# Contents

# CHAPTER 15

# Private International Law

## A. COMMERCIAL LAW/UNCITRAL

### 1. UNCITRAL

The U.S. statement at the UN General Assembly Sixth Committee on the report of the United Nations Commission on International Trade Law ("UNCITRAL") on the work of its 52nd session is excerpted below.

---

*  *  *  *

The United States welcomes the Report of the 52nd session of the United Nations Commission on International Trade Law and commends the efforts of UNCITRAL's Member States, observers, and Secretariat in continuing to promote the development and harmonization of international commercial law.

We were pleased that UNCITRAL approved a number of new guides and legal instruments in 2019. We would like to thank the Secretariat for its excellent work managing the update of the Model Legislative Provisions on Public-Private Partnerships and accompanying Legislative Guide. Developed with the assistance of experts and Member States, this updated guide should better promote the sound management of such partnerships with its emphasis on enhancing transparency, fairness, and sustainability, while reducing the risk of corruption and the misuse of public funds.

We note that the Practice Guide to the UNCITRAL Model Law on Secured Transactions was the final product concluded by the very productive working group on Secured Transactions. We hope this Practice Guide will serve as a useful reference to individuals and businesses looking for practical, actionable advice on how to operate and structure transactions under the UNCITRAL Model Law.

We were also pleased that UNCITRAL approved the Model Law on Enterprise Group Insolvency and its Guide to Enactment. We hope this law will contribute to the establishment of harmonized national enterprise group insolvency laws that protect and maximize the value of the assets and operations of enterprise groups and their members, while also providing appropriate protection to creditors. In addition, and relatedly, we were pleased that UNCITRAL updated its Legislative Guide on Insolvency Law to address the obligations of directors of enterprise group companies in the period approaching insolvency.

We note with satisfaction that UNCITRAL undertook a number of suggestions made in prior years to improve its working methods and become more efficient. As a result, the Commission session this year was well organized and more streamlined, and we look forward to UNCITRAL's continued efforts to structure its agenda and meetings to maximize both efficiency and effectiveness.

We look forward to continuing our productive engagement with UNCITRAL this year. We welcome planned discussions on the appropriate size and composition of UNCITRAL's membership. We hope such discussions will focus on ensuring UNCITRAL can maintain and improve upon its ability to develop and promote effective, usable instruments supporting stable and predictable legal outcomes for citizens and businesses of our country, and the world.

* * * *

## 2. Singapore Convention on Mediation

On August 7, 2019, U.S. Chargé d'Affaires Rafik Mansour addressed a roundtable following the signing ceremony of the Singapore Convention on Mediation. See *Digest 2018* at 529 regarding the conclusion of the Singapore Convention (the United Nations Convention on International Settlement Agreements Resulting from Mediation). Chargé Mansour's remarks on behalf of the United States are excerpted below and available at https://sg.usembassy.gov/remarks-charge-daffaires-mansour-at-the-singapore-convention-on-mediation-roundtable-lunch/?_ga=2.202703698.238228175.1580748886-698237648.1580748886.

---

* * * *

… I would like to thank the Government of Singapore and the UN Commission on International Trade Law (UNCITRAL) for hosting this ceremony today. As we gather to sign the Singapore Convention on Mediation, we are casting a spotlight for the world on the importance of mediation as a means to settle disputes and further promote international commerce.

The United States was an early proponent of the Singapore Convention, having recognized the need for a way to bolster confidence that once a mediated settlement had been reached by parties to a dispute in different countries, stakeholders could rely on it being enforced across national boundaries. And, the United States is proud to be among the first countries signing the Singapore Convention.

The Singapore Convention on Mediation will make it easier for companies operating across borders to resolve their disputes with partners through mediation. The United States believes that the Singapore Convention will support the efforts of many companies, including

American ones, to encourage their overseas partners to make greater use of mediation. In fact, a coalition of business groups wrote to Secretary of State Pompeo last November, highlighting how the Singapore Convention will reduce costs for businesses and reduce the need for duplicative litigation, by encouraging mediation as a viable path to resolving commercial disputes.

On behalf of the U.S. government, I would like to take this opportunity to thank UNCITRAL, its Secretary Anna Joubin-Bret, and her outstanding team for all their tireless efforts on the Convention, as well as delegates from Singapore, who spearheaded the negotiations. …

We believe that this Convention represents UNCITRAL's work at its best—bringing together lawyers and experts from different legal cultures to work together to develop an instrument that will address a significant need and that will benefit cross-border trade and facilitate international commerce around the world. The Convention truly has the potential to become one of UNCITRAL's most significant accomplishments and one of its most successful instruments.

The United States looks forward to continuing to work with all of you to support the Singapore Convention and encourage the greater use of mediation as a means to resolve cross-border commercial disputes. …

* * * *

### 3. U.S. Ratification of the UN Convention on the Assignment of Receivables in International Trade

The United States of America became the second State Party to the UN Convention on the Assignment of Receivables in International Trade when it deposited its instrument of ratification at UN Headquarters in New York on October 15, 2019. The Convention requires that five States Parties ratify before it can enter into force. The Convention was endorsed by the General Assembly and opened for signature and ratification in 2001. See *Digest 2001* at 792. The U.S. instrument of ratification, including understandings and declarations, appears below. U.N. Doc. No. C.N.567.2019.TREATIES-X.17 (Depositary Notification).

