



## **Broad foreign arbitration clauses are enforceable in the US**

Recent US Court of Appeals decision reinforces the enforceability of broad arbitration clauses subject to the New York Arbitral Convention and the applicability of such arbitration clauses to non-signatories in certain circumstances under the US doctrine of collateral estoppel. The decision adds additional support to the enforcement of foreign choice of law and arbitration provisions in commercial contracts.

Published 03 September 2024

The US Court of Appeals for the 11th Circuit (one of several US regional federal courts of appeal) in a recent decision involving a commission claim made pursuant to a mega-yacht sales contract has reinforced the enforceability of broad arbitration clauses in international contracts subject to the New York Arbitration Convention and the applicability of such arbitration clauses to non-signatories in certain circumstances under the US doctrine of collateral estoppel. The Court rejected efforts by the claimants to avoid the arbitration clause by framing their claims in tort rather than contract. The greater familiarity of the US federal courts versus state courts in matters concerning arbitration makes it advisable when possible to remove such claims if filed first in a state court. This decision upholds the removability of claims subject to the New York Convention. The decision is styled *Northrop and Johnson Yacht-Ships Inc. v. Royal Van Lent Shipyard BV and Feadship America Inc.* and is reported at 2021 U.S. App. LEXIS 8797.

## **Procedural history and underlying claims**

The claims were originally filed in Florida state court by yacht broker Northrop and Johnson Yacht-Ships Inc. against Dutch yacht builder Royal Van Lent Shipyard BV and its US distribution agent Feadship America Inc. Royal Van Lent and Feadship removed the claims to the federal court in Miami alleging the applicability of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). They also maintained that all claims asserted, including contractual and tort allegations, were subject to the Dutch arbitration clause contained in the commission agreement between the brokerage company and the yacht builder. The lower federal court agreed and granted the motion to dismiss and compel arbitration. The claimants then appealed to the Court of Appeals for the 11th Circuit which reviewed the lower court decision *de novo*.

## **Court of Appeals decision**

In a unanimous opinion issued on 26 March 2021 the Court of Appeals affirmed the lower court. The opinion first noted that the underlying commission agreement contained an arbitration clause which provided that: *Any dispute arising out of or in connection with this Agreement shall be finally settled in accordance with The Arbitration Rules of the Netherlands Arbitration Institute (NAI)*. The opinion restated that US court decisions interpreting the New York Convention have generally held that the Convention requires the courts of signatory nations to give effect to private arbitration agreements and to enforce arbitral awards made in other signatory nations and that such claims are removable for the state to federal court further noting that both the US and The Netherlands are signatories to the Convention.

## **Issues on appeal**

The broker Northrop on appeal again challenged whether there was an agreement to arbitrate, which issue became the focus of the Court's analysis. Northrop argued that the Commission Agreement governed only the commission due to Northrop for the sale of a first yacht and not the commission due for the construction of a second yacht and that the latter formed the basis of the suit such that its claims arose outside the scope of the arbitration provision. Northrop also argued that Feadship America could not invoke the arbitration provision as a non-signatory to the Commission Agreement.

### **Jurisdictional requirements to apply the New York Convention**

In upholding the lower court decision, the Court of Appeals first restated the general rule that arbitration agreements fall under the Convention when four jurisdictional prerequisites are met:

1. that there is an agreement in writing within the meaning of the Convention;

2. that the agreement provides for arbitration in the territory of a signatory of the Convention;
3. that the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and
4. that a party to the agreement is not an American citizen or that the commercial relationship has some reasonable relation with one or more foreign states.

## **Strong presumption in favor of arbitration**

The Court of Appeals then generally noted that under the New York Convention and Supreme Court and 11th Circuit precedent applying the Convention, there is a strong presumption in favor of freely negotiated contractual choice-of-law and forum selection provisions and this presumption applies with special force in the field of international commerce. The Court then went on to state that US courts have consistently held that that provisions that cover “all disputes arising out of or in connection with an agreement” such as in this case are meant to be read broadly. The Court concluded that the arbitration provision in question did cover all of Northrop's claims and that even the tort claims of quantum merit, tortious interference and unjust enrichment went to the heart of the agreement between the parties and fell squarely within the scope of the arbitration provision. The Court held that Northrop could not try to avoid the express terms of the agreement it signed by bringing equitable tort claims rather than breach of contract claims.

## **Applicability to certain non-signatories under collateral estoppel**

The Court of Appeals also rejected Northrop's argument that the lower court had erred when it allowed Feadship America to invoke the arbitration provision because it was not a signatory to the Commission Agreement. The Court restated that under US law a non-signatory to an arbitration agreement may nevertheless compel arbitration under the doctrine of equitable estoppel either when the plaintiff-signatory must rely on the terms of the written agreement in asserting its claims or when the plaintiff-signatory alleges substantially interdependent and concerted misconduct by the signatories and non-signatories and such alleged misconduct is founded in or intimately connected with the obligations of the underlying agreement. The Court of Appeals noted that the US Supreme Court recently in 2020 in the case of *GE Energy Power Conversion France SAS Corp. v. Outokumpu Stainless USA LLC* held that the New York Convention does not prohibit the application of domestic equitable estoppel doctrines. The Court then held that Feadship America was entitled to invoke the Commission Agreement's arbitration provision under the second theory of equitable estoppel given that the broker had alleged supposed interdependent and concerted misconduct between Royal Van Lent and Feadship America that allegedly violated express obligations in the Commission Agreement.

## **Conclusions**

We believe this Court of Appeals decision is important because it reinforces the enforceability of broadly drafted arbitration clauses and reiterates that a party may not try to avoid such broadly drafted arbitration clauses by attempting to cast their complaint in tort rather than contract.

The decision is also important in that it applied a recent US Supreme Court case holding that the New York Arbitration Convention does not prevent a US court from applying the doctrine of equitable estoppel to compel arbitration in certain circumstances as to a non-signatory to the underlying agreement.

The decision also reinforces the advisability of removing such actions within 30 days of service from the state to federal court pursuant to the New York Convention and then moving the federal court to compel arbitration.

*We thank our guest authors, Charles De Leo and Ryon Little for sharing their time and knowledge. The law firm, De Leo & Kuylenstierna, specializes in maritime law and is located in Miami, Florida.*