INTERNATIONAL ARBITRATION—NINTH CIRCUIT'S APPLICATION OF FEDERAL COMMON LAW CAUSES DISUNITY BETWEEN DOMESTIC AND INTERNATIONAL ARBITRAL PARTIES—*SETTY V. SHRINIVAS SUGANDHALAYA LLP*, 3 F.4TH 1166 (9TH CIR. 2021).

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention or Convention) is a United Nations treaty that requires the courts of contracting states to effectuate arbitral agreements and to enforce awards made by contracting States.[1] Although the New York Convention is the "most significant international instrument" for enforcing arbitral awards, contracting states should additionally apply the domestic laws of the country where enforcement is sought.[2] In

1. *See* U.N. Comm'n of Int'l Trade Law, UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1, 1 (Sept. 2016), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2016_guide_on_the_convention.pdf [hereinafter UNCITRAL] (providing overview of Convention on Recognition and Enforcement of Foreign Arbitral Awards). The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention or Convention) is a widely recognized United Nations arbitration treaty that is "undoubtedly the most significant international instrument for the recognition and enforcement of arbitral awards . . . ." *Id.* at 2. In addition, "[s]ince its inception, the Convention's regime for recognition and enforcement has become deeply rooted in the legal systems of its Contracting States and has contributed to the status of international arbitration as today's normal means of resolving commercial disputes." *Id.* at 1. Signatory states that adhere to the New York Convention promise to "give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement, and to recognize and enforce awards made in other States . . . ." *Id. See also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 534 n.15 (1974) (detailing purpose for statutory enactment). Section 201 was primarily enacted to implement the New York Convention, which "encourage[s] recognition and enforcement of commercial arbitration agreements in international contracts and . . . unif[ies] the standards by which agreements to arbitrate are observed and arbitral awards are enforced in signatory countries." *Id. See generally* 9 U.S.C. § 201 (supplying guidelines for statutory enforcement of New York Convention in U.S. courts).

2. *See* UNCITRAL, *supra* note 1, at 2-3 (stating New York Convention "does not operate in isolation"). Even if the New York Convention applies to an arbitral agreement, "[i]n some circumstances, other international treaties, or the domestic law of the country where enforcement is sought, will also apply to the question of whether a foreign arbitral award should be recognized and enforced." *Id. See also* GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637, 1645 (2020) (outlining application of domestic law in combination with New York Convention principles). In *GE Energy*, the Supreme Court stated that when the New York

Setty v. Shrinivas Sugandhalaya LLP,[3] the United States Court of Appeals for the Ninth Circuit addressed whether federal common law or state contract law applies to an equitable estoppel claim to compel arbitration when brought by an international company against another international company—both nonsignatories to the agreement containing the arbitration provision–and where the agreement is governed by the New York Convention.[4] The Ninth Circuit upheld the denial of the plaintiffs' motion to compel arbitration because U.S. federal common law requires equitable estoppel allegations governed by the New York Convention to be "clearly intertwined" with the arbitration agreement applied.[5]

Brothers Balkrishna and Nagraj Setty were partners in an Indian incense manufacturing and distribution partnership, Shrinivas Sugandhalaya Partnership.[6] As part of their signed partnership

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Convention applies to an arbitral agreement, it "does not restrict contracting states from applying domestic law to refer parties to arbitration . . . ." *Id.* Further, the New York Convention will "not prevent the application of domestic laws that are more generous in enforcing arbitration agreements" and the New York Convention does not "displace domestic doctrines." *Id.*

3. 3 F.4th 1166 (9th Cir. 2021).

4. *See id.* at 1168 (explaining issue before Ninth Circuit). The Court acknowledged that "[t]he parties dispute whether the law of India or federal common law applies . . . ." *Id.* According to Justice Bea's dissent, the majority was:

> [F]aced with the question of which equitable estoppel law governs an Indian company's motion to compel another Indian company and its Indian owner to arbitration based on an agreement entered into in India, signed by two Indian brothers (who own the Indian companies), and governing conduct in India and the United States.

Id. at 1169 (Bea, J., dissenting).

5. *See id.* at 1168-69 (outlining majority's conclusion). The Ninth Circuit majority held that "[i]n cases involving the New York Convention, in determining the arbitrability of federal claims by or against nonsignatories to an arbitration agreement, we apply 'federal substantive law . . . .'" *Id.* (citation omitted). The Court concluded that while a nonsignatory could compel arbitration when the agreement is covered by the New York Convention, "as a factual matter, the allegations here do not implicate the agreement that contained the arbitration clause . . . ." *Id.* at 1169. Moreover, the Court held that for equitable estoppel to apply under federal law, the subject matter of the dispute must be "intertwined" with the arbitral contract. *Id.* The Plaintiffs' equitable estoppel claim to compel arbitration had "no relationship with the partnership deed containing the arbitration agreement at issue" because it was not "clearly 'intertwined' with the Partnership Deed providing for arbitration." *Id.* (citation omitted). Therefore, the Court affirmed the district court's denial of the Plaintiffs' motion to compel arbitration. *Id.* *See* Ved P. Nanda et al., 3 LITIG. OF INT'L DISP. IN U.S. COURTS § 19:1 (2022) (examining federal circuit court's use of federal common law). For the majority of federal circuit courts, "the meaning of the term 'arbitration' under the FAA" is considered to be governed by federal common law. *Id.*

6. *See* Setty v. Shrinivas Sugandhalaya LLP, No. 2:17-cv-01146-RAJ, 2018 U.S. Dist. LEXIS 104253, at *2 (W.D. Wash. June 21, 2018) (providing factual background of

deed, the brothers agreed to an arbitration clause requiring any litigation arising out of the partnership to submit to the provisions of Indian arbitration law.[7] In 2014, each brother started his own incense manufacturing firm outside of the partnership, and control of the incense manufacturing transferred from the original partnership to the individual partners.[8] Balkrishna Setty owned Shrinivas Sugandhalaya (BNG) LLP (SS Bangalore), and Nagraj Setty owned Shrinivas Sugandhalaya LLP (SS Mumbai), neither of which were signatories to the original partnership deed between the brothers.[9] Shortly after the inception of SS Bangalore and SS Mumbai, it became clear the brothers were "now

partnership and events leading to litigation). K.N. Satyam Setty "formed an incense manufacturing and distribution partnership in India." *Id.* After his death, Mr. Setty's sons, Balkrishna and Nagraj Setty, continued the partnership. *Id.* *See also* Complaint at 14-16, Setty v. Shrinivas Sugandhalaya LLP, No. 2:17-cv-01146-RAJ, 2018 U.S. Dist. LEXIS 104253 (W.D. Wash. June 21, 2018) (outlining formation of original partnership). According to the complaint, the Shrinivas Sugandhalaya Partnership is a "general partnership formed under the laws of the country of India pursuant to a Deed of Partnership, made and entered into at Mumbai, India on December 24, 1999." *Id.* at 14. Both Balkrishna and Nagraj agreed to have "equal ownership of the Partnership." *Id.* at 15. The purpose of the partnership was to "continu[e] the incense manufacturing and distribution business founded in 1964 by the late Mr. K.N. Satyam Setty and promoted under the mark SHRINIVAS SUGANDHALAYA." *Id.* at 16.

7. *See Setty*, 2018 U.S. Dist. LEXIS 104253, at *2-3 (providing insight into contents of partnership deed signed by brothers). Balkrishna and Nagraj signed a partnership deed "agreeing to manufacture the incense and split the profits equally." *Id.* at *2. In addition, the partnership deed included an arbitration clause. *Id.* at *2-3. The clause stated:

> All disputes of any type whatsoever in respect of the partnership arising between the partners either during the continuance of this partnership or after the determination thereof shall be decided by arbitration as per the provision of the Indian Arbitration Act, 1940 or any statutory modification thereof for the time being in force.

Id.

