

CAUGHT BETWEEN THE FAA AND THE NEW YORK CONVENTION: NON-SIGNATORIES TO INTERNATIONAL COMMERCIAL ARBITRATION AGREEMENTS AND THE “IN WRITING” REQUIREMENT

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I. INTRODUCTION

The judicial approach of U.S. courts toward arbitration has evolved significantly since the enactment of the United States Arbitration Act (“FAA”)¹ in 1925. Prior to this Act, it was “settled law . . . that an agreement to arbitrate would not be specifically enforced in United States Courts, nor be recognized as a defense to an action.”² The prevailing

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1. 9 U.S.C.A. §§ 1–16 (2018). This first chapter of the FAA continues to apply to arbitration agreements concerning “maritime transactions” or “any other matters in foreign commerce,” including “commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia.” *Id.* at § 1. Chapter One also “applies to actions and proceedings brought under [Chapter Two] to the extent that chapter is not in conflict with [Chapter Two] or the Convention [on the Recognition and Enforcement of Foreign Arbitral Awards] as ratified by the United States.” 9 U.S.C.A. § 208 (2018).

2. *Am. Sugar Ref. Co. v. Anaconda*, 138 F.2d 765, 766 (5th Cir. 1943) (stating that “prior to the enactment of the arbitration act . . . an agreement to arbitrate would not be specifically enforced in United States Courts” because “parties may not by private

attitude of the courts toward arbitration before the FAA was therefore one of “disapproval”³ and “hostility.”⁴ Gradually, the Supreme Court of the United States (“Supreme Court”) came to recognize that “we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.”⁵ Accordingly, the Court held that “[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute,”⁶ thereby placing arbitration “on a level playing field with judicial proceedings.”⁷

The same reasoning applies, perhaps with even greater force, to international commercial arbitration agreements.⁸ Such agreements are

agreement oust the jurisdiction of the courts”); *see also* *Cont’l Grain Co. v. Dant & Russell, Inc.*, 118 F.2d 967, 969 (9th Cir. 1941) (“Prior to the enactment of the United States arbitration act (1925) [arbitration] agreements could not be enforced in the courts of the United States.”); *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 120–21 (1924) (“The federal courts—like those of the states and of England—have, both in equity and at law, denied, in large measure, the aid of their processes to those seeking to enforce executory agreements to arbitrate disputes.”); *Tatsuuma Kisen Kabushiki Kaisha v. Prescott*, 4 F.2d 670, 672–73 (9th Cir. 1925) (“[W]hile the rule under consideration [that an agreement which leaves the disposition of the whole matter to arbitration is not a bar to an action in court] has been criticised and its wisdom questioned, it is nevertheless the established law in the courts of the United States, from which the inferior federal courts are not at liberty to depart.”).

3. *DiMercurio v. Sphere Drake Ins., PLC*, 202 F.3d 71, 75 (1st Cir. 2000).

4. *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942).

5. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626–27 (1985); *see also* *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 66 (1995) (stating that the Federal Arbitration Act aims “to ensure the enforceability, according to their terms, of private agreements to arbitrate”) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989)).

6. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

7. PEDRO J. MARTINEZ-FRAGA, *THE AMERICAN INFLUENCE ON INTERNATIONAL COMMERCIAL ARBITRATION: DOCTRINAL DEVELOPMENTS AND DISCOVERY METHODS* 31 (2009).

8. The Supreme Court has recognized the advantages of international arbitration from the early days of the country’s adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and on several occasions has provided guidance on the interpretation of the FAA and the implementation of its pro-arbitration policy. It has held that “[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved. A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes,

governed by Chapter Two of the FAA, enacted in 1970,⁹ which incorporates¹⁰ the 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (“New York Convention” or “Convention”).¹¹

but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. . . . [T]he dicey atmosphere of such a legal no-man’s-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.” *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516–17 (1974). Accordingly, “[t]o determine that ‘American standards of fairness’ . . . must nonetheless govern the controversy [notwithstanding an international arbitration clause] demeans the standards of justice elsewhere in the world, and unnecessarily exalts the primacy of United States law over the laws of other countries.” *Id.* at 517 n.11. A decade later, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court held that “concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.” 473 U.S. 614, 629 (1985). Therefore, “the emphatic federal policy in favor of arbitral dispute resolution . . . applies with special force in the field of international commerce.” *Id.* at 631.

9. 9 U.S.C. §§ 201–208 (2018). This second chapter of the FAA applies only to an arbitration agreement or award that “falls under the Convention,” as defined in § 202.

10. 9 U.S.C. § 201 (2018) (“The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.”).

11. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, 330 U.N.T.S. 3 (entering into force with respect to the United States on Dec. 29, 1970). At the time of writing, the Convention has 162 Parties. *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=_en [<https://perma.cc/AXT4-TTBN>] (last visited Feb. 7, 2020). It has thus been said to play “a fundamental role in making arbitration the most popular means of dispute resolution in international trade.” Domenico Di Pietro, *General Remarks on Arbitrability Under the New York Convention*, in *ARBITRABILITY: INTERNATIONAL & COMPARATIVE PERSPECTIVES* 85 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009). It has also been viewed as “the most successful international juridic accomplishment of the past century” (MARTINEZ-FRAGA, *supra* note 7, at 151) and as “the single most important pillar on which the edifice of international arbitration rests” (ALAN REDFERN ET AL., *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 133 (4th ed. 2004)).

The United States entered two reservations upon accession to the Convention: first, “[t]he United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State[.]” and second, “[t]he United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States.” *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=_en#EndDec [<https://perma.cc/AXT4-TTBN>] (last visited Feb. 7, 2020). Even though the Convention was approved by the U.S. in October 1968, the instrument of accession was not deposited until Chapter Two of the FAA was enacted into

The Supreme Court has stated that the invalidation of an international commercial arbitration agreement would “reflect a ‘parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.’”¹²

Nonetheless, antagonism toward international commercial arbitration seems to persist in some U.S. courts, even in the face of the clear federal policy in favor of arbitration.¹³ One area in which hostility to arbitration has recently surfaced concerns the meaning of the “in writing” requirement of Article II(1) of the Convention¹⁴ where non-signatories are involved.¹⁵ The term “in writing” is defined in Article II(2) as including “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”¹⁶ It has long been

law, since the President and Congress believed that “[c]hanges in the Federal Arbitration Act (title 9 of the United States Code) [were] required before the United States bec[ame] party to the [C]onvention.” *ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 382 (4th Cir. 2012).

12. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

13. As noted by the Supreme Court, “[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, a concern which ‘requires that we rigorously enforce agreements to arbitrate.’” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625–26 (1985).

14. The Article provides that “[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all of any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.” Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(1), June 10, 1958, 330 U.N.T.S. 3.

15. The term “non-signatories” is admittedly used at times “largely out of laziness” and may be “over-inclusive since under the law of most jurisdictions, arbitration agreements don’t have to be signed anyway,” even between their original parties. Alan Scott Rau, “Consent” to Arbitral Jurisdiction: Disputes with Non-Signatories, in *MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION* 105 (Permanent Court of Arbitration ed., 2009); Mohamed S. Abdel Wahab, *Extension of Arbitration Agreements to Third Parties: A Never Ending Legal Quest Through the Spatial-temporal Continuum*, in *CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION* 138 n.1 (Franco Ferrari & Stefan Kröll eds., 2011) (“The author is cognisant that the term ‘non-signatories’ may not be entirely synonymous with third parties, as arbitration agreements need not be reduced to signed documents owing to the fact that parties may themselves have concluded their arbitration agreement by exchanged communications or the like and are accordingly non-signatories as well.”). However, the term is apt for present purposes since it reflects precisely the issue examined in this article—that some American courts have found parties to the dispute before them not to be bound by an arbitration agreement merely because they have not signed it, even though they may otherwise be “parties” to it.

16. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art.

accepted in international commercial arbitration practice that this “in writing” requirement, insofar as it evidences the parties’ consent to arbitrate their dispute(s), is to be interpreted liberally.¹⁷ Accordingly, some domestic arbitration laws and courts have expanded the definition of “in writing,” or dispensed with it altogether. Most jurisdictions also allow the application of international commercial arbitration agreements to parties that have not signed them on the basis of various legal and equitable doctrines such as agency, piercing the corporate veil, and estoppel.¹⁸ The extent to which these doctrines are available to non-signatories attempting

II(2), June 10, 1958, 330 U.N.T.S. 3.

17. GARY B. BORN, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* 57–58 (2012). There is also a well observed distinction between the requirements of Article II(2), which are considered as relating to the “formal validity” of arbitration agreements, and issues of consent, which are considered as relating to the “substantive validity” of arbitration agreements. *See, e.g., id.* at 70. For present purposes, however, this distinction will not be observed, for two reasons. First, the rights and obligations of non-signatories straddle both the formal and substantive validity of arbitration agreements. Second, part of the confusion created by recent decisions of U.S. Courts of Appeals discussed in this article arises precisely from their failure to maintain this distinction. Another common distinction not observed in this article is that between courts’ findings on jurisdiction and merits in the context of enforcing arbitration agreements. This is because in the U.S. a determination of whether the arbitration agreement is “in writing” within the meaning of the Convention is required both for finding federal subject-matter jurisdiction and for applying the agreement to a non-signatory. While some courts have observed this distinction and applied a different standard to the “in writing” requirement at each stage, many of the decisions discussed here do not. In any event, the focal point of the article is the examination of when courts have imposed a signature requirement in order to satisfy the “in writing” requirement and enforce international arbitration agreements, whether this was done as a jurisdictional requirement or on the merits of the parties’ claims.

18. A discussion of these and other legal or equitable doctrines used by courts to apply arbitration agreements to non-signatories is beyond the scope of this article. For such a discussion *see, e.g.,* Wahab, *supra* note 15, at 144–71; BORN, *supra* note 17, at 96–99; ALAN REDFERN ET AL., *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 148–52 (4th ed. 2004); NIGEL BLACKABY ET AL., *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* 85–92 (6th ed. 2015); ANDREA MARCO STEINGRUBER, *CONSENT IN INTERNATIONAL ARBITRATION* 144–64 (2012); Stavros Brekoulakis, *Parties in International Arbitration: Consent v. Commercial Reality*, in *THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION* 119–60 (Stavros Brekoulakis, Julian D.M. Lew & Loukas Mistelis eds., 2016); Bernard Hanotiau, *Groups of Companies in International Arbitration*, in *PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION* 279–90 (Loukas M. Mistelis & Julian D. M. Lew eds., 2006); James M. Hosking, *The Third Party Non-Signatory’s Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent*, 4 PEPP. DISP. RESOL. L.J. 469 (2004); Stavros Brekoulakis, *Rethinking Consent in International Commercial Arbitration: A General Theory for Non-Signatories*, 8 J. INT’L DISP. SETTLEMENT 610 (2017); J. Douglas Uloth & J. Hamilton Rial, III, *Equitable Estoppel as a Basis for Compelling Nonsignatories to Arbitrate—A Bridge Too Far*, 21 REV. LITIG. 593 (2002).

to invoke an arbitration agreement, or to those wishing to bind them to such an agreement, differs across jurisdictions and is largely contextual. However, the fact that such legal and/or equitable grounds are, in principle, available in lieu of an actual signature to evidence consent to arbitrate has now been accepted internationally and by most modern arbitration jurisdictions.¹⁹

Not so in the United States, where a Circuit split has emerged from findings of the Courts of Appeals for the Ninth and Eleventh Circuits that, unless an international commercial arbitration agreement was *actually signed* by the parties to the dispute before them, that dispute cannot be referred to arbitration.²⁰ The question arising from this split may be simply put as follows: do individuals or entities that have not signed an international commercial arbitration agreement nonetheless have a right, or an obligation, to arbitrate under it? The Supreme Court now has the opportunity to provide a much-needed answer to this question in an appeal²¹ from the decision of the United States Court of Appeals for the Eleventh Circuit (“Eleventh Circuit”) in *Outokumpu Stainless USA, LLC, et al. v. GE Energy Power Conversion France SAS, Corp.*²²

A brief summary of the facts of the case and the District Court’s

19. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1404–1524 (2d ed. 2014).

20. See *infra* pp. 26–31. U.S. courts at both the trial and appellate levels also seem split on other non-signatory related issues. See S.I. Strong, *What Constitutes an “Agreement in Writing” in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act*, 48 STAN. J. INT’L L. 47, 49 (2012) (referring to several cases in which certiorari was sought from the Supreme Court on non-signatory related issues, including: 1) Petition for Writ of Certiorari, *Ruhrgas AG v. Marathon Oil Co.*, No. 97-409, 1997 WL 33549149 (Sept. 8, 1997), where the question presented to the Supreme Court concerned legal doctrines allowing for the binding of non-signatory corporate affiliates; 2) Petition for Writ of Certiorari at i–ii, *Neilson v. Seaboard Corp.*, No. 08-65, 2008 WL 2773349 (July 14, 2008), where the question presented to the Supreme Court was: “Does Article II(2) of the Convention require arbitration of the employer’s claims when the employment agreement prepared and signed by the employer contains an arbitration clause, was tendered to an employee but not signed by him, and thereafter was performed without objection by either party and arbitration is sought by the employee?”).

21. *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/ge-energy-power-conversion-france-sas-v-outokumpu-stainless-usa-llc/> [<https://perma.cc/BN6N-LRD3>] (last visited Feb. 23, 2020) (showing that the petition for a writ of certiorari was granted on June 28, 2019).

