Can a non-signatory compel arbitration?

Arbitration, whether domestic or international, is a creature of contractual consent.[1] One therefore would naturally conclude that a non-signatory to a contract requiring arbitration could neither be compelled to arbitrate nor compel a signatory to arbitrate. After all, one of the key considerations in deciding whether to include an arbitration provision in a contract is an evaluation of the opposing party. Not all counterparties are good candidates for the less formal procedures that typify arbitration. Some require the firmer (and sterner) hand that a court will provide. This is particularly true when contracting across international borders.

Almost all rules of law are subject to caveats, however, and the rights and duties of non-signatories to an arbitration agreement is an area in which the exceptions can threaten to subsume the rule. Courts in the United States have long embraced a doctrine known as “direct benefits estoppel” to grant a signatory’s motion to compel a non-signatory to arbitrate. [2] Other countries have applied similar doctrines at the behest of signatories to force no signatories out of court and into arbitration.[3]

An altogether different issue is presented when a non-signatory offensively uses the contract that he did not sign to force a signatory into arbitration. This sometimes occurs when a signatory has filed suit for breach of contract or warranty (along with ancillary torts) against multiple defendants in a chain of distribution. The terms imposed by the manufacturer of the product may require arbitration, but the resellers of the product have no similar contract with the plaintiff. Similar scenarios can be found in professional liability actions and in internet commerce when the order is filled by a third party rather than the website operator with whom the plaintiff dealt.

These non-signatory defendants may prefer arbitration over litigation because they do not want to face a jury or because they wish to erect a barrier to a class action. Whatever the reason, the Federal Arbitration Act ("**FAA**") gives them a path to follow. Section 2 of the FAA[4] makes written arbitration agreements "valid, irrevocable and enforceable save upon such grounds as exist at law or in equity for the revocation of a contract." Section 3 of the FAA[5] provides an enforcement mechanism when the signatory and non-signatory are already in federal court. It states that "[o]n application of one of the parties," the court must stay the litigation if the arbitration agreement is in writing and valid.

But how can an arbitration agreement be valid as to Section 3 movants if they never signed it? The answer is found in the language of Section 2 quoted above, specifically: "save upon such grounds as exist at law or in equity for revocation of the contract." Even though the quoted language seems to apply only to "revocation of the contract," the courts have interpreted the Federal Arbitration Act as incorporating the full range of common law contract doctrines. A non-signatory can use those doctrines either offensively or defensively.

In the 2009 case of Arthur Andersen, LLP v. Carlisle,[6] for example, the United State Supreme Court held that common law contract doctrines permit non-signatories to claim the arbitration benefits of a contract they did not sign by using Section 3 to compel arbitration pursuant to that contract. Similarly, in the 2020 case of GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless, USA, LLC,[7] the Supreme Court held that a non-signatory may move to compel arbitration even when the arbitration must be conducted pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") because it involves foreign nationals.

In its Arthur Andersen and GE Power opinions, the Supreme Court referenced state common law as providing the relevant contract doctrines. However, there is a split among the lower courts as to what law applies. Most courts hold that the law of the forum state or the governing law specified in the contract controls.[8] A significant minority of courts, however, rely upon federal common law to determine a non-signatory's rights and duties.[9]

As will be discussed below, there are numerous common law doctrines (both state and federal) that grant offensive rights upon non-signatories. Most of these doctrines are privity based and are generally recognized in Europe as well as in the United States. However, one of the common law doctrines that non-signatories invoke most often—equitable estoppel—is principally an American construct that the European courts treat warily, if at all. Fortunately for international comity, three very recent United States Court of Appeals decisions demonstrate that it is quite difficult to actually prevail on this theory.