---

* * * *

UNDERSTANDINGS

(1) It is the understanding of the United States that paragraph (2) (e) of Article 4 excludes from the scope of the Convention the assignment of-

(A) receivables that are securities, regardless of whether such securities are held with an intermediary; and

(B) receivables that are not securities, but are financial assets or instruments, if such financial assets or instruments are held with an intermediary.

(2) It is the understanding of the United States that the phrase 'that place where the central administration of the assignor or the assignee is exercised,' as used in Articles 5 (h) and

36 of the Convention, has a meaning equivalent to the phrase, 'that place where the chief executive office of the assignor or assignee is located.'

(3) It is the understanding of the United States that the reference, in the definition of 'financial contract' in Article 5 (k), to 'any other transaction similar to any transaction referred to above entered into in financial markets' is intended to include transactions that are or become the subject of recurrent dealings in financial markets and under which payment rights are determined by reference to-

(A) underlying asset classes; or

(B) quantitative measures of economic or financial risk or value associated with an occurrence or contingency. Examples are transactions under which payment rights are determined by reference to weather statistics, freight rates, emissions allowances, or economic statistics

(4) It is the understanding of the United States that because the Convention applies only to 'receivables,' which are defined in Article 2 (a) as contractual rights to payment of a monetary sum, the Convention does not apply to other rights of a party to a license of intellectual property or an assignment or other transfer of an interest in intellectual property or other types of interests that are not a contractual right to payment of a monetary sum.

(5) The United States understands that, with respect to Article 24 of the Convention, the Article requires a Contracting State to provide a certain minimum level of rights to an assignee with respect to proceeds, but that it does not prohibit Contracting States from providing additional rights in such proceeds to such an assignee.

DECLARATIONS

(1) Pursuant to Article 23 (3), the United States declares that, in an insolvency proceeding of the assignor, the insolvency laws of the United States or its territorial units may under some circumstances-

(A) result in priority over the rights of an assignee being given to a lender extending credit to the insolvency estate, or to an insolvency administrator that expends funds of the insolvency estate for the preservation of the assigned receivables (see, for example, title 11 of the United States Code, sections 364 (d) and 506 (c)); or

(B) subject the assignment of receivables to avoidance rules, such as those dealing with preferences, undervalued transactions and transactions intended to defeat, delay, or hinder creditors of the assignor.

(2) Pursuant to Article 36 of the Convention, the United States declares that, with respect to an assignment of receivables governed by enactments of Article 9 of the Uniform Commercial Code, as adopted in one of its territorial units, if an assignor's location pursuant to Article 5 (h) of the Convention is the United States and, under the location rules contained in section 9-307 of the Uniform Commercial Code, as adopted in that territorial unit, the assignor is located in a territorial unit of the United States, that territorial unit is the location of the assignor for purposes of this Convention.

(3) Pursuant to Article 37 of the Convention, the United States declares that any reference in the Convention to the law of the United States means the law in force in the territorial unit thereof determined in accordance with Article 36 and the Article 5 (h) definition of location. However, to the extent under the conflict-of-laws rules in force in that territorial unit, a particular matter would be governed by the law in force in a different territorial unit of the United States, the reference to 'law of the United States' with respect to that matter is to the law in force in the different territorial unit. The conflict-of-laws rules referred to in the preceding sentence refer

primarily to the conflict-of-laws rules in section 9-301 of the Uniform Commercial Code as enacted in each State of the United States.

(4) Pursuant to Article 39 of the Convention, the United States declares that it will not be bound by chapter V of the Convention.

(5) Pursuant to Article 40, the United States declares that the Convention does not affect contractual anti-assignment provisions where the debtor is a governmental entity or an entity constituted for a public purpose in the United States."

* * * *

## 4. Convention on the recognition and enforcement of foreign judgments in civil or commercial matters

On June 18, 2019, State Department Attorney Adviser Michael Coffee delivered the U.S. opening statement at a diplomatic conference to finalize the text of a convention on the recognition and enforcement of foreign judgments in civil or commercial matters. Mr. Coffee's remarks are excerpted below.

* * * *

Since the 1800s, federal and state courts in the United States have recognized and enforced foreign judgments, both in furtherance of the principle of international comity and as a result of domestic law. Long ago, we realized that this was an appropriate course of action. In light of increasing transnational business relations and the recognition that transnational friendship and commerce would be advanced by the flow of judgments between countries, the United States proposed that the Hague Conference on Private International Law undertake work on this topic beginning in the early 1990s.

We now find ourselves poised to take a step toward realizing our shared goals. Over the next two weeks, we have an opportunity to find common ground on a series of final issues and achieve our shared objective of securing consensus in this body on a convention on the recognition and enforcement of foreign judgments in civil or commercial matters. This would be a significant accomplishment that we hope will promote global commerce and friendship and facilitate cross-border movement of persons and goods.

…We look forward to working with the delegations to reach consensus.