22. *Outokumpu Stainless USA, LLC v. Convertteam SAS*, 902 F.3d 1316 (11th Cir. 2018) [hereinafter *Outokumpu v. GE*]. Oral argument was heard on Jan. 21, 2020. *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/ge-energy-power-conversion-france-sas-v-outokumpu-stainless-usa-llc/> [<https://perma.cc/BN6N-LRD3>] (last visited Feb. 23, 2020). The Supreme Court has yet to render its decision in the case at the time of writing.

decision²³ will set the stage for further analysis. The plaintiff, Outokumpu—a steel plant operator in Alabama—entered into three contracts with Fives—an American subsidiary of a French corporation—to provide it with three cold rolling mills (the “Contracts”).²⁴ Each mill required three motors, and Fives subcontracted with defendant GE—a foreign entity—to provide all nine motors.²⁵ “The motors were manufactured in France and delivered and installed in Alabama between 2011 and 2012.”²⁶ By August 2015, all three of the mill motors failed and “Outokumpu approached Fives about replacing or repairing the motors.”²⁷

The Contracts defined “Outokumpu as the ‘Buyer’ and Fives as the ‘Seller’” and referred to them “collectively as ‘Parties.’”²⁸ They further provided that “[w]hen Seller is mentioned it shall be understood as Sub-contractors included, except if expressly stated otherwise,” and “Sub-contractor” was defined as “any person (other than the Seller) used by the Seller for the supply of any part of the Contract Equipment, or any person to whom any part of the Contract has been sub-let by the Seller[.]”²⁹ Appended to the Contracts was a subcontractor list that enumerated the “mandatory” vendors from which Fives could select suppliers, including GE.³⁰ Each Contract also contained an arbitration clause providing that “[a]ll disputes arising between both parties in connection with or in the performance of the Contract shall be settled through friendly consultation

23. The case was heard by the Eleventh Circuit on appeal from the U.S. District Court for the Southern District of Alabama in *Outokumpu Stainless USA LLC v. Converteam SAS*, No. 16-00378-KD-C, 2017 WL 401951 (S.D. Ala. Jan. 30, 2017) [hereinafter *District Court*]. The same District Court rendered a decision on Feb. 3, 2019, granting GE’s motion to compel arbitration against the other plaintiffs, *Outokumpu’s* insurers (*Outokumpu Stainless USA LLC v. Converteam SAS*, No. 16-00378-KD-C, 2017 WL 480716 (S.D. Ala. Feb. 3, 2017)). GE adopted and incorporated the arguments from its earlier motion to compel arbitration against Outokumpu in its motion to compel arbitration against the insurers. Although the insurers raised different arguments than Outokumpu (e.g., that EG waived its right to arbitrate), these arguments were not addressed by the Court of Appeals for the Eleventh Circuit in its decision. Therefore, this article focuses on the District Court’s decision of Jan. 30, 2017.

24. *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1320 (11th Cir. 2018).

25. *Id.* at 1321.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. GE and Fives had entered into a subcontractor agreement three weeks after the Contracts were executed. Under the subcontractor agreement, GE was to provide electrical equipment for the mills and was “acting as subcontractor” of Fives. *Outokumpu Stainless USA LLC v. Converteam SAS*, No. 16-00378-KD-C, 2017 WL 401951, at *1 (S.D. Ala. Jan. 30, 2017).

between both parties. In case no agreement can be reached through consultation . . . any such dispute shall be submitted to arbitration for settlement.”³¹ Any arbitration was to “take place in Dusseldorf, Germany in accordance with the Rules of Arbitration of the International Chamber of Commerce” and in accordance with the substantive law of Germany.³²

In 2016, Outokumpu filed suit against GE in the Circuit Court of Mobile County, Alabama. GE removed the suit to the federal District Court based on federal subject matter jurisdiction,³³ while Outokumpu moved to remand back to the state court. A federal Magistrate Judge determined that the removal was proper.³⁴ The District Court adopted the Magistrate’s report and recommendation and found removal proper under the Convention and the FAA since the case “related to” the arbitration agreement found in the Contracts and that arbitration agreement fell under the Convention.³⁵ The Court therefore denied Outokumpu’s motion to remand. GE then moved to dismiss and compel arbitration.³⁶

The District Court noted that it must be “mindful that the [FAA] ‘generally establishes a strong presumption in favor of arbitration of international commercial disputes.’”³⁷ Accordingly, in determining whether to compel arbitration under the FAA, “a court conducts ‘a very limited inquiry’” as to whether or not an arbitration agreement falls within the New York Convention.³⁸ This inquiry is based on four factors set out in *Bautista v. Star Cruises*,³⁹ one of which being that the “agreement [is] in

31. *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1320–21 (11th Cir. 2018).

32. *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1321 (11th Cir. 2018).

33. GE removed the action from the Circuit Court to the Federal District Court on the ground, *inter alia*, of federal subject matter jurisdiction pursuant to 9 U.S.C. § 205 (2018), which authorizes removal of an action “[w]here the subject matter [of an action or proceeding pending in a State court] relates to an arbitration agreement or award falling under the [New York] Convention.” On motions to remove in international arbitration cases see Holly Wilson, *Rethinking Removal and “Relates to”: International Arbitration Disputes and the N.Y. Convention*, 52 U. RICH. L. REV. 451 (2018).

34. *Outokumpu Stainless USA, LLC v. Converteam SAS*, No. CA 16-0378-KD-C, 2016 WL 7423406 (S.D. Ala. Nov. 21, 2016).

35. *Outokumpu Stainless USA, LLC v. Converteam SAS*, No. 16-0378-KD-C, 2016 WL 7422675 (S.D. Ala. Dec. 22, 2016).

36. *Joseph Muller Corp. Zurich v. Commonwealth Petrochemicals, Inc.*, 334 F.Supp. 1013, 1018 (S.D.N.Y. 1971) (“A motion to compel arbitration . . . is simply a request for an order compelling specific performance of part of a contract.”).

37. *Outokumpu Stainless USA, LLC v. Converteam SAS*, No. 16-00378-KD-C, 2017 WL 480716, at *3 (S.D. Ala. Feb. 3, 2017).

38. *Bautista v. Star Cruises*, 396 F.3d 1289, 1294 (11th Cir. 2005).

39. *Id.* at 1294 n.7. The remaining three factors are that: “(2) the agreement provides

writing within the meaning of the Convention.”⁴⁰ A motion to compel arbitration must be granted “so long as (1) the four jurisdictional prerequisites are met and (2) no available affirmative defense under the Convention applies,” namely that the agreement is “null and void, inoperative or incapable of being performed,” pursuant to Article II.⁴¹

With regard to the *Bautista* requirement that the agreement be “in writing” within the meaning of the Convention, GE argued that it was included under the definition of “Seller” in the Contracts, being Fives’ subcontractor, and that the phrase “both parties” in the arbitration clause meant the “Buyer” and “Seller.”⁴² In contrast, Outokumpu argued that the use of the phrase “both parties” in the arbitration clause limited the signatories to only two parties: Outokumpu and Fives, and operated to expressly exclude subcontractors like GE from the interpretation of “Seller.”⁴³ “Viewing the [Contracts] as a whole and construing any ambiguities against [Outokumpu] as the drafter,” the District Court found that “the plain language of the arbitration provisions, supports a reasonable interpretation that subcontractors are not expressly excluded from the meaning of ‘parties’ in the arbitration provisions. There is simply no express statement, as required by the [Contracts], whereby the subcontractors are excluded as ‘Seller’ or ‘parties.’”⁴⁴ The District Court accordingly held, on the basis of generally accepted principles of contract law, that GE was a party to the Contracts by virtue of the interpretation of “Seller” as including the subcontractors, and therefore that the parties had an agreement “in writing” within the meaning of the New York Convention.⁴⁵ Having also found that the remainder of the *Bautista* factors were satisfied, the District Court granted GE’s motion to compel arbitration.⁴⁶

The Eleventh Circuit reversed and remanded the District Court’s order compelling arbitration for further proceedings, but upheld the District

for arbitration in the territory of a signatory of the Convention; (3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial; and (4) 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.”

40. As already noted, the term “agreement in writing” is defined by the Convention as “an arbitral clause in a contract or an arbitration agreement, signed by the parties.” Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(2), June 10, 1958, 330 U.N.T.S. 3.

41. *Outokumpu Stainless USA LLC v. Converteam SAS*, No. 16-00378-KD-C, 2017 WL 401951, at *5 (S.D. Ala. Jan. 30, 2017).

42. *Id.* at *6.

43. *Id.* at 6–7.

44. *Id.* 7–8.

45. *Id.* at 8–9.

46. *Id.* at 9–12.

Court's dismissal of Outokumpu's motion to remand.⁴⁷ GE appealed the Court's decision to the Supreme Court. GE's petition for writ of certiorari presented the following question to the Supreme Court: "[w]hether the Convention . . . permits a non-signatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel."⁴⁸ While the question is specific to the doctrine of equitable estoppel, it necessarily invokes the preliminary question of whether or not consent to arbitration must be evidenced by a signature. If the answer is affirmative, no equitable, or for that matter, legal, doctrine could assist a non-signatory attempting to invoke an arbitration agreement.⁴⁹ The Eleventh Circuit's position on this issue is that GE "cannot avoid U.S. and international arbitration law that require that the parties sign an agreement to arbitrate the dispute between them."⁵⁰ This article challenges this statement and sets out to illustrate that such a requirement is controversial under U.S. law, and practically non-existent under international commercial arbitration law.

Parts II and III of the article set out the main findings of the Eleventh Circuit and identify the problematic aspects of its decision. Part IV places the reasoning of the Court in the context of previous federal Courts of Appeals and District Courts' decisions concerning the signature requirement under the Convention. Part V assesses the compatibility of the Eleventh Circuit's decision with generally accepted principles of international commercial arbitration and the prevailing interpretation of the Convention by foreign courts and by leading commentators. Part VI concludes that should the U.S. wish to preserve its reputation as a "pro-arbitration jurisdiction,"⁵¹ its courts ought to follow the internationally

47. *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1327 (11th Cir. 2018).

48. Petition for a Writ of Certiorari at *i, *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, No. 18-1048, 2019 WL 559565 (Feb. 7, 2019). For an analysis of the application of equitable estoppel to non-signatories to international arbitration agreements, see Tamar Meshel, *Of International Commercial Arbitration, Non-Signatories, and American Federalism: The Case for a Federal Equitable Estoppel Rule*, 56(2) STAN. J. INT'L L. (forthcoming 2020).

49. GE's Petition notes this broader question of "whether the Convention allows a non-signatory to compel arbitration." *Id.* at *3.

50. *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1326 (11th Cir. 2018).

51. *The US Supreme Court Confirms the United States Is a Pro-Arbitration Jurisdiction*, DENTONS (Jan. 28, 2019), <https://www.dentons.com/en/pdf-pages/generateinsightpdf?isPdf=true&ItemId=M/DoVsfQWzICWATorQ69tCdH2Vg2d/5BUb+hAkfj7Xw7f0qngG5x7w==> [<https://perma.cc/K6L8-T92Q>]. The notion of a pro-arbitration jurisdiction, however, is contentious. See, e.g., George A. Bermann, *What Does It Mean to Be 'Pro-Arbitration'?*, 34 ARB. INT'L 341, 347 (2018).

accepted liberal interpretation and application of the Convention’s “in writing” requirement in the context of non-signatories to international commercial arbitration agreements.

II. THE ELEVENTH CIRCUIT’S FINDINGS

The Eleventh Circuit was faced with two questions on appeal. The first question related to Outokumpu’s motion to remand the case to the state court, and concerned “whether an action between a buyer and a sub-contractor of a seller ‘relates to’ an arbitration agreement signed by the buyer and seller sufficient to establish federal subject matter jurisdiction.”⁵² The second question related to GE’s motion to compel arbitration, and concerned “whether a non-signatory sub-contractor may compel arbitration against the buyer under that arbitration agreement.”⁵³ The Eleventh Circuit noted that “[f]ederal policy favors arbitral dispute resolution”⁵⁴ and that the FAA “sets forth a clear presumption—’a national policy’—in favor of arbitration.”⁵⁵ Nevertheless, the Court proceeded to apply this pro-arbitration policy only to the first question on the motion to remand, while disregarding it in the context of the second question on the motion to compel arbitration.

Regarding the motion to remand, the Eleventh Circuit noted the “broad grounds for removal” under § 205 of the FAA “[w]here the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention.”⁵⁶ Accordingly, courts are to perform “a limited inquiry on the face of the pleadings and the removal notice”⁵⁷ to determine (1) whether the arbitration agreement “falls under the Convention” pursuant to the *Bautista* factors, and (2) whether the suit “relates to” the arbitration agreement.⁵⁸ As applied by the Eleventh Circuit, “this initial jurisdictional inquiry is distinct from a determination of whether the parties are bound to arbitrate” and should not involve an examination of “whether the arbitration agreement binds the parties before it.”⁵⁹

Under the first step of this analysis, the Eleventh Circuit applied the

52. *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1320 (11th Cir. 2018).

53. *Id.*

54. *Id.* at 1322.

55. *Id.* at 1326.

56. *Id.* at 1323.

57. *Id.* at 1320.

58. *Id.* at 1324.

59. *Id.* at 1324.