8. *See id.* at *3 (describing brothers' expansion into incense market beyond partnership). "In 2014, the sons started their own companies, irrespective of the Partnership . . . ." *Id.* *See also* Complaint, *supra* note 6, at 49-54 (explaining how Setty brothers created separate companies). "[I]n 2014, control of the manufacturing of incense products was effectively transferred from the Partnership to its partners, Plaintiff Balkrishna Setty and Mr. Nagraj Setty . . . ." *Id.* at 51. The transfer to the individual partners allowed the brothers to "manufacture, package, distribute, and promote incense products, independently of one another, under the SHRINIVAS SUGANDHALAYA mark." *Id.*

9. *See Setty*, 2018 U.S. Dist. LEXIS 104253, at *3 (describing differing companies). Balkrishna Setty founded and owns Shrinivas Sugandhalaya BNG LLP (SS Bangalore), which is located in Bangalore, India. *Id.* Nagraj Setty's company is Shrinivas Sugandhalaya LLP (SS Mumbai), which is located in Mumbai. *Id.* *See also* Setty v. Shrinivas Sugandhalaya LLP, 3 F.4th 1166, 1170 (9th Cir. 2021) (Bea, J., dissenting) (stating which parties signatories to original partnership deed). Since only Balkrishna and Nagraj were individual signatories to the partnership deed for the Shrinivas Sugandhalaya

competitors rather than partners" in the incense manufacturing industry.[10]

In June 2018, plaintiffs Balkrishna Setty and SS Bangalore (collectively Plaintiffs) sued SS Mumbai in the United States District Court for the Western District of Washington on the theory that SS Mumbai fraudulently obtained trademark registrations for its mark and design of incense in violation of U.S. federal trademark laws.[11] At trial, SS Mumbai moved to dismiss or stay the proceedings pursuant to the arbitration clause the Setty brothers signed in the original partnership deed.[12] The district court noted that only one party in the dispute, Balkrishna Setty, was a signatory

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Partnership, "[n]either SS Bangalore nor SS Mumbai were signatories to the Partnership Deed and its arbitration clause." *Id.*

10. *See Setty*, 3 F.4th at 1170 (Bea, J., dissenting) (highlighting competitive incense manufacturing market). Since forming their own separate companies, "the two brothers and their companies have competed against each other in the incense market, ultimately leading to the present dispute over trademark rights in the United States." *Id. See also Setty,* 2018 U.S. Dist. LEXIS 104253, at *3 (describing tensions between Setty brothers). In his complaint, Balkrishna claims "that he and his brother are now competitors rather than partners." *Id. See also* Complaint *supra* note 6, at 58-59 (showing brothers moved into individual incense markets). According to the complaint, Balkrishna and SS Bangalore contend that the brothers are "not partners" and are "direct competitors." *Id.* at 58. Further, neither brother "account[s] to one another for the sale of their respective incense products, nor share the proceeds resulting therefrom." *Id.* at 59.

11. *See Setty,* 2018 U.S. Dist. LEXIS 104253, at *3-4 (stating Plaintiffs' cause of action). Before the United States District Court for the Western District of Washington, Balkrishna and SS Bangalore (collectively Plaintiffs) claim that:

> SS Mumbai misrepresented where it manufactured its incense—by putting Bangalore on the packaging rather than Mumbai—in an effort to confuse customers about the quality of the product . . . [and] SS Mumbai [interfered] in Plaintiff's business by sending cease and desist letters that claim SS Bangalore [infringed] on Defendants' trade dress rights . . . . Plaintiffs further claim that SS Mumbai fraudulently obtained trademark registrations for the mark and design of its incense.

Id. at *3-4. *See also* Setty v. Shrinivas Sugandhalaya LLP, No. 2:17-cv-01146-RAJ, 2018 U.S. Dist. LEXIS 195118, *2 (W.D. Wash., 2018) (summarizing Plaintiffs' causes of action). On December 15, 2016, Plaintiffs sued SS Mumbai alleging it "engaged in [sic] unfair competition, false advertising, false designation of origin, and fraudulent trademark registration." *Id. See Setty*, 3 F.4th at 1170 (Bea, J., dissenting) (stating original suit brought in Alabama and transferred to Washington District Court). Balkrishna and SS Bangalore originally brought suit against SS Mumbai in a federal district court in Alabama. *Id.* The suit was not heard in Alabama and was instead "transferred from the Northern District of Alabama to the Western District of Washington." *Id.*

12. *See Setty*, 2018 U.S. Dist. LEXIS 104253, at *4 (describing SS Mumbai's motion before district court). Before the district court, SS Mumbai sought "dismissal or stay in proceedings because it claims that Plaintiffs must bring their claims in arbitration—pursuant to the Partnership Deed—and not in this forum." *Id. See also Setty*, 2018 U.S. Dist. LEXIS 195118, at *2-3 (outlining SS Mumbai's motion to dismiss plaintiffs' action). In the district court, SS Mumbai "filed a motion to dismiss . . . seeking to

to the partnership deed.[13] Nevertheless, SS Mumbai asserted that Balkrishna and SS Bangalore should be equitably estopped from avoiding the arbitration clause because their claims were dependent on rights deriving from the partnership deed subject to Indian law.[14] The district court rejected SS Mumbai's equitable estoppel claim to compel arbitration because its claims as a nonsignatory were "divorced from the underlying Partnership Deed."[15] Following the district court's refusal to compel arbitration, SS Mumbai appealed to the Ninth Circuit, which affirmed the district court decision.[16]

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enforce the arbitration clause of a Partnership Deed signed by Plaintiff Balkrishna Setty and his brother, Nagraj Setty, the founder of Defendant SS Mumbai." *Id.*

13. *See Setty*, 2018 U.S. Dist. LEXIS 104253, at *5 (confirming signatories and nonsignatories to original partnership deed). The district court concluded:

> Only one party in this lawsuit was a signatory to the Partnership Deed—Mr. Balkrishna Setty. SS Mumbai was not a signatory to the Partnership Deed, nor was it a third-party beneficiary as it did not exist until several years after the Setty brothers signed the Partnership Deed. Nonetheless, SS Mumbai argues that Plaintiffs' claims are dependent on rights allegedly derived from the Partnership Deed.

Id.

14. *See id.* at *5-6 (highlighting SS Mumbai's arguments before district court). Pursuant to the partnership deed containing the arbitration clause subject to Indian law, "SS Mumbai argues that equitable estoppel results in Plaintiffs' need to arbitrate this dispute." *Id.* at *5. The court determined that a nonsignatory may compel arbitration under theories of equitable estoppel: "(1) when the signatory's claims against a nonsignatory arise out of the underlying contract; and (2) when the nonsignatory's conduct is intertwined with a signatory's conduct." *Id.* at 6 (citation omitted). *See also Setty*, 3 F.4th at 1170 (Bea, J., dissenting) (expanding upon SS Mumbai's equitable estoppel claim to compel arbitration). "The district court did not address the question of which law of equitable estoppel should apply. Instead, the court analyzed the equitable estoppel claim under generalized estoppel doctrine drawn from Ninth Circuit cases." *Id.*

15. *See Setty*, 2018 U.S. Dist. LEXIS 104253, at *6-7 (describing district court's order affirmed on appeal). The district court held:

> [T]he conduct alleged in the Complaint is not intertwined with the Partnership Deed such that the claims arise out of the underlying contract. Instead, the conduct relates to how the new entities—SS Bangalore and SS Mumbai—manufacture and advertise their products, compete with each other, and whether SS Mumbai properly registered its trademarks. . . . This conduct is divorced from the underlying Partnership Deed, which set out to define the manufacturing relationship and financial divisions between the two brothers while they remained partners.

Id.