A. Privity based doctrines non-signatories can use

Federal courts in the United States "have recognized that arbitration agreements may enforced by non-signatories through assumption, piercing the corporate veil, alter ego, incorporation by reference [and] third party beneficiary theories...."[10] In addition, contracts signed only by an agent can be enforced by the principal, and contracts assigned to a third party can be enforced by that non-signatory assignee.[11]

Foreign courts similarly allow non-signatories to enforce arbitration agreements under such familiar privity-based legal doctrines as agency, assignment, succession, and alter ego.[12]

B. Non-signatory enforcement through equitable estoppel

As a general matter, estoppel "is a uniquely Anglo-American concept" that "is rarely applied in the arbitration context in Continental Europe. "[13] In the United States, equitable estoppel usually is the primary arrow in the non-signatory's quiver. Indeed, this was the common law contract doctrine asserted (and blessed) in Arthur Andersen and GE Power. As a practical matter, however, the equitable estoppel arrow hits its target only rarely.

In Setty v. Shrinivas Sugandhalaya, LLP,[14] the Ninth Circuit Court of Appeals considered a case where the plaintiff and his brother were each a 50% owner of the defendant LLC. The two brothers' interests in the LLC were governed by a separate Partnership Deed (similar to a shareholder agreement) that included an arbitration clause. When the plaintiff brother sued the LLC for trademark infringement, the LLC (controlled by the other brother) moved to compel arbitration even though the LLC was not a party to the Partnership Deed. The LLC relied on equitable estoppel to claim the benefit of the Partnership Deed's arbitration clause.

The Ninth Circuit initially held that federal common law controlled because the litigants were foreign nationals and any arbitration would be governed by the New York Convention. After stating that "for equitable estoppel to apply, it is essential …that the subject matter of the dispute [be] intertwined with the contract providing for arbitration,"[15] the Ninth Circuit construed the contracts very narrowly to affirm the district court's finding of insufficient intertwining. The Ninth Circuit did this even though the Partnership Deed specified how the brothers would interact when running the LLC. Most telling was the Ninth Circuit's observation that "[w]e have never previously allowed a non-signatory defendant to invoke equitable estoppel against a signatory plaintiff."[16]

In Doe v. The Trump Corporation Corporation,[17] the Second Circuit Court of Appeal also had the opportunity to weigh in on the use of equitable estoppel to compel arbitration. The plaintiffs in that case contracted with a company to participate in the company's multi-level marketing program. The company had previously hired the defendants (former President Trump and his family) to promote the program. The plaintiffs claimed that the third-party promoters engaged in false and misleading business practices when touting the marketing program, and brought a putative class action against the promoters. The promoters responded by filing a motion to compel arbitration. While they had no contractual relationship with the plaintiffs, the promoters relied upon equitable estoppel to claim the benefit of arbitration provisions in the contracts between the plaintiffs and the marketing company.

The Second Circuit rejected this effort on the facts, stating:

We have extended estoppel beyond situations involving affiliated corporate entities in a limited number of circumstances where a defendant, while a non-signatory to the…contract containing an arbitration clause, was nevertheless explicitly named therein as having certain tasks under that contract or the signatory seeking to avoid arbitration treated the other signatory and non-signatory as interchangeable with respect to its rights and responsibilities under the relevant contract. Where, however, the non-signatory is alleged to be a third-party wrongdoer as it is here, we have made clear that the arbitration contract in no way extends to the non-signatory.[18]

Finally, in **Sosa v. Onfido, Inc.**,[19] the Seventh Circuit Court of Appeals decided a case where the plaintiff had sued a third-party technology company that allegedly used facial recognition technology to collect the plaintiff's biometric identifiers without his consent. The incident occurred when the plaintiff interacted with an app operator in order to become a verified user of the app. The terms of the plaintiff's registration with the app operator stated that all user identities would be verified by the third-party technology company, and further stated that any disputes would be arbitrated. The technology company was not a party to this contract, but instead relied on equitable estoppel when moving to compel arbitration.

The Seventh Circuit affirmed the district court's denial of the motion to compel, ruling that the defendant technology company had not identified any statement that the plaintiff had made to induce the technology company to rely on the contract's arbitration provision. Interestingly, the Seventh Circuit applied Illinois state law to affirm denial of the motion, and expressly refused to adopt a federal common law test that was arguably more lenient.