Bautista test “to the four corners of the arbitration agreement” and asked “whether the removing party has articulated a non-frivolous basis” for the four factors of the test.⁶⁰ The Court dispensed with the first factor—“that there is an agreement in writing”—swiftly, citing Article II(2) of the Convention and finding that “[b]ecause the Contracts are signed by Outokumpu and Fives, the Contracts satisfy the first factor.”⁶¹

Under the second step of the analysis, the Eleventh Circuit followed previous decisions of sister Circuits, finding that the term “relates to” is to be interpreted broadly so that “whenever an arbitration agreement falling under the Convention could *conceivably* affect the outcome of the plaintiff’s case, the agreement ‘relates to’ to the plaintiff’s suit sufficient for removal jurisdiction.”⁶² The court is only to determine for this purpose “whether, on the face of the pleadings and the removal notice, there is a non-frivolous claim that the lawsuit relates to an arbitration agreement that ‘falls under the Convention.’”⁶³ In this regard, the Eleventh Circuit found that “the arbitration agreement contained in [the] Contracts is sufficiently related to the instant dispute such that it could conceivably affect the outcome of this case.”⁶⁴ The Eleventh Circuit accordingly upheld the District Court’s dismissal of Outokumpu’s motion to remand.

The Eleventh Circuit diverged from the District Court’s reasoning, however, with respect to GE’s motion to compel arbitration, finding that the District Court wrongly “trac[ed]” and “[i]nser[t]” the definitions of “Buyer,” “Seller,” and “Parties” into the arbitration clause.⁶⁵ Both courts recognized that in a motion to compel arbitration, only a “very limited inquiry” is required into whether or not an arbitration agreement falls within the Convention under the *Bautista* test.⁶⁶ Nonetheless, the Eleventh Circuit proceeded to find that this inquiry necessarily engages “a more rigorous analysis of the *Bautista* factors” than a motion to remand, in order to “determine whether the parties before the district court entered into an agreement under the meaning of the Convention to arbitrate their dispute.”⁶⁷ Applying this approach to GE’s motion, the Eleventh Circuit

60. *Id.*

61. *Id.*

62. *Id.* at 1323.

63. *Id.* at 1324.

64. *Id.* at 1325.

65. *Id.* at 1326.

66. *Outokumpu Stainless USA LLC v. Converteam SAS*, No. 16-00378-KD-C, 2017 WL 401951, at *5 (S.D. Ala. Jan. 30, 2017); *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1325 (11th Cir. 2018).

67. *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1320, 1325 (11th Cir. 2018).

found that the *Bautista* test failed on the first factor since there was no arbitration agreement in writing within the meaning of the Convention.⁶⁸

The Eleventh Circuit concluded that “[p]rivate parties—here Outokumpu and Fives—cannot contract around the Convention’s requirement that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration.”⁶⁹ Since the Contracts were signed by Outokumpu and Fives at a time when GE was “at most, a potential subcontractor,” the Court found that GE was “undeniably not a signatory to the Contracts.”⁷⁰ In support of this conclusion, the Eleventh Circuit referenced its previous decision in *Czarina, L.L.C. v. W.F. Poe Syndicate*,⁷¹ where it found that an unsigned, unexecuted “sample wording” did not satisfy the Convention’s writing requirement.⁷² Accordingly, it reversed and remanded the District Court’s order compelling arbitration for further proceedings. As noted above, GE has successfully petitioned the Supreme Court for a Writ of Certiorari of this decision.⁷³

III. ANALYSIS

For both the motion to remand and the motion to compel arbitration, the Eleventh Circuit set out to determine whether an arbitration agreement “in writing” existed within the meaning of the Convention.⁷⁴ In making this determination, however, the Court altered its definition of “parties” for the purpose of each motion.⁷⁵ For the motion to remand, the Court defined Outokumpu and Fives, the actual signatories of the Contracts, as the

68. *Id.* at 1325.

69. *Id.* at 1326.

70. *Id.*

71. 358 F.3d 1286 (11th Cir. 2004).

72. *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1326 (11th Cir. 2018).

73. Petition for a Writ of Certiorari, *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, No. 18-1048, 2019 WL 559565 (Feb. 7, 2019).

74. According to the Eleventh Circuit, on a motion to remand, the court is to “perform a limited inquiry on the face of the pleadings and the removal notice to determine whether the suit ‘relates to’ an arbitration agreement *falling under the Convention*.” *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1320 (11th Cir. 2018) (emphasis added). On a motion to compel arbitration, a “more rigorous analysis” is required “to determine whether the parties before the district court entered into an agreement *under the meaning of the Convention* to arbitrate their dispute.” *Id.* at 1320 (emphasis added).

75. *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1324–26 (11th Cir. 2018) (When determining jurisdiction on a motion to remand, “the district court need not—and should not—examine whether the arbitration agreement binds the parties before it.” On a motion to compel, “the district court must determine whether the parties before the court agreed to arbitrate their dispute.”).

“parties,” thereby easily concluding that there was an arbitration agreement “in writing” under the Convention.⁷⁶ For the purpose of the motion to compel arbitration, in contrast, the Eleventh Circuit defined Outokumpu and GE as the “parties,” finding that there was no “agreement in writing” signed by GE and therefore no arbitration agreement within the meaning of the Convention.⁷⁷

In fact, the relevant “parties” for determining whether there was an arbitration agreement “in writing” for the purpose of both motions should have been the *parties to the agreement*, Outokumpu and Fives. Once the Court concluded that there was a valid arbitration agreement between them, the question of whether GE, as a non-signatory, has a right to invoke it relates to the scope of the arbitration agreement,⁷⁸ which should have been determined on the basis of other applicable legal or equitable grounds.

These different definitions of “parties” employed by the Eleventh Circuit led it to two contradictory conclusions that effectively canceled each other out. First, the Court concluded that there was an arbitration agreement “in writing” within the meaning of the Convention (between Outokumpu and Fives), rendering the action (between Outokumpu and GE) within federal jurisdiction under § 205 of the FAA.⁷⁹ Second, the Court concluded that the same action should not be referred to arbitration since GE did not sign the arbitration agreement, and thus there was no agreement “in writing” between Outokumpu and GE within the meaning of the Convention.⁸⁰ Of course, the same arbitration agreement cannot fall both within and outside the Convention. Therefore, the Court’s finding that GE had no arbitration agreement with Outokumpu within the meaning of the Convention for the purpose of the motion to compel necessarily meant that

76. *Id.* at 1324 (“Because the Contracts are signed by Outokumpu and Fives, the Contracts satisfy the first [*Bautista*] factor. . . . that there is an agreement in writing, that is, an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”).

77. *Outokumpu Stainless USA, LLC v. Convertteam SAS*, 902 F.3d 1316, 1325–26 (11th Cir. 2018).

78. GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 1417 (2d ed. 2014) (“In cases where there is concededly a valid agreement to arbitrate between some parties, 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.”).

79. *Outokumpu Stainless USA, LLC v. Convertteam SAS*, 902 F.3d 1316, 1324–25 (11th Cir. 2018).

80. *Id.* at 1326–27 (“[W]e hold that, to compel arbitration, the Convention requires that the arbitration agreement be signed by the parties before the Court or their privities. . . . [I]n the absence of a signed agreement, Outokumpu cannot be compelled to arbitrate its dispute with GE Energy under the Convention.”).

the action commenced by GE fell outside the Convention and, thus, federal jurisdiction for the purpose of the motion to remand.

This was indeed the ultimate outcome of the Eleventh Circuit's decision.⁸¹ The Magistrate Judge's subsequent Report and Recommendation found that

the [District] Court has already held—and the Eleventh Circuit agreed—that GE Energy's Notice of Removal adequately pleaded that Plaintiffs' claims, for purposes of § 205, "related to" an arbitration agreement falling under the Convention. But, the Eleventh Circuit also held that GE Energy could not compel Plaintiffs to arbitrate their claims because GE Energy was not a signatory to any arbitration agreement with Outokumpu, as is required under the Convention.⁸²

With arbitration not being compelled, the Magistrate Judge recommended that the action be sent back to the Alabama state court where it was originally filed.⁸³

Therefore, even though the Eleventh Circuit found that the action was related to an arbitration agreement that fell within the Convention, and thus within federal subject matter jurisdiction, its finding that GE did not have an arbitration agreement with Outokumpu within the meaning of the Convention ultimately led the parties back to square one. Whether this outcome was what the Eleventh Circuit actually desired (but was reluctant to deny federal subject matter jurisdiction over an action related to an international commercial arbitration agreement), or it was an unintended consequence of its bifurcated reasoning (and the Court rather intends to have the case heard by the federal District Court), the Eleventh Circuit's decision remains extremely problematic for the parties to this, and future, international commercial arbitration cases.

Also inappropriate was the Eleventh Circuit's reliance on its previous decision in *Czarina*,⁸⁴ where it found that unsigned, unexecuted "sample wording" containing an arbitration clause, which was not drafted for the specific transaction at issue, did not satisfy the Convention's writing

81. *Outokumpu Stainless USA, LLC v. GE Energy SAS*, No. 1:16-cv-00378-KD-C, 2019 WL 2158872 (S.D. Ala. Mar. 19, 2019).

82. *Id.* at *2 (citation omitted).

83. *Id.* at *3. This recommendation was adopted by the District Court in *Outokumpu Stainless USA, LLC v. Converteam SAS*, No. 16-0378-KD-C, 2019 WL 1748110 (S.D. Ala. Apr. 18, 2019). GE has appealed this decision (*Outokumpu Stainless USA, LLC v. Converteam SAS*, No. 19-11930 (11th Cir. May 17, 2019)).

84. *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1326 (11th Cir. 2018).

requirement.⁸⁵ While GE did not sign the Contracts itself, it is undisputed that they were negotiated and signed by Outokumpu. Outokumpu therefore agreed to arbitration, and the only question remaining is with whom. These facts are therefore very different from the unsigned “sample wording” at issue in the *Czarina* case.⁸⁶

Moreover, the *Czarina* decision concerned a motion to confirm an arbitration award, rather than a motion to compel an arbitration agreement.⁸⁷ In a motion to compel an arbitration agreement, “the most preferable course of action is to refer the parties to arbitration.”⁸⁸ In a motion to confirm an arbitration award, courts retain the ability to “review the arbitral panel’s decision regarding the incorporation of a non-signatory to the arbitration at the stage of setting aside or enforcement of the award” pursuant to Article V of the Convention.⁸⁹ Indeed, where a respondent relies on this ground to argue against recognition and enforcement of an arbitral award, “this issue is decided by the court by re-assessing the facts

85. *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286 (11th Cir. 2004). In this case, an Israeli company entered into an agreement with defendant, a Florida reinsurance company, under which defendant agreed to reinsure some of its risks. Defendant’s lead underwriters were to draft a written contract, but they never did. Nonetheless, the Israeli company maintained that defendant “was indebted to it under this reinsurance agreement.” *Id.* at 1289. The Israeli company later “became insolvent and was liquidated. In the liquidation, [plaintiff] purchased some of [its] accounts receivable, including the [defendant’s] account. After [defendant] refused to pay [plaintiff] on that account, [plaintiff] initiated an arbitration in London. . . . [Plaintiff] asserted that arbitration was the proper forum for deciding its dispute with” defendant on the basis of several documents, including “sample wording” that the Israeli company had used in its reinsurance relationships. *Id.*

86. *Czarina* has indeed been interpreted as holding that “the arbitration agreement was invalid not merely because it was unsigned, but because it was only a sample wording that was not shown to have been adopted by the contesting party.” See *TransAsia Lawyers v. EcoNova, Inc.*, No. 1:13-cv-98 DN, 2014 WL 2112442, at *6 (D. Utah May 20, 2014); see also *China Nat’l Chem. Constr. Chongqing Co. v. Seedling*, No. CV-05-350-ST, 2006 WL 8449845, at *10 (D. Or. Jan. 3, 2006) (distinguishing *Czarina* from the case before it since “petitioners have submitted a written agreement with an arbitration clause,” and finding that clause enforceable against the non-signatory party). In *Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 660 n.2, 663 (2d Cir. 2005), the Court of Appeals held that “[t]o the extent the facts and holding of *Czarina* are not distinguishable, we reject its holding.”

87. This is also why this decision is not included in the next section, which examines previous Courts of Appeals decisions on the signature requirement.

88. INT’L COUNCIL FOR COMMERCIAL ARBITRATION, ICCA’S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES 60 (2011), https://www.arbitration-icca.org/media/0/13365477041670/judges_guide_english_composite_final_revised_may_2012.pdf [<https://perma.cc/YPR6-P5AB>] (last visited Feb. 23, 2020).

89. *Id.*

of the case, independent of the decision reached by the arbitrators.”⁹⁰ This was also recognized by the Supreme Court, holding that

the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that . . . legitimate interest[s] . . . ha[ve] been addressed. The Convention reserves to each signatory country the right to refuse enforcement of an award where the “recognition or enforcement of the award would be contrary to the public policy of that country.”⁹¹

In sum, the decision of the Eleventh Circuit presents a rather confused, and confusing, analysis of the Convention’s “in writing” requirement and its application to non-signatories to international commercial arbitration agreements. The Court’s interpretation of this requirement as restricting arbitration to “the specific parties to an agreement” effectively excludes from arbitration any party that has not “actually signed” the arbitration agreement.⁹² As will become evident from the review of other U.S. federal courts’ decisions and of international principles and practice in the following sections, this position flies in the face of the widely accepted liberal interpretation of this requirement, which clearly allows for international commercial arbitration agreements to attach rights and obligations to non-signatories in certain circumstances.

IV. THE “IN WRITING” REQUIREMENT: A REVIEW OF U.S. FEDERAL COURTS JURISPRUDENCE

Chapter One of the FAA provides in part that

[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.⁹³

This has largely been interpreted to mean that a contract need not be signed in order for its arbitration clause to be enforceable, as non-signatories may be bound to, or benefit from, arbitration agreements they did not sign based on various legal or equitable doctrines.⁹⁴ Chapter Two of the FAA governs

90. *Id.* at 86.

91. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985).

92. *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316, 1326 (11th Cir. 2018).

93. 9 U.S.C. § 2 (2018).

94. *See, e.g., Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 624 (2009) (holding that

how U.S. courts treat international commercial arbitration agreements falling under the Convention. Actions or proceedings concerning such agreements shall be heard by district courts,⁹⁵ who may refer them to

“traditional state-law principles allow enforcement of contracts by (or against) nonparties through, *e.g.*, assumption or third-party beneficiary theories”); *Interocean Shipping Co. v. Nat’l Shipping & Trading Corp.*, 523 F.2d 527, 539 (2d Cir. 1975) (holding that “the mere fact that a party did not sign an arbitration agreement does not mean that it cannot be held bound by it. Ordinary contract principles determine who is bound.”); *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 776 (2d Cir. 1995) (finding that “a nonsignatory party may be bound to an arbitration agreement if so dictated by the ‘ordinary principles of contract and agency,’” including “1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel”); *McCarthy v. Azure*, 22 F.3d 351, 356 (1st Cir. 1994) (holding that “a person signing a contract only in a corporate capacity, and unambiguously indicating that fact on the face of the contract documents, does not thereby become a party to the agreement,” and examining “contract and agency principles” in order to determine if the agent should nonetheless be considered as a party to the arbitration agreement even though he did not sign the agreement in his individual capacity); *Arnold v. Arnold Corp.—Printed Commc’ns for Bus.*, 920 F.2d 1269 (6th Cir. 1990) (holding that the individual defendants were entitled to arbitration as agents of signatory corporate defendant, even though they had not signed the arbitration agreement); *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 194–95 (3d Cir. 2001) (noting that “when asked to enforce an arbitration agreement against a non-signatory to an arbitration clause, we ask ‘whether he or she is bound by that agreement under traditional principles of contract and agency law.’ . . . [T]hird party beneficiary, agency/principal, and equitable estoppel, [are] recognized principle[s] of contract or agency law applicable in the arbitration context”); *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006) (holding that “nonsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles”); *Lawson v. Life of the S. Ins. Co.*, 648 F.3d 1166, 1170 (11th Cir. 2011) (holding that “‘traditional principles of state law’ may allow ‘a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel”); *Todd v. S.S. Mut. Underwriting Ass’n (Berm.) Ltd.*, 601 F.3d 329, 333 (5th Cir. 2010) (citing the Supreme Court’s conclusion in *Carlisle* that “nonsignatories to arbitration agreements (such as direct action plaintiffs) may sometimes be compelled to arbitrate”).

95. See 9 U.S.C. § 203 (2018) (“An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.”); see also 9 U.S.C. § 205 (2018) (“Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.”).

arbitration.⁹⁶ An international arbitration agreement “falling under the Convention” is defined in §202 as one “arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title,” *i.e.*, in Chapter One.⁹⁷

A general agreement among Circuit Courts of Appeals has developed that “[a] court presented with a request to refer a dispute to arbitration pursuant to Chapter Two of the Federal Arbitration Act performs a very limited inquiry. It must resolve four preliminary questions: [the first of which being whether] there is an agreement in writing to arbitrate” within the meaning of Article II of the Convention.⁹⁸ The consensus seems to end here, however, as Courts of Appeals remain split on the meaning of this “in writing” requirement in the context of motions to compel international commercial arbitration agreements by or against non-signatories. Some courts, such as the Eleventh Circuit in *Outokumpu v. GE*, seem to require an actual signature in order to compel a party to arbitrate, while others recognize the applicability of various legal or equitable doctrines to determine this question.⁹⁹

Most U.S. federal courts have interpreted the “in writing” requirement of the Convention liberally, and therefore have not insisted on a strict signature requirement. The Court of Appeals for the First Circuit (“First Circuit”) has found that “[a] non-signatory may be bound by or acquire rights under an arbitration agreement under ordinary state-law principles of agency or contract.”¹⁰⁰ The First Circuit has accordingly held, for instance, that a signatory to an international arbitration agreement may be equitably estopped from avoiding arbitration of a dispute with a non-signatory that involves issues intertwined with a contract between signatories.¹⁰¹

96. 9 U.S.C. § 206 (2018) (“A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.”).

97. 9 U.S.C. § 202 (2018).

98. *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186–87 (1st Cir. 1982); *see, e.g.*, *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat’l Oil Co.*, 767 F.2d 1140, 1144–45 (5th Cir. 1985); *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186–87 (1st Cir. 1982); *Smith/Enron Cogeneration Ltd. P’ship v. Smith Cogeneration Int’l, Inc.*, 198 F.3d 88 (2d Cir. 1999); *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005).

99. The following survey is not intended to be exhaustive of all federal courts’ decisions on this issue, but rather aims to discuss a representative sample of such decisions in order to illustrate the split in the courts’ positions.

100. *Restoration Pres. Masonry, Inc. v. Grove Europe Ltd.*, 325 F.3d 54, 63 (1st Cir. 2003).

101. *Sourcing Unlimited, Inc. v. Asimco Int’l, Inc.*, 526 F.3d 38 (1st Cir. 2008).

Equitable principles were similarly applied by the First Circuit to determine the ability of a non-signatory company to assert that it was not a party to an international arbitration agreement since it had not embraced or sought to derive benefits from the contract.¹⁰²

The Court of Appeals for the Fourth Circuit (“Fourth Circuit”) has also held that “a party can agree to submit to arbitration by means other than personally signing a contract containing an arbitration clause,” and thus “in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.”¹⁰³ Accordingly, the Fourth Circuit has found that “a nonsignatory parent company may arbitrate a claim if its subsidiary is a signatory to an arbitration agreement and the charges against the parent and subsidiary involve inherently inseparable facts.”¹⁰⁴ The Fourth Circuit has also relied on “common law principles of contract interpretation” in finding that contracts containing an international arbitration agreement applied to a non-signatory since they concerned the same subject matter as contracts signed by that party, “and were executed by the same parties within one day of each other.”¹⁰⁵ At least one District Court located in this Circuit has noted that

[E]ven where a party has not personally signed a contract containing an arbitration clause, other circumstances may still permit such a party to “enforce, or to be bound by, an arbitration provision within a contract executed by other parties.” . . . This enforcement rests, not on the terms of the contract itself, but rather upon the theory of equitable estoppel.¹⁰⁶

The Court of Appeals for the Fifth Circuit (“Fifth Circuit”) has similarly noted that “in both FAA and Convention cases, courts have largely relied on the same common law contract and agency principles to determine whether nonsignatories must arbitrate.”¹⁰⁷ Therefore, “cases discussing whether nonsignatories can be compelled to arbitrate under the

102. *InterGen N.V. v. Grina*, 344 F.3d 134 (1st Cir. 2003).

103. *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416–17 (4th Cir. 2000).

104. *Silkworm Screen Printers, Inc. v. Abrams*, No. 91-1631, 1992 WL 317187, at *5 (4th Cir. Nov. 4, 1992).

105. *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 368 (4th Cir. 2012).

106. *DP Sols., Inc. v. Help Desk Now, Inc.*, No. 1:08 CV 104, 2008 WL 4543785, at *3 (M.D.N.C. Oct. 9, 2008) (finding ultimately that the theory was inapplicable on the facts before it).

107. *Todd v. S.S. Mut. Underwriting Ass’n (Berm.) Ltd.*, 601 F.3d 329, 333–34 (5th Cir. 2010).

FAA are relevant for this case governed by the New York Convention.”¹⁰⁸ The Fifth Circuit has also found that “‘background principles’ of state contract law, when relevant ‘allow a contract to be enforced by or against nonparties to the contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.’”¹⁰⁹ The Court accordingly considered, albeit rejected on the facts, a non-signatory defendant’s estoppel argument in one case,¹¹⁰ and in another case it upheld the district court’s decision to “not require that the contract containing an arbitral provision be signed to constitute an agreement in writing under the Convention.”¹¹¹ District courts located in this Circuit have agreed, noting that “[t]he question of whether a non-signatory can be bound to arbitrate is a procedural one,” and finding that under both federal and state law the “direct-benefits estoppel theory” can be applied “when enforcing arbitration agreements against non-signatories.”¹¹² Accordingly, a defendant “need not show that it has the right to enforce the arbitration agreement. It is enough that ‘in certain limited instances, pursuant to an equitable estoppel doctrine, a nonsignatory-to-an-arbitration-agreement-defendant can nevertheless compel arbitration against a signatory-plaintiff.’”¹¹³

In the same vein, the Court of Appeals for the Sixth Circuit has held in one case involving non-signatory plaintiffs that “[a]lthough plaintiffs were not parties to the contract . . . , if they are going to try to enforce it, they are subject to its terms and to the international law governing its terms,” including arbitration.¹¹⁴ A district court located in this Circuit, when called

108. *Id.* at 335. The Court remanded the case back to the District Court, which had originally denied the plaintiff’s motion to compel arbitration. On remand, the District Court found that the arbitration agreement was enforceable and granted the motion to compel. *Todd v. S.S. Mut. Underwriting Ass’n, Ltd.*, No. 08-1195, 2011 WL 1226464, at *7 (E.D. La. Mar. 28, 2011).

109. *Brittania-U Nigeria, Ltd. v. Chevron USA, Inc.*, 866 F.3d 709, 715 (5th Cir. 2017).

110. *Marathon Oil Co. v. Ruhrgas, A.G.*, 115 F.3d 315, 321 (5th Cir. 1997).

111. *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666, 669–70 (5th Cir. 1994). The Court interpreted the “signed by the parties or contained in an exchange of letters or telegrams” qualifier in Article II(2) of the Convention as applying only to “an arbitration agreement” and not to “an arbitral clause in a contract,” as in this case. *Id.* at 699.

112. *Authenment v. Ingram Barge Co.*, 878 F.Supp.2d 672, 680–81 (E.D. La. 2012).

113. *QPro Inc. v. RTD Quality Servs. USA, Inc.*, 718 F.Supp.2d 817, 824 (S.D. Tex. 2010).

114. *Aasma v. Am. S.S. Owners Mut. Prot. & Indem. Ass’n, Inc.*, 95 F.3d 400, 405 (6th Cir. 1996). Plaintiffs in this case were “a group of merchant mariners who claim injury resulting from exposure to asbestos during their service aboard ships” whose owner was insured by the defendant. *Id.* at 402. The insurance policies, to which plaintiffs were not signatories, contained arbitration clauses. *Id.* at 405.

upon to decide whether the non-signatory defendant was a party to the international arbitration agreement, noted that the “Sixth Circuit has recognized five theories for binding nonsignatories to arbitration agreements: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter-ego; and (5) estoppel.”¹¹⁵ The Court of Appeals for the Seventh Circuit has also noted that “[w]e see no reason why, even in the absence of a writing, ordinary rules of contract law should not apply.”¹¹⁶

Similarly, the Court of Appeals for the DC Circuit has accepted in principle that “when contract law principles demonstrate the existence of an arbitration agreement between the parties, courts will find that Article II is satisfied and that subject matter jurisdiction is proper,” even absent a signature.¹¹⁷ The same reasoning was adopted by the Court of Appeals for the Eighth Circuit (“Eighth Circuit”), finding that “a willing signatory seeking to arbitrate with a non-signatory that is unwilling must establish at least one of . . . [these] five theories[:]: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel.”¹¹⁸ The Eighth Circuit has also upheld a district court’s decision recognizing, yet finding inapplicable on the facts, the “common law third party beneficiary” theory as grounds for binding a non-signatory to an international arbitration clause.¹¹⁹ However, not all district courts in this Circuit have followed suit. One such court has found that since the defendant before it did not sign the contract containing the arbitration agreement and there was no “exchange of letters or telegrams,” there was no enforceable arbitration agreement under the Convention.¹²⁰

Rounding up the discussion of those U.S. federal courts that have largely adopted a liberal interpretation of the Convention’s “in writing”

115. *Rossisa Participações S.A. & Cia. Rossi De Automóveis v. Reynolds & Reynolds Co.*, 2019 WL 4242937, at *7 (S.D. Ohio Sept. 6, 2019) (concerning a Petition to Confirm Arbitration Award pursuant to the Inter-American Convention on International Commercial Arbitration, which is enforced in the U.S. in accordance with Chapter Three of the FAA, 9 U.S.C.A. §§ 301–307 (2018)).

116. *Slaney v. Int’l Amateur Athletic Fed’n*, 244 F.3d 580, 591 (7th Cir. 2001) (citing with approval the Second Circuit in *Smith/Enron Cogeneration Ltd. P’ship v. Smith Cogeneration Int’l, Inc.*, 198 F.3d 88 (2d Cir. 1999), where the Second Circuit held that “non-signatories to an arbitration agreement may nevertheless be bound according to ordinary principles of contract and agency, including estoppel”).

117. *Dynamo v. Ovechkin*, 412 F.Supp.2d 24, 27–28 (D.D.C. 2006) (finding the arbitration agreement to be inapplicable to the non-signatory party since he had not “expressed his affirmative acceptance of an agreement to arbitrate”).

118. *Reid v. Doe Run Res. Corp.*, 701 F.3d 840, 846 (8th Cir. 2012).

119. *Recold, S.A. de C.V. v. Monfort of Colorado, Inc.*, 893 F.2d 195, 197 (8th Cir. 1990).