16. *See Setty*, 3 F.4th at 1167 (reiterating Ninth Circuit's first affirmation of district court's decision). The majority stated that "we previously held that SS Mumbai could not equitably estop SS Bangalore from avoiding arbitration, and thus affirmed the district court's order." *Id.* (citation omitted). On appeal, the Ninth Circuit did not "affirm on the merits of the equitable estoppel claim . . . ." *Id.* at 1170 (Bea, J., dissenting). Instead, the Ninth Circuit held "that nonsignatory SS Mumbai was barred from

Relying on the Court's decision in *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC,* which held the New York Convention does not conflict with the enforcement of nonsignatory arbitration agreements under domestic equitable estoppel doctrines, SS Mumbai sought certiorari from the Supreme Court.[17] The Supreme Court granted certiorari, vacated the Ninth Circuit's decision, and remanded the case for further consideration.[18] On remand, the Ninth Circuit acknowledged that as a nonsignatory, SS Mumbai could compel arbitration in a New York Convention case.[19] The Court, however, determined that in New York Convention cases, "federal substantive law," and not the law of the contracting state, primarily governs.[20] Using federal substantive law, the Ninth Circuit majority determined that since SS Mumbai's allegations have "no relationship" to the partnership deed's arbitration clause, the district court exercised appropriate discretion in denying SS Mumbai's motion to compel arbitration.[21]

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compelling arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards . . . ." *Id.* at 1170-71.

17. *See also Setty,* 3 F.4th at 1168 (detailing Supreme Court's holding and reasoning why SS Mumbai sought certiorari). "[T]he Supreme Court specifically concluded, '[w]e hold only that the New York Convention does not conflict with the enforcement of arbitration agreements by nonsignatories under domestic-law equitable estoppel doctrines.'" *Id.*

18. *See id.* at 1171 (Bea, J., dissenting) (describing why SS Mumbai sought and obtained certiorari). After the Ninth Circuit's first affirmation of the district court's decision denying SS Mumbai's motion to compel arbitration, "SS Mumbai sought and obtained certiorari from the Supreme Court, which vacated our prior decision and remanded the case in light of its decision in *GE Energy* . . . ." *Id.*

19. *See id.* at 1169 (acknowledging Supreme Court's decision and basis for remand). The Ninth Circuit accepts that "a nonsignatory could compel arbitration in a New York Convention case." *Id.* Following its decision in *GE Energy*, "[t]he Supreme Court has now ruled that nonsignatories to arbitration agreements governed by the New York Convention are not precluded from compelling arbitration under the FAA." *Id.* at 1171 (Bea, J., dissenting).

20. *See Setty,* 3 F.4th at 1168 (presenting issue before Ninth Circuit on remand). On remand, "[t]he parties dispute whether the law of India or federal common law applies to the question of whether SS Mumbai, a nonsignatory to the Partnership Deed containing an arbitration provision, may compel SS Bangalore to arbitrate." *Id.* The Ninth Circuit "decline[d] to apply Indian law on the basis of the Partnership Deed." *Id.* Instead, the Ninth Circuit relied on Ninth Circuit precedent in finding that "[i]n cases involving the New York Convention, in determining the arbitrability of federal claims by or against nonsignatories to an arbitration agreement, we apply 'federal substantive law,' for which we look to 'ordinary contract and agency principles.'" *Id.* (citation omitted).

21. *See id.* at 1169 (stating Ninth Circuit's holding on remand). The Ninth Circuit determined that SS Mumbai's allegations "have no relationship with the partnership

The New York Convention, adopted at the United Nations New York headquarters in 1958, is recognized worldwide as a "foundational instrument" for the establishment of international arbitration.[22] The Convention requires contracting states to recognize and enforce international arbitral agreements that are made pursuant to the Convention.[23] While the New York Convention

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deed containing the arbitration agreement at issue in this appeal." *Id.* In order to have prevailed on its equitable estoppel claim under federal substantive law, SS Mumbai had to "implicate the agreement that contained the arbitration clause—a prerequisite for compelling arbitration under the equitable estoppel framework." *Id.* Pursuant to a successful equitable estoppel claim, the subject matter of the underlying dispute must be "intertwined with" the arbitration clause. *Id.* The Ninth Circuit asserts that SS Mumbai could not equitably estop SS Bangalore and Balkrishna Setty into abiding by the partnership deed's arbitration clause because:

> SS Bangalore's claims against SS Mumbai are not clearly "intertwined" with the Partnership Deed providing for arbitration. To be sure, the crux of several claims is that the Partnership, and not SS Mumbai, is the true owner of the disputed marks. But the Partnership does not own the marks because of any provision of the Partnership Deed, but rather because of the Partnership's "prior use" of the marks over several years. Moreover, any allegations of misconduct by Nagraj Setty (a signatory to the Partnership Deed) are not clearly intertwined with SS Bangalore's claims against SS Mumbai.

Id. Thus, the Ninth Circuit concluded that "[b]ecause the district court did not err in denying SS Mumbai's motion to compel arbitration, it did not abuse its discretion in denying SS Mumbai's motion to stay the proceedings pending arbitration." *Id.*

22. *See* UNCITRAL, *supra* note 1, at ix (promoting New York Convention). The New York Convention is:

> [O]ne of the most important and successful United Nations treaties in the area of international trade law. . . [was] adopted by diplomatic conference on 10 June 1958 . . . . The Convention is widely recognized as a foundational instrument of international arbitration and requires courts of contracting States to give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement and also to recognize and enforce awards made in other States . . . .

Id. See also The New York Convention, N.Y. ARB. CONVENTION, https://www.newyorkconvention.org/ (last visited Feb. 10, 2023) (providing overview of New York Convention). *See also* U.N. Comm'n On Int'l Trade L., Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (last visited Feb. 10, 2023) (listing contracting countries applying all or part of Convention). *See Arbitration*, BLACK'S LAW DICTIONARY (10th ed. 2019) (defining arbitration). Arbitration is "[a] dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute." *Id.*

23. *See* U.N. Conf. on Int'l Com. Arbitration, Convention on the Recognition and Enf't of Foreign Arbitral Awards, June 10, 1958, 49 U.N.T.S. 330, https://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf (outlining requirements of New York Convention) [hereinafter N.Y. ARB. CONVENTION]. In Article II of the body of the Convention's provisions, it requires:

is the primary mechanism by which international arbitration is recognized and enforced, the Convention also permits contracting courts to enforce arbitral awards pursuant to more favorable domestic or state laws.[24]

In the United States, Congress enacted the Federal Arbitration Act (FAA) to create consistent procedures for forming, enforcing, and litigating arbitration agreements.[25] In addition, the FAA codifies the Convention into federal law to encourage U.S. courts to respect and enforce international arbitral agreements made by international parties.[26] Congress did not intend for the

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> 1. Each Contracting State shall recognize an agreement in writing 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.
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> 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.
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> 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.

Id. at 49. When a contracting state agrees to follow the Convention's regulations, it is of primary importance that each state should "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon." *Id. See also* Lucy Greenwood, *A New York Convention Primer*, AM. BAR ASS'N: DISP. RESOL. MAG. (Sept. 12, 2019), https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/summer-2019-new-york-convention/summer-2019-ny-convention-primer/ (reciting aims of Convention). The Convention "ensure[s] the enforcement of arbitration awards worldwide. It requires contracting states to recognize and enforce arbitration awards in the same way they do domestic awards, by essentially converting the arbitration award into a judgment enforceable by a national court." *Id.*

24. *See* UNCITRAL, *supra* note 1, at 298 (stating domestic laws of contracting states can be applied congruently with Convention's provisions). Article VII (1) of the Convention enables contracting states to "enforce[e] arbitral awards pursuant to more favorable provisions found in their domestic laws." *Id.*

25. *See* Validity, Irrevocability, and Enforcement of Agreements to Arbitrate, 9 U.S.C. § 2 (stating purpose of Federal Arbitration Act). The Federal Arbitration Act (FAA) ensures contracts containing an arbitration provision "shall be valid, irrevocable, and enforceable, save any such grounds as exist at law or in equity for the revocation of any contract . . . ." *See* Jason Gordon, *Federal Arbitration Act - Explained*, THE BUS. PROFESSOR (Apr. 3, 2023), https://thebusinessprofessor.com/en_US/criminal-civil-law/federal-arbitration-act (summarizing purpose of FAA). In 1925, "Congress passed the Federal Arbitration Act (FAA) to encourage the use of arbitration to resolve conflicts." *Id.*

26. *See* 9 U.S.C. § 201(1) (ratifying New York Convention). *See also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 534 n.15 (1974) (noting purpose for ratification).

