R. 1423 – Passed the House and Referred to the Senate

1. Prohibits predispute arbitration agreements for employment, consumer, antitrust, or civil rights disputes; and
 2. Prohibits agreements that interfere with participation in joint, class, or collective actions related to an employment, consumer, antitrust, or civil rights disputes
- Hearings held in House and Senate Committees
 - Passage unlikely given the composition of the Senate



LEGISLATION – NEW JERSEY

NJ A 584 and NJ S 3894: State Agencies – Prohibitions on Arbitration

“A State agency shall not enter into a contract...with a business entity that requires any person or public entity...to submit a dispute arising after the signing of the contract to binding arbitration....”

- **Current Status:** In Assembly, Referred to Local Government Committee. In Senate, Referred to Government, Wagering, Tourism, Historic Preservation Committee

NJ A 1215: Consumer Arbitration Venues

“A term...in a consumer contract concerning venue...involving a resident of this State is valid only if [it] requires that the dispute is resolved within the State of New Jersey. This requirement may only be waived upon the advice of counsel as evidenced by counsel’s signature on the contract.”

- **Current Status:** In Assembly and Referred to Assembly Appropriations Committee



LEGISLATION – NEW JERSEY

NJ A 4972: Arbitration Providers

An arbitration organization shall not administer a consumer arbitration, or provide any other services related to a consumer arbitration, if:

- (a) the arbitration organization has, or within the preceding year has had, a financial interest in any party or attorney for a party; or
- (b) any party or attorney for a party has, or within the preceding year has had, any type of financial interest in the arbitration organization.

"Financial interest" means:

- (1) holding a position in a business as officer, director, trustee, or partner, or holding any position in management of the business; or
- (2) ownership of more than five percent interest in a business.



INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

2018 CASE DATA

993

International Cases Filed

TOTAL CLAIMS
USD 8.2 BILLION

LARGEST CLAIM
USD 2.8 BILLION

MEDIATIONS ADMINISTERED
101

PARTY NATIONALITY

Top Non-U.S. Nationalities

COUNTRIES

CANADA
131 PARTIES

UNITED KINGDOM
95 PARTIES

MEXICO
53 PARTIES

INDIA
52 PARTIES

CHINA
44 PARTIES

GERMANY
44 PARTIES

SWITZERLAND
42 PARTIES

FRANCE
38 PARTIES

COLOMBIA
35 PARTIES

SPAIN
27 PARTIES

REGIONS

UNITED STATES
1,067 PARTIES

CANADA
131 PARTIES

LATIN AMERICA
227 PARTIES

EUROPE
380 PARTIES

ASIA
250 PARTIES

AFRICA
23 PARTIES



Note: The color red indicates a case(s) involving a party from that country in 2018



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SINGAPORE CONVENTION SIGNING CEREMONY

AUGUST 7, 2019



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SINGAPORE CONVENTION SIGNING CEREMONY OPENING ADDRESS – PRIME MINISTER LEE HSIEN LOONG



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MAXWELL SUITES – OPENING CEREMONY



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MAXWELL SUITES – OPENING CEREMONY SINGAPORE NATIONAL DAY



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DATA PROTECTION AND CYBERSECURITY

Significant and Ongoing Commitment

- **Internal**
 - Infrastructure and Investment
 - Training and Testing
 - Education
- **External**
 - Arbitrators and Mediators
 - Case Management Platforms
- **International Council for Commercial Arbitration – International Bar Association (ICCA – IBA) Joint Task Force on Data Protection**

