FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESTHER MARGARITA LIMA SUAREZ VIUDA DE YANG, Individually and as Personal Representative of the Estate of Chang Cheol Yang, Deceased; BRANDON CHEOL YANG LIMA, Minor; JI HEA YANG LIMA, Minor; CAMILA ROMINA YANG LIMA, Minor, *Plaintiffs-Appellees*, v. MAJESTIC BLUE FISHERIES, LLC, a Delaware limited liability company, *Defendant*, and DONGWON INDUSTRIES CO., LTD., a corporation incorporated under the laws of Korea, *Defendant-Appellant.*	No. 15-16881 D.C. No. 1:13-cv-00015 OPINION

Appeal from the United States District Court
for the District of Guam
Frances Tydingco-Gatewood, Chief District Judge,
Presiding

Argued and Submitted June 13, 2017
Honolulu, Hawaii

Filed November 30, 2017

Before: Raymond C. Fisher, Richard A. Paez, and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Nguyen

SUMMARY*

Arbitration

The panel affirmed the district court's order denying a motion to compel arbitration in a maritime action arising from the death of a seaman in the sinking of a fishing vessel.

A defendant sought arbitration based on an employment agreement between the seaman and the vessel's owner. Pursuant to a contract with the owner, the defendant supplied the vessel's crew and supervised its repairs and maintenance.

The panel held that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, an act implementing a treaty of the same name, does not allow non-signatories or non-parties to compel arbitration. Agreeing with other circuits, the panel held that, like an arbitration agreement, an arbitral clause in a contract must be "signed

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

by the parties" in order to be enforceable under Article II(2) of the Convention Treaty.

The panel further held that the defendant could not compel arbitration under the Federal Arbitration Act, which expressly exempts from its scope any "contracts of employment of seamen." The panel declined to import into the court's Convention Act analysis precedent permitting a litigant who is not a party to an arbitration agreement to invoke arbitration under the FAA if the relevant state contract law allows the litigant to enforce the agreement.

COUNSEL

Jerry D. Hamilton (argued) and Michael J. Dono, Hamilton Miller & Birthisel LLP, Miami, Florida, for Defendant-Appellant.

Scott A. Wagner (argued), Michael T. Moore, and Clay M. Naughton, Moore & Company P.A., Coral Gables, Florida, for Plaintiffs-Appellees.

OPINION

NGUYEN, Circuit Judge:

Chang Cheol Yang was a seaman who died when the fishing vessel he worked on sank because of inadequate repairs and an incompetent crew provided by Dongwon Industries Co. Ltd ("Dongwon"). His widow commenced a wrongful death action against Dongwon on behalf of his three minor children, herself, and his estate. Dongwon moved to compel arbitration based on an employment

agreement between Mr. Yang and the vessel's owner, Majestic Blue Fisheries, LLC ("Majestic"). Because Dongwon is neither a signatory nor a party to the employment agreement, the district court denied Dongwon's motion. We affirm.

I.

In 2008, Dongwon sold the vessel, the F/V Majestic Blue, for $10 to Majestic, which is owned by the same family that owns Dongwon. *In re Majestic Blue Fisheries, LLC*, No. CV 11-00032, 2014 WL 3728556, at *10–11 (D. Guam July 25, 2014). Around that time, Majestic and Dongwon entered into contracts that required Dongwon both to supply the vessel's crew and to supervise its repairs and maintenance. *Id.* at *11. By then, the vessel was the oldest in Dongwon's fleet. *Id.*

On May 21, 2010, after undergoing repairs and despite a known rudder leak, the vessel set sail from Guam with Mr. Yang on board. *Id*. at *22, 32. Three weeks later, on June 14, 2010, the vessel sank in fair weather after being flooded with water. *Id.* at *29, *42. The crew failed to properly respond to the flooding, leaving Captain David Hill to execute critical abandon ship procedures on his own. *Id*. at *30, *48. Shortly after Mr. Yang re-boarded to look for Captain Hill, the vessel sank and both men died. *Id*. at *26.

Following this tragedy, the widows of Mr. Yang and Captain Hill filed separate wrongful death actions with overlapping claims and legal theories. Both widows contend that the vessel's inadequate repairs and incompetent crew rendered it unseaworthy and caused it to sink. The complaints in both actions assert the same four claims against Dongwon and Majestic: (1) a survival action based on negligence for pre-death pain and suffering under the

Jones Act, 46 U.S.C. § 30304; (2) a wrongful death action under general maritime law; (3) a wrongful death action under the Death on the High Seas Act, 46 U.S.C. § 30301 *et seq.*; ("DOHSA"); and (4) a wrongful death action under the Jones Act.