FAA to replace the Convention, but rather it expected that both arbitration doctrines would be applied concurrently by the U.S. courts.[27] The Convention, however, supersedes the FAA if its laws are in direct conflict with FAA provisions as applied to an international arbitration agreement dispute.[28]

With respect to the intersection of the FAA and the Convention within U.S. courts, one particular conflict is whether courts should apply federal or state substantive law to litigation claims

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Under section 201 of the FAA, the New York Convention was adopted in order to "encourage recognition and enforcement of commercial arbitration agreements in international contracts and to unify standards by which agreements to arbitrate are observed and arbitral awards are enforced in signatory countries." *Id.* *See* Christopher R. Drahozal, *New York Convention and the American Federal System, the Symposium*, J. DISP. RESOL. 101, 104 (2012) (analyzing how United States courts apply New York Convention). Under section 203 of the FAA, federal district courts have subject matter jurisdiction over arbitral causes of action that fall under the Convention. *See Article XI*, N.Y. CONVENTION GUIDE 1958, https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=632&opac_view=-1 (last visited Feb. 10, 2023) (stating reasons why Congress codified Convention). Due to the codification of the Convention into the FAA, United States courts must:

> [E]nforce all foreign arbitral awards, which are governed by the Convention, pursuant to Chapter 2 of the FAA. The United States Supreme Court has held that the Convention, as incorporated into federal law, is intended "to encourage the recognition and enforcement in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."

Id.

27. *See* Arb., Mediation, ADR Prac. Grp. at Mintz Levin, *Enforcement of International Arbitration Agreements: SCOTUS Rules That the New York Convention (and FAA ch. 2) Are Not Preemptively Exclusive*, NAT'L L. REV. (Aug. 7, 2020), https://www.natlawreview.com/article/enforcement-international-arbitration-agreements-scotus-rules-new-york-convention (recounting what FAA and Convention apply to). The majority of domestic arbitration agreements are subject "only to ch. 1 of the FAA," while foreign and international arbitration agreements are "subject to the New York Convention and its implementing legislation, FAA ch. 2." *Id.* *See also* 9 U.S.C. § 208 (describing overlap between FAA and Convention for international agreements). The FAA and the Convention "provide overlapping coverage to the extent they do not conflict." *Id.*

28. *See* Arb., Mediation, ADR Prac. Grp. at Mintz Levin, *supra* note 27 (describing intersection between Convention and FAA). In general, the Supreme Court takes the stance that "the New York Convention sets a floor but not a ceiling regarding the enforceability of international arbitration agreements." *Id.* The Supreme Court explains that the "New York Convention requires contracting states to enforce international arbitration agreements that satisfy the conditions specified in the treaty, but it does not prohibit such states from enforcing such agreements otherwise—e.g., if they satisfy other conditions." *Id.* *See also* 9 U.S.C. § 208 (describing when Convention supersedes FAA). Chapter 1 of the FAA "applies to actions and proceedings brought under this chapter . . . to the extent . . . [it's] not in conflict with . . . the Convention as ratified by the United States." *Id.*

brought under the FAA but otherwise governed by the Convention.[29] Despite a lack of national case law uniformity, courts have routinely held that state substantive law can be applied to certain claims brought under the FAA that seek to enforce international arbitration agreements through U.S. domestic doctrines, such as equitable estoppel.[30] This same line of reasoning applies to cases in which the claim–bearer is a nonsignatory to the arbitration agreement they seek to enforce.[31] Further, the Supreme Court has held that as long as the application of the equitable estoppel

29. *See* Arb., Mediation, ADR Prac. Grp. at Mintz Levin, *supra* note 27 (describing conflict between federal and state substantive law). While "international treaties and federal laws [have] preemptive authority over inconsistent state laws," U.S. courts are frequently asked to decide what to do when "state law is not in conflict with a federal statute or international treaty of the United States?" *Id.* Accordingly, "the door appears to be open in U.S. courts for the application of domestic law principles to the determination of party arbitrability with respect to international arbitration agreements. Consequently, the determination of the law that is applicable in that regard becomes critical." *Id. See also* 9 U.S.C. § 208 (emphasizing lack of uniformity between state and substantive law application in United States Courts). The Supreme Court held that the Convention does not "set out [a] comprehensive regime that displace[s] domestic law but rather require[s] courts to rely on domestic law to fill gaps." *Id.*

30. *See* Tracer Rsch. Corp. v. Nat'l Envtl. Servs. Co., 42 F.3d 1292, 1294 (9th Cir. 1994). Certain claims under the FAA are governed solely by federal substantive law, such as "the scope of the arbitration clause." *Id. But see* Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630 (2009) (finding not all claims governed by federal substantive law). The FAA does not "alter background principles of state contract law regarding the scope of agreements . . . ." *Id.* at 630-31. Instead, "'traditional principles' of state law allow a contract to be enforced through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver, and estoppel.'" *Id. See also* GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637, 1643 (2020) (allowing for application of state contract law). The Supreme Court held that "Chapter 1 of the Federal Arbitration Act (FAA) permits courts to apply state-law doctrines related to the enforcement of arbitration agreements." *Id.* Further, this provision "requires federal courts to 'place [arbitration] agreements 'upon the same footing as other contracts.'" *Id.*

31. *See* Lauren H. Evans & Lisa M. Richman, *In Setty, Ninth Circuit Signals Shift in Arbitration Landscape for Non-Signatories*, McDermott, Will & Emery IP Update (Feb. 4, 2021), https://www.ipupdate.com/2021/02/in-setty-ninth-circuit-signals-shift-in-arbitration-landscape-for-non-signatories/ (highlighting hot arbitration topic before U.S. courts). Courts are asked to decide "whether nonsignatories to an arbitration agreement can compel arbitration." *Id. See also* Walter D. Kelley Jr., *Can a Non-Signatory Compel Arbitration?*, Hausfeld (Aug. 31, 2021), https://www.hausfeld.com/en-us/what-we-think/competition-bulletin/can-a-non-signatory-compel-arbitration/ (stating non-signatories to arbitration agreement can compel arbitration under FAA). Kelley asks, "how can an arbitration agreement be valid as to Section 3 [of the FAA] movants if they never signed a contract?" *Id.* The answer is that Section 2 states that written arbitration agreements are "valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of a contract." *Id.* The U.S. courts have "interpreted the Federal Arbitration Act as incorporating the full range of common law contract doctrines. A non-signatory can use those doctrines either offensively or defensively."

domestic law doctrine does not conflict with the Convention, whichever body of domestic substantive law that governs the arbitration agreement should be applied to international disputes brought under the FAA.[32]

Id. *See Arthur Andersen LLP*, 556 U.S. at 625 (stating nonsignatories can compel arbitration). The Court in *Arthur Andersen LLP* held that:

> A litigant who was not a party to the arbitration agreement may invoke § 3 [of the FAA] if the relevant state contract law allows him to enforce the agreement. Neither FAA § 2-the substantive mandate making written arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at low or in equity for the revocation of a contract"-nor § 3 purports to alter state contract law regarding the scope of agreements. Accordingly, whenever the relevant state law would make a contract to arbitrate a particular dispute enforceable by a nonsignatory, that signatory is entitled to request and obtain a stay under § 3 . . . .