With that said, it is essential that we remain realistic in the coming weeks about the need to finalize an instrument that will promote harmony among jurisdictions. While the instrument might not be the most ambitious with respect to the matters covered or the manner in which it applies to those matters, we must not lose sight of the contribution that such a convention will provide. We should resist letting the perfect be an enemy of the good. In this regard, the United States delegation believes that the following goals are critical: (1) to draft an instrument that will be understandable to those for whom we are negotiating—litigants, attorneys and judges, and (2) to ensure that any new convention that emerges from this process will be implementable—and will be implemented—by a maximum number of States taking into account the domestic legal process that each state will need to follow in ratifying or otherwise bringing the new convention

into force as a matter of their domestic law. If we fall short on either of these goals, we will have negotiated a convention of, at best, limited benefit.

As we think about the scope of the Convention, the United States would like to limit the need for a State to declare that it will not apply the Convention to particular subject matters as well as the likelihood that courts will rely on public policy to refuse to recognize or enforce a foreign judgment. For this reason, the United States believes that it is essential to obtain consensus on the inclusion of particular matters within the scope of the Convention. To do otherwise will invite complication in implementation, which will not assist the beneficiaries of this Convention.

Similarly, we seek convention provisions that are understandable in, and work within, a maximum number of legal systems. While we focus on how a provision will operate within our system, we will strive to listen to other delegations concerning the manner in which that provision will operate within their system. Ultimately we seek solutions that will work for all. We are confident that all delegations will apply a similar approach.

We also emphasize consideration of ratifiability throughout these negotiations. Any text that cannot be applied because it cannot be brought into force does not help anyone. We have long ago learned that it is difficult to become party to a contentious treaty. For this reason, we focus on substance and drafting of the entirety of the text. We can promise that you will be hearing from us about issues such as a mechanism on the establishment of treaty relations to increase the chances for the United States to become party to the convention currently being negotiated.

* * * *

## B. FAMILY LAW

See Chapter 2 for discussion of litigation regarding the Hague Abduction Convention.

## C. INTERNATIONAL CIVIL LITIGATION

### *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA,* et al.

In September 2019, the United States filed an amicus brief in the U.S. Supreme Court in support of the petitioner in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC,* et al., No. 18-1048. The issue in the case is whether the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards allows a nonsignatory to an arbitration agreement to compel arbitration based on the application of domestic-law agency and contract doctrines, such as equitable estoppel. The U.S. brief, arguing that the New York Convention does not categorically prohibit enforcement by a nonsignatory, is excerpted below.

---

* * * *

The court of appeals erred in interpreting the New York Convention to categorically prohibit a nonsignatory to an arbitration agreement from compelling arbitration based on the application of domestic-law contract and agency principles, such as equitable estoppel. The court's interpretation of the Convention runs counter to its text, context, purpose, drafting history, the post-ratification understanding of Contracting States, and the Executive Branch's interpretation of the treaty. The Convention requires Contracting States to recognize and enforce arbitration agreements that satisfy its provisions as to form. But the Convention does not prohibit Contracting States from determining the scope of such agreements—including who is bound by or can enforce them—in accordance with domestic law providing for enforcement by nonsignatory parties under contract law and agency principles. Thus, just as a nonsignatory to a domestic arbitration agreement may enforce that agreement "through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel," *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 631 (2009) (citation and internal quotation marks omitted), so too may a nonsignatory to an international arbitration agreement rely on those doctrines in an appropriate case.

**A. The New York Convention Does Not Categorically Prohibit The Application Of Domestic-Law Doctrines That Allow Nonsignatories To Compel Arbitration**

Under principles of interpretation that this Court has applied to treaties to which the United States is a party, a court begins "with the text of the treaty and the context in which the written words are used." *Air France* v. *Saks*, 470 U.S. 392, 397 (1985). In addition, the Court considers the "overall structure" and "purpose" of a treaty. *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 169 (1999). "Because a treaty ratified by the United States is 'an agreement among sovereign powers,' [this Court will] also consider[] as 'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations." *Medellin* v. *Texas*, 552 U.S. 491, 507 (2008) (quoting *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)). And the Court has recognized that the Executive Branch's interpretation of a treaty "is entitled to great weight." *Id.* at 513 (citation omitted). These interpretive principles support the conclusion that the Convention does not require the parties before the court to have signed a written arbitration agreement if applicable domestic-law principles otherwise demonstrate that the nonsignatory parties are entitled to invoke the agreement.

1. The court of appeals "h[eld] that, to compel arbitration, the Convention requires that the arbitration agreement be signed by the parties before the Court or their privities." But no provision of the Convention purports to define who may properly be considered a "party" to an arbitration agreement entitled to enforce it in court—let alone to limit that category only to those who signed the agreement. See, *e.g.*, 1 Gary B. Born, *International Commercial Arbitration* § 10.01[C], at 1412 (2d ed. 2014) ("[T]he New York Convention refers only to the basic principle that international arbitration agreements bind their parties, without addressing the question of how an arbitration agreement's parties are determined."). Nor does the Convention address whether equitable estoppel or other doctrines may be applied to determine whether a nonsignatory may be bound by or enforce a covered agreement. Dorothee Schramm et al., *Article II, in Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary On the New York Convention*, at 62, 64 (Herbert Kronke et al. eds., 2010) (Schramm) ("[I]t is not infrequent for arbitration proceedings to involve parties who did not sign th[e] instrument, or who signed it in a different name…. The national law governing the arbitration agreement

determines whether and under which conditions the non-signatory is bound by the arbitration agreement and is thus a proper party to the arbitration."). The Convention therefore does not displace ordinary principles of contract law and agency that function to identify "which non-signatories may be held to be parties to—and consequently both bound and benefitted by—an arbitration agreement." Born § 10.01, at 1406.

