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The Work-From-Home Revolution and Employers' Ability to Control Employee Use of Digital Communications to Discuss Terms and Conditions of Employment

By Jeffrey Champ, Tallahassee

The COVID-19 pandemic has affected how companies conduct business, pushing more and more of their interactions with both customers and employees online. Accordingly, employers have begun transitioning their employees to full-time work-from-home status for the foreseeable future or even permanently. The effect of this transition on worker productivity and stress has been well documented. However, the unique characteristics of a wholly digital workforce raise new challenges related to the employees' use of their employer's digital communications systems to collectively discuss the terms and conditions of their employment under Section 7 of the National Labor Relations Act (NLRA). While a recent decision by the National Labor Relations Board (NLRB) suggests that employers maintain the ability to control their

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The CROWN Act: Protecting Natural Hairstyles

A Root-to-End Overview for Employers on Hair Discrimination Laws

By Cymoril M. White, Tampa

Many have said that the workplace tends to be society's battlefield—where culture wars play out and emerging trends conflict with long-established traditions. This notion holds true with the controversial issue of hairstyles in the workplace, an issue that has been brought to the forefront in the past year and a half by the CROWN Act. The CROWN Act (CROWN is an acronym for "Creating a Respectful and Open World for Natural Hair") prohibits discrimination based on natural hair style and texture. Variations of this bill have been introduced in twenty-nine states and even at the federal level. Now, more than ever, employers must look at several federal, state, and local laws—which are constantly changing to keep up with societal views—

See "The CROWN Act," page 12

Outokumpu Stainless: SCOTUS Applies State Law to Allow Arbitration of International Agreement Dispute by Nonsignatory

By Christopher Shulman, Tampa

If you're like most members of the Labor and Employment Law Section, the only arbitration statutes you've likely dealt with are the Federal Arbitration Act (FAA), Title 9 U.S.C. §§ 1–16, and the (Revised) Florida Arbitration Code, Chapter 682, Florida Statutes. However, Florida is, as we all know, surrounded by international waters and has substantial commerce with the Caribbean, Central America, and South America (and, of course, other parts of the world). Accordingly, employment arbitration involving at least one party who is not a U.S. national is occurring with greater frequency. Under those circumstances, the arbitration agreement typically will fall under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1] (the New York Convention or the Convention). If so, the United States Supreme Court's (SCOTUS) June 2020 decision in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*[2] is required reading.

The New York Convention generally provides for judicial enforcement of international arbitration agreements and awards, i.e., those where at least one of the parties is not a citizen of the United States. For example, Article II of the Convention deals with enforcement of an international arbitration agreement unless "said agreement is null and void, inoperative or incapable of being performed."[3] Article V provides for enforcement of resulting arbitral awards "except under certain limited circumstances dealing with specific procedural defects or when recognition or enforcement of the award would be contrary to the public policy of that country."[4]

Chapter 2 of Title 9, U.S.C.,[5] contains the United States' implementation of the New York Convention.[6] The Chapter provides for enforcement of the Convention in federal courts,[7] which have original jurisdiction regardless of the amount in controversy,[8] so long as the arbitration agreement "falls under the Convention."[9]

The FAA recognizes that state law doctrines applicable to other contracts are also applicable to arbitration agreements.[10] In *Outokumpu*, SCOTUS confirmed this, citing *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*[11] and quoting *Arthur Andersen LLP v. Carlisle*: "[The FAA] does not 'alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them).'"[12] *Carlisle*, noted the *Outokumpu* Court, specifically held that, under the FAA, nonsignatories may enforce arbitration clauses against signatories if the relevant state law (e.g., the doctrine of equitable estoppel) would have allowed the nonsignatories to bring an action against the signatories under the same circumstances.[13]

The issue in *Outokumpu* was whether the state law equitable estoppel doctrine under the FAA applied to arbitration agreements falling under the New York Convention, such that a nonsignatory could require a signatory to arbitrate disputes within the scope of the agreement. Overruling the Eleventh Circuit, SCOTUS held that, because the New York Convention contains no language that prevents it and because U.S. law otherwise requires it, the domestic doctrine of equitable estoppel does apply to contracts falling under the Convention.[14]

I suspect many of you are saying, "That's good to know, but how does that apply to my employment practice?" Here's how.

First, the case may apply if you represent a signatory to an international agreement that contains an arbitration clause, as most such agreements do. Now, under *Outokumpu*, a nonsignatory may be able to require your client to arbitrate the case where the agreement falls under the New York Convention.

Second, and perhaps of greater potential impact, is the basis for the Court's decision:

> Given that the Convention was drafted against the backdrop of domestic law, it would be unnatural to read Article II(3) [of the New York Convention] to displace domestic doctrines in the absence of exclusionary language.
>
> This interpretation is especially appropriate in the context of Article II. Far from displacing domestic law, the provisions of Article II contemplate the use of domestic doctrines to fill gaps in the Convention. For example, . . . Article II(3) states that it does not apply to agreements that are "null and void, inoperative or incapable of being performed," but it fails to define those terms. Again, ***the Convention requires courts to rely on domestic law to fill the gaps; it does not set out a comprehensive regime that displaces domestic law.***[15]

Outokumpu, in effect, states that domestic law will apply to Article II disputes regarding international agreements. By its terms, the decision does not expressly address other areas of domestic law beyond the equitable estoppel doctrine. However, especially in light of the Court's reference to 9 U.S.C. § 208, which provides that

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the FAA "applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention," it seems the decision could have a much broader impact, importing substantive U.S. contract law into the decision matrix for international employment claims, whether between signatories or between a nonsignatory and one or more signatories.