Unencumbered by an arbitration clause, Captain Hill's widow successfully litigated her claims, obtaining a $3.2 million judgment that we affirmed on appeal. *Hill v. Majestic Blue Fisheries, LLC,* 692 F. App'x 871 (9th Cir. 2017). In that case, the district court found that the vessel sank because it was unseaworthy due to shoddy repairs (which resulted in the rudder leak) and an incompetent and untrained crew (who failed to close watertight doors or properly abandon ship). *Majestic Blue*, 2014 WL 3728556 at *30–31, *37, *49. But while Captain Hill's widow accessed a judicial forum for her claims against Majestic and Dongwon without litigating the arbitration issue, Yang's litigation has been stalled by a motion to compel arbitration filed by Dongwon (and joined by Majestic). Dongwon's motion relies on a March 23, 2010 employment agreement in which Majestic agreed to hire Mr. Yang as a Chief Engineer aboard the vessel. The agreement, which contains an arbitration clause, is signed by Mr. Yang and by Dongwon "on behalf of MAJESTIC BLUE FISHERIES, LLC."

The district court compelled arbitration of the claims against Majestic, but denied the motion as to Dongwon. Dongwon now appeals.

II.

A. The Convention Act Does Not Allow Non-Signatories or Non-Parties to Compel Arbitration

Dongwon seeks to compel arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 *et seq.* ("Convention Act"), which implements a treaty of the same name[1] ("Convention Treaty") regarding arbitration agreements entered into by foreign entities or individuals. *See Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1152–53 (9th Cir. 2008). A party seeking to compel arbitration under the Convention Act must prove the existence and validity of "an agreement in writing within the meaning of the Convention" Treaty. *Balen v. Holland Am. Line Inc.*, 583 F.3d 647, 654–55 (9th Cir. 2009) (citation omitted). The Convention Treaty in turn defines an "agreement in writing" 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." Convention Treaty, art. II(2) (emphasis added). Recognizing that it is neither a signatory nor a party to Mr. Yang's employment agreement, Dongwon seeks to compel arbitration under the theory that the "signed by the parties" requirement in Article II(2) applies only to "an

[1] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf. While the Convention Treaty was executed in 1958, *id.*, the Convention Act was not enacted until 1970. *Rogers*, 547 F.3d at 1152.

arbitration agreement" and not "an arbitral clause in a contract." We disagree.

We do not write on a blank slate. In *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, the Second Circuit conducted the first reasoned analysis of Article II(2)'s text and legislative history to reverse an order compelling arbitration because, as here, the arbitration clause in the contract was not signed by one of the litigants. 186 F.3d 210, 215–18 (2d Cir. 1999) *abrogation on other grounds recognized by Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 660 n.2 (2d Cir. 2005). Turning first to the text, the court concluded that the comma before the phrase "signed by the parties" signaled that it modified both "an arbitral clause in a contract" and "an arbitration agreement." *Id.* at 217. The court relied on two common canons of construction. First, it explained that, under the rule of punctuation, a modifying phrase that is set off from a series of antecedents by a comma applies to each of those antecedents. *Id.* at 216–17.[2] The court reasoned that interpreting the phrase "signed by the parties" to modify only an "arbitration agreement" rendered the comma superfluous, thereby violating the rule against surplusage. *Id.* at 217. Next, the court considered not only the final English text of the Convention Treaty but also the official French and Spanish texts, each of which used a plural form of the word "signed," consistent with the conclusion that the signature requirement applies not only to an "arbitration agreement" but also to an "arbitral clause in

[2] Under the last-antecedent rule, "the series 'A or B with respect to C' contains two items: (1) 'A' and (2) 'B with respect to C.' On the other hand, under the [punctuation canon] the series 'A or B, with respect to C' contains these two items: (1) 'A with respect to C' and (2) 'B with respect to C.'" *Stepnowski v. C.I.R.*, 456 F.3d 320, 324 n.7 (3d Cir. 2006) (citing *Kahn Lucas*, 186 F.3d at 216 n.1).

a contract." *Id.* at 216, 217. Finally, cognizant of the Supreme Court's instruction that an "analysis based only on punctuation is necessarily incomplete," the court analyzed Article II(2)'s legislative history, which confirmed the drafters' intent to apply the signing requirement to both phrases. *Id.* at 216, 218 (quoting *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993)).

Consistent with *Kahn Lucas*, both we and our sister circuits have recognized the punctuation canon, under which "a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one [where the phrase] is separated from the antecedents by a comma." *Davis v. Devanlay Retail Grp., Inc.*, 785 F.3d 359, 364 n.2 (9th Cir. 2015) (applying California law) (citation omitted). In *Davis*, for example, we applied this rule when reasoning that the phrase "[r]equest, or require as a condition to accepting the credit card as payment" indicates that the payment clause would modify only "require," not "request.'" *Id.* at 364–65; *see also Am. Int'l Grp., Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 781–82 (2d Cir. 2013) ("When there is no comma, . . . the subsequent modifier is ordinarily understood to apply only to its last antecedent. When a comma is included, . . . the modifier is generally understood to apply to the entire series."); *Finisar Corp. v. DirecTV Grp., Inc.*, 523 F.3d 1323, 1336 (Fed. Cir. 2008) ("[W]hen a modifier is set off from a series of antecedents by a comma, the modifier should be read to apply to each of those antecedents.") (internal quotation marks omitted) (quoting *Kahn Lucas*, 186 F.3d at 215); *Stepnowski v. Comm'r*, 456 F.3d 320, 324 (3d Cir. 2006) ("[W]here there is a comma before a modifying phrase, that phrase modifies all of the items in a series and not just the immediately preceding item."); *Bingham, Ltd. v. United States*, 724 F.2d 921, 925–26 & n.3 (11th Cir. 1984) ("Where the modifier *is*

set off from two or more antecedents by a comma, . . . the comma indicates the drafter's intent that the modifier relate to more than the last antecedent.").[3]

The case relied upon by Dongwon—*Azure v. Morton*, 514 F.2d 897 (9th Cir. 1975)—is not to the contrary. There, we applied the last antecedent rule, not the punctuation rule. *See id.* at 900. Properly applying the punctuation rule here, the signature requirement applies not only to "an arbitration agreement" but also to "an arbitral clause in a contract."