The Convention's silence on whether nonsignatories may be deemed to be parties or otherwise entitled to enforce an arbitration agreement resolves this case. Congress provided that "Chapter 1 [of the FAA] applies to actions and proceedings brought under [Chapter 2]" in the absence of a conflict with the Convention, 9 U.S.C. 208, and this Court has interpreted Chapter 1 to permit enforcement of arbitration agreements based on " 'traditional principles' of state law [that] allow a contract to be enforced by or against" nonsignatories "through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel,' " *Arthur Andersen*, 556 U.S. at 631 (citation omitted). Those "background principles of state contract law" concern "the scope of agreements" to arbitrate, "including the question of who is bound by them." *Id.* at 630. Because the Convention does not restrict the permissible scope of international arbitration provisions, it does not conflict with the application of doctrines governing when a nonsignatory may enforce those agreements. See Restatement of the Law: The U.S. Law of International Commercial and Investor-State Arbitration § 2.3(b) (Proposed Final Draft Apr. 24, 2019) (approved by the membership of the American Law Institute at the May 2019 Annual Meeting…) ("Upon request, a court enforces an international arbitration agreement against or in favor of a nonsignatory to the agreement to the extent that the nonsignatory: (1) is deemed to have consented to such agreement, or (2) is otherwise bound by or entitled to invoke the agreement under applicable law.").

The court of appeals reached a contrary conclusion by relying on the Convention's requirement that Contracting States "recognize an agreement in writing under which the parties undertake to submit to arbitration," Convention art. II(1), 21 U.S.T. 2519, and its definition of "[t]he term 'agreement in writing' " to "include an arbitral clause in a contract or an arbitration agreement, signed by the parties," *id.* art. II(2), 21 U.S.T. 2519. Those provisions addressing an arbitration agreement's form "establish a rule of presumptive validity applicable to those agreements" that satisfy those provisions and "preclude[] Contracting States from requiring additional or more demanding formal requirements under national law." Born §§ 4.04[A][1][b][i], at 494, and 4.06[A][1], at 618. The Convention thereby sets a uniform international standard guaranteeing that written arbitration agreements that are signed will be valid and enforceable—but it does not limit the scope of those agreements or prevent the application of domestic-law doctrines governing who may properly be deemed to be bound by them. See Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* ¶ 2.42 (6th ed. 2015) ("The requirement of a signed agreement in writing * * * does not altogether exclude the possibility that an arbitration agreement concluded in proper form between two or more parties might also bind other parties.").

It would be anomalous to interpret the Convention's provisions regarding the form of an arbitration agreement to restrict the permissible scope of an arbitration agreement, because those form provisions serve different functions. One "purpose of [the written-form provision] is to ensure that a party is aware that he is agreeing to arbitration." Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, at 171 (1981). Written-form provisions also serve an evidentiary function by "provid[ing] a readily-verifiable evidentiary record of the parties' agreement to arbitrate," including their agreement on "critical

issues such as the arbitral seat, institutional rules, language, number of arbitrators and the like." Born § 5.02[A][1], at 661-662. "In cases where there is concededly a valid agreement to arbitrate between some parties," as established by compliance with the form provisions, "the question whether that agreement extends to another party is more closely akin to determining the scope of the agreement than to determining whether any agreement has been formed or whether an agreement is valid." *Id.* § 10.01[E], at 1417.

In addition to prescribing the form of an agreement that Contracting States must recognize as valid, the Convention provides that "[t]he 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." Convention art. II(3), 21 U.S.T. 2519. Outokumpu contends that "the term 'the parties' should have the same meaning every time Article II uses it," and that "[t]he logical reading of the Article II text is that 'one of the parties' requesting arbitration must be a 'party' to—a signatory of—the arbitration agreement." Resps. Br. in Opp. 21, 23. But the context of the provisions makes clear that when the Convention uses the term "party," it sometimes refers to parties to an arbitration agreement, see, *e.g.*, Convention arts. II(1), V(1)(a), 21 U.S.T. 2519, 2520; sometimes refers to the litigants in court seeking to compel arbitration, *id.* art. II(3), 21 U.S.T. 2519; and sometimes refers to the individuals or entities who participated in arbitration or who are seeking to enforce an arbitral award, see, *e.g.*, *id.* art. V(1), 21 U.S.T. 2520. To be sure, sometimes the only "parties" involved are those who signed the arbitration agreement. But in other cases, background principles of contract law and agency demonstrate that a nonsignatory to an agreement should be deemed a "party" or otherwise bound by or entitled to enforce the agreement. In such a case, the Convention's use of the term "party" should not be read to confine the scope of the agreement by binding, and limiting enforcement to, only its signatories.