Conclusion

As has been noted in prior articles,[20] the Supreme Court has often stretched the law and facts (sometimes to their breaking points) in order to enforce a presumption in favor of arbitration. This presumption is reflected in **Arthur Andersen** and **GE Power** where the Supreme Court permitted non-signatories to assert equitable estoppel as a basis for compelling arbitration. However, in neither case did the Supreme Court define the doctrine or decide whether the non-signatory movants had proven its elements.

The recent Courts of Appeal cases discussed above show that non-signatories cannot invoke the words "equitable estoppel" as a key that opens the arbitration door. The U.S. lower courts might have to honor the doctrine in theory, but they appear to require an extraordinary set of facts for its adoption.

Footnotes

[1] **GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC**, 140 S.Ct. 1637, 1649 (2020) (Sotomayor, J., concurring).

[2] **See, e.g., Gater Assets, Ltd. v. AO Moldovagaz**, 2 F.4th 42, 68-69 (2d. Cir. 2021); **IMA Incorporated v. Columbia Hospital Medical City at Dallas, Subsidiary L.P.**, 1 F.4th 385, 390-394; **Int'l Paper v. Schwabedissen Maschinen & Anlagen GMBH**, 206 F.3d 414, 418 (4th Cir. 2000).

[3] **See** Albert Jan van den Berg, The New York Convention of 1958: Towards a Uniform Judicial Interpretation 222-26 (1981).

[4] 9 U.S.C. §2.

[5] 9 U.S.C. §3.

[6] 129 S. Ct. 1896 (2009).

[7] 140 S. Ct. 1637 (2020).

[8] See generally Setty v. Shrinivas Sugandhalaya LLP, 3 F.4th 1166, 1169-76 (9th Cir. 2021) (Bea, J., dissenting) (discussing cases).

[9] Id. at 1168; Invista S.a.r.l. v. Rhodia, S.A., 625 F.3d 75, 84-85 (3d Cir. 2010)

[10] 140 S. Ct. at 1643; Dr. Robert L. Meinders, D.C., Ltd. v. United Healthcare Services, Inc., 2021 WL 3234918 at *5 (7th Cir., July 30, 2021)

[11] 21 Williston on Contracts 57:19 (4th ed. July 2019 update).

[12] 1 Gary B. Born, International Commercial Arbitration §§ 5.02[A][9], 10.02[A]-[P], at 713, 1418-84 (2d ed. 2014).

[13] James J. Senter, Jr., Who is Bound by Arbitration Agreements? Enforcement by and Against Non-Signatories, 6 Bus. L. Int'l 55, 65 (2005).

[14] 3 F.4th 1166 (9th Cir. 2021).

[15] Id. at 1169.

[16] Id.

[17] 2021 WL 3176760 (2d Cir., July 28, 2021).

[18] Id. at *10.

[19] 2021 WL 3523197 (7th Cir., August 11, 2021).

[20] Walter D. Kelley, Jr., Arbitrability -Which Is To Be Master?, Hausfeld Competition Bulletin (Winter 2019), reprinted in https://www.lexology.com/library/detail.aspx?g=c96af729-7741-4c4f-8dbe-e60958a345dd; Walter D. Kelley, Jr., When Does Stealth Contracting for Arbitration Become Too Sneaky?, Hausfeld Competition Bulletin (Summer 2018), reprinted in www.lexology .com/library/detail.aspx?g=b39d9ef2-c74f-42ec-a441-a319292dfa8a; Walter D. Kelley, Jr., Can State Law Render Arbitration Agreements Unenforceable?, Hausfeld Competition Bulletin (Summer 2017), reprinted in www.lexology.com/library/detail.aspx?g=242430c1-a67e-4190-879c-b8aa8d7bb475; Walter D. Kelley, Jr., United States Arbitration Update, Hausfeld Competition Bulletin (Spring 2017), reprinted in www.lexology.com/library/detail.aspx?g=55effe2-4176-4dac-9e76-31bd93da9be7; Walter D. Kelley, Jr., Mandatory Arbitration in the United States and Europe, Hausfeld Competition Bulletin (Winter 2016), reprinted in https://www.lexology.com/library/detail.aspx?g=55e3ffe2-4176-4dac-9e76-31bd93da9be7.

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