We are persuaded by *Kahn Lucas*'s faithful adherence to the principles of treaty interpretation, which involve examining "the text of the treaty and the context in which the written words are used," as well as "the history of the treaty, the negotiations, and the practical construction adopted by the parties." *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 534–35 (1991) (internal quotation marks and citations omitted). Dongwon does not challenge *Kahn Lucas*'s detailed analysis of Article II(2)'s legislative history and negotiations. Instead, Dongwon urges us to consider a 2006 recommendation by a United Nations commission that only vaguely addresses Article II(2)'s application and dates more than three decades after the Convention Treaty's 1970 implementation.[4] While Dongwon argues that the

[3] As with the last antecedent rule, the punctuation canon is not absolute. *See U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454-55 (1993).

[4] *See* United Nations Commission on International Trade Law, 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, U.N. Doc. A/61/17 (July 7, 2006) (recommending that Article II(2) be "applied recognizing that the circumstances described therein are not exhaustive"), available at

recommendation's musings are "persuasive," it then relies on a case that does not support that proposition. In *In re Condor Insurance Ltd.*, the court examined a model law drafted by a United Nations commission that was later implemented almost verbatim via a federal statute expressly instructing courts to "consider its international origin" when interpreting it. 601 F.3d 319, 321–22 (5th Cir. 2010) (quoting 11 U.S.C. § 1508). Here, in contrast, the Convention Treaty was not drafted by the United Nations commission that issued the 2006 recommendation, and its recommendation has never been implemented by Congress. *See Kahn Lucas*, 547 F.3d at 216 (noting that the United Nations Conference on International Commercial Arbitration drafted the Convention Treaty). While we have occasionally interpreted an ambiguous treaty term in light of the signatory nations' post-ratification understanding, the 2006 recommendation is nothing like the kind of evidence we have found persuasive. *See, e.g., In re 840 140th Ave. NE, Bellevue, Wash.*, 634 F.3d 557, 568 (9th Cir. 2011) (examining decisions by signatory nations' courts).

Moreover, every circuit to consider *Kahn Lucas*'s cogent analysis has adhered to it. *See Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 449 (3d Cir. 2003) (following *Kahn Lucas* to hold that the Convention Treaty's "signed by the parties" requirement applied to "an arbitral clause within a contract or a separate arbitration agreement"); *Czarina, LLC v. W.F. Poe Syndicate*, 358 F.3d 1286, 1290–91 (11th

---

http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf. Dongwon argues that this 2006 recommendation and Article II(2)'s use of the word "include" show that an agreement in writing "can be formed in multiple ways." But even if that were so, it does not negate the requirement that the agreement—regardless of how it was formed—be "signed by the parties." Convention Treaty, art. II(2).

Cir. 2004) (following *Kahn Lucas* to affirm the district court's refusal to enforce an arbitration award based on an unsigned arbitration clause). Dongwon nonetheless urges us to follow an outlier decision from the Fifth Circuit, issued before *Kahn Lucas*, which deemed the "signed by the parties" requirement to be inapplicable to an arbitration clause agreed to by the parties. *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666, 669–70 (5th Cir. 1994). That decision cited no authority and provided no analysis, *id.*, and has therefore been rejected by our sister circuits. *See Kahn Lucas*, 186 F.3d at 214, 218; *Standard Bent*, 333 F.3d at 449–50. Moreover, the Fifth Circuit has since expressly adopted the punctuation canon that *Sphere Drake* omitted and *Kahn Lucas* applied. *See Sobranes Recovery Pool I, LLC v. Todd & Hughes Const. Corp.*, 509 F.3d 216, 223 (5th Cir. 2007) ("[W]hen there is a serial list followed by modifying language that is set off from the last item in the list by a comma, this suggests that the modification applies to the whole list and not only the last item.").

Regardless, we need not rely solely on *Kahn Lucas* or its progeny to hold that Dongwon cannot compel arbitration. The Convention Treaty contemplates that only a "party" or "parties to the agreement referred to in article II" may litigate its enforcement. Convention Treaty, art. IV(1), V(1)(a), VI. Indeed, 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. *Id.* at art. II(1) (emphasis added). Dongwon has therefore failed to satisfy not only the "signed by the parties" requirement discussed in *Kahn Lucas* but also the more basic requirement that a litigant be a "party" to the agreement under which it moves to compel. Because the Convention Treaty does not

allow non-signatories or non-parties to compel arbitration, Dongwon cannot do so here.