120. *Seaboard Corp. v. Grindrod Ltd.*, 248 S.W.3d 27, 31 (Mo. Ct. App. 2008).

requirement and its application to non-signatories are the district courts located in the Tenth Circuit. One such court has noted that “[a]lthough Article II, paragraph 2 of the Convention states that the agreement should be signed or contained in an exchange of letters, courts have repeatedly held that non-signatories to an arbitration agreement ‘may nevertheless be bound according to ordinary principles of contract and agency.’”¹²¹ Moreover, “the United Nations Commission on International Trade Law (‘UNCITRAL’) has recommended that ‘[A]rticle II, paragraph 2, of the [New York Convention] be applied recognizing that the circumstances described therein are not exhaustive.’”¹²² Therefore, “[g]eneral contract principles can validate an unsigned agreement to arbitrate.”¹²³

In contrast, the Court of Appeals for the Second Circuit (“Second Circuit”) has been inconsistent in its approach to the signature requirement. Early on, it did not apply such a requirement to international commercial arbitration agreements falling under the Convention, even where the applicable state law included a signature requirement.¹²⁴ The Court further found that some

state statutes . . . directly clash with the Convention and with the Arbitration Act because they effectively reincarnate the former judicial hostility towards arbitration. Accordingly, we hold that the Convention and the Arbitration Act preempt the [state] statute, and that the . . . arbitration provisions, as drafted, are enforceable.¹²⁵

121. *TransAsia Lawyers v. EcoNova, Inc.*, No. 1:13-cv-98 DN, 2014 WL 2112442, at *6 (D. Utah May 20, 2014).

122. *Id.*

123. *Id.*

124. *David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 250 (2d Cir. 1991) (“Because federal arbitration law governs this dispute, we must determine whether the Vermont statute is sufficiently consistent with federal law that the two may peacefully coexist. Article II, Section 1 of the Convention requires only that the agreement to arbitrate be in writing; this standard obviously is less rigid than that required by the Vermont statute.”); *see also Beromun Aktiengesellschaft v. Societa Industriale Agricola “Tresse” Di Dr. Domenico e Dr. Antonio Dal Ferro*, 471 F.Supp. 1163, 1170 (S.D.N.Y. 1979) (“[W]ritten agreement for arbitration is the Sine qua non of an enforceable arbitration agreement,” but that such agreement “need not be signed, however, and ordinary contract principles dictate when the parties are bound by a written arbitration provision absent their signatures.”).

125. *David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 250 (2d Cir. 1991). The arbitration agreement was contained in the “parties’ basic trading agreements[,] which incorporated London metal exchange rule providing for arbitration of disputes ‘arising out of or in relation to’ contracts for metals.” *Id.* at 246. The suit was brought for alleged breach of a separate trader’s agreement between the parties. *Id.*

In another early case, the Second Circuit explicitly stated that “it is well-established that a party may be bound by an agreement to arbitrate even absent a signature. Further, while the Act requires a writing, it does not require that the writing be signed by the parties.”¹²⁶

However, a few years later the Second Circuit seemed no longer willing to apply international commercial arbitration agreements to non-signatories. It found,¹²⁷ on the basis of an elaborate grammatical analysis of Article II of the Convention, that “in order to be enforceable under the Convention, both an arbitral clause in a contract and an arbitration agreement must be signed by the parties or contained in an exchange of letters or telegrams.”¹²⁸ Since the contract containing the arbitration clause in that case was only signed by one of the parties and was not contained in an exchange of letters or telegrams, the Court concluded that there was “no ‘agreement in writing’ sufficient to bring this dispute within the scope of the Convention.”¹²⁹ In reaching this conclusion, the Second Circuit recognized its own previous ruling that “the Convention ‘should be interpreted broadly to effectuate its recognition and enforcement purposes,’”¹³⁰ but did not explain how its decision is to be reconciled with

126. *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 846 (2d Cir. 1987) (citation omitted); *see also*, *Borsack v. Chalk & Vermilion Fine Arts, Ltd.*, 974 F.Supp. 293, 299–300 (S.D.N.Y. 1997) (finding that “[o]ur Court of Appeals has rejected the proposition that only signatories to an arbitration agreement can be bound by its terms, applying instead ordinary principles of contract and agency to determine which parties are bound by an agreement to arbitrate,” and that “[u]nder general contract principles, ‘non-signatories [] fall within the scope of an arbitration agreement where that is the intent of the parties’”); *Overseas Cosmos, Inc. v. NR Vessel Corp.*, No. 97 CIV. 5898(DC), 1997 WL 757041, at *3 (S.D.N.Y. 1997) (“While Article II of the Convention indeed requires that an agreement to arbitrate be in writing to be enforceable, ‘it does not require that the writing be signed by the parties,’ . . . and ‘ordinary contract principles dictate when the parties are bound by a written arbitration provision absent their signatures.’”).

127. *Kahn Lucas Lancaster, Inc. v. Lark Int’l Ltd.*, 186 F.3d 210, 217–18 (2d Cir. 1999). Nonetheless, federal District Courts in the Circuit remained split on the issue. *Compare Siderugica Del Orinoco (Sidor), C.A. v. Linea Naviera De Cabotaje, C.A.*, No. 99 CIV. 0075(TPG), 1999 WL 632870, at *5 (S.D.N.Y. 1999) (stating, with respect to an international arbitration agreement falling under Chapter Three of the FAA, 9 U.S.C.A. §§ 301–307, which implements the Inter-American Convention on International Commercial Arbitration, that “the writing required under the FAA need not be signed and that ordinary contract principles dictate when parties are bound by a written arbitration provision absent their signatures”) *with* *Sen Mar, Inc. v. Tiger Petroleum Corp.*, 774 F.Supp. 879, 882–83 (S.D.N.Y. 1999) (featuring an arbitration clause that was contained in a telex, which could not be enforced since “[i]t is not found in a signed writing nor is it found in an exchange of letters”).

128. *Kahn Lucas Lancaster, Inc. v. Lark Int’l Ltd.*, 186 F.3d 210, 217 (2d Cir. 1999).

129. *Id.* at 217–18.

130. *Id.* at 218 (citing *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 933 (2d Cir.

its previous decisions concerning the signature requirement. The Court did, however, expressly reject the liberal approach to this requirement adopted by the Fifth Circuit.¹³¹

Nonetheless, in a decision rendered a mere six months later, the Second Circuit once again acknowledged the applicability of various doctrines, including incorporation by reference, assumption, agency, veil-piercing/alter ego, and estoppel, to determine whether an international commercial arbitration agreement should be applied to non-signatories.¹³² The Court appears to have maintained this position, dispensing with the strict signature requirement, in subsequent cases.¹³³

1983)).

131. *Id.* (finding that “the rules governing our construction do not allow us to follow the Fifth Circuit’s interpretation of article II, section 2 as expressed in *Sphere Drake*”).

132. *Smith/Enron Cogeneration Ltd. P’ship v. Smith Cogeneration Int’l, Inc.*, 198 F.3d 88, 97 (2d Cir. 1999).

133. *See, e.g., Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 495 (2d Cir. 2002) (“We have recognized certain theories under which a non-signatory party may be bound by an arbitration agreement and thus subject to the jurisdiction of the court in proceedings to compel arbitration. . . .”); *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 146 (2d Cir. 2001) (“An agreement to arbitrate exists within the meaning of the Convention and the FAA if: (1) there is a written agreement; (2) the writing provides for arbitration in the territory of a signatory of the convention; (3) the subject matter is commercial; and (4) the subject matter is not entirely domestic in scope.”).

Sarhank Grp. v. Oracle Corp., 404 F.3d 657 (2d Cir. 2005), has been viewed as abrogating *Kahn Lucas*. “[T]he *Kahn Lucas* court assumed the dispositive question was one of subject matter jurisdiction without addressing the distinction between determining whether subject matter jurisdiction existed and determining—on the merits—whether the parties had made an agreement to arbitrate. . . . [T]o the extent that *Kahn Lucas* is read as viewing an element of a claim as a jurisdictional requisite, the absence of which deprives the Court of subject matter jurisdiction, it is contrary to prior holdings of this Court.” *Id.* at 660 n.2. *See also* *Sea Bowld Marine Grp., LDC v. Oceanfast Pty, Ltd*, 432 F.Supp.2d 1305, 1313 (S.D. Fla. 2006) (stating that “[t]he Eleventh Circuit Court of Appeals has repeatedly stated that the ‘lack of a written arbitration agreement is not an impediment to arbitration’”); *Alghanim v. Alghanim*, 828 F.Supp.2d 636, 647–48 (S.D.N.Y. 2011) (stating that “[p]ursuant to federal law, in the particular context of the Convention, the fact that non-signatories did not sign a written arbitration agreement ‘does not foreclose the application of the well-established contract and agency principles under which nonsignatories sometimes can be obligated by, or benefit from agreements signed by others’”).

The *Kahn Lucas* decision has given rise to some interesting reasoning by District Courts seeking to avoid its harsh outcome. The decision was distinguished, for instance, in *Glencore Ltd. v. Degussa Engineered Carbons L.P.*, 848 F.Supp.2d 410, 437 (S.D.N.Y. 2012), where the Court found that the case before it “involve[d] an entirely different level of interchange between the parties than present in *Kahn Lucas Lancaster*, and compelling evidence of a meeting of the minds between the parties on the terms set forth in the contract incorporating the arbitration clause.” The Court therefore concluded “comfortably, that the parties’ written back-and-forth . . . satisfies the requirement of an arbitral clause ‘contained

The Court of Appeals for the Third Circuit (“Third Circuit”) has been similarly inconsistent in its approach to the Convention’s signature requirement. Early on, the Court held that “[w]hen asked to enforce an arbitration agreement against a nonsignatory, we ask whether he or she is bound by that agreement under traditional principles of contract and agency law.”¹³⁴ “In keeping with the federal policy favoring arbitration,” the Court, for instance, “extend[ed] the scope of [international commercial] arbitration clauses to agents of the party who signed the agreements.”¹³⁵ However, the Third Circuit’s position gradually changed, as a few years later it found that “the plain language [of the Convention] provides that an arbitration clause is enforceable only if it was contained in a signed writing or an exchange of letters.”¹³⁶ The Third Circuit shifted yet again more recently, finding, for instance, that “arbitration provisions, like other contractual provisions, may be incorporated by reference through general incorporation provisions,” specifically recognizing such “incorporation by reference as one theory for binding nonsignatories to arbitration agreements.”¹³⁷ The Court has further recognized that “[t]here are five

in an exchange of letters and telegrams’ within the meaning of the Convention.” *Id.* In *Dedon GmbH v. Janus et Cie*, No. 10 Civ. 04541 (CM), 2011 WL 666174, at *1, *3–4 (S.D.N.Y. 2011), the District Court was faced with a claim for tortious interference while the dispute was being heard in ICC arbitration in London. The Court first found that “*Kahn Lucas*’ holding precluding enforcement of an unsigned arbitration agreement pursuant to the New York Convention survives *Sarhank* and remains good law.” *Id.* at *3. Therefore, had the defendant to the unsigned arbitration agreement sought to compel arbitration, “*Kahn Lucas* would require this Court to deny the motion with prejudice, since there is no dispute that there is neither a signed agreement containing an arbitration clause nor any exchange of letters or telegrams between the parties.” *Id.* However, the District Court also found that “there is a distinction between the existence of a contract and its enforceability.” *Id.* at *1. Accordingly, it held that “*Kahn* says nothing at all about whether an arbitration agreement exists; it holds only that an agreement to arbitrate must be signed to be enforceable under the New York Convention, which has as its limited purpose the establishment of criteria for conferring authority on United States courts to compel arbitration (and enforce awards) under international arbitration agreements.” *Id.* at *3. Since “*Kahn* does not hold that no arbitration agreement can come into being absent a signature . . . it is possible that the parties concluded a valid and binding agreement to arbitrate under whatever contract law governs their dealings . . . *Kahn* does not obviate the need for the trial on the issue of contract formation.” *Id.* at *1, *3–4.

134. *Bel-Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 444 (3d Cir. 1999).

135. *Id.* (quoting *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1122 (3d Cir. 1993)).

136. *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 449 (3d Cir. 2003); *see also Sandvik AB v. Advent Int’l Corp.*, 220 F.3d 99, 101 (3d Cir. 2000) (noting that the act bringing the arbitration clause into effect was “the signing of the agreement”).

137. *Century Indem. Co. v. Certain Underwriters at Lloyd’s, London, Subscribing to Retrocessional Agreement Nos. 950548, 950549, 950646*, 584 F.3d 513, 532 (3d Cir. 2009).

theories for binding nonsignatories to arbitration agreements under the Convention: (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing/alter ego, and (5) estoppel.”¹³⁸

Two Courts of Appeals seem to have pivoted in the opposite direction, and now require a signature to evidence consent to arbitrate. Up until recently, the Court of Appeals for the Ninth Circuit (“Ninth Circuit”) was willing to apply international commercial arbitration agreements to non-signatories in certain circumstances, on the basis of “ordinary contract and agency principles.”¹³⁹ The Court now seems to have changed its position,

138. *Invista S.À.R.L. v. Rhodia, S.A.*, 625 F.3d 75, 84 (3d Cir. 2010); *see also* *Quanqing (Changshu) Cloth-Making Co. v. Pilgrim Worldwide Trading, Inc.*, No. 2:09-cv-03785, 2010 WL 2674589, at *3 (D.N.J. 2010) (finding, on the basis of *Century Indem.*, that a “non-signatory to a contract [can] be estopped from denying obligations under a contract, including a provision providing for the arbitration of disputes,” in certain circumstances).

