CHAPTER 30

GE Energy Power Conversion France SAS Corp v. Outokumpu Stainless USA, LLC (2020): Application of U.S. Domestic Arbitration Law to Non-Signatory Enforcement of International Arbitration Agreements, and Other Potential Impacts of Domestic Arbitration Doctrines in International Contexts

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1 Introduction

Because arbitration is rooted in the consent of the parties to arbitrate their disputes, there is a presumption that generally only the signatories to a contract with an arbitration clause are bound by, or may invoke, the agreement to arbitrate.[1] In 2009, the U.S. Supreme Court held that under Chapter 1 of the Federal Arbitration Act ("FAA"), which applies to domestic arbitration agreements, "background principles of state contract law" may govern whether non-signatories have also agreed to arbitrate despite not having signed the contract containing the arbitration agreement.[2] Those principles include "'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.'"[3]

1 This presumption is reflected in the Restatement of U.S. Law of International Commercial and Investor-State Arbitration. *See* Comment a to Restatement Section 2.3 ("Ordinarily, only persons who have formally executed an international arbitration agreement or otherwise expressly assented to it are bound by or may invoke such an agreement.").

2 *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009). The Supreme Court considered whether Chapter 1 of the FAA categorically prohibited "those who are not parties to a written arbitration agreement" from invoking the FAA's provisions under state contract law principles entitling a non-signatory to enforce such agreements. The Supreme Court held that Chapter 1's provisions concerning the validity and enforcement of arbitration agreements did not "alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Id.*

3 *Id.* at 631 (internal citation omitted).

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Until *GE Energy Power Conversion France SAS Corp. v. Outokumpu Stainless USA, LLC*, however, courts of appeals were split over whether those principles also apply to determining whether non-signatories may be considered as having agreed to arbitrate under *international* arbitration agreements. In this 2020 decision, the Supreme Court resolved the split in a unanimous decision authored by Justice Thomas and held that the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), as implemented in Chapter 2 of the FAA, does not preclude a non-signatory from seeking to enforce an international arbitration agreement by invoking common law principles routinely relied on in domestic arbitration proceedings.[4] Under that holding, it is now clear that United States courts will apply domestic law principles to determine questions of who may enforce (and presumably, who is bound by) an agreement to arbitrate beyond its actual signatories, although the Court did not reach the important question of *whose* domestic law should govern that issue.

2 The Case

2.1 *Background of the Case*

The dispute at issue in *GE Energy Power Conversion France SAS Corp. v. Outokumpu Stainless USA, LLC* arose after the motors of an Alabama cold-rolling mill, used to produce stainless steel, failed and allegedly caused substantial damage to the owner. At the time of the incident in the summer of 2015,[5] the mill was owned by Outokumpu Stainless USA, LLC ("Outokumpu"), a U.S. company with a Finnish parent.[6] Eight years earlier, ThyssenKrupp Stainless USA, LLC ("ThyssenKrupp"), the then-owner of the plant, had entered into three contracts with F.L. Industries, Inc. ("F.L. Industries") for the construction of the cold rolling mills at issue.[7] F.L. Industries had in turn entered into a subcontractor agreement with the French company GE Energy Power

4 *See generally*, *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020). The same reasoning would apply to international arbitration agreements governed by the Inter-American Convention on International Commercial Arbitration of 1975 (the "Panama Convention"), implemented in Chapter 3 of the FAA, and throughout this chapter references to the New York Convention should be understood to apply to both the New York Convention and the Panama Convention.

5 *Id.* at 1642.

6 *Id.*

7 *Id.*

Conversion SAS Corporation ("GE Energy"), then known as Converteam SAS, to design, manufacture, and supply the motors of the cold rolling mills.[8]

Each of the contracts between ThyssenKrupp and F.L. Industries contained an identical arbitration clause providing that "[a]ll disputes arising between both parties in connection with or in the performances of the Contract" would be settled by an International Chamber of Commerce ("ICC") arbitration seated in Germany and applying German law.[9] The contracts defined ThyssenKrupp as the "Buyer" and F.L. Industries as the "Seller," and stated that "Buyer and Seller [are] also referred to individually as 'Party' and collectively as 'Parties.'"[10] Critically, the contracts specified that "[w]hen Seller is mentioned it shall be understood as Sub-contractors included, except if expressly stated otherwise."[11] The contracts also imposed a list of mandatory subcontractors, which included Converteam SAS.[12] However, Converteam SAS had never signed any of these contracts.