B. Dongwon Cannot Compel Arbitration on Other Grounds

Nor can Dongwon compel arbitration on grounds other than the Convention Treaty. Federal arbitration law is codified in different chapters of Title 9 of the United States Code, and each chapter imposes unique requirements on a party seeking to compel arbitration. *See Rogers*, 547 F.3d at 1152–53. Dongwon moved to compel arbitration only under the second chapter—the Convention Act—but failed to satisfy its requirements. Dongwon did not and cannot seek to compel arbitration under the first chapter—the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*—because the FAA expressly exempts from its scope any "contracts of employment of seamen." 9 U.S.C. § 1; *Rogers*, 547 F.3d at 1152–53.

The failure to satisfy either the requirements of the Convention Act or the FAA should end the inquiry. But Dongwon urges us to circumvent the Convention Act's requirements by importing into our Convention Act analysis precedent permitting a "litigant who is not a party to an arbitration agreement to invoke arbitration *under the FAA* if the relevant state contract law allows the litigant to enforce the agreement." *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128 (9th Cir. 2013) (emphasis added).

We reject this doctrinal sleight of hand because the Convention Act and the FAA impose conflicting requirements on a litigant seeking to compel arbitration. While the FAA permits arbitration where an arbitration agreement is enforceable under state law, *id.*, the Convention Act requires a litigant to satisfy additional prerequisites

established by the Convention Treaty. *See Balen*, 583 F.3d at 654–55. One such prerequisite is that the litigant prove the agreement is in writing and "signed by the parties." Convention Treaty, art. II(2). Another is that the dispute at issue be one between the "parties." Convention Treaty, art. II(1). To the extent the FAA provides for arbitration of disputes with non-signatories or non-parties, it conflicts with the Convention Treaty and therefore does not apply. 9 U.S.C. § 208. Accordingly, cases interpreting the FAA as allowing a non-signatory or non-party to compel arbitration where an arbitration agreement is enforceable under state law offer no guidance in interpreting the Convention Act's requirement that an agreement in writing be signed by the parties.

Even if we ignore the Convention Act's requirements and instead look to our precedent interpreting the FAA, Dongwon would still not be entitled to relief. Under that precedent, we first determine, as a threshold matter, which state's contract law governs the agreement at issue. *See Kramer*, 705 F.3d at 1128. Under the relevant California law, none of Dongwon's three theories—equitable estoppel, agency, and alter ego—provide a basis to compel arbitration.[5]

"Equitable estoppel 'precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes.'" *Comer v. Micor, Inc.,* 436 F.3d 1098, 1101 (9th Cir. 2006) (quoting *Wash.*

[5] Given the absence of Guam cases on point, we follow the Guam Supreme Court's instruction to look to California law as persuasive authority regarding equitable estoppel. *Mobil Oil Guam, Inc. v. Young Ha Lee*, 2004 Guam 9, ¶ 24 n.2 (Guam 2004); *Limtiaco v. Guam Fire Dep't,* 2007 Guam 10, ¶ 58 (Guam 2007).

Mut. Fin. Grp., LLC v. Bailey, 364 F.3d 260, 267 (5th Cir. 2004)). The doctrine does not apply where, as here, a plaintiff "would have a *claim* independent of the existence of the" agreement containing the arbitration provision. *Kramer*, 705 F.3d at 1131 (affirming denial of non-signatory's motion to compel arbitration). Dongwon's contrary argument "erroneously equates" the Complaint's allegation of an employment *relationship* between Mr. Yang and Dongwon with reliance upon the employment *agreement* between Mr. Yang and Majestic.[6] *Id.* at 1132. But Yang's DOHSA and general maritime law claims do not require proof of an employer agreement.[7] And, while the Jones Act claims require a finding that Dongwon was an employer, that finding does not require proof of a written employment agreement.[8] Because Yang's claims against Dongwon rely on its acts and omissions—furnishing an unseaworthy vessel and crew—and not on any obligations created by the employment agreement, Dongwon cannot compel arbitration under an equitable estoppel theory. *See Goldman v. KPMG LLP*, 92 Cal. Rptr. 3d 534, 550, 555 (Ct.

[6] The Complaint describes an "agent and alter ego" relationship between Dongwon and Majestic and alleges that both were employers for purposes of the Jones Act.

[7] *See Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 819–20 (2001) (recognizing a general "maritime cause of action" for wrongful death against an entity that had never "employed" decedent); *Davis v. Bender Shipbuilding & Repair Co.*, 27 F.3d 426, 428 (9th Cir. 1994) ("DOHSA claims may be pursued against defendants other than employers.").

[8] *See Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495, 1498–99 (9th Cir. 1995) (explaining that employer status under the Jones Act claims may be established based on several factors, including whether the alleged employer hired and controlled the crew), *abrogated on other grounds by Atl. Sounding Co., Inc. v. Townsend*, 557 U.S. 404 (2009).

App. 2009) (affirming denial of non-signatory's motion to compel arbitration).