139. *See Balen v. Holland Am. Line Inc.*, 583 F.3d 647, 655 (9th Cir. 2009) (finding, on the basis of “ordinary contract and agency principles,” that the agent signing the arbitration agreement on behalf of the defendant non-signatory rendered the latter a party to it); *Wimbledon Fin. Master Fund, Ltd. v. Molner*, 578 F. App’x 691, 692 (9th Cir. 2014) (recognizing that “nonsignatories of arbitration agreements’ [are] bound by such agreements to the extent ‘ordinary contract and agency principles’ would bind them,” and finding that “[d]efendants have not alleged a contract or agency theory to bind Plaintiffs to the terms of an arbitration agreement they did not sign”). *See also* *Prograph Int’l Inc. v. Barhydt*, 928 F.Supp. 983, 990 (N.D. Cal. 1996) (“Agency principles have been held to permit nonsignatory corporations to compel arbitration under arbitration clauses signed by their corporate parents, subsidiaries, or affiliates, at least when the allegations against the nonsignatory corporation do not differ substantially from those against its signatory affiliate.”); *China Na’l Chem. Constr. Chongqing Co. v. Seedling*, No. CV-05-350-ST, 2006 WL 8449845, at *10 (D. Or. Jan. 3, 2006) (finding that submitting “a written agreement with an arbitration clause . . . satisfies the procedural requirements of Article II. The issue is whether [the] non-signator to the agreement, is bound by that arbitration clause. Even if he did not sign the agreement with the arbitration clause, he may still be bound by an arbitration agreement arising out of common law principles of contract and agency law, such as incorporation by reference, assumption, agency, piercing the corporate veil/alter ego, and estoppel.”); *Greenberg v. Park Indem. Ltd.*, No. LA CV12-10756 JAK (AJWx), 2013 WL 12123695, at *16 (C.D. Cal. Oct. 8, 2013) (finding that an arbitration clause in an insurance policy was enforceable even absent the plaintiff’s signature, and reconciling *Sphere Drake* and *Kahn Lucas* by holding that “although *Kahn Lucas* determined that the purchase order and confirmation of order forms did not satisfy the signature requirement, it did not address what would constitute evidence of an agreement sufficient to satisfy the Convention.” The Court further found equitable estoppel applicable as ground for finding the non-signatory to be bound by the arbitration agreement in this case); *Chloe Z Fishing Co., Inc. v. Odyssey Re (London) Ltd.*, 109 F.Supp.2d 1236, 1246–49 (S.D. Cal. 2000) (finding that “Article II of the Convention exhaustively defines what constitutes an ‘agreement in writing’” and that “both an arbitral clause and an agreement in writing must be found either in a signed writing or an exchange of letters under the Convention.” The District Court did, however, broadly interpret “an exchange of letters,” finding that the “conduct of the parties in negotiating the [insurance] policies affirmatively manifests their

however,¹⁴⁰ interpreting the Convention to mean that “only a ‘party’ or ‘parties to the agreement referred to in article II’ may litigate its enforcement.”¹⁴¹ The Ninth Circuit has reasoned that “Article II makes clear that arbitration is permissible only where there is ‘an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between *them*’—not disputes between a party and a non-party.”¹⁴² The Court therefore concluded that “the Convention Treaty does not allow non-signatories or non-parties to compel arbitration.”¹⁴³

consent to the arbitral clauses within the meaning of the ‘exchange of letters or telegrams’ requirement under the Convention.” Moreover, the Court found that “the import of the parties’ conduct must be construed in accordance with English law,” rather than federal law, since “the manifestation of assent here occurred in London.”)

140. *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996 (9th Cir. 2017). Plaintiff in this case was the widow of a seaman “who died when the fishing vessel he worked on sank because of inadequate repairs and an incompetent crew provided by [defendant]. [She] commenced a wrongful death action. . . . [[D]efendant] moved to compel arbitration based on an employment agreement between [the deceased] and the vessel’s owner. Defendant was owned by the same family who owned the vessel. The agreement, which contained an arbitration clause, was signed by defendant “on behalf of” the vessel’s owner.” *Id.* at 998. “The District Court compelled arbitration of the claims against [the vessel’s owner], but denied the motion as to [defendant].” *Id.* Defendant appealed, arguing that the “‘signed by the parties’ requirement in Article II(2) applies only to ‘an arbitration agreement’ and not ‘an arbitral clause in a contract.’” *Id.* at 999. *See also* *Setty v. Shrinivas Sugandhalaya LLP*, 771 F. App’x 456 (9th Cir. 2019). Plaintiff and his company, located in Bangalore, sued defendant company, owned by his brother and located in Mumbai, for trademark infringement. Defendant moved to compel arbitration on the basis of an arbitration clause contained in a partnership deed signed between the brothers prior to the incorporation of their respective companies. *Setty v. Shrinivas Sugandhalaya LLP*, No. 2:17-cv-01146-RAJ, 2018 WL 3064778 (W.D. Wash. June 21, 2018). The District Court denied the motion and defendant appealed. Relying on *Yang*, the Court of Appeals affirmed, finding that since defendant was not a signatory to the Partnership Deed, and was not even in existence at the time the Partnership Deed was signed, it may not compel arbitration under the New York Convention. *Setty v. Shrinivas Sugandhalaya LLP*, 771 F. App’x 456, 456–57 (9th Cir. 2019).

141. *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1001 (9th Cir. 2017).

142. *Id.*

143. *Id.* The Court noted that the widow of a second seaman who died in the accident, who was “[u]nencumbered by an arbitration clause . . . successfully litigated her claims, obtaining a \$3.2 million judgment that we affirmed on appeal.” *Id.* at 998. The Court of Appeals’ decision in *Yang* has been followed by lower courts in the Circuit and interpreted as holding that “arbitration agreements arising under the Convention are enforceable only by a party who is a signatory to the agreement under which it moves to compel. . . . Moreover, . . . a litigant may not circumvent the Convention’s requirements under the state law exceptions of equitable estoppel, agency, or alter ego.” *Youssefzadeh v. Global-IP Cayman*, No. 2:18-cv-02522-JLS-JCG, 2018 WL 6118436, at *6 (C.D. Cal. July 30, 2018). However, *Yang* was distinguished in *STM Atl. N.V. v. Dong Yin Dev. Holdings Ltd.*, No.

The trajectory of the Eleventh Circuit in this regard is similar to that of the Ninth. Up until its recent decision in *Outokumpu v. GE* discussed above, the Court largely applied international commercial arbitration agreements to non-signatories on grounds similar to those referenced by sister Circuits.¹⁴⁴ For instance, the Eleventh Circuit found that non-signatory defendants could invoke an arbitration clause “in the light of their close relationship to the parties to the agreement.”¹⁴⁵ Similarly, the Court applied equitable estoppel to require a signatory plaintiff to arbitrate a claim against a non-signatory defendant where that claim was “inextricably intertwined” with its claim against a signatory defendant.¹⁴⁶ Finally, in several decisions the Court allowed for the application of an unsigned international commercial arbitration agreement incorporated by reference

2:18-cv-01269-JLS-JCG, 2019 WL 2417625, at *6 (C.D. Cal. Feb. 15, 2019). The case involved a motion by defendant non-signatory to stay the litigation pending arbitration on the basis of equitable estoppel. The Court recognized that *Yang* “rejected a non-signatory’s attempt to compel arbitration under a theory of equitable estoppel,” but found that *Yang* “precludes only the *remedy* of actual arbitration. Nothing in *Yang* suggests that *alternative equitable relief*, such as a stay, runs afoul of the Convention.” *Id.*

144. The position of the Court on this issue in *Bautista v. Star Cruises*, 396 F.3d 1289, 1300 (11th Cir. 2005) is not entirely clear. The Court noted “the jurisdictional prerequisite that the court be provided with an agreement to arbitrate signed by the parties,” however it did not express a position on whether or not consent could also be ascertained by other means since the parties in the case did in fact sign the document containing the arbitration clause. *Id.* For a strict interpretation of the Eleventh Circuit’s decisions on the signatory requirement, see *NCL (Bah.) Ltd. v. ABB Ltd.*, No. 05-21796-CIV-LENARD/GARBER, 2008 WL 11400755, at *4 (S.D. Fla. Apr. 24, 2008) (holding that “[b]ased on the Eleventh Circuit’s decisions regarding the ‘agreement in writing’ jurisdictional prerequisite, it is apparent that both parties must be signatories to the arbitration agreement in order for a district court to have subject matter jurisdiction.” The Court further found that “[t]he plain reading of Article II, Section 2 is that, to be considered an ‘agreement in writing’ governed by the Convention, the arbitration agreement or contract containing an arbitral clause must be signed by ‘the parties.’ While the Convention does not specify who ‘the parties’ are, the most logical inference is that the Convention is referring to the parties to the subsequent litigation.”).

145. *Olsher Metals Corp. v. Olsher*, No. 03-12184, 2004 WL 5394012, at *3 (11th Cir. Jan. 26, 2004).

146. *Escobal v. Celebration Cruise Operator, Inc.*, 482 F. App’x 475, 476 (11th Cir. 2012). *See also* *B & B Jewelry, Inc. v. Pandora Jewelry LLC*, 247 F.Supp.3d 1283, 1287 n.1 (S.D. Fla. 2017) (noting that in order to enforce arbitration provisions “against non-signatories under the doctrines of equitable estoppel, agency, and third-party beneficiary principles . . . under well-established Eleventh Circuit precedent, the claims against the non-signatories must be ‘inextricably intertwined’ with the claims against the signatory”); *Pineda v. Oceania Cruises, Inc.*, 283 F.Supp.3d 1307, 1310–11 (S.D. Fla. 2017) (finding that “equitable estoppel is available to allow a nonsignatory to compel arbitration,” although the conditions for its application were not satisfied in that case).

into the contract signed by the parties.¹⁴⁷ The Eleventh Circuit did not address any of these decisions in *Outokumpu v. GE*. Instead, it relied on a 2017 decision of the Ninth Circuit¹⁴⁸ and older decisions of the Second Circuit¹⁴⁹ and Third Circuit,¹⁵⁰ even though the latter Courts of Appeals have moved away from this rigid position since these decisions were rendered twenty-one and seventeen years ago, respectively. Nonetheless, the Eleventh Circuit's decision in *Outokumpu v. GE* has now been followed by lower courts and interpreted as “unequivocally determin[ing] that non-signatories cannot be bound to arbitration agreements under the Convention under theories of estoppel or third party beneficiary.”¹⁵¹

As part of its justification for imposing a strict signature requirement, the Eleventh Circuit in *Outokumpu v. GE* found there to be a conflict between the Convention and the FAA.¹⁵² This so-called conflict arises, according to the Court, since Chapter One of the FAA does not require that the parties sign the arbitration agreement, while “the Convention, as codified in Chapter 2 of the FAA, only allows the enforcement of agreements in writing signed by the parties.”¹⁵³ Since Congress “has specified that the Convention trumps Chapter 1 of the FAA where the two are in conflict,”¹⁵⁴ the Eleventh Circuit reasoned that the Convention's “signature requirement” prevails. However, as the next section will illustrate, there is no conflict between the Convention and the FAA in this

147. See, e.g., *Vera v. Cruise Ships Catering & Servs. Int'l, N.V.*, 594 F. App'x 963 (11th Cir. 2014); *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1214–15 (11th Cir. 2011).

148. *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996 (9th Cir. 2017).

149. *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 186 F.3d 210 (2d Cir. 1999).

150. *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440 (3d Cir. 2003).

151. See, e.g., *McCullough v. Royal Caribbean Cruises, Ltd.*, No. 16-cv-20194-GAYLES, 2019 WL 2076192, at *4 (S.D. Fla. 2019). The District Court noted that the Court of Appeals’ “explicit language severely restricts any attempt to bind a non-signatory through theories of equity,” and concluded that “because there is no agreement signed by both parties, the [plaintiffs] cannot be compelled to arbitrate.” The plaintiffs have filed an appeal (Notice of Appeal, *McCullough v. AIG Ins. Hong Kong, Ltd.*, 2019 WL 2076192 (May 30, 2019) (No. 19-12100). But see *White Eagle Property Group, LLC v. Amrice, LLC*, No. 6:19-cv-335-Orl-31DCI, 2019 WL 2337005, at *2 (M.D. Fla. June 3, 2019) (distinguishing *Outokumpu v. GE* as dealing “with a very different set of facts than the case at hand. It involved an entity that was not a signatory to the contract at issue; here, the Plaintiff is clearly a party to the contract. The Fifth Circuit case [in *Sphere Drake*] is on point, logical, and persuasive. The Eleventh Circuit’s contrary reference to that case is dicta and the *Outokumpu Stainless* holding is not inconsistent with the result here.” The Court accordingly found that an unsigned insurance contract was enforceable.)

152. *Outokumpu Stainless USA, LLC v. Convertteam SAS*, 902 F.3d 1316, 1326 (11th Cir. 2018).

153. *Id.*

154. *Id.*

regard since the Convention does not, in fact, require international commercial arbitration agreements to be signed.

V. THE “IN WRITING” REQUIREMENT: INTERNATIONAL ARBITRATION LAW AND PRACTICE

Article II of the Convention provides that

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.¹⁵⁵

The term “in writing” is then defined to include “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”¹⁵⁶ This provision reflects the relatively simple nature of international business transactions at the time the Convention was concluded in 1958,¹⁵⁷ although it was already recognized at the time of drafting that “[i]t was not customary in international commerce to have documents signed by the two parties, even in very important transactions.”¹⁵⁸ This is even truer nowadays, when modern communications and the complexity of international trade mean

155. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(1), June 10, 1958, 330 U.N.T.S. 3.

156. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(2), June 10, 1958, 330 U.N.T.S. 3.