In the wake of the motor failures, Outokumpu and its insurers asserted tort and warranty claims in Alabama state court against Converteam SAS, now GE Energy, as well as its insurers.[13] GE Energy removed the case to the federal district court and moved to compel arbitration based on Chapter 2 of the FAA.[14] In support, GE Energy argued that Outokumpu's and its insurers' claims were subject to the arbitration agreement contained in the three contracts between ThyssenKrupp and F.L. Industries.[15]

The district court granted GE Energy's motion to compel arbitration. The court ruled that a motion to compel must be granted under Chapter 2 of the FAA "'so long as (1) the four jurisdictional prerequisites [of the New York Convention and Chapter 2] are met and (2) no available affirmative defense under the Convention applies.'"[16] With respect to the first prong, the district court noted that (1) there must be an agreement in writing within the meaning of the New York Convention; (2) the agreement must provide for arbitration in the territory of a signatory of the Convention; (3) the agreement must arise out of a legal relationship, whether contractual or not, which is considered

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8 *Id.*

9 *Outokumpu Stainless USA, LLC v. Converteam SAS*, No. 16-00378-KD-C, 2017 WL 401951, at *2 (S.D. Ala. Jan. 30, 2017) (internal citations omitted).

10 *Id.* at *3–4.

11 *Id.* (internal citations omitted).

12 *Id.* at *1, 4–5.

13 *Id.* at *5.

14 *Id.* at *2.

15 *Id.* at *3–4.

16 *Id.* at *3 (quoting *Suazo v. NCL (Bahamas), Ltd.*, 822 F.3d 543, 546 (11th Cir. 2016)).

commercial; and (4) either a party to the agreement must be a non-American citizen, or the commercial relationship must have some reasonable relation with one or more foreign states.[17]

Outokumpu, in opposing the motion, argued that the term "parties" in the contracts excluded subcontractors such as GE Energy and that, in any event, neither GE Energy nor Outokumpu had signed the contracts.[18] The district court rejected this argument, pointing out that the contract provided that "[w]hen Seller is mentioned it shall be understood as Sub-contractors included, except if expressly stated otherwise," and concluded that GE Energy as a subcontractor qualified as a party to the contract by virtue of the contractual definition of "Seller."[19] Based on this conclusion, the court declined to address the alternative argument GE Energy also sought to raise that it was entitled to enforce the agreement under principles of equitable estoppel, which would allow a non-signatory to enforce an agreement when the signatory must rely on the terms of that agreement to assert its own claims against the non-signatory.

Outokumpu appealed, and the U.S. Court of Appeals for the Eleventh Circuit reversed.[20] The Eleventh Circuit held that GE Energy could not invoke the arbitration agreement because it was not a signatory to the underlying contracts.[21] In so holding, the Eleventh Circuit relied on the four jurisdictional prerequisites for a party to compel arbitration that the lower court had identified, but found that the inquiry ended with the first prerequisite because there was no agreement in writing within the meaning of the New York Convention.[22] The Eleventh Circuit read Article II(2) of the New York Convention – which states that "[t]he 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"[23] – as requiring a signature by the parties or their privies and therefore disagreed with the district court's conclusion that GE Energy qualified as a signatory.[24]

The Eleventh Circuit also addressed and rejected the equitable estoppel argument that the district court had declined to reach. In so doing, the Eleventh Circuit recognized that the U.S. Supreme Court's precedent in *Arthur*

17 *Id.*
18 *Id.* at *5.
19 *Id.* at *4.
20 *See generally Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316 (11th Cir. 2018).
21 *Id.* at 1325–27.
22 *Id.* at 1325.
23 *Id.*
24 *Id.* at 1325–26.

Andersen LLP v. Carlisle[25] made equitable estoppel available under Chapter 1 of the FAA to compel arbitration in domestic settings.[26] The Eleventh Circuit found, however, that "estoppel is only available under Chapter 1 because Chapter 1 does not expressly restrict arbitration to the specific parties to an agreement."[27] The Eleventh Circuit held that, by contrast, Chapter 2 of the FAA requires the application of the New York Convention where there is a conflict with Chapter 1, and the New York Convention expressly requires that the parties have signed an arbitration agreement in order to compel arbitration. This requirement, according to the Eleventh Circuit, prevents the use of equitable estoppel to compel arbitration by a non-signatory under Chapter 2. GE Energy sought *certiorari* review.