While *Outokumpu* dealt with alleged breach of contract in a construction case, I dealt with the issue as arbitrator in the context of a Florida-based cruise line employee's international contract[16] to arbitrate his employment-related claims. In that instance, the case turned on the employment agreement's choice-of-law provision, which stated that Bahamian law should apply. This was significant because the substantive claims the employee brought were claims under U.S. law—in that case, the Jones Act[17] and general United States maritime law. The parties agreed that Bahamian law afforded similar but diminished remedies to those available under U.S. law.

The cruise line case presented two conflicting principles. For the employee's part, domestic law was clear: neither Jones Act relief nor seaman-related maritime law (e.g., the seaworthiness doctrine or a seaman's right to maintenance and cure) could be waived prospectively by contract.[18] For the employer's part, pursuant to two important Eleventh Circuit cases—*Cvoro v. Carnival Corp.*[19] and *Lindo v. NCL (Bahamas), Ltd.*[20]—such provisions are generally enforceable in international contracts, so long as there is some right of post-award review like that provided by the Convention's Article V provisions and 9 U.S.C. § 207, notwithstanding the fact that a choice-of-law clause may diminish substantive remedies a litigant might otherwise have available under U.S. law. In essence, *Cvoro* and *Lindo* allow an employer to require, through a choice-of-law provision, effective waiver of the broad scope of Jones Act and U.S. maritime law presumptions, burdens of proof, and remedies in arbitration.

However, those cases dealt with Article V enforcement of arbitration awards. *Outokumpu* teaches that we must apply U.S. law "to fill the gaps" in determining whether international employment law agreements may be compelled to arbitration under Article II(3)—i.e., whether there was an enforceable arbitration agreement under domestic (U.S. or Florida) law that was susceptible to arbitration in the first instance. Thus, applying *Outokumpu* and performing what amounted to an Article II analysis on arbitrability, I found that the choice-of-law clause would have operated as a prospective waiver of the employee's rights under the Jones Act and American maritime law, rendering the arbitration clause "null and void" if not severed. Frankly, but for *Outkumpu*'s importation of domestic law considerations into international arbitration agreements, I likely would have ruled that Bahamian law applied, under *Lindo*.[21]

To borrow an ironic phrase from one of the counsel in the seafarer arbitration in which the issue came up, *Outokumpu* represents a "sea change" in the application of choice-of-law terms in international contracts between seamen and their American-based employers. I suspect it could have broader application, beyond just the cruise industry, to any internationally chartered but American-based employer. In any event, *Outokumpu* deserves the attention of labor and employment lawyers.


C. SHULMAN

***Chris Shulman** is an attorney, mediator, and arbitrator based out of Tampa. He has conducted almost 3500 mediations and more than 1500 arbitrations (or similar decision-making processes)—a majority of which involved labor or employment issues.*

Endnotes

1 June 10, 1958, 21 U.S.T. 2517.

2 140 S. Ct. 1637, __ U.S. __ (2020).

3 Article II(3), New York Convention, 1970 U.S.T. LEXIS 115, *3, 21 U.S.T. 2517.

4 *Id.* at Article V(2)(b).

5 Chapter 1, Title 9, U.S.C., is the Federal Arbitration Act.

6 9 U.S.C. §§ 201–208.

7 *Id.* at § 201.

8 *Id.* at § 203.

9 *Id.* at § 202.

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in [9 U.S.C. § 2], falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

Id.

10 9 U.S.C. § 2.

11 489 U.S. 468, 474 (1989).

12 *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1643 (2020) (quoting *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009)).

13 *Id.* at 1643–44 (citing *Carlisle*, 556 U.S. at 631).

14 140 S. Ct. 1644–45.

15 *Id.* at 1645 (emphasis added) (internal citations omitted).

16 The employee was a citizen of a country other than the United States, and the employer was formed under the laws of yet another country, although its principal place of business was here in Florida.

17 46 U.S.C. § 30104.

18 *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG*, 783 F.3d 1010, 1021 (5th Cir. 2015); *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 422 n.9 (2009) (the right to maintenance and cure derives from tort and, "[a]lthough the right has been described as incident to contract, it cannot be modified or waived.").

19 941 F.3d 487 (11th Cir. 2019).

20 652 F.3d 1257 (11th Cir. 2011).

21 *Id.* at 1279. Apparently, I am not too far out on a limb here, as the parties in my arbitration made reference to other decisions where arbitrators had ruled the same way, post-*Outokumpu*. The difference is, I believe, the fact that the analysis is taking place at the Article II stage, rather than the Article V award enforcement stage.