Id. Under the FAA, "traditional principles of state law allow a contract to be enforced by nonparties to a contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel." *Id.* at 631. *See* Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1127 (9th Cir. 2013) (finding scope of arbitration agreement governed by federal substantive law). Even though the FAA uses federal substantive law as a basis to enforce arbitration agreements, it is well settled that the Supreme Court has "held that a litigant who is not a party to an arbitration agreement may invoke arbitration under the FAA if the relevant state contract law allows the litigant to enforce the agreement." *Id.* at 1128. *See also GE Energy Power Conversion*, 140 S. Ct. at 1643 (holding nonsignatories may assert state substantive law claims). The Supreme Court views "traditional principles of state law" applied under Chapter 1 of the FAA to "include doctrines that authorize the enforcement of a contract by a nonsignatory." *Id.* The Supreme Court thus allowed "a nonsignatory to rely on state-law equitable estoppel doctrines to enforce an arbitration agreement." *Id.* at 1644.

32. *See GE Energy Power Conversion*, 140 S. Ct. at 1644-45 (determining equitable estoppel claims do not conflict with Convention). The issue before the Supreme Court in *GE Energy* was "whether the equitable estoppel doctrines permitted under Chapter 1 of the FAA . . . 'conflict with . . . the [New York] Convention.'" *Id.* The Court determined that "they do not." *Id.* at 1645. *But see* Leslie Berkoff, *The Ninth Circuit Affirms Denial of a Non-Signatory's Motion to Compel Arbitration*, AM. BAR ASS'N: BUS. L. TODAY (Aug. 4, 2021), https://businesslawtoday.org/month-in-brief/july-in-brief-business-litigation-and-dispute-resolution/ (explaining why Supreme Court did not decide whether plaintiff could compel arbitration). The Supreme Court in *GE Energy* "had 'specifically concluded' that 'the New York Convention does not conflict with enforcement of arbitration agreements by nonsignatories under domestic-law equitable estoppel doctrines.'" *Id.* The Supreme Court, however, "had not determined whether GE Energy [as applied to the particular dispute before Court] could enforce the arbitration clauses under principles of equitable estoppel." *Id.* Moreover, the Supreme Court did not also "determine which body of law governed. In fact, the Supreme Court had recognized that courts of numerous contracting states to the New York Convention permit nonsignatories to compel arbitration under their domestic laws." *Id.* Regardless, the *GE Energy* Court decided that nonsignatories are not precluded from "tak[ing] advantage of arbitration clauses in related agreements." *Id.*

In *Setty v. Shrinivas Sugandhalaya LLP*, the Court of Appeals for the Ninth Circuit settled whether federal substantive law or domestic Indian law governed a nonsignatory claim brought under the FAA to compel arbitration when the agreement otherwise fell under the New York Convention.[33] The Court concluded that federal substantive law applied and barred SS Mumbai's equitable estoppel claim.[34] The court reasoned that because SS Mumbai was a nonsignatory to the partnership agreement, federal law required its claim to be sufficiently "intertwined" with the arbitration agreement at issue, which it was not.[35]

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33. *See* Setty v. Shrinivas Sugandhalaya LLP, 3 F.4th 1166, 1168 (9th Cir. 2021) (stating issue at center of litigation dispute). Before the Court, "the parties dispute[d] whether the law of India or federal common law applies to the question of whether SS Mumbai, a nonsignatory to the Partnership Deed containing an arbitration provision, may compel SS Bangalore to arbitrate." *Id.* at 1168. SS Mumbai argued that Indian law applied based on "the Partnership Deed's arbitration provision." *Id.*

34. *See id.* at 1168 (quoting another source explaining use of "federal substantive law"). According to the Court, the Supreme Court "has recognized that in the context of the *New York Convention*, uniformity of the law is of *paramount* importance." *Id.* Thus, "concluding application of state-specific law would undermine this purpose." *Id.* Therefore, when "determining the arbitrability of federal claims by or against nonsignatories to an arbitration agreement, we apply 'federal substantive law,' for which we look to 'ordinary contract and agency principles.'" *Id.* Further, the Court's decision "comports with First, Second, and Fourth Circuit decisions applying federal common law to threshold issues of arbitrability in New York Convention cases." *Id.* at n.1. *See* Tracer Rsch. Corp. v. Nat'l Envtl. Servs. Co., 42 F.3d 1292, 1294 (9th Cir. 1994) (applying federal substantive law to certain claims brought under FAA). Under the FAA, even if the arbitral agreement provides that domestic law will govern the agreement's construction, "the scope of arbitration clause is governed by federal law." *Id. But see Arthur Andersen LLP*, 556 U.S., at 631 (finding FAA enables nonfederal substantive law for certain claims). Under 9 U.S.C. §§ 2-3, neither section "purports to alter background principles of state contract law." *Id.* Further, in *Arthur Andersen*, the petitioners sought to invoke an arbitration agreement under the FAA by arguing that "the principles of equitable estoppel demanded that respondents arbitrate their claims under the investment agreements with Bricolage." *Id.* at 627. The Supreme Court held that "traditional principles of state law allow a contract to be enforced by or against nonparties to the contract through . . . estoppel." *Id.* at 631. Therefore, "a litigant who was not a party to the relevant arbitration agreement may invoke [the FAA] if the relevant state contract law allows him to enforce the agreement." *Id.* at 632.

35. *See Setty*, 3 F.4th at 1669 (finding it "essential" that dispute's subject matter "intertwined" with arbitral contract). The Court found "SS Bangalore's claims against SS Mumbai are not clearly 'intertwined' with the Partnership Deed providing for arbitration." *Id.* The Court judged the merits of SS Mumbai's claims on the basis of whether the "claims have [a] relationship with the partnership deed containing the arbitration agreement at issue in this appeal." *Id.* at 1169. *See also* Rajagopalan v. NoteWorld, LLC, 718 F.3d 844, 847 (9th Cir. 2013) (stating intertwined standard required for equitable estoppel claims to succeed). In order for equitable estoppel claims to apply to the enforcement of an arbitration agreement, it is "essential . . . that the subject matter of the dispute [is] intertwined with the contract providing for arbitration." *Id.*

The Ninth Circuit recognized that Convention–governed nonsignatory arbitral agreements may be compelled by state or domestic law equitable estoppel doctrines.[36] In the interest of uniformity for an international agreement governed by the Convention, however, the Court applied a federal standard that focused on whether a nonsignatory's claim was based in the arbitration agreement itself.[37] Substantiating its decision to apply federal substantive law to SS Mumbai's attempts to compel arbitration, the Court concluded that the original partnership deed applied to disputes "arising between the partners," not third parties or nonsignatories.[38] The Court determined that SS Mumbai's equitable estoppel claim had no relationship with the partnership agreement containing the arbitration clause.[39] On the basis of this finding, the Court rejected SS Mumbai's claim to compel SS

36. *See id.* at 1168 (stating Court's outlook on equitable estoppel doctrines). According to the Court, "[t]he New York Convention and its implementing legislation emphasize the need for uniformity in the application of international arbitration agreements." *Id.* In *GE Energy*, which held, "only that the New York Convention does not conflict with the enforcement of arbitration agreements by nonsignatories under domestic-law equitable estoppel doctrines," the Supreme Court did not decide whether the party "could enforce the arbitration clauses under principles of equitable estoppel or which body of law governs that determination." *Id.*

37. *See id.* at 1168 (barring nonsignatories from bringing claim when not original party to arbitral agreement). The original partnership deed between the Setty brothers contained an "arbitration provision [that applied] to disputes 'arising between the partners' and not also to third part[ies] such as SS Mumbai." *Id.*

38. *See id.* at 1169 (explaining why Court applied federal law to present dispute). The Court found:

> Here, the claims have no relationship with the partnership deed containing the arbitration agreement at issue in this appeal. SS Bangalore's claims against SS Mumbai are not clearly 'intertwined' with the Partnership Deed providing for arbitration. To be sure, the crux of several claims is that the Partnership, and not SS Mumbai, is the true owner of the disputed marks. But the Partnership does not own the marks because of any provision of the Partnership Deed, but rather because of the Partnership's 'prior use' of the marks over several years.