The authorities invoked by Dongwon do not suggest a different result. In *Metalcad*, the non-signatory defendant was able to compel arbitration under an equitable estoppel theory because the plaintiff's breach of contract and fraud claims alleged that defendant "caused" the signatory-defendant "to breach the underlying contract" with the plaintiff that contained the arbitration clause. *Metalclad Corp. v. Ventana Envtl. Organizational P'ship*, 1 Cal. Rptr. 3d 328, 337 (Ct. App. 2003). That is the quintessential example of a plaintiff "claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes." *Kramer*, 705 F.3d at 1128. The other cases relied upon by Dongwon are also inapposite because they do not apply California law[9] and have been overruled or abrogated due to their failure to specify the applicable state law.[10]

Nor can Dongwon compel arbitration based on the Complaint's allegations of an agency or alter ego relationship between Dongwon and Majestic. Not only did

[9] *See, e.g., Ragone v. Atl. Video at Manhattan Ctr.,* 595 F.3d 115, 122, 128 (2d Cir. 2010) (citing New York and federal law); *Brown v. Pac. Life Ins.,* 462 F.3d 384, 389 (5th Cir. 2006) (citing Louisiana and federal law).

[10] *See, e.g., MS Dealer Serv. Corp. v. Franklin,* 177 F.3d 942, 948 (11th Cir. 1999) (failing to specify which law applied), abrogated by Arthur Andersen LLP v. Carlisle, 556 U.S. 624 (2009) as recognized in Lawson v. Life of the S. Ins. Co., 648 F.3d 1166, 1170–71 (11th Cir. 2011) (rejecting non-signatory's equitable estoppel argument as a basis to compel arbitration because MS Dealer's failure to make "clear that the applicable state law provides the rule of decision" meant that MS Dealer was either overruled or abrogated).

Dongwon waive arguments under these theories by failing to timely raise them in the district court, *see Hendricks & Lewis PLLC v. Clinton*, 766 F.3d 991, 998 (9th Cir. 2014), it affirmatively represented to the district court in related litigation that Dongwon and Majestic were "separate and distinct companies." Where, as here, an alter ego or agency relationship "was expressly disavowed," the non-signatory cannot compel arbitration under that theory. *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1233 (9th Cir. 2013) (reversing order compelling arbitration). Moreover, Dongwon cannot invoke an alter ego theory to compel arbitration of the statutory claims at issue here because the alter ego rationale "applies only to" breach of contract claims. *Rowe v. Exline*, 63 Cal. Rptr. 3d 787, 794 (Ct. App. 2007) (rejecting non-signatory's argument to compel arbitration of statutory claims under alter ego theory).

Finally, we see no reason to depart from the general rule that the contractual right to compel arbitration "may not be invoked by one who is not a party to the agreement and does not otherwise possess the right to compel arbitration." *Britton v. Co-op Banking Grp.,* 4 F.3d 742, 744 (9th Cir. 1993). Dongwon argues that the state law exceptions to this general rule—equitable estoppel, agency, and alter ego—must be construed in Dongwon's favor given the federal policy in favor of arbitration. But the "public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement." *Comedy Club, Inc. v. Improv W. Assocs.,* 553 F.3d 1277, 1287 (9th Cir. 2009) (quoting *Buckner v. Tamarin*, 119 Cal. Rptr. 2d. 489, 490 (Ct. App. 2001). That is because the federal policy applies to "the scope of arbitrable issues" and "is inapposite when the question is whether a particular party is bound by the arbitration agreement." *Norcia v. Samsung Telecomm. Am., LLC*, 845 F.3d 1279, 1291 (9th Cir. 2017) (internal quotation

marks and citation omitted) (affirming denial of non-signatory's motion to compel arbitration); *accord Rajagopalan v. NoteWorld, LLC*, 718 F.3d 844, 847 (9th Cir. 2013) (same).

Accordingly, we affirm the district court's denial of Dongwon's motion to compel arbitration.

Costs shall be taxed against Dongwon.

AFFIRMED.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

(New York, 1958)

UNITED NATIONS

The United Nations Commission on International Trade Law (UNCITRAL) is a subsidiary body of the General Assembly. It plays an important role in improving the legal framework for international trade by preparing international legislative texts for use by States in modernizing the law of international trade and non-legislative texts for use by commercial parties in negotiating transactions. UNCITRAL legislative texts address international sale of goods; international commercial dispute resolution, including both arbitration and conciliation; electronic commerce; insolvency, including cross-border insolvency; international transport of goods; international payments; procurement and infrastructure development; and security interests. Non-legislative texts include rules for conduct of arbitration and conciliation proceedings; notes on organizing and conducting arbitral proceedings; and legal guides on industrial construction contracts and countertrade.

Further information may be obtained from:

UNCITRAL secretariat, Vienna International Centre,
P.O. Box 500, 1400 Vienna, Austria

Telephone: (+43-1) 26060-4060
Telefax: (+43-1) 26060-5813
Internet: www.uncitral.org
E-mail: uncitral@uncitral.org

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

(New York, 1958)

UNITED NATIONS
New York, 2015

NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The publication reproduced here is a revised version in which part three of the original publication of 2009 has been removed.