157. Interestingly, international conventions on commercial arbitration predating the New York Convention did not require an arbitration agreement to be signed, or for that matter, written, in order to be recognized. See Protocol on Arbitration Clauses, 27 L.N.T.S. 157 (1924), <https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2027/v27.pdf> [<https://perma.cc/9K97-25EX>]; Convention on the Execution of Foreign Arbitral Awards, 92 L.N.T.S. 301 (1929), <https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2092/v92.pdf> [<https://perma.cc/QG9J-8A7R>]. Moreover, at the time the New York Convention was concluded, telegrams were the latest technology. Indeed, “[a]s demonstrated by the inclusion of telegrams as the then-current technology in Article II(2) NY Convention, the NY Convention aimed to promote international trade when setting form provisions for arbitration agreements. The rationale of accommodating business needs by allowing for contemporary communication technology demands recognition of electronic equivalents if they equally meet object and purpose of the paper-based requirements.” Reinmar Wolff, *The UN Convention on the Use of Electronic Communications in International Contracts: An Overlooked Remedy for Outdated Form Provisions under the New York Convention?*, in 60 YEARS OF THE NEW YORK CONVENTION: KEY ISSUES AND FUTURE CHALLENGES 115–16 (Katia Fach Gómez & Ana M. López Rodríguez eds., 2019).

158. MARIKE R. P. PAULSSON, *THE 1958 NEW YORK CONVENTION IN ACTION* 79 (2016).

that “states, corporations, and individuals who are *not* [signatories] to the arbitration agreement might wish to become parties” to it or might find themselves joined as parties regardless of their wishes.¹⁵⁹

Any other interpretation of Article II(2) would therefore be “distinctly old-fashioned.”¹⁶⁰ Indeed, the Convention’s drafters “agreed that the ‘in writing’ requirement should not be interpreted too strictly and could be regarded as an element susceptible to evolve, such that the formal scope of Article II would be in alignment with contemporary customs in international trade.”¹⁶¹ The United Nations Commission on International Trade Law (UNCITRAL) has also recommended that Article II(2) “be applied recognizing that the circumstances described therein are not exhaustive.”¹⁶² Therefore, while the debate surrounding the appropriate legal or equitable basis upon which international commercial arbitration agreements should be applied to non-signatories admittedly remains “largely unsettled,”¹⁶³ the basic question of whether or not an actual signature is necessary to evidence consent to arbitrate now seems to be mostly answered in the negative.¹⁶⁴

159. NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 14 (6th ed. 2015) [emphasis in original].

160. ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 6 (4th ed. 2004); see also Neil Kaplan, *Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?*, 12 ARB. INT’L 27, 44 (1996) (tracing the evolution of Article II(2) and its “in writing” requirement and noting that “it is not unreasonable to propose that the time has come for another look at Article II(2). In my view, its emphasis on writing or exchange is outmoded.”).

161. MARIKE R. P. PAULSSON, THE 1958 NEW YORK CONVENTION IN ACTION 80 (2016).

162. UNCITRAL, Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 18 (2015), <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf> [https://perma.cc/2JHL-THTU]. Amendments to the UNCITRAL Model Law, adopted in 2006, set out two options for article 7. Option I retains the writing requirement, but provides that “[a]n arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.” MODEL LAW ON INT’L COMMERCIAL ARBITRATION art. 7 (UNCITRAL 2006), https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [https://perma.cc/8L6G-XM2U]. Option II eliminates the writing requirement altogether and provides that an “Arbitration agreement” is “an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.” *Id.*

163. Stavros Brekoulakis, *Parties in International Arbitration: Consent v. Commercial Reality*, in THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION 119 (Stavros Brekoulakis, Julian D.M. Lew & Loukas Mistelis eds., 2016).

164. ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL

A useful guide to understanding the meaning of the “in writing” requirement is ICCA’S *Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*,¹⁶⁵ as it reflects “the purpose of the Convention and the best practices developed in the Contracting States during more than fifty years.”¹⁶⁶ The Guide notes that “the Convention sets forth a ‘pro-enforcement’, ‘pro-arbitration’ regime which rests on the presumptive validity – formal and substantive – of arbitration agreements.”¹⁶⁷ It also sets out several generally accepted principles underlying the Convention, including the “competence-competence” principle (permitting arbitrators to hear any challenge to their own jurisdiction) and the limited review of arbitration agreements by courts at a pre-arbitration stage.¹⁶⁸

The Guide confirms that “[e]nforcement of an arbitration agreement cannot proceed under the Convention if the writing requirement set out in Article II is not met,” yet establishes a “comparatively liberal substantive rule on the writing requirement.”¹⁶⁹ With regard to the specific question of whether a non-signatory may successfully invoke or be bound by an international commercial arbitration agreement, the Guide recognizes as a starting point that such “an arbitration agreement only confers rights and imposes obligations on the parties to it.”¹⁷⁰ However, who such “parties” are “cannot be defined solely with regard to the sole signatories of an arbitration agreement. Non-signatories may also assume the rights and obligations arising under a contract, under certain conditions.”¹⁷¹

Accordingly, some jurisdictions do not even require arbitration agreements to be written at all,¹⁷² and many national arbitration laws do not

ARBITRATION 136 (4th ed. 2004) (noting that “[i]n the modern laws of arbitration [the signature] requirement has largely disappeared,” evidencing “a triumph of substance over form”); Mohamed S. Abdel Wahab, *Extension of Arbitration Agreements to Third Parties: A Never Ending Legal Quest Through the Spatial-temporal Continuum*, in CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION 141 (Franco Ferrari & Stefan Kröll eds., 2011) (noting that “an arbitration agreement in the vast majority of jurisdictions could be contained in unsigned exchanged written communications”).

165. INT’L COUNCIL FOR COMMERCIAL ARBITRATION, ICCA’S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES 60 (2011), https://www.arbitration-icca.org/media/0/13365477041670/judges_guide_english_composite_final_revised_may_2012.pdf [<https://perma.cc/YPR6-P5AB>].

166. *Id.* at 37.

167. *Id.* at 37.

168. *Id.* at 39–41.

169. *Id.* at 43.

170. *Id.* at 58.

171. *Id.*

172. *E.g.*, Germany (silence is recognized as acceptance in some circumstances), England (oral arbitration agreements are allowed), Sweden (there are no form requirements

require arbitration agreements to be signed.¹⁷³ Under French law, for instance, “[t]he arbitration agreement is not subject to any formal requirement,” leading to “[t]he unqualified acceptance of an unwritten arbitration agreement” and its application to non-signatories.¹⁷⁴ Many national courts have also interpreted Article II(2) “expansively—readily accepting that there is an agreement in writing—or reading it as merely setting out some examples of what is an agreement ‘in writing’ within the meaning of Article II(1).”¹⁷⁵

For instance, some courts have found non-signatories to be bound by international commercial arbitration agreements under the “group of companies” doctrine, including the courts of Brazil,¹⁷⁶ India¹⁷⁷ and

at all), France (the parties’ consent can be established by any possible means). JEAN-FRANÇOIS POUURET & SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 160–65 paras. 196–203 (2d ed. 2007).

173. In addition to the American FAA, 9 U.S.C.A. § 2 (2018), see, e.g., Arbitration Act 1996, 1996 c. 23, § 5(4) (Eng.); LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [LDIP], FEDERAL CODE ON PRIVATE INTERNATIONAL LAW [CPIL] Dec. 18, 1987, RS 291, art. 178(1) (Switz.); CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1443 (Fr.); Arbitration Act 1996, sch. 1, s 7 (N.Z.); The Arbitration Law, 5728–1968, § 1, 22 LSI 210 (1967–68) (as amended); Dutch Arbitration Act 1986, Stb. 1986, 372; Law No. 27 of 1994 (Law Concerning Arbitration in Civil and Commercial Matters), *AL-JARIDAH AL-RASMIYAH*, vol. 16 bis, 21 April 1994, art. 12 (Egypt).

174. Philippe Pinsolle, *A French View on the Application of the Arbitration Agreement to Non-Signatories*, in *THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION* 211 (Stavros Brekoulakis, Julian D.M. Lew & Loukas Mistelis eds., 2016).

175. INT’L COUNCIL FOR COMMERCIAL ARBITRATION, *ICCA’S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES* 44 (2011), https://www.arbitration-icca.org/media/0/13365477041670/judges_guide_english_composite_final_revised_may_2012.pdf [<https://perma.cc/YPR6-P5AB>].

176. Mohamed S. Abdel Wahab, *Extension of Arbitration Agreements to Third Parties: A Never Ending Legal Quest Through the Spatial-temporal Continuum*, in *CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION* 157 (Franco Ferrari & Stefan Kröll eds., 2011) (referring to the decision of the Sao Paulo State Court of Appeals in *Trelleborg v. Anel*, D.J.S.P.-7, Ap. Civ. No. 267.450.4/6.00, Relator: Des. Constança Gonzaga, 24.5.2006 (Braz.)).

177. NIGEL BLACKABY ET AL., *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* 87 (6th ed. 2015) (referring to the decision of the Supreme Court of India in *Chloro Controls (I) P Ltd. v. Severn Trent Water Purification Inc. & Ors*, Sep. 28, 2012, where the Court relied on the “real intentions of the parties” in concluding that an arbitration clause should be extended to a non-signatory); see also Ashutosh Kumar, Raina Upadhyay, Anusha Jegadeesh & Yakshay Chheda, *Interpretation and Application of the New York Convention in India*, in *RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: THE INTERPRETATION AND APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS* 474 (George A. Bermann ed., 2017) (“*Chloro Controls (I) Pvt Ltd v Severn Trent Water Purification Inc & Ors* put forward a positive approach towards international arbitration by referring multiple parties to arbitration (including certain non-signatories) based on the ‘group of companies’ doctrine.”).

France.¹⁷⁸ French courts have also found non-signatories bound where they participated in the negotiation or performance of the underlying contract, where the contract has been assigned to them,¹⁷⁹ and where they were found to be third party beneficiaries under it.¹⁸⁰ In Switzerland, “[i]f a corporate group wishes to avoid having non-signatory affiliates pulled into arbitration, it should clearly communicate which entity is or is not considered bound by the contract,”¹⁸¹ since the Swiss Federal Supreme Court has found that the absence of a signature is not a bar to applying the arbitration clause to a third party.¹⁸² The courts of Hong Kong have found that communications exchanged between the parties provide sufficient record “in writing” of their agreement to arbitrate, despite the fact that the arbitration agreement was not signed by either party.¹⁸³ They have also held that an arbitration clause did not have to be between the same parties as the contract into which the arbitration clause was incorporated by reference.¹⁸⁴

178. Pierre Mayer, *Extension of the Arbitration Clause to Non-Signatories Under French Law*, in MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 189 (Belinda Macmahon ed., 2009).

179. *Id.*; NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 89 (6th ed. 2015) (referring to the decision of the Cour de cassation in *Sté Alcatel Business Systems et Alcatel Micro Electronics c/v and ors* of Mar. 27, 2007); Mohamed S. Abdel Wahab, *Extension of Arbitration Agreements to Third Parties: A Never Ending Legal Quest Through the Spatial-temporal Continuum*, in CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION 163 (Franco Ferrari & Stefan Kröll eds., 2011) (referring to the decision of the Cour de cassation in *Société Taurus Films v. Les Film du Jeudi* of Feb. 8, 2000).

180. NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 88 (6th ed. 2015) (referring to the Cour de Cassation’s decision in *Banque populaire Loire et Lyonnais v. Société Sangar* of July 11, 2006, where the Court held that “where a contract conferring a benefit on a third party . . . contains an arbitration clause, the third party is obliged to refer any claim to arbitration.” The authors also refer to a similar decision by the Italian Corte di Cassazione in *Assicurazione Generali SpA v. Tassinari*, of Mar. 18, 1997); Mohamed S. Abdel Wahab, *Extension of Arbitration Agreements to Third Parties: A Never Ending Legal Quest Through the Spatial-temporal Continuum*, in CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION 162 (Franco Ferrari & Stefan Kröll eds., 2011) (referring to the decision of the Lisbon Court of Appeals (Portugal) of Jan. 13, 2010, process no. 373/09.0TTLSB. L1-4).

181. Georg von Segesser, *Swiss Supreme Court Extends Arbitration Agreement to a Third Party: Potential Risk for Corporate Groups*, KLUWER ARB. BLOG (June 3, 2015), <http://arbitrationblog.kluwerarbitration.com/2015/06/03/swiss-supreme-court-extends-arbitration-agreement-to-a-third-party-potential-risk-for-corporate-groups/> [<https://perma.cc/2C8K-FH42>].

182. Tribunale Federale [TF] [Federal Supreme Court] Oct. 16, 2003, 129 DECISIONE DEL TRIBUNALE FEDERALE [DTF] III 736 (Switz.).

183. *Oonc Lines Ltd. v. Sino-Am. Trade Advancement Co.*, [1994] 35 H.K.C. 1 (H.C.) (H.K.).

184. *Astel-Peiniger Joint Venture v. Argos Eng’g, Heavy Indus. Co.*, [1994] 3 H.K.C.