Id.

39. *See id.* at 1169 (stating courts must first decide whether nonsignatory can enforce arbitral agreement as nonparty). The Court held "that as a factual matter, the allegations here do not implicate the agreement that contained the arbitration clause—a prerequisite for compelling arbitration under the equitable estoppel framework." *Id.* In addition, "whether SS Mumbai may enforce the Partnership Deed as a nonsignatory is a 'threshold issue' for which we do not look to the agreement itself." *Id.* at 1168. Since the Partnership Deed's arbitration agreement did not apply to nonsignatories, but only to parties explicitly associated with the agreement, federal substantive law requires that equitable estoppel claims first implicate the agreement containing the arbitration clause before the merits of the equitable estoppel claim will be examined. *Id.* at 1168-69. SS Mumbai was not an original party to the arbitration agreement and

Bangalore to arbitration, stating that in New York Convention cases, it would not universally apply the law governing the international arbitral agreement without a nonsignatory first satisfying the federal substantive law precondition that the claim be intertwined with the agreement itself.[40]

Rather than applying domestic Indian principles to SS Mumbai's claim to compel arbitration, the Ninth Circuit reinstated a judicial standard that is now avoided by many U.S. courts.[41] In

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could not compel SS Bangalore to arbitrate without first implicating the agreement itself, which it did not do. *Id.* at 1169.

40. *See id.* at 1169 (affirming district court's decision denying SS Mumbai relief). The Court found "the district court did not abuse its discretion in rejecting SS Mumbai's argument that SS Bangalore should be equitably estopped from avoiding arbitration." *Id.* Further, the Court held that "[b]ecause the district court did not err in denying SS Mumbai's motion to compel arbitration, it did not abuse its discretion in denying SS Mumbai's motion to stay the proceedings pending arbitration." *Id.* The Court held that for all cases, domestic and international, that are governed by the New York Convention, it is a "prerequisite for compelling arbitration under the equitable estoppel framework" that the factual allegations implicate the disputed arbitral agreement. *Id.* Here, "as a factual matter, the allegations . . . do not implicate the agreement that contained the arbitration clause." *Id.*

41. *See id.* at 1175 (Bea, J., dissenting) (showing precedents apply state law to nonsignatory arbitration claims). In his dissent, Justice Bea notes "our precedents demonstrate no qualms in applying state law to nonsignatory enforcement of arbitrability of federal claims." *Id.* Further, Justice Bea believes that "[b]ecause SS Mumbai's motion is brought pursuant to the FAA, the Supreme Court and Ninth Circuit precedents governing this question should be adequate to resolve this issue." *Id.* at 1176. In fact, "[t]he Supreme Court and Ninth Circuit have time and again held that whichever background body of state contract law that governs the arbitration agreement governs equitable estoppel claims to compel arbitration" brought under the FAA. *Id.* at 1169. In *GE Energy*, the Supreme Court found that "nonsignatories to arbitration agreements governed by the New York Convention are not precluded from compelling arbitration under the FAA." *Id.* at 1171. Therefore, the Ninth Circuit majority's holding that foreign substantive law should be applied to SS Mumbai's motion to compel arbitration "because the arbitration agreement is otherwise governed by the New York Convention," is contradictory to Ninth Circuit precedent. *Id.* at 1169. *See also* Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631 (2009) (allowing for application of "traditional principles" of state law by nonsignatories). In *Arthur Andersen*, the Supreme Court ruled that the Sixth Circuit was mistaken to prevent a noncontract signatory from seeking relief since state law's traditional principles permit a contract to be enforced by or against nonparties via techniques such as "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel . . . ." *Id.* As such, for disputes centering around arbitration agreements made in the United States, "relevant state contract law" governs the arbitrability, not federal law. *Id.* at 632. *See also* GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637, 1645 (2020) (outlining use of domestic equitable estoppel doctrines by foreign nonsignatories). Although the Supreme Court in *GE Energy* acknowledges how "[t]he text of the New York Convention does not address whether nonsignatories may enforce arbitration agreements under domestic doctrine such as equitable estoppel," the Court goes on to find that "nothing in the text of the

doing so, the Ninth Circuit wrongly ignored the well-settled trend that the U.S. courts should allow domestic doctrines to be applied to a foreign nonsignatory's claims to compel arbitration out of respect for arbitral awards made in other countries.[42] The Court's decision to reject SS Mumbai's claim for arbitration on the grounds that its argument as an international nonsignatory lacked sufficient "intertwin[ing]" with the agreement effectively severing the complimentary relationship between the FAA and

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Convention could be read to otherwise prohibit the application of domestic equitable estoppel doctrines." *Id.* at 1640. Therefore, as to the use of domestic doctrines by *international* nonsignatories, the Supreme Court held that "the New York Convention does not conflict with the enforcement of arbitration agreements by nonsignatories under domestic-law equitable estoppel doctrines." *Id.* at 1648.

42. *See GE Energy.*, 140 S. Ct. at 1646 (indicating Convention allows use of domestic law doctrine by nonsignatories). According to the Supreme Court, "the weight of authority from contracting states indicates that the New York Convention does not prohibit the application of domestic law addressing the enforcement of arbitration agreements." *Id. See also* UNCITRAL, *supra* note 1, at 1 (outlining aims of Convention). The Convention's purpose is to ensure that its "regime for recognition and enforcement has become deeply rooted in the legal systems of its Contracting States and has contributed to the status of international arbitration as today's normal means of resolving commercial disputes." *Id.* In fact, the Convention encourages the enforcement of arbitration agreements by its contracting states so much so that "a Contracting State will not be in breach of the Convention by enforcing arbitral awards and arbitration agreements pursuant to more liberal regimes than the Convention itself." *Id.* at 2. *See also* Arb., Mediation, ADR Prac. Grp. at Mintz Levin, *supra* note 27 (stating domestic laws can apply to international arbitration agreements). Although foreign and international agreements preempt "authority over inconsistent state laws," a nonsignatory "to an international arbitration agreement [is] not barred from compelling arbitration against a signatory on the basis of U.S. state equitable estoppel law because such 'domestic' law does not conflict with the New York Convention." *Id. See also* 9 U.S.C. § 208 (outlining domestic equitable estoppel claims for international arbitrates). As enumerated in the statute:

> Nothing in [the] text of Convention on the Recognition and Enforcement of Foreign Arbitral Awards . . . conflicted with application of domestic equitable estoppel doctrines permitted under FAA, as Convention was simply silent on issue of nonsignatory enforcement. Nor did anything in drafting history suggest that Convention sought to prevent contracting states from applying domestic law that permitted nonsignatories to enforce arbitration agreements in additional circumstances.

Id. See also UNCITRAL, *supra* note 1, at 246 (noting arbitral enforcement trend in contracting states). Contracting states to the New York Convention have typically "set very few limits on the types of disputes that are capable of settlement by arbitration . . . This reflects the trend of reserving only a small category of disputes solely to the jurisdiction of courts and the growing confidence of most jurisdictions in arbitration." *Id.* at 232. In fact, "the incapable of settlement by arbitration exception has been narrowly construed in light of the strong judicial interest in encouraging the use of arbitration." *Id.*

the Convention.[43] Although the majority "accept[s] that a nonsignatory could compel arbitration in a New York Convention case," in actuality, its holding promotes U.S. federal law over the principles outlined in Convention cases by making it extremely difficult for a nonsignatory to use the domestic doctrines the Supreme Court permitted them to claim in the first place.[44]

43. *See Setty*, 3 F.4th at 1669 (finding subject matter of claimants' dispute must intertwine with arbitration contract). The majority held that SS Mumbai's claims "have no relationship with the partnership deed containing the arbitration agreement at issue in this appeal" because they are not "clearly 'intertwined' with the Partnership Deed providing for arbitration." *Id.* The "intertwined" standard arises under federal law, and according to the majority, is applicable in a "New York Convention case." *Id. But see id.* at 1172 (Bea, J., dissenting) (outlining intersection between Convention and FAA principles). When Congress statutorily adopted the New York Convention within the provisions of the FAA, it ensured that the FAA "would still apply to actions and proceedings brought pursuant to arbitration agreements covered by the New York Convention, except for any provision . . . that conflicts with the New York Convention." *Id.* Further, the New York Convention "instructs us to apply nonconflicting FAA law 'to actions and proceedings brought under' the New York Convention." *Id.* at 1173. Rather, Justice Bea highlights how the FAA and the Convention are not meant to be applied as distinct doctrines but as concurrent doctrines so that "an arbitration agreement [] otherwise governed by the New York Convention is irrelevant to the choice of law determination for a nonsignatory's equitable estoppel claim." *Id.* at 1774. Instead, Justice Bea asserts he "would hold that claims to compel arbitration under the FAA are governed by the domestic contract law of the relevant state or country, regardless whether the arbitration agreement is primarily governed by the FAA or the New York Convention." *Id.* at 1776.

44. *See Setty*, 3 F.4th at 1669 (showing how majority acknowledged, but did not apply, Supreme Court's holding in *GE Energy*). According to the majority, "following the Supreme Court's decision in *GE Energy*, we accept that a nonsignatory could compel arbitration in a New York Convention case." *Id.* Despite this assertion, the majority held, "that as a factual matter, the allegations here do not implicate the agreement that contained the arbitration clause." *Id.* Using a federal substantive law standard, the Court concludes that "[f]or equitable estoppel to apply, it is 'essential . . . that the subject matter of the dispute [is] intertwined with the contract providing for arbitration.'" *Id.* The federal substantive law standard calling for the subject matter of the dispute to be "intertwined" is a "prerequisite for compelling arbitration." *Id. See also* Evans & Richman, *supra* note 31 (outlining federal substantive law standard applied in *Setty*). In *Setty*, "nonsignatories may have the power to compel arbitration using equitable estoppel . . . based upon the facts of this particular case, the defendant was not able to do so." *Id. But see* Kelley, *supra* note 31 (highlighting potential negative impact from majority's holding in *Setty*). In opposition to the Supreme Court's broad allowance of domestic contract theories to be used by nonsignatories to Convention arbitration agreements, "the Ninth Circuit construed the contracts very narrowly to affirm the district court's finding of insufficient intertwining." *Id.* In fact, "[t]he Ninth Circuit did this even though the Partnership Deed specified how the brothers would interact when running the LLC." *Id.* In general, "in the United States, equitable estoppel usually is the primary arrow in the nonsignatory's quiver. Indeed, this was the common law contract doctrine asserted (and blessed) in *Arthur Anderson* and *GE Power*. As a practical matter, however, the equitable estoppel arrow hits its target only rarely." *Id.* Now, the Ninth Circuit in *Setty* ensures that nonsignatories "cannot invoke the words 'equitable

Justice Bea's dissent criticizes the majority's application of federal substantive law by citing how U.S. precedent makes clear that courts "should not alter the choice of law doctrine established by the Supreme Court" for arbitral agreements governed by the New York Convention.[45] Moreover, the dissent maintains that the majority's conclusion confuses the fact that FAA provisions "are not made inapplicable" by the New York Convention.[46] While previous courts held that the FAA's clause permitting nonsignatories to compel arbitration under traditional contract theory conflicted with the Convention, the Supreme Court has since held that those claims are nonconflicting.[47] Further, Justice

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estoppel' as a key that opens the arbitration door." *Id.* Rather, while "[t]he U.S. lower courts might have to honor the doctrine in theory, [] they appear to require an extraordinary set of facts for its adoption." *Id.*

45. *See Setty*, 3 F.4th at 1171 (Bea, J., dissenting) (disputing whether federal common law should govern SS Mumbai's equitable estoppel claim). Since its holding in *GE Energy*, "[t]he Supreme Court has now ruled that nonsignatories to arbitration agreements governed by the New York Convention are not precluded from compelling arbitration under the FAA." *Id.* Even if the agreement is "otherwise governed by the New York Convention," Justice Bea argues that the Convention "should not alter the choice of law doctrine established by the Supreme Court." *Id.* Further, federal substantive law "does not govern all questions arising under the FAA." *Id.* Instead, in *Arthur Andersen*, the Supreme Court held that "the FAA did not 'alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them).'" *Id. See GE Energy*, 140 S. Ct. at 1645 (providing state and domestic law not altered by Convention). The Supreme Court found "[g]iven that the Convention was drafted against the backdrop of domestic law, it would be unnatural to read [the Convention] to displace domestic doctrines in the absence of exclusionary language." *Id.* Further, the Court held that "the weight of authority from contracting states indicates that the New York Convention does not prohibit the application of domestic law addressing the enforcement of arbitration agreements." *Id.* at 1646.

46. *See Setty*, 3 F.4th at 1173 (Bea, J., dissenting) (asserting FAA not erased by Convention). According to Justice Bea, "state contract law governs equitable estoppel claims even for international arbitration agreements because those claims still rely on the provisions of the FAA, which are not made inapplicable by the New York Convention." *Id.* According to the dissent, domestic contract law should not be ignored, and should not be superseded by federal law, regardless of whether the arbitration agreement falls under the Convention. *Id.*

47. *See id.* (highlighting Supreme Court's loose application of domestic doctrines for foreign nonsignatories). Since *GE Energy*, "nonsignatories to New York Convention-governed arbitration agreements are now authorized to compel arbitration using domestic contract law doctrines." *Id.* The Supreme Court ruled that the Convention does not conflict with the FAA. *Id.* In ruling so, "*GE Energy* merely removed an obstacle that had prevented application of existing FAA doctrine." *Id. See also* Kelley, *supra* note 31 (noting current state of law regarding FAA incorporation of common law doctrines). Even if movants to arbitration agreement litigation never signed the agreement, "courts have interpreted the Federal Arbitration Act as incorporating the full range of common law contract doctrines. A nonsignatory can use those doctrines either offensively or defensively." *Id.*

Bea argues that the majority overemphasizes the Convention's role and that if the parties were not foreign, the "relevant contract law" governing their original partnership would have applied to SS Mumbai's equitable estoppel claim, rather than the Convention.[48] The majority's view is that "settled FAA law should somehow apply differently" to agreements governed by the New York Convention, treating international nonsignatories differently from U.S. nonsignatories.[49]

The application of the Ninth Circuit's holding in *Setty* is likely incompatible with the majority's stated goal of emphasizing "uniformity in the application of international arbitration agreements" because its decision effectively treats equitable estoppel claims brought by domestic arbitration–seekers differently than those made by parties to international agreements.[50] The FAA

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48. *See id.* at 1174 (Bea, J., dissenting) (finding "relevant contract law" governing Setty brothers' partnership agreement "should govern SS Mumbai's equitable estoppel claim."). In *GE Energy*, the Supreme Court highlighted the trend in United States courts to "reinforce[] the idea that [the] New York Convention d[oes] not fundamentally supplant our domestic contract doctrines." *Id.* at 1176. In opposition, the majority treats American parties to arbitration agreements differently than international parties when "they seek justice in the United States." *Id. See also* Arb., Mediation, ADR Prac. Grp. at Mintz Levin, *supra* note 27 (highlighting existing legal landscape for domestic arbitral parties). Currently for domestic arbitration cases, the FAA "permits courts to apply state-law doctrines related to the enforcement of arbitration agreements." *Id. See* Walter D. Kelley Jr., *supra* note 31 (stating courts should rule in favor of arbitration regardless of international circumstances). Frequently, the Supreme Court has "enforce[d] a presumption in favor of arbitration." *Id.* In fact, "[t]his presumption is reflected in *Arthur Andersen* and *GE Power* where the Supreme Court permitted nonsignatories to assert equitable estoppel as a basis for compelling arbitration." *Id.*

49. *See Setty*, 3 F.4th at 1166 (Bea, J., dissenting) (suggesting majority wrongly complicates application of FAA to Convention cases). Although the majority briefly cited uniformity as a reason to apply federal substantive law to Convention cases, "[i]n the interests of uniformity of application of law, [Justice Bea] see[s] no reason to hold that settled FAA law should somehow apply differently to nonsignatories of agreements otherwise governed by the New York Convention." *Id.*

50. *See id.* at 1168 (stating majority's emphasis on uniformity in Convention cases). According to the Ninth Circuit majority, the Convention and "its implementing legislation emphasize the need for uniformity in the application of international arbitration agreements." *Id.* To the majority, uniformity is best served by "applying 'federal substantive law' for which [the court] look[s] to 'ordinary contract and agency principles.'" *Id.* Accordingly, the majority states that to hold otherwise, would "undermine the FAA's goal of simplicity and uniformity." *Id.* at n.1. *But see id.* at 1776 (Bea, J., dissenting) (finding majority's conclusion wrongly punishes international nonsignatories). Justice Bea states, "with confusion the majority's paean to uniformity of application of arbitration law when the rule it advances arbitrarily treats equitable estoppel claims made pursuant to domestic arbitration agreements differently than those made pursuant [to] international agreements." *Id. See* Evans & Richman, *supra* note 31 (finding *Setty* majority indicates nonsignatories could use equitable estoppel claims but refused

and the New York Convention were meant to interact in order to ensure arbitration agreements were upheld as "valid, irrevocable and enforceable."[51] The majority's use of federal substantive law on SS Mumbai's equitable estoppel claim imposes "substantially more onerous conditions" on SS Mumbai's ability to successfully litigate in the United States, contradicting the Convention.[52] Moreover, the Court's emphasis on applying federal substantive law in a case otherwise governed by the Convention muddles the aims of the Convention and current U.S. judicial actions to create international stability and predictability in cases brought under the FAA in the United States.[53]

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claim in instant case). Technically, "the decision in *Setty* indicates . . . that nonsignatories may have the power to compel arbitration using equitable estoppel in the Ninth Circuit." *Id.* Yet, the Court still found that "based upon the facts of this particular case, the defendant was not able to do so." *Id.*

51. *See* Drahozal, *supra* note 26, at 116 (discussing FAA statutory adoption of Convention into United States law). The purpose of the FAA adoption the Convention into U.S. law was to "make international arbitration agreements 'valid, irrevocable, and enforceable' in federal court and state court." *Id. See also* Greenwood, *supra* note 23 (noting importance of Convention and its principles). Currently, "more than 80 percent of the countries in the world are contracting states" to the Convention. *Id.* As such, the "New York convention [is] the most important weapon in an international arbitration practitioner's arsenal." *Id. See also* 9 U.S.C. § 202 (stating policy of Convention). *See also* UNCITRAL, *supra* note 1, at 41 (emphasizing focus of Convention). The Convention "has been interpreted as establishing a presumption that arbitration agreements are valid." *Id.*

52. *See* N.Y. ARB. CONVENTION, *supra* note 23, at 49 (detailing specific requirements of Convention). Under Article III of the Convention, every 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." *Id.* Further, the Convention precludes "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." *Id. See also Setty*, 3 F.4th at 1176 (Bea, J., dissenting) (finding disparate treatment between foreign and domestic nonsignatories will create confusion). In his dissent, Justice Bea mirrors the language of Article III of the Convention that is against applying more difficult conditions on parties governed by the Convention than would be applied to domestic arbitration awards. *Id.* This is evidenced by his fear of courts treating domestic and nondomestic arbitrational agreements differently merely on the basis of whether the Convention applies or not. *Id.* Instead, the Convention permits "courts to rely on domestic law to fill the gaps; it does not set out a comprehensive regime that displaces domestic law." *Id.* at 1176.

53. *See Setty*, 3 F.4th at 1175 (Bea, J., dissenting) (finding uniformity best served by applying Convention and FAA law concurrently). In the interest of uniformity, "any preference that may exist [] *as to the interpretation and enforcement* of the international agreements by their signatories would not be disturbed by the uniform application of FAA law under *Arthur Andersen*." *Id.* Moreover, "a certain amount of nonuniformity comes with the territory" of applying domestic equitable estoppel doctrines in state courts. *Id.* Therefore, Justice Bea argues that SS Mumbai's motion to compel

In *Setty v. Shrinivas Sugandhalaya LLP*, the Ninth Circuit questioned whether SS Mumbai's position as a nonsignatory to an Indian arbitral agreement governed by the New York Convention called for the application of U.S. federal substantive law in analyzing the permissibility of its claim. While the Court was motivated to create uniformity in applying federal law to Convention cases, it failed to consider how its holding would cause the disproportionate judicial analysis of domestic law theories brought by domestic arbitral parties as compared to foreign parties. The Convention was codified under the FAA to ensure U.S. courts would respect and enforce foreign arbitration awards in the same way they respect and enforce domestic awards. Instead of inquiring into whether uniformity is more accomplishable by treating domestic and foreign parties alike when seeking to enforce arbitration agreements in the United States, the majority's decision to apply a federal substantive law standard splits from the aim of the Convention to ensure foreign awards are as judicially enforceable

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arbitration was wrongly denied because, for claims "brought pursuant to the FAA," domestic doctrines are enough to resolve the question of "what law governs a claim by a nonsignatory to compel arbitration using domestic equitable estoppel law permitted by the FAA?" *Id.* at 1176. Now, the majority's holding appears to revert back to U.S. precedent dating before *GE Energy*, where "nonsignatories were barred from using the FAA to compel arbitration if the relevant arbitration agreement was governed by the New York Convention." *Id.* at 1173. The dissent acknowledges that before the Supreme Court remanded *Setty* back to the Ninth Circuit in light of *GE Energy*, the majority was once correct when it held that "because SS Mumbai was a nonsignatory to Balkrishna and Nagraj's Partnership Deed and its arbitration clause, and because the agreement was governed by the New York Convention, SS Mumbai was not entitled to pursue a theory of equitable estoppel that relied on the FAA." *Id.* Yet, times have changed because of *GE Energy*'s distinct holding that nonsignatories could use domestic equitable estoppel doctrines in light of the Convention, which "did not conflict." *Id.* Therefore, the dissent questions how the majority was able to conclude that federal substantive law applies to SS Mumbai's domestic equitable estoppel claim, regardless of whether he is a nonsignatory, or "whether [the] particular contract is governed by the New York Convention or not." *Id.* Further, even if "uniformity is a primary concern for agreements under the New York Convention, it is not so paramount that we should jettison the reasonable choice of law rules handed down by *Arthur Andersen* and *GE Energy*." *Id.* at 1176. The majority overlooks the well-established precedent of applying choice of law rules when it affirmed the district court's motion to compel arbitration. *Id. See* UNCITRAL, *supra* note 1, at 318-19 (emphasizing positive interaction between FAA and Convention). As a result of Congress codifying the Convention into the FAA, "United States courts are required to enforce all foreign arbitral awards, which are governed by the Convention, pursuant to Chapter 2 of the FAA." *Id.* The rationale behind this decision was "to encourage the recognition and enforcement in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Id.* at 319 (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974)).

as domestic awards. To decide whether domestic and equitable claims do not apply to an arbitration agreement merely because it is covered by the Convention fails to create uniformity, leaving interested parties to sophisticated contracts uncertain as to whether their claims may be arbitrated.

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