Contents

Introduction

Objectives

Recognizing the growing importance of international arbitration as a means of settling international commercial disputes, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The term "non-domestic" appears to embrace awards which, although made in the state of enforcement, are treated as "foreign" under its law because of some foreign element in the proceedings, e.g. another State's procedural laws are applied.

The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. An ancillary aim of the Convention is to require courts of Parties to give full effect to arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.

Key provisions

The Convention applies to awards made in any State other than the State in which recognition and enforcement is sought. It also applies to awards "not considered as domestic awards". When consenting to be bound by the Convention, a State may declare that it will apply the Convention *(a)* in respect to awards made only in the territory of another Party and *(b)* only to legal relationships that are considered "commercial" under its domestic law.

The Convention contains provisions on arbitration agreements. This aspect was covered in recognition of the fact that an award could be refused enforcement on the grounds that the agreement upon which it was based might not be recognized. Article II (1) provides that Parties shall recognize

written arbitration agreements. In that respect, UNCITRAL adopted, at its thirty-ninth session in 2006, a Recommendation that seeks to provide guidance to Parties on the interpretation of the requirement in article II (2) that an arbitration agreement be in writing and to encourage application of article VII (1) to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

The central obligation imposed upon Parties is to recognize all arbitral awards within the scheme as binding and enforce them, if requested to do so, under the lex fori. Each Party may determine the procedural mechanisms that may be followed where the Convention does not prescribe any requirement.

The Convention defines five grounds upon which recognition and enforcement may be refused at the request of the party against whom it is invoked. The grounds include incapacity of the parties, invalidity of the arbitration agreement, due process, scope of the arbitration agreement, jurisdiction of the arbitral tribunal, setting aside or suspension of an award in the country in which, or under the law of which, that award was made. The Convention defines two additional grounds upon which the court may, on its own motion, refuse recognition and enforcement of an award. Those grounds relate to arbitrability and public policy.

The Convention seeks to encourage recognition and enforcement of awards in the greatest number of cases as possible. That purpose is achieved through article VII (1) of the Convention by removing conditions for recognition and enforcement in national laws that are more stringent than the conditions in the Convention, while allowing the continued application of any national provisions that give special or more favourable rights to a party seeking to enforce an award. That article recognizes the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention.

Entry into force

The Convention entered into force on 7 June 1959 (article XII).

How to become a party

The Convention is closed for signature. It is subject to ratification, and is open to accession by any Member State of the United Nations, any other

State which is a member of any specialized agency of the United Nations, or is a Party to the Statute of the International Court of Justice (articles VIII and IX).

Optional and/or mandatory declarations and notifications

When signing, ratifying or acceding to the Convention, or notifying a territorial extension under article X, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Party to the Convention. It may also declare that it 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 State making such declaration (article I).

Denunciation/Withdrawal

Any Party may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of the receipt of the notification by the Secretary-General (article XIII).

Part one

UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION, NEW YORK, 20 MAY–10 JUNE 1958

Excerpts from the Final Act of the United Nations Conference on International Commercial Arbitration[1]

"1. The Economic and Social Council of the United Nations, by resolution 604 (XXI) adopted on 3 May 1956, decided to convene a Conference of Plenipotentiaries for the purpose of concluding a convention on the recognition and enforcement of foreign arbitral awards, and to consider other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes.

[…]

"12. The Economic and Social Council, by its resolution convening the Conference, requested it to conclude a convention on the basis of the draft convention prepared by the Committee on the Enforcement of International Arbitral Awards, taking into account the comments and suggestions made by Governments and non-governmental organizations, as well as the discussion at the twenty-first session of the Council.

"13. On the basis of the deliberations, as recorded in the reports of the working parties and in the records of the plenary meetings, the Conference prepared and opened for signature the Convention on the Recognition and Enforcement of Foreign Arbitral Awards which is annexed to this Final Act.

[…]

"16. In addition the Conference adopted, on the basis of proposals made by the Committee on Other Measures as recorded in its report, the following resolution:

[1]The full text of the Final Act of the United Nations Conference on International Commercial Arbitration (E/CONF.26/8Rev.1) is available at http://www.uncitral.org

"*The Conference*,

"*Believing* that, in addition to the convention on the recognition and enforcement of foreign arbitral awards just concluded, which would contribute to increasing the effectiveness of arbitration in the settlement of private law disputes, additional measures should be taken in this field,

"*Having considered* the able survey and analysis of possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes prepared by the Secretary-General (document E/CONF.26/6),

"*Having given particular attention* to the suggestions made therein for possible ways in which interested governmental and other organizations may make practical contributions to the more effective use of arbitration,

"*Expresses the following views* with respect to the principal matters dealt with in the note of the Secretary-General:

"1. It considers that wider diffusion of information on arbitration laws, practices and facilities contributes materially to progress in commercial arbitration; recognizes that work has already been done in this field by interested organizations,[2] and expresses the wish that such organizations, so far as they have not concluded them, continue their activities in this regard, with particular attention to coordinating their respective efforts;