2.2 *Issues and the Parties' Allegations before the Supreme Court*

Although equitable estoppel was a secondary issue in the Eleventh Circuit proceedings – and was not addressed at all by the district court – the question that GE Energy presented to the U.S. Supreme Court was "whether the [New York Convention] permits a non-signatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel."[28] Framing the case around that issue permitted GE Energy to point to the existence of a circuit split, usually a critical element for a successful *certiorari* petition. The First and Fourth Circuits had previously held that non-signatories may compel a signatory to arbitrate under the Convention based on the doctrine of equitable estoppel.[29] By contrast, the Ninth Circuit and now the Eleventh Circuit had read the New York Convention's requirement that an agreement to arbitrate be in writing as precluding non-signatories from enforcing an arbitration agreement governed by the New York Convention.[30] GE Energy's strategy worked, and review was granted.

On the merits before the Supreme Court, GE Energy stressed that Chapter 2 of the FAA requires courts to apply Chapter 1 unless doing so would conflict

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25 *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009).

26 *Converteam SAS*, 902 F.3d at 1327 (citing *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009)).

27 *Id.* at 1326–27.

28 Brief of Petitioner at i, *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020) (No. 18–1048) ("Brief of Petitioner").

29 *See generally Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38 (1st Cir. 2008); *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355 (4th Cir. 2012).

30 *See generally Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000); *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996 (9th Cir. 2017); *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F.3d 1316 (11th Cir. 2018).

with Chapter 2 or the New York Convention,[31] and pointed to traditional tools of treaty interpretation to show the absence of any conflict.[32] GE Energy reasoned that Chapter 2 therefore permitted common law contract principles such as equitable estoppel to apply, just as Chapter 1 did.[33]

Outukumpo, by contrast, focused on a textualist argument. It primarily contended that the New York Convention limited the enforcement of arbitration agreements to the "parties" to the agreement, arguing that Article II(3) – read as a whole and together with Article II(1) and Article II(2) – can be understood as authorizing judicial enforcement only when "one of the parties to the written agreement requests enforcement of the agreement."[34] It recognized that within the New York Convention concept of "parties," enforcement by non-signatories through "privity-based" theories like agency, assignment, succession, or alter ego would be consistent with "the . . . consent principle foundational to the Convention."[35] By contrast, it claimed that equitable estoppel was based "on vague, ill-defined concepts of 'equity' and 'fairness.'"[36] In any case, it argued that determining whether equitable estoppel was consistent with this "privity" limitation was unnecessary because German law, as the law of the seat, did not recognize the estoppel doctrine.[37]

The issue before the Court garnered significant interest from the legal community, and specifically international arbitration practitioners, as demonstrated by the submission of nearly 10 *amicus curiae* briefs. The United States asked the Court to reverse the "categorical" rule adopted by the Eleventh Circuit barring the application of *all* domestic law contract and agency principles to determine whether a non-signatory may enforce a valid arbitration agreement.[38] Rather, since the New York Convention does not purport to define who might be deemed a "party" to an arbitration agreement, the United States argued that the question of whether someone could enforce or be bound by an arbitration agreement should generally be determined by the consent of the

31 Brief of Petitioner at 28–35 (citing 9 U.S.C. § 208, which provides that Chapter 1 "applies 'to the extent that chapter is not in conflict with [Chapter 2] or the Convention.'").

32 *Id.* at 36–44.

33 *Id.* at 23–28.

34 Brief of Respondent at 15, *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020) (No. 18–1048) ("Brief of Respondent").

35 *Id.* at 2.

36 *Id.*; *see also id.* at 44–45.

37 *Id.* at 39–40.

38 Brief for the United States as *Amicus Curiae* Supporting Petitioner, *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020) (No. 18–1048) ("U.S. Brief").

relevant persons.[39] As a gloss on this view, the United States warned that binding a non-signatory *sovereign* to an arbitration agreement would raise "special concerns" arising from principles of sovereign immunity.[40]