In England, courts have compelled non-signatories to join arbitral proceedings on the basis of a relationship of agency¹⁸⁵ or assignment.¹⁸⁶ Agency has also been applied as grounds for finding a non-signatory (namely, the principal) bound by an international commercial arbitration agreement by courts in Sweden, Austria, Italy, France, and Germany.¹⁸⁷ Israeli courts have found that there are circumstances in which non-signatories may be bound by an international commercial arbitration agreement where the interpretation of the agreement and the parties' relationship suggest that the non-signatory party agreed to take part in the arbitration, and where the parties should be prevented from evading an arbitration to which they had substantively agreed by relying on formalistic arguments.¹⁸⁸ Similarly, Israeli courts have found that a non-signatory to an international commercial arbitration agreement may be bound by it if it had substantial proximity to the matter, had taken part in the proceedings, or its interest was represented in the proceedings.¹⁸⁹ In Australia, courts have held that "Article II does not say that the only agreement to which it refers is one which was formed or concluded by the act of signing."¹⁹⁰ A Canadian court has also defined "agreement in writing" inclusively rather than exhaustively, the important issue being that there "be a record to evidence the agreement of the parties to resolve the dispute by an arbitral process."¹⁹¹ Another Canadian court has similarly held that "a formal executed written agreement is not required to prove that a written agreement existed between contracting parties and the simple exchange of electronic communications between parties may be sufficient."¹⁹² In short,

328 (H.C.) (H.K.).

185. Hanna Roos, *Agency as a Mechanism for Compelling a Non-Signatory to Join Arbitral Proceedings*, KLUWER ARB. BLOG (Dec. 21, 2009), <http://arbitrationblog.kluwerarbitration.com/2009/12/21/agency-as-a-mechanism-for-compelling-a-non-signatory-to-join-arbitral-proceedings/> [<https://perma.cc/7QLG-2W3A>].

186. NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 89 (6th ed. 2015) (referring the English case of *West Tankers Inc. v. RAS Riunione Adriatica di Sicurtà SpA* [2005] EWHC (Comm) 454).

187. *Id.* at 90.

188. CA 1030/15 *Yehoyachin Yosef Hadad v. Gabriel Dadon and Abante Holdings Limited* (2015) (Isr.) (on file with author).

189. CC (TA) 31228-06-13 *Simin Ltd. v. International Trade Exchange Ltd.* (2014) (Isr.) (on file with author).

190. *Comandate Marine Corp v Pan Austl Shipping Pty Ltd* [2006] FCAFC 192 (Austl.).

191. *Proctor v. Schellenberg*, 2002 MBCA 170, para. 18 (Can.).

192. *Brentwood Plastics Inc. v. Topsyn Flexible Packaging Ltd.*, 2014 MBQB 97, para. 36 (Can.); see also *Schiff Food Products Inc. v. Naber Seed & Grain Co.*, [1997] 1 W.W.R. 124 (Can.) (finding that "[i]t is a basic principle of law that . . . parties may be contractually bound without signing documents. Acceptance [of a contract containing an arbitration clause] need not be in writing but may be inferred by conduct."). However, there appears to

There seems little doubt that in certain cases it is necessary and justified that an individual or entity shall be bound by an arbitration agreement, thereby becoming a party to the arbitration, even though there is no signature by such individual or entity in the agreement containing the arbitration clause.¹⁹³

Indeed, the District Court in *Outokumpu v. GE* did not seem to doubt that GE, a non-signatory to the arbitration agreement, could compel Outokumpu, a signatory, to arbitrate pursuant to the international arbitration agreement contained in the latter's Contracts with Fives. As this section has illustrated, this decision is supported by a wide consensus in international commercial arbitration practice that "a signature is no longer a decisive criterion for determining the parties to an arbitration agreement."¹⁹⁴ Rather, the true intentions of the parties must be ascertained. This does not render consent irrelevant but merely operates to identify such consent where traditional formalities are absent.¹⁹⁵ This liberal interpretation of the Convention's "in writing" requirement is also warranted in light of the complex nature of modern commercial transactions—"a]n inflexible application of the Convention's writing requirement would contradict the current and widespread business usages and be contrary to the pro-enforcement thrust of the Convention."¹⁹⁶

be some inconsistency also in Canadian case law interpreting the "in writing" requirement. See *Javor v. Francoeur*, 2003 BCSC 350, para. 16 (finding that "'party' means party to an arbitration agreement . . ." and that the arbitration agreement ". . . must be in writing . . ." and is deemed in writing ". . . if it is contained in a document signed by the parties . . .").

193. Nathalie Voser, *The Swiss Perspective on Parties in Arbitration: "Traditional Approach with a Twist Regarding Abuse of Rights" or "Consent Theory Plus"*, in *THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION* 161 (Stavros Brekoulakis, Julian D.M. Lew & Loukas Mistelis eds., 2016).

194. JEAN-FRANÇOIS POUURET & SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 211 para. 250 (2d ed. 2007).

195. William W. Park, *Non-Signatories and International Contracts: An Arbitrator's Dilemma*, in *MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION* 6, 14–15 (2009). Non-signatories have been able to arbitrate on theories of, *inter alia*, estoppel, alter ego, apparent authority, transfer and assignment, and the group of companies doctrine. Stavros Brekoulakis, *Parties in International Arbitration: Consent v. Commercial Reality*, in *THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION* 120 (Stavros Brekoulakis, Julian D.M. Lew & Loukas Mistelis eds., 2016). However, Brekoulakis criticizes the use of such doctrines for requiring courts to engage in "a complex quest for elusive consent," arguing instead that adjudicators should focus on "the scope of the dispute submitted for arbitration and the scope of the original arbitration clause" in deciding whether to apply it to non-signatories. *Id.* at 121–22. Nonetheless, Brekoulakis does not challenge the position that a signature, as such, is not required for such application.

196. INT'L COUNCIL FOR COMMERCIAL ARBITRATION, *ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES* 45 (2011), https://www.arbitration-icca.org/media/0/13365477041670/judges_guide_english_c

VI. CONCLUSION

Over thirty years ago, the Supreme Court cautioned that National courts . . . need to “shake off the old judicial hostility to arbitration,” and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.¹⁹⁷

By attaching an unduly narrow and overly technical interpretation to the “in writing” requirement under Article II(2) of the Convention, the Eleventh Circuit in *Outokumpu v. GE*, as well as several other U.S. federal district and appellate courts, have failed to heed this admonition.

The decision of the Eleventh Circuit seems to rest on the assumption that to apply the arbitration agreement to GE as a non-signatory would violate the “in writing” requirement of the Convention. However, it has been clearly recognized, both by other U.S. courts and in international commercial arbitration practice, that allowing a non-signatory to invoke an arbitration agreement is not in conflict with this requirement.¹⁹⁸ There are two reasons for this. First, to require an actual signature as evidence of consent to arbitrate misses entirely the real question in cases involving non-signatories, which is “who is really a party to the agreement and, in consequence, can rely on it or is bound by it?”¹⁹⁹ Second, a strict signature requirement risks inviting potentially absurd outcomes. For instance, parties who have accepted an arbitration agreement by way of conduct, but have not signed it, would be able to evade arbitration,²⁰⁰ while a mere signatory to an arbitration agreement, such as an agent, could find itself

omposite_final_revised_may_2012.pdf [https://perma.cc/YPR6-P5AB].

197. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638–39 (1985) (citation omitted).

198. INT’L COUNCIL FOR COMMERCIAL ARBITRATION, ICCA’S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES 59 (2011), https://www.arbitration-icca.org/media/0/13365477041670/judges_guide_english_composite_final_revised_may_2012.pdf [https://perma.cc/YPR6-P5AB].

199. JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 211 para. 250 (2d ed. 2007).

200. Types of arbitration agreements that are commonly relied upon in modern international trade, but are typically not signed include: “clauses in standard conditions; clauses forming direct or indirect part of a bill of lading or charter party; and clauses that parties deem to be part of the contract through incorporation by reference.” See MARIKE R. P. PAULSSON, *THE 1958 NEW YORK CONVENTION IN ACTION* 78 (2016).

bound by it even though it is not in fact a proper party to the agreement.²⁰¹ This is clearly not the intention or spirit of the Convention, or the FAA.

Moreover, not only did the Eleventh Circuit in *Outokumpu v. GE* misinterpret the Convention as restricting arbitration to the actual signatories of the arbitration agreement, it also misconstrued the Convention as setting out rigid standards that national courts cannot derogate from, even where more favorable rules are available. However, the Convention in fact sets a flexible standard, which does not preclude the application of less stringent domestic requirements for applying international commercial arbitration agreements to non-signatories. Therefore, even if we were to accept the Eleventh Circuit's reasoning that the Convention and international arbitration law require written *and signed* arbitration agreements, it could still have legitimately allowed GE's motion to compel arbitration. The rationale would be as follows: since there is no signature requirement under Chapter One of the FAA, and the Convention allows national courts to rely on more favorable domestic laws when interpreting Article II(2), the Eleventh Circuit could have extended the "in writing but not signed" requirement of Chapter One to the arbitration agreement in this case even though it is governed by Chapter Two. Indeed, U.S. courts have consistently extended pro-arbitration provisions of Chapter One to cases falling under Chapter Two. For instance, while Chapter Two contains a provision allowing a court to compel arbitration pursuant to an arbitration agreement that falls under the Convention, it does not provide for a stay or dismissal of court proceedings in such circumstances.²⁰² For this, the courts have relied on § 3 of Chapter One.²⁰³ This section permits a party seeking to arbitrate, whether a signatory or a non-signatory,²⁰⁴ to request that the court stay or dismiss litigation

201. JEAN-FRANÇOIS POUURET & SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 211 para. 250 (2d ed. 2007).

202. The difference between a stay of proceedings and a motion to compel is that the former "merely arrests further action by the court itself in the suit until something outside the suit has occurred; but the court does not order that it shall be done," whereas the latter "affirmatively orders that someone do (or refrain from doing) some act outside the suit." *Kulukundis Shipping Co., v. Amtorg Trading Corp.*, 126 F.2d 978, 987 (2d Cir. 1942).

203. John Fellas, *Enforcing International Arbitration Agreements*, in *INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK* 206–07, 233 (James H. Carter & John Fellas eds., 2010); *see, e.g.*, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (reversing the decision of the Seventh Circuit and denying an application for a stay of proceedings under § 3 of Chapter One in favor of an international arbitration agreement); *Reid v. Doe Run Res. Corp.*, 701 F.3d 840, 846 (8th Cir. 2012) (noting that "claims made by nonsignatories can be subject to a stay under 9 U.S.C. § 3").

204. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 632 (2009) (holding that "a litigant who was not a party to the relevant arbitration agreement may invoke § 3 if the relevant

commenced in violation of the arbitration agreement.²⁰⁵

The consensual nature of arbitration has often been invoked in support of the position that non-signatories should not be bound by arbitration agreements. National courts determining the validity of international commercial arbitration agreements should no doubt protect this fundamental principle of party consent to arbitration. However, what this principle actually means is that an arbitration agreement only binds parties who have *accepted* it, rather than those who have *signed* it. It is the courts' task to identify when "a person who is a non-signatory [should] stand in the shoes . . . of a regular party."²⁰⁶ Indeed, "fulfilling the ends of justice requires striking the proper balance between the principle of privity and considerations of justice and fairness, which may entail extending the arbitration agreement to a non-signatory."²⁰⁷ Therefore, domestic courts should also recognize that consent is not always, nor is it required to be, reflected in an actual signature. Rather, the arbitration agreement can take "its binding force through some circumstance other than the formality of signature" and consent can be "express, implied or incorporated by reference to other documents or transactions."²⁰⁸ Therefore, "[i]t is not justified, at least in international arbitration, to opt for a 'restrictive' interpretation of the arbitration clause."²⁰⁹

This should apply with equal force to U.S. courts, whose "first task" when "asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute."²¹⁰ The courts are to make this determination by applying the "federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [Federal Arbitration] Act."²¹¹ Federal substantive law, in turn, provides "that questions of arbitrability must be addressed with a healthy regard for the

state contract law allows him to enforce the agreement").

205. John Fellas, *Enforcing International Arbitration Agreements*, in INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 234 (James H. Carter & John Fellas eds., 2010).

206. Justice Breyer, oral argument in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA*, No. 18-1048, Jan. 21, 2020, at 42, <https://www.scotusblog.com/case-files/cases/ge-energy-power-conversion-france-sas-v-outokumpu-stainless-usa-llc/>.

207. Mohamed S. Abdel Wahab, *Extension of Arbitration Agreements to Third Parties: A Never Ending Legal Quest Through the Spatial-temporal Continuum*, in CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION 139 (Franco Ferrari & Stefan Kröll eds., 2011).

208. William W. Park, *Non-Signatories and International Contracts: An Arbitrator's Dilemma*, in MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 9–10 (2009).

209. JEAN-FRANÇOIS POUURET & SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 228 para. 264 (2d ed. 2007).

210. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

211. *Id.*

federal policy favoring arbitration.”²¹² Where international commercial arbitration agreements are at issue, in particular, “[i]f the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements.”²¹³ The Eleventh Circuit in *Outokumpu v. GE* indeed recognized, at least in principle, the pro-arbitration policy of the FAA and the Convention. It failed, however, as did the Ninth Circuit and other courts, to adhere to this policy in practice, creating needless uncertainty and confusion for parties seeking to enforce international commercial arbitration agreements in the United States and jeopardizing the overarching goal of the Convention—to achieve predictability and uniformity in its application.²¹⁴ While the Chief U.S. District Judge, hearing this case on remand, declined “GE Energy’s invitation to re-evaluate the wisdom of the Eleventh Circuit,”²¹⁵ one hopes that the Supreme Court will take up this task.

212. *Id.* (citing *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)).

213. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995).

214. As the Supreme Court has noted, “[t]he 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).

215. *Outokumpu Stainless USA, LLC v. Convertteam SAS*, No. 16-0378-KD-C, 2019 WL 1748110, at *2 (S.D. Ala. Apr. 18, 2019).