"2. It recognizes the desirability of encouraging where necessary the establishment of new arbitration facilities and the improvement of existing facilities, particularly in some geographic regions and branches of trade; and believes that useful work may be done in this field by appropriate governmental and other organizations, which may be active in arbitration matters, due regard being given to the need to avoid duplication of effort and to concentrate upon those measures of greatest practical benefit to the regions and branches of trade concerned;

"3. It recognizes the value of technical assistance in the development of effective arbitral legislation and institutions; and suggests that interested Governments and other organizations endeavour to furnish such assistance, within the means available, to those seeking it;

"4. It recognizes that regional study groups, seminars or working parties may in appropriate circumstances have productive results; believes that consideration should be given to the advisability of the convening of

[2]For example, the Economic Commission for Europe and the Inter-American Council of Jurists.

such meetings by the appropriate regional commissions of the United Nations and other bodies, but regards it as important that any such action be taken with careful regard to avoiding duplication and assuring economy of effort and of resources;

"5. It considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes, notes the work already done in this field by various existing organizations,[3] and suggests that by way of supplementing the efforts of these bodies appropriate attention be given to defining suitable subject matter for model arbitration statutes and other appropriate measures for encouraging the development of such legislation;

"*Expresses the wish* that the United Nations, through its appropriate organs, take such steps as it deems feasible to encourage further study of measures for increasing the effectiveness of arbitration in the settlement of private law disputes through the facilities of existing regional bodies and non-governmental organizations and through such other institutions as may be established in the future;

"*Suggests* that any such steps be taken in a manner that will assure proper coordination of effort, avoidance of duplication and due observance of budgetary considerations;

"*Requests* that the Secretary-General submit this resolution to the appropriate organs of the United Nations."

[3]For example, the International Institute for the Unification of Private Law and the Inter-American Council of Jurists.

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it 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 State making such declaration.

Article II

1. 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.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) *(e)*, the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order

to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation

shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Part two

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

General Assembly resolution 61/33 of 4 December 2006

The General Assembly,

Recognizing the value of arbitration as a method of settling disputes arising in the context of international commercial relations,

Recalling its resolution 40/72 of 11 December 1985 regarding the Model Law on International Commercial Arbitration,[1]

Recognizing the need for provisions in the Model Law to conform to current practices in international trade and modern means of contracting with regard to the form of the arbitration agreement and the granting of interim measures,

Believing that revised articles of the Model Law on the form of the arbitration agreement and interim measures reflecting those current practices will significantly enhance the operation of the Model Law,

Noting that the preparation of the revised articles of the Model Law on the form of the arbitration agreement and interim measures was the subject of due deliberation and extensive consultations with Governments and interested circles and would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international commercial disputes,

---

[1] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I.

Believing that, in connection with the modernization of articles of the Model Law, the promotion of a uniform interpretation and application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,[2] is particularly timely,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for formulating and adopting the revised articles of its Model Law on International Commercial Arbitration on the form of the arbitration agreement and interim measures, the text of which is contained in annex I to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session,[3] and recommends that all States give favourable consideration to the enactment of the revised articles of the Model Law, or the revised Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, when they enact or revise their laws, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

2. *Also expresses its appreciation* to the United Nations Commission on International Trade Law for formulating and adopting the 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, done at New York, 10 June 1958,[2] the text of which is contained in annex II to the report of the United Nations Commission on International Trade Law on the work of its thirty-ninth session;[3]

3. *Requests* the Secretary-General to make all efforts to ensure that the revised articles of the Model Law and the recommendation become generally known and available.

64th plenary meeting
4 December 2006

---

[2]United Nations, *Treaty Series*, vol. 330, No. 4739.

[3]*Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17).

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, DONE IN NEW YORK, 10 JUNE 1958, ADOPTED BY THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON 7 JULY 2006 AT ITS THIRTY-NINTH SESSION

The United Nations Commission on International Trade Law,

Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

Conscious of the fact that the different legal, social and economic systems of the world, together with different levels of development, are represented in the Commission,

Recalling successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

Convinced that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958,[4] has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

Recalling that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference "considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes",

Bearing in mind differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

Taking into account article VII, paragraph 1, of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to

[4]United Nations, *Treaty Series*, vol. 330, No. 4739.

the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

Considering the wide use of electronic commerce,

Taking into account international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration,[5] as subsequently revised, particularly with respect to article 7,[6] the UNCITRAL Model Law on Electronic Commerce,[7] the UNCITRAL Model Law on Electronic Signatures[8] and the United Nations Convention on the Use of Electronic Communications in International Contracts,[9]