Columbia Law School Professor George Bermann, along with other Reporters and Advisers to the Restatement of the U.S. Law of International Commercial and Investor-State Arbitration, provided further bases for the proposition that the New York Convention permits non-signatories to be bound by or to enforce international arbitration agreements.[41] In particular, the *amici* posited that the Eleventh Circuit interpretation of the New York Convention, and in particular Article II(2), overlooked the post-ratification understanding of the New York Convention by its Contracting States. *Amici* pointed to a UNCITRAL 2006 recommendation which had clarified that Article II(2) was not an exhaustive statement of the agreements meant to be covered by the New York Convention, and suggested that Article VII(1) – allowing a party to rely on a more favorable domestic law to enforce an arbitration award – also applied to the enforcement of arbitration agreements.[42] *Amici* further noted that whereas the Restatement recognized the general rule that parties must expressly consent to arbitration, the Restatement also recognized exceptions based on implied *and*, in some instances, imputed consent.[43]

2.3 *The Supreme Court's Opinion*

In a unanimous opinion by Justice Thomas, the U.S. Supreme Court resolved the circuit split regarding the application of state law principles to determine whether non-signatories may be bound by or invoke arbitration agreements.[44] The Court accepted GE Energy's narrow framing of the issue as being

39 *Id.* at 31–35.

40 *Id.* at 32–34 (citing to non-arbitration precedents in which equitable estoppel and third-party beneficiary theories were held not to apply when asserted against the United States). Because of these concerns, the U.S. argued that doctrines such as equitable estoppel and third-party beneficiary status should *not* provide a basis to compel arbitration against a sovereign absent a clear expression of consent. *GE Power* obviously did not involve a foreign sovereign, but the United States clearly wished to signal the Court to be careful in the way it framed its decision to avoid later misunderstanding on this point.

41 *See generally* Brief of *Amici Curiae* Professor George A. Bermann, R. Doak Bishop, Professor Andrea A. Bjorklund, Douglas Earl McLaren, Professor Alan S. Rau, Professor W. Michael Reisman and John M. Townsend, *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020) (No. 18–1048).

42 *Id.*

43 *Id.* at 34.

44 *See generally GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020).

whether the New York Convention conflicts with domestic equitable estoppel doctrines.[45] It held that the New York Convention does not preclude a non-signatory – in this case, GE Energy – from seeking to enforce an international arbitration agreement by invoking state law principles routinely relied on in domestic arbitration proceedings.[46] The Court applied familiar tools of treaty interpretation and reasoned that the silence of the New York Convention on whether non-signatories may enforce arbitration agreements under domestic doctrines was dispositive of the issue.[47]

At the outset, the Court explained that the question before the Court could be resolved by determining whether the doctrine of equitable estoppel "'conflict[ed] with . . . the Convention,'"[48] noting that Section 208 of the FAA provides that "'Chapter 1 applies to actions and proceedings brought under this chapter [Chapter 2] to the extent that [Chapter 1] is not in conflict with this chapter or the Convention.'"[49] Based on this framing of the inquiry, the Court looked to "familiar tools of treaty interpretation" and concluded that the text of the New York Convention did "not address whether non-signatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel."[50]

The Court first determined that Article II(3) is the only provision to address the enforcement of arbitration agreements and found that while Article II(3) requires courts of Convention States to enforce written arbitration agreements at the request of a party, it does not expressly preclude the application of domestic law principles that are more generous in enforcing arbitration agreements in other circumstances.[51] In support of this textualist reading of Article II(3), the Court pointed out that the New York Convention was drafted against the backdrop of domestic law and contemplated that there would be a place for domestic law in international arbitration.[52] As a result, the Court explained that it would be unnatural to displace domestic law doctrines absent explicit exclusionary language.[53] Examining Article II(3), the Court concluded that the provision did not contain any such exclusionary language and that instead, the provision left many concepts undefined – such as disputes "'capable of

45 *Id.* at 1642.
46 *Id.* at 1642.
47 *Id.* at 1645.
48 *Id.* at 1644–45 (citing 9 U.S.C. § 208).
49 *Id.* at 1644 (citing 9 U.S.C. § 206).
50 *Id.* at 1645.
51 *Id.*
52 *Id.*
53 *Id.*

settlement by arbitration'" or agreements "null and void, inoperative or incapable of being performed" – thereby requiring courts to rely on domestic law to fill the gaps.[54]

This textual analysis was reinforced by the Court's consideration of the New York Convention's context.[55] The Court concluded that the drafting history showed that the drafters only sought to impose baseline requirements on State parties and did not suggest that the New York Convention drafters sought to prevent Contracting States from applying domestic law.[56] As to the post-ratification understanding of other Contracting States, as evidenced by their court decisions, and their post-ratification conduct, the Court found again that these aids merely indicated that the New York Convention does not prohibit the application of domestic law addressing the enforcement of arbitration agreements.[57] In particular, the Court pointed out that numerous Contracting States permit enforcement of arbitration agreements by non-signatories and noted that, consistent with such view, a recommendation issued by the United Nations Commission on International Trade Law had adopted a non-exclusive interpretation of the requirement in Article II(2) that the agreement be signed.[58] Consistent with the "originalist" views of its author in other contexts, the Court's opinion downplayed the weight to be given to these sources because they dated from decades after the New York Convention's finalization and therefore did not reflect the "original shared understanding of the treaty's meaning."[59] It nonetheless noted that they "confirm our interpretation of the Convention's text."[60]

Based, therefore, on both the text and States parties' understanding of the New York Convention, the Court concluded that the Eleventh Circuit had erred. Critically, the Court of Appeals had failed to distinguish between Articles II(1) and II(2), which deal with "the recognition of arbitration agreements," and Article II(3), which alone "speaks to who may request" arbitration, and does not prohibit the application of domestic law in answering the latter question. Noting that the Court of Appeals had not reached the issue of whether GE Energy could actually enforce the arbitration clauses under principles of equitable estoppel under domestic law, or "which body of law governs that

54 *Id.* (citation omitted).
55 *Id.* at 1645–46.
56 *Id.*
57 *Id.* at 1656–47.
58 *Id.*
59 *Id.*
60 *Id.* at 1647.

determination," the Supreme Court remanded for the lower courts to address these issues.[61]

In a concurrence, Justice Sotomayor emphasized that, in all cases, the application of state law principles to permit non-signatories to enforce arbitration agreements was subject to the "important limitation" that such "domestic doctrines must be rooted in the principle of consent to arbitrate" which "governs the FAA on the whole."[62] Acknowledging the lack of any "bright-line test for determining whether a particular domestic non-signatory doctrine reflects consent to arbitrate," Justice Sotomayor advised lower courts that they "must . . . determine, on a case-by-case basis, whether applying a domestic non-signatory doctrine would violate the FAA's inherent consent restriction."[63]

On remand, the district court again did not address whether Outokumpu could be compelled to arbitrate on equitable estoppel grounds. Instead, largely following its initial decision, it held that "GE Energy is a defined party covered by the arbitration clause" such that "Outokumpu simply agreed to arbitrate with GE Energy per the contract's plain terms."[64]

3 Critical Analysis

The Supreme Court's opinion in *GE Energy* is important but narrow, and it leaves many issues undecided, and indeed unaddressed. The decision clearly holds that under U.S. law there is no distinction between domestic arbitration agreements governed by Chapter 1 of the FAA and international arbitration agreements governed by the New York Convention in Chapter 2 of the FAA in terms of *who* may enforce them, and that domestic contract law principles may be invoked in either situation by parties seeking enforcement. The opinion, however, leaves at least two key questions unanswered.

First, while domestic law is clearly available to decide who may enforce an agreement to arbitrate, the Court's opinion is absolutely silent about which jurisdiction's domestic law should govern this question. In particular, while there are references throughout its opinion to domestic law, and less frequently to "state law," as gap-fillers in deciding questions of *who* can enforce arbitration agreements, there is no reference to *which* state's domestic law should apply;

61 *Id.* at 1648.

62 *Id.* at 1648–49.

63 *Id.* at 1649.

64 *Outokumpu Stainless USA, LLC v. GE Energy Power Conversion Fr. SAS, Corp.*, No. 1:16-cv-00378-KD-C, 2022 WL 2643936, at *3 (S.D. Ala. Jul. 8, 2022).

indeed, the Supreme Court's opinion does not even mention the seat of the arbitration, the governing law of the contracts, or *lex arbitri*, although these sources of law would be likely relevant to this unanswered question. *A fortiori* there is no discussion of whether it is the *lex arbitri* or the substantive law governing the contract in which the arbitration agreement is contained, or some other law in the place where the relevant conduct may have occurred, that should govern the "who can enforce" question.

This lack of guidance is especially striking because it is far from clear that equitable estoppel, an essentially common law concept, even exists under German law, which would seem to have been the most likely domestic law to govern the issue of non-signatory enforcement under the facts of *GE Energy*. The Supreme Court was clear that nothing in the FAA or New York Convention precludes a non-signatory from enforcing an arbitration agreement, but there is no reason to think that U.S. law would otherwise play any role in deciding the underlying question of whether, or under what circumstances, a non-signatory can enforce an arbitration agreement in any particular case.[65]

Second, the Supreme Court did not discuss whether there is any difference between who may *enforce* an arbitration agreement, and who is bound by it. The issue in *GE Energy* was only the former, not the latter. It would seem that the Court would expect "domestic law" to provide the answer as to who is bound by an arbitration agreement, but there may conceivably be differences in what that answer is, depending on the domestic law that governs. As Justice Sotomayor's concurrence emphasized, the notion of consent underpins all U.S. arbitration law, and the same is true of most if not all other domestic legal systems. It may be conceptually easier to find that a non-signatory can enforce an agreement to arbitrate against someone who clearly signed it and thereby consented to arbitrate, than to require a non-signatory to arbitrate based on someone else's consent.

What if, for example, the relevant domestic law required a non-signatory to arbitrate based on a ground that did not satisfy U.S. notions of consent, and the U.S. court were asked to compel arbitration on that foreign domestic law ground? The logic of *GE Energy* suggests that if the governing domestic law indeed requires arbitration under these circumstances, nothing in the FAA or New York Convention would permit the U.S. court to refuse to order it. Nonetheless, one can imagine a court feeling uneasy about compelling a non-consenting non-signatory to arbitrate in such a case. Like other situations

65 Indeed, U.S. courts only entered the picture in *GE Energy* because an action was brought in the United States on claims that the defendant asserted were covered by an arbitration agreement.

left unaddressed by *GE Energy*, the law on this fact pattern, if it ever emerges, would require further development.

4 Conclusion

GE Energy definitively holds as a matter of U.S. law that there is nothing in the New York Convention or Chapter 2 of the FAA implementing it that precludes resorting to principles of domestic law to determine who may enforce an international arbitration agreement in United States courts. However, the Supreme Court did not address which domestic law applies or how that question is to be answered. In short, on the non-signatory enforcement issue itself, it is a narrow opinion leaving much to be explored by future decisions.

Interestingly, though, *GE Energy* is already being applied to answer other questions of interpretation of Chapter 2 of the FAA and its interplay with Chapter 1. In *Day v. Orrick, Herrington & Sutcliffe LLP*, for example, it was invoked by the Ninth Circuit in a case where an arbitrator in an international arbitration seated in Washington, D.C. issued a non-party subpoena to a witness in California under Section 7 of the FAA, which is part of Chapter 1. In rejecting the non-party's challenge to the subject matter jurisdiction of the California federal district court to enforce the subpoena, the Ninth Circuit relied on the Supreme Court's reasoning in *GE Energy* that "rejected the notion that the New York Convention must list every 'judicial tool' for it to 'fall under the Convention,'" and concluded that "[n]either the Convention nor Chapter 2 contains any language excluding the use of petitions to enforce arbitral summonses."[66] In another decision, *Corporación AIC, SA v. Hidroeléctrica Santa Rita S.A.*, the Court of Appeals for the Eleventh Circuit recently reversed its prior precedent and joined the Second, Third, Fifth, Sixth, Ninth, Tenth, and D.C. Circuits in finding that the grounds for vacatur under Chapter 1 of the FAA may also apply to non-domestic awards (that is, arbitration awards with a seat in the United States but involving a non-U.S. party).[67] The Eleventh Circuit reached this conclusion "based on the Supreme Court's discussion in [*GE Energy v.*] *Outokumpu* and the New York Convention's binary framework," holding that "the primary jurisdiction's domestic law acts as a gap-filler that provides the vacatur grounds for an arbitral award."[68]

66 *Day v. Orrick, Herrington & Sutcliffe, LLP*, 42 F.4th 1131, 1135–36 (9th Cir. 2022).
67 *Corporación AIC, SA v. Hidroeléctrica Santa Rita S.A.*, 66 F.4th 876, 886 (11th Cir. 2023).
68 *Id.*

GE Energy is thus being read to reinforce the idea that both the U.S. domestic procedures of Chapter 1 of the FAA, and more important, relevant substantive domestic arbitration law principles, must be applied by U.S. courts in international/non-domestic arbitrations, unless there is an explicit conflict between those principles and the New York Convention. *GE Energy* leaves open the question of *how* the relevant domestic arbitration law principles should be chosen but makes clear that it should be domestic law principles that fill in the gaps where procedural or substantive provisions of the New York Convention are silent.