Notably, the Convention's use of the term "party" mirrors the similarly varied use of the term "party" in Chapter 1 of the FAA. Like the Convention, the FAA sometimes uses the term "party" to refer to the parties to an arbitration agreement, 9 U.S.C. 9 ("[i]f the parties in their agreement have agreed"); sometimes refers to the litigants seeking to enforce the agreement in court, 9 U.S.C. 3 (court shall grant a stay "on application of one of the parties"); and sometimes refers to the individuals who participated in an arbitration, 9 U.S.C. 9 ("any party to the arbitration may apply"). In *Arthur Andersen*, this Court observed that the reference to "parties" in the FAA's stay provision "refers to parties to the litigation rather than parties to the contract." 556 U.S. at 630 n.4. And while the stay provision requires that the claims be "referable to arbitration under an agreement in writing, " 9 U.S.C. 3, this Court reasoned that "[i]f a written arbitration provision is made enforceable against (or for the benefit of) a third party under state contract law, the statute's terms are fulfilled." *Arthur Andersen*, 556 U.S. at 631. So too here, if a written and signed international arbitration agreement is made enforceable by or against a nonsignatory under domestic-law contract or agency principles, the Convention's terms are fulfilled.

It would be particularly unwarranted to interpret Article II of the Convention to restrict enforcement of an arbitration agreement to those who signed the agreement, because the definition of the term "agreement in writing" uses non-exhaustive language, stating that it "shall *include*"—but is not textually *limited to*— "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." Convention art. II(2), 21 U.S.T. 2519 (emphasis added); see, *e.g.*, *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("[T]he term 'including' is not one of all-embracing

definition, but connotes simply an illustrative application of the general principle.") (citation omitted). Because the signature of the parties is not an unalterable prerequisite to a valid "agreement in writing" within the meaning of the Convention, Article II(2) cannot sensibly be read to limit the scope of those entitled to enforce an agreement to only the signatories.

In line with that understanding, a recommendation issued by the United Nations Commission on International Trade Law (UNCITRAL), which is responsible for promotion of the Convention and its effective implementation and uniform interpretation, proposes that Article II(2) should "be applied recognizing that the circumstances described therein are not exhaustive." *Report of the United Nations Commission on International Trade Law on the work of its 39th Session, 19 June – 7 July, 2006,* Annex II, at 62, U.N. Doc. A/61/17, GAOR 61st Sess., Supp. No. 17 (2006) (*UNCITRAL Report*). The Restatement likewise provides that "Article II(2)'s list of writings" should be understood "as illustrating, not exhausting, the documentation that meets the Convention's requirements as to form," based on "the FAA provisions that implement the Convention[], the plain meaning of 'include' * * * , international trends, and sound policy." Restatement § 2.4 cmt. b. Thus, while an "agreement in writing" clearly includes signed, written agreements, it does not by its terms exclude written agreements intended to encompass nonsignatories who are, as a matter of domestic law, properly deemed parties to the agreement or are otherwise bound by or entitled to enforce it.

2. The context and structure of the Convention further demonstrate that Article II does not limit a nonsignatory's ability to compel enforcement of an arbitration agreement in accordance with domestic law. With respect to enforcement of an arbitral *award*, the Convention expressly provides that the Convention should not be read to "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." Convention art. VII(1), 21 U.S.T. 2520-2521. The Convention accordingly sets a floor that requires Contracting States to recognize awards under specified circumstances, but it does not establish a ceiling preventing broader recognition of awards in accordance with domestic-law principles. See, *e.g.*, *Commissions Imp. Exp. S.A.* v. *Republic of the Congo*, 757 F.3d 321, 328 (D.C. Cir. 2014) (the Convention "expressly preserves, under Article VII, arbitral parties' right to rely upon domestic laws that are *more favorable* to award enforcement than are the terms of the Convention"). And in proceedings governed by the Convention, courts have approved reliance on background principles of contract and agency law to determine "whether a third party not named in an arbitral award may have that award enforced against it under a theory of alter-ego liability, or any other legal principle concerning the enforcement of awards or judgments." *CBF Indústria de Gusa S/A* v. *AMCI Holdings, Inc.*, 850 F.3d 58, 75 (2d Cir. 2017).

Although Article VII of the Convention does not expressly mention arbitration agreements in addition to form provisions, and the question therefore is not whether the agreement is presumptively valid but rather who may enforce it.

3. That interpretation of the Convention also "accords with its objects and purposes." *Abbott* v. *Abbott*, 560 U.S. 1, 20 (2010). "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to *encourage* the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (emphasis added).

The Convention thus should be interpreted in accordance with the "emphatic federal policy in favor of arbitral dispute resolution," which "applies with special force in the field of international commerce." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); see Schramm 48 (concluding that it would be "overly formalistic and even counterproductive to deny the validity of [an] arbitral clause solely on Article II grounds"). As this Court has recognized when interpreting Chapter 1 of the FAA, the federal policy favoring arbitration "cannot possibly require the disregard of state law *permitting* arbitration by or against nonparties to the written arbitration agreement." *Arthur Andersen*, 556 U.S. at 630 n.5. The Convention likewise does not override such laws, which would put international agreements at a disadvantage compared to similar domestic agreements. See Restatement § 2.4 cmt. b (observing that "no compelling policy supports maintaining more rigorous writing standards for international arbitration agreements than for agreements falling under FAA Chapter 1"); see also Convention art. III, 21 U.S.T. 2519 (prohibiting Contracting States from "impos[ing] substantially more onerous conditions * * * on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards"). While the application of domestic-law contract and agency principles will not necessarily lead to a uniform *outcome* in all cases, it will lead to a uniform *approach* to enforcement of arbitration agreements, in accordance with the Convention's purpose.

The Eleventh Circuit's contrary rule, interpreting the Convention to categorically prohibit enforcement of an international arbitration agreement by a nonsignatory, is also in tension with the Convention's objective of giving effect to an arbitration agreement's terms. Cf. *Volt Info. Sciences, Inc.* v. *Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) (observing that the FAA's "primary purpose" is to "ensur[e] that private agreements to arbitrate are enforced according to their terms"). If domestic-law contract and agency principles establish that the signatories must be deemed to have consented to a nonsignatory's enforcement of an arbitration agreement in appropriate circumstances, and the nonsignatory then seeks to compel arbitration in accordance with that understanding, the Convention should not be interpreted to stand in the way of enforcement. See, *e.g.*, Restatement § 2.3 Reporters' Note a (observing that "the general proposition that nonsignatories can be bound by or invoke an arbitration agreement" is "practically and logically necessary to give effect to parties' agreements to arbitrate," and that courts may permissibly "rely on a range of ordinary contract, agency, and related principles" to "determine the parties' intent with respect to nonsignatories").

4. The Convention's negotiating history reinforces the conclusion that Article II was not intended to restrict the permissible scope of an arbitration agreement or dictate who may enforce it. As this Court has recognized, "[i]n their discussion of [Article II], the delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements." *Scherk*, 417 U.S. at 520 n.15 (citing G. W. Haight, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of United Nations Conference, May/June 1958*, at 24-28 (1958)).

In particular, the negotiating history reflects the drafters' intent to impose duties on Contracting States to enforce arbitration agreements that satisfied the form provisions triggering the rule of presumptive validity. See Haight 21-28. For example, "[t]he United Kingdom delegate felt strongly * * * that these provisions for the recognition of agreements were necessary" to prevent Contracting States from "kill[ing] an arbitration before it was even born by

permitting litigation in their courts in spite of agreements to arbitrate." *Id.* at 25. And the drafters "appeared unwilling to qualify the broad undertaking not only to recognize but also to give effect to arbitral agreements" through the Article II(3) provision on compelling arbitration. *Id.* at 28. Nothing in this history indicates that Article II of the Convention was intended to regulate the scope of arbitration agreements or displace domestic-law doctrines concerning who is bound by or may enforce a valid agreement.

5. The "post ratification understanding" of Contracting States, *Zicherman*, 516 U.S. at 226, further confirms that the Convention does not categorically prohibit a nonsignatory from enforcing an international arbitration agreement pursuant to contract and agency doctrines such as assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver, or estoppel.

In cases arising under the Convention, "disputes over the identities of the parties to international arbitration agreements, and the application of non-signatory doctrines, have been left almost entirely to national courts, arbitral tribunals and commentary." Born § 10.01[C], at 1412. In resolving those disputes, foreign courts have often invoked domestic-law contract and agency principles—including principles of estoppel—to enforce international arbitration agreements between signatories and nonsignatories. See *id.* §§ 10.01[D], at 1412-1414, 10.02[A]-[P], at 1419-1484; see also *id.* § 10.02[K], at 1473 (observing that the estoppel doctrine is particularly well-recognized "in common law jurisdictions" and that civil law jurisdictions apply "similar conceptions * * * under rubrics of good faith, abuse of right, or *venire contra factum proprium*").

For example, the Federal Supreme Court of Switzerland recently rejected the argument that Article II of the Convention prohibits a nonsignatory from enforcing an arbitration agreement. See Bundesgericht [BGer], Case No. 4A_646/2018 (Apr. 17, 2019), ¶ 2.4 (English translation) (rejecting argument that Article II prohibits applying "a valid arbitration agreement to third Parties that do not meet the formal requirement"). The Court reasoned that the form specifications in Article II(2) apply only to the initial signing of the contract and do not limit the ability of nonsignatory third parties to enforce the contract under domestic law, including Swiss law providing that an arbitration agreement may encompass a nonsignatory who performs the contract. *Ibid.* (concluding that "[t]he wording 'signed by the Parties'" in Article II(2) should "be understood as meaning that the arbitration agreement must be signed by the (original) parties to the agreement when the agreement is concluded," with no additional requirement that a nonsignatory "meet any additional formal requirement" in order to enforce or be bound by an arbitration clause pursuant to domestic-law principles); see also Nathalie Voser & Luka Groselj, *Switzerland: Extension Of Arbitration Agreement To Non-Signatory Upheld Under New York Convention (Swiss Supreme Court)*, Mondaq (June 28, 2019) (summarizing decision).

Courts in other Contracting States likewise have concluded that the Convention's form provisions in Article II do not bar application of domestic-law doctrines that govern when a nonsignatory may invoke or be bound by an arbitration agreement. See, *e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice], Case No. III ZR 371/12 (May 8, 2014) (German-language text of decision and English-language summary prepared by the German Arbitration Institute available at http://www.disarb.org/en/47/datenbanken/rspr/bgh-case-no-iii-zr-371-12-date-2014-05-08-id1603) (decision by the German Federal Court of Justice concluding that the form provisions in Article II would not prevent applying an arbitration clause to a nonsignatory under domestic-law doctrines); Phillippe Pinsole, *A French View on the Application of the Arbitration Agreement to Non-signatories, in The Evolution and Future of International Arbitration* (Stavros

Brekoulakis et al. eds., 2016) ¶ 12.33, at 214 (providing English translation of Paris Court of appeal cases) (international arbitration clauses encompass "all parties directly involved in the performance of the contract and in the disputes to which they may give rise, once it has been established that their situation and their activities allow to presume that they were aware of the existence and scope of the arbitration clause, even if they did not sign the contract containing it").

Domestic legislation implementing the Convention in Contracting States also illustrates the general understanding that the Convention does not categorically prohibit nonsignatories from enforcing an arbitration agreement. Some Contracting States have expressly authorized courts to compel arbitration when requested by any "person claiming through or under" a party to an international arbitration agreement—indicating that the request may come from a nonsignatory. *E.g.*, *International Arbitration Act*, ch. 143A, s. 5 (Sing.); *International Arbitration Act 1974* (Cth.) pt II, s. 7.4 (Austl.). Peru's national legislation governing international arbitration agreements provides that such agreements "comprise[] all those whose consent to submit to arbitration is determined in good faith by their active and decisive participation in the negotiation, execution, performance or termination of the contract that contains the arbitration agreement" and "those who seek to attain any rights or benefits from the contract, pursuant to its terms." Cecilia O'Neill de la Fuente & José Luis Repetto Deville, *Main Features of Arbitration in Peru*, 23 ILSA J. Int'l & Comp. L. 425, 431 (2017) (providing English translation of Peruvian Arbitration Law Article 14). And UNCITRAL's Model Law on International Commercial Arbitration, which is intended to be consistent with the Convention and has been adopted by dozens of Contracting States, contains no language confining the right to enforce an arbitration agreement only to those who signed the agreement. See *UNCITRAL Model Law on International Commercial Arbitration*, 1985, Ch. II, Arts. 7 & 8 (amended 2006). The post-ratification common practice of Contracting States in implementing the Convention through judicial decisions and domestic legislation thus weighs against interpreting Article II to restrict enforcement of arbitration agreements to signatories.

6. Consistent with the practice of other Contracting States, the Executive Branch has previously taken the position that the Convention does not prohibit courts from determining that "non-signatories may be bound by an agreement to arbitrate under 'ordinary principles of contract and agency,' including '(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/ alter ego; and (5) estoppel.'" Gov't Amicus Br. at 11, *AMCI Holdings, Inc., supra* (No. 15-1133) (citation omitted); see *id.* at 14 (stating that under Chapter 2 of the FAA, courts may "compel participation in arbitration by entities that have not signed an arbitration agreement when they are nonetheless bound to the agreement for a valid legal reason"). "In the view of the United States," that interpretation of the Convention "is consistent with judicial decisions on the interpretation and enforcement of both domestic and international arbitration agreements, as well as the text and purpose of the Convention and its implementing legislation, the FAA." *Id.* at 9. The Executive Branch has also taken the position that the Convention "sets a 'floor,' but *not* a 'ceiling,' for enforcement of arbitral awards," with no "obligation on a Contracting Party to deny recognition to an arbitral agreement or arbitral award" even if it "is not required to be enforced under the Convention." Gov't Amicus Br. at 7, 9, *Commissions Imp. Exp.*, *supra* (No. 13-7004).

It is "well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'" *Abbott*, 560 U.S. at 15 (quoting *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982)); *ibid.* (noting Court's deference in *Sumitomo* to "the Executive's interpretation of a

treaty as memorialized in a brief before this Court"). That principle stems both from the fact that the Executive, as the Branch constitutionally responsible for negotiating and enforcing treaties, is in the best position to explain the intent of the treaty parties, *Sumitomo*, 457 U.S. at 185; see U.S. Const. Art. II, § 2, Cl. 2, and from the recognition that the "Executive is well informed concerning the diplomatic consequences resulting from this Court's interpretation[s]," *Abbott*, 560 U.S. at 15. This "well-established canon of deference" provides further confirmation that the Convention does not categorically prohibit enforcement of arbitration agreements by a nonsignatory. *Ibid.*

### B. The Application Of Domestic-Law Contract And Agency Doctrines That Allow A Nonsignatory To Compel Arbitration Turns On The Parties' Consent As Informed By Those Domestic Laws

As described, the New York Convention does not prevent Contracting States from providing for a nonsignatory to enforce an arbitration agreement in accordance with domestic-law contract and agency principles. Courts considering whether a nonsignatory may enforce or be bound by an arbitration agreement, however, must take care to ensure that the nonsignatory party's participation is not inconsistent with the parties' consent regarding arbitration, as informed by those domestic laws.

1. "[I]nternational commercial arbitration is fundamentally consensual in nature," Born § 10.01, at 1406, and the Convention specifically refers to the agreement of the parties to "undertake to submit to arbitration," Convention art. II(1), 21 U.S.T. 2519; see *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (observing that arbitration is a "matter of consent, not coercion") (citation omitted). Domestic-law doctrines that permit nonsignatories to enforce an arbitration agreement often "provide a basis for concluding that an entity is in reality a party to the arbitration agreement * * * because that party's actions constitute consent to the agreement, notwithstanding the lack of its execution of the agreement." Born § 10:01[D], at 1414. Thus, "nonsignatories may be bound by or entitled to invoke an arbitration agreement to the extent that they may be deemed to have assented to the arbitration agreement under ordinary principles of contract law, as well as other legal doctrines that operate legally to bind parties." Restatement § 2.3 cmt. a; see *ibid.* ("Despite the multiplicity of theories for finding that a nonsignatory is bound or may invoke an arbitration agreement, the primary purpose of each inquiry is to discern the intent of the parties.").

2. a. In any given case, the question whether a nonsignatory may enforce or be bound by an arbitration agreement will depend on the circumstances of the dispute and the agreement. Thus, while domestic-law principles of contract and agency "provide[] the structure for evaluating particular contractual language and factual settings," courts must in each case examine "the parties' intentions and the legal consequences of those intentions." Born § 10.01[E], at 1414. In all cases, "[a] party who attempts to compel arbitration must show that a valid agreement to arbitrate exists, that the movant is entitled to invoke the arbitration clause, that the other party is bound by that clause, and that the claim asserted comes within the clause's scope." *InterGen N.V.* v. *Grina*, 344 F.3d 134, 142 (1st Cir. 2003). Thus, in situations in which courts have applied doctrines such as "incorporation by reference, assumption, veil piercing/alter ego and estoppel," the "court[s] ha[ve] found an agreement to arbitrate" based on "the totality of the evidence support[ing] an objective intention to agree to arbitrate," *Sarhank Grp.* v. *Oracle Corp.*, 404 F.3d 657, 662 (2d Cir. 2005), with a particular focus on the "context of the case," *Sourcing Unlimited, Inc.* v. *Asimco Int'l, Inc.*, 526 F.3d 38, 46 (1st Cir. 2008) (deeming it

"significant" that "[t]he party who is a signatory to the written agreement requiring arbitration is the party seeking to avoid arbitration").

b. In conducting that analysis, any effort to bind a nonsignatory sovereign nation to an arbitration agreement would raise special concerns. In international disputes, the analysis of consent by a sovereign encompasses additional considerations, reflected in principles of sovereign immunity, that support the conclusion that a sovereign cannot be bound to resolve a dispute through litigation or arbitration in the absence of express consent. See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia & Herzegovina v. Yugoslavia (Serbia & Montenegro)*), 1993 I.C.J. 325, 342 (Sept. 13) (Order) (requiring an "unequivocal indication of a voluntary and indisputable acceptance" of consent to International Court of Justice jurisdiction) (internal quotation marks omitted); see also *Fireman's Fund Ins. Co.* v. *United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/02 /01, Decision on the Preliminary Question ¶ 64 (July 17, 2003) ("[T]he Tribunal does not believe that under contemporary international law a foreign investor is entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement [with a State].").

Notably, in suits involving the U.S. Government, this Court has previously recognized "that equitable estoppel will not lie against the Government as it lies against private litigants." *Office of Pers. Mgmt.* v. *Richmond*, 496 U.S. 414, 419 (1990); see *Heckler* v. *Community Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60 (1984) ("[I]t is well settled that the Government may not be estopped on the same terms as any other litigant."). Similarly, with respect to third-party beneficiary principles, this Court has recognized that "the modern jurisprudence permitting intended beneficiaries to sue does not generally apply to contracts between a private party and the government." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1387 (2015); see also, *e.g.*, *Kremen* v. *Cohen*, 337 F.3d 1024, 1029 (9th Cir. 2003) ("When a contract is with a government entity, a more stringent test [than otherwise] applies: Parties that benefit are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary. The contract must establish not only an intent to confer a benefit, but also an intention to grant the third party enforceable rights.") (citations, ellipses, and internal quotation marks omitted). In the context of international disputes as well, doctrines such as equitable estoppel and asserted third-party beneficiary status should not provide a basis to compel arbitration against a sovereign absent a clear expression of consent.

3. In the lower court proceedings in this case, the parties disputed whether nonsignatory GE Energy could enforce the arbitration agreement with Outokumpu under principles of equitable estoppel. The United States takes no position on the question whether equitable estoppel provides an available basis to seek enforcement of that arbitration agreement under a choice-of-law analysis, or whether, assuming estoppel principles could apply, they would support GE Energy's effort to enforce the arbitration agreement based on the particular facts of this case.

The court of appeals did not consider those questions because it erroneously concluded "that, to compel arbitration, the Convention requires that the arbitration agreement be signed by the parties before the Court or their privities." This Court should reverse that categorical rule and clarify that the Convention does not bar the application of domestic-law doctrines that allow an arbitration agreement to be enforced by or against a nonsignatory where the applicable law provides for enforcement of an otherwise valid agreement.

* * * *

**Cross References**

*Children's Issues*, **Ch. 2.B.**
*Hague Abduction Convention Cases*, **Ch. 2.B.2.c.**
*U.S. securities law & purchases of interests in foreign companies*, **Ch. 11.F.6.**