Taking into account also enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

Considering that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

---

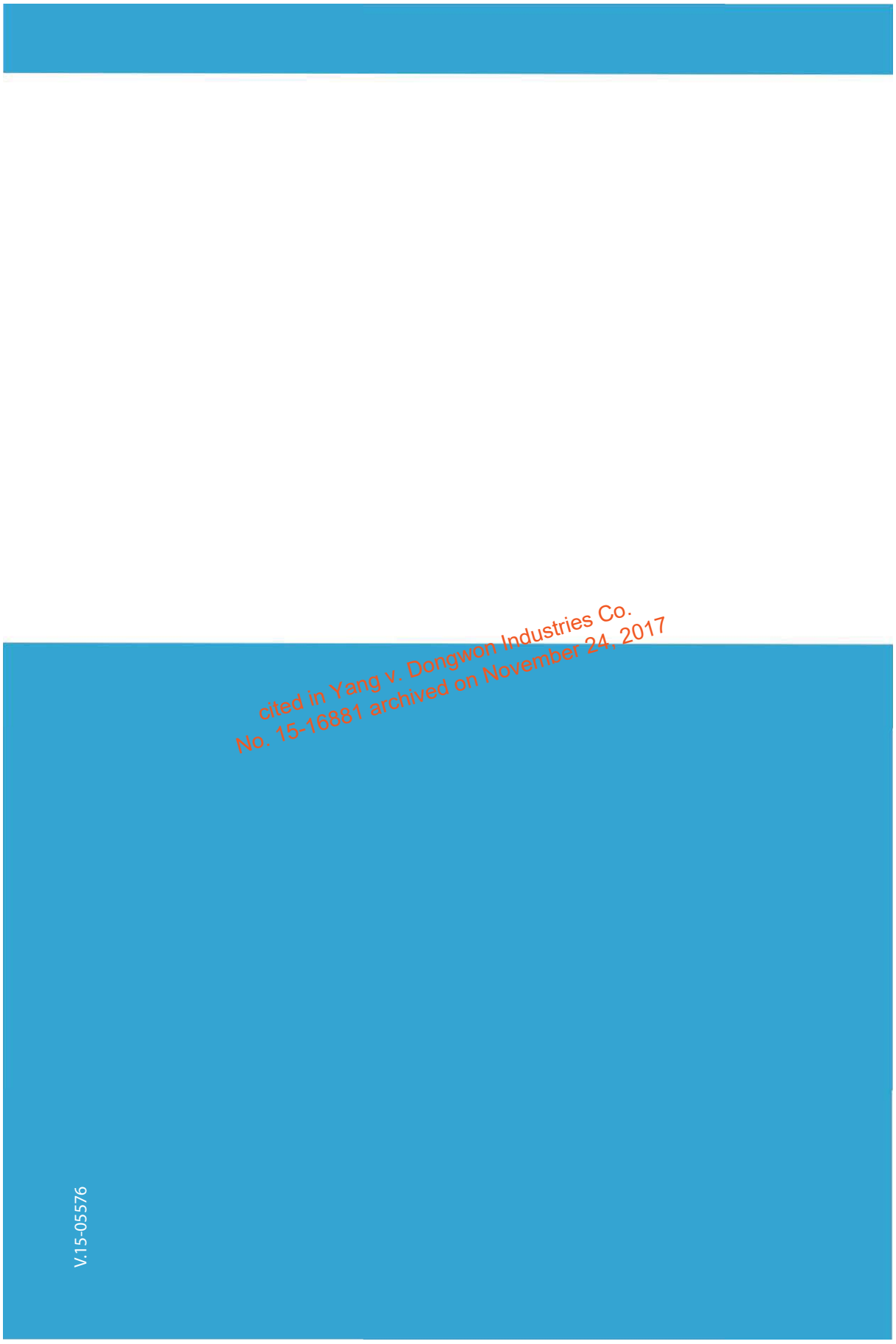
[5] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I, and United Nations publication, Sales No. E.95.V.18.

[6] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), annex I.

[7] Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), annex I, and United Nations publication, Sales No. E.99.V.4, which contains also an additional article 5 bis, adopted in 1998, and the accompanying Guide to Enactment.

[8] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), annex II, and United Nations publication, Sales No. E.02.V.8, which contains also the accompanying Guide to Enactment.

[9] General Assembly resolution 60/21, annex.



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, DONE IN NEW YORK, 10 JUNE 1958, ADOPTED BY THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON 7 JULY 2006 AT ITS THIRTY-NINTH SESSION*

The United Nations Commission on International Trade Law,

Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

Conscious of the fact that the different legal, social and economic systems of the world, together with different levels of development, are represented in the Commission,

Recalling successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

Convinced that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958,[1] has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

Recalling that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference "considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes",

Bearing in mind differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

Taking into account article VII, paragraph 1, of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to

[1] United Nations, *Treaty Series*, vol. 330, No. 4739.

* Issued in *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), annex II.

the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

Considering the wide use of electronic commerce,

Taking into account international legal instruments, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration,[2] as subsequently revised, particularly with respect to article 7,[3] the UNCITRAL Model Law on Electronic Commerce,[4] the UNCITRAL Model Law on Electronic Signatures[5] and the United Nations Convention on the Use of Electronic Communications in International Contracts,[6]

Taking into account also enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

Considering that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.

---

[2]*Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I, and United Nations publication, Sales No. E.95.V.18.

[3]Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), annex I.

[4]Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), annex I, and United Nations publication, Sales No. E.99.V.4, which contains also an additional article 5 bis, adopted in 1998, and the accompanying Guide to Enactment.

[5]Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), annex II, and United Nations publication, Sales No. E.02.V.8, which contains also the accompanying Guide to Enactment.

[6]General Assembly resolution 60/21, annex.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk