FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALEED KHALID ABU AL-WALEED AL HOOD AL-QARQANI; AHMED KHALID ABU AL-WALEED AL HOOD AL-QARQANI; SHAHA KHALID ABU AL-WALEED AL HOOD AL-QARQANI; NAOUM AL-DOHA KHALID ABU AL-WALEED AL HOOD AL-QARQANI; NISREEN MUSTAFA JAWAD ZIKRI, *Petitioners-Appellants*, v. CHEVRON CORPORATION; CHEVRON USA INC., *Respondents-Appellees.*	No. 19-17074 D.C. No. 4:18-cv-03297-JSW OPINION

Appeal from the United States District Court
for the Northern District of California
Jeffrey S. White, District Judge, Presiding

Argued and Submitted October 19, 2020
San Francisco, California

Filed August 12, 2021

Before: Sidney R. Thomas, Chief Judge, and Paul J. Kelly, Jr.[*] and Eric D. Miller, Circuit Judges.

Opinion by Judge Miller

SUMMARY[**]

Arbitration

Affirming the district court's judgment on a petition for enforcement of a foreign arbitral award against Chevon Corporation, the panel held that the parties did not enter into a binding agreement to arbitrate, and enforcement under the New York Convention therefore should be denied.

In 1949, the government of Saudi Arabia transferred land to an official, who leased it to an affiliate of what later became Chevron. The official's heirs claimed that Chevron owed them rent. They contended that an arbitration clause contained in a separate 1933 land concession agreement between Saudi Arabia and Chevron's predecessor, Standard Oil Company of California, applied to their dispute. An Egyptian arbitral panel agreed and awarded them $18 billion. The district court found that the parties had never agreed to arbitrate and therefore held that it lacked jurisdiction over the heirs' petition for enforcement of the award.

[*] The Honorable Paul J. Kelly, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

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

The panel held that under Fed. R. App. P. 3(c)(1)(A), the five heirs named in the notice of appeal were the only proper appellants.

Agreeing with the Second Circuit, and disagreeing with the Eleventh Circuit, the panel held that the absence of an agreement to arbitrate was a reason to deny enforcement on the merits, rather than to dismiss for lack of subject-matter jurisdiction. The panel held that so long as a party makes a non-frivolous claim that an arbitral award is covered by the New York Convention, the district court must assume subject-matter jurisdiction.

The panel held that as to respondent Chevron USA, Inc., which was not named in the Egyptian arbitral award, the heirs advanced no non-frivolous theory of enforcement. The panel therefore affirmed the district court's dismissal for lack of subject-matter jurisdiction as to Chevron USA.

The panel held that as to Chevron Corporation, the district court correctly concluded that there was no binding agreement to arbitrate between the parties. First, the heirs could not enforce the 1933 concession agreement against Chevron directly because the agreement was signed by Saudi Arabia, not the heirs, and Chevron's rights and obligations under the 1933 agreement were extinguished long ago. Second, the 1949 deed did not incorporate by reference the arbitration clause contained in the 1933 agreement. The panel held that the proper disposition was not dismissal but denial of the enforcement petition on the merits. Nonetheless, because there was no reason to remand to the district court simply to direct it to affix a new label to its order, the panel affirmed the district court's judgment.

COUNSEL

Edward C. Chung (argued), Chung Malhas & Mantel PLLC, Seattle, Washington, for Petitioners-Appellants.

Thomas G. Hungar (argued), Gibson Dunn & Crutcher LLP, Washington, D.C.; Charles J. Stevens and Stephen Henrick, Gibson Dunn & Crutcher LLP, San Francisco, California; Randy M. Mastro, Anne Champion, and Akiva Shapiro, Gibson Dunn & Crutcher LLP, New York, New York; Christian Leathley and Scott Balber, Herbert Smith Freehills New York LLP, New York, New York; for Respondents-Appellees.

OPINION

MILLER, Circuit Judge:

In 1949, the government of Saudi Arabia transferred certain land in that country to an official named Khalid Abu Al-Waleed Al-Hood Al-Qarqani, who leased it to an affiliate of what later became Chevron Corporation. Five of Al-Qarqani's heirs now claim that Chevron owes them billions of dollars in rent. The heirs contend that an arbitration clause contained in a separate 1933 agreement between Saudi Arabia and Chevron's predecessor, Standard Oil Company of California (SOCAL), applies to their dispute. An Egyptian arbitral panel agreed and awarded them $18 billion. The heirs petitioned for enforcement of that award, but the district court found that the parties had never agreed to arbitrate and therefore held that it lacked jurisdiction over the petition. We agree with the district court that the parties did not enter into a binding agreement to arbitrate. Although the absence of an agreement is a reason to deny enforcement

on the merits rather than to dismiss the petition for lack of subject-matter jurisdiction, the practical effect in this case is the same. We therefore affirm.

In 1933, SOCAL and the government of Saudi Arabia entered a land concession agreement for oil exploration and extraction. Article 25 of the agreement authorized SOCAL "to obtain from the owner of the land the surface rights of the lands which the Company deems necessary for use in its works." In return, SOCAL would pay Saudi Arabia an annual rent and a portion of its proceeds and "pay to the occupant of the lands an allowance."

The 1933 concession agreement contained an arbitration clause. Specifically, article 31 required Saudi Arabia and SOCAL to arbitrate "any doubt, difficulty or difference . . . in interpreting th[e] Agreement, the execution thereof or the interpretation or execution of any of it or with regard to any matter that is related to it or the rights of either of the two parties or the consequences thereof." The clause provided that any arbitration would take place in the Hague, unless the parties agreed on a different location, and it prescribed certain procedures for the appointment of arbitrators.

Later that year, SOCAL assigned its rights under the concession agreement to a wholly owned subsidiary, California Arabian Standard Oil Company, which later became Arabian American Oil Company (Aramco). A few years later, SOCAL surrendered its majority ownership interest in that subsidiary; by 1948, SOCAL was a minority shareholder owning only 30 percent of Aramco.

The next year, Saudi Arabia transferred the ownership of certain plots of land to Al-Qarqani and others. The 1949 deed transferring the land also contained a lease agreement between Al-Qarqani, the other land recipients, and Aramco

that "transfer[red] . . . to [Aramco]," for "good and valuable consideration," "the right to use and occupy" the land "for the purposes of the Saudi Arabian Concession." It further provided "that the rights of [Aramco], as to using and occupying the said Plots of Land, are based on the requirements of Article (25) of the said Concession." The 1949 deed did not mention the arbitration clause of the 1933 concession agreement.

In the 1970s and 1980s, Saudi Arabia nationalized Aramco, and in 1990, Aramco was dissolved. In the meantime, SOCAL changed its name to Chevron Corporation.

In 2014, several of Al-Qarqani's heirs initiated arbitration proceedings against Chevron before the International Arbitration Center (IAC) in Cairo, claiming rents due under the 1949 deed. Chevron objected that it was not a party to the relevant contracts, that there was no valid agreement to arbitrate, and that the 1933 concession agreement upon which the heirs relied did not authorize IAC arbitration in Cairo. Despite those objections, the arbitration proceeded. Soon thereafter, Chevron stopped participating in the arbitration, citing a series of irregularities in the composition of the arbitral panel. The proceedings continued in Chevron's absence, but the irregularities persisted. For example, the IAC cycled through five arbitrators and two umpires over the course of one year. And after the initial arbitral panel dismissed the dispute, the panel was reformulated and the dismissal withdrawn. A new arbitral panel then issued an award ordering Chevron to pay the heirs $18 billion.

The heirs petitioned to enforce the award in the Northern District of California, naming as respondents both Chevron Corporation and Chevron U.S.A. Inc. They invoked the

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, commonly known as the New York Convention. The Convention aims "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). Soon after the United States joined the Convention, Congress provided that the Convention "shall be enforced in United States courts." 9 U.S.C. § 201. When an arbitrator enters an award that is subject to the Convention, any party may apply to a federal district court "for an order confirming the award as against any other party to the arbitration." *Id.* § 207.

The district court dismissed the petition for lack of subject-matter jurisdiction. The court reasoned that one of "the Convention's jurisdictional requirements" is that "there is an 'arbitration agreement under the terms of the Convention.'" (quoting *Bothell v. Hitachi Zosen Corp.*, 97 F. Supp. 2d 1048, 1053 (W.D. Wash. 2000)). Emphasizing that "[t]he original agreement to arbitrate occurred between third parties, not the current parties before this Court," the court stated that "[p]etitioners make no persuasive or legally coherent argument that the parties . . . are legally obligated by the third party signatories to the original agreement." In addition, the court dismissed the petition as to Chevron U.S.A. because that entity "was not a named . . . party in the arbitration proceedings."

The district court went on to explain "that numerous procedural infirmities would independently preclude confirmation of the arbitral award." For example, the court

noted that the heirs had "failed to produce a duly certified copy of the arbitration award." The court further determined that the arbitral proceedings did not comply with article 31 of the 1933 agreement because, among other things, the heirs "unilaterally brought their arbitration before the IAC and seated the tribunal in Cairo instead of Holland," in violation of "the explicit contractual terms of the arbitration provision." And the court found that "the constitution of the arbitral panel was highly irregular and appears to have been engineered to produce a result" in the heirs' favor.

The heirs now appeal. Or do they? The petition to enforce the arbitral award listed several dozen individuals as petitioners, but the notice of appeal names only five of them, along with the "Heirs of Khalid Abu al-Waleed al-Hood al-Qarqani," a group whose members the notice of appeal does not identify. Federal Rule of Appellate Procedure 3(c)(1)(A) requires that a notice of appeal "specify the party or parties taking the appeal." The omission of a party from the notice of appeal "constitutes a failure of that party to appeal" and means that the court of appeals lacks jurisdiction over that party. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314 (1988); *see Gonzalez v. Thaler*, 565 U.S. 134, 147–48 (2012). To be sure, Rule 3 "does not require that the individual names of the appealing parties be listed in instances in which a generic term, such as plaintiffs or defendants, adequately identifies them." *National Ctr. for Immigrants' Rts., Inc. v. INS*, 892 F.2d 814, 816 (9th Cir. 1989) (per curiam). But the term "heirs" is not sufficiently definite to "give[] fair notice of the specific individual or entity seeking to appeal." *Torres*, 487 U.S. at 318. We conclude that only the five named individuals have appealed the district court's order. (For simplicity, we will continue to refer to them as "the heirs."). Those individuals are identified in the caption of this opinion, and the clerk is

directed to revise the docket to reflect that they are the only appellants.

For those appellants who are properly before us, we begin by considering the district court's conclusion that it lacked subject-matter jurisdiction. The district court was correct that the existence of a binding agreement to arbitrate is a prerequisite to enforcing an arbitration award under the New York Convention. The Convention's implementing legislation provides that a court presented with a petition to confirm an arbitral award "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the . . . Convention." 9 U.S.C. § 207. If there is no binding agreement to arbitrate, then at least two such grounds will apply.

First, article II of the Convention provides that signatory states will "recognize an agreement in writing under which the parties undertake to submit [claims] to arbitration." N.Y. Convention art. II(1). The term "agreement" includes "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." *Id.* art. II(2). And article IV provides that a party seeking to enforce an arbitral award must produce "[t]he original agreement referred to in article II or a duly certified copy thereof." *Id.* art. IV(1)(b); *see China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 292 (3d Cir. 2003) (Alito, J., concurring). Accordingly, without an agreement to arbitrate, the Convention does not provide for enforcement.

Second, article V of the Convention bars enforcement of an award if the underlying arbitration agreement is invalid or the dispute is not arbitrable under the law of the country in which enforcement is sought. N.Y. Convention art.

V(1)(a), (2)(a). In the United States, "[a]rbitration is strictly 'a matter of consent'" and requires an agreement to arbitrate. *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287, 299 (2010) (quoting *Volt Info. Scis., Inc. v. Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). Thus, in the absence of an arbitration agreement that binds the parties, the dispute "is not capable of settlement by arbitration under" United States law, and the award is unenforceable. *See VRG Linhas Aereas S.A. v. MatlinPatterson Glob. Opportunities Partners II L.P.*, 717 F.3d 322, 325 (2d Cir. 2013) (quoting N.Y. Convention art. V(2)(a)).

Because of the Convention's "mandatory language," the Eleventh Circuit has held "that the party seeking confirmation of an award falling under the Convention must" establish the existence of a written agreement to arbitrate "to establish the district court's subject matter jurisdiction." *Czarina, LLC v. W.F. Poe Syndicate*, 358 F.3d 1286, 1292 (11th Cir. 2004); *see also Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666, 669 (5th Cir. 1994). The Second Circuit has rejected that view, reasoning that the existence of a written agreement to arbitrate is a merits question that does not affect subject-matter jurisdiction. *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 660 & n.2 (2d Cir. 2005).

We agree with the Second Circuit. It does not follow that simply because a statute uses mandatory language, it limits the subject-matter jurisdiction of a district court. The Supreme Court has "rejected the notion that all mandatory prescriptions, however emphatic, are properly typed jurisdictional." *V.L. v. E.L.*, 577 U.S. 404, 409 (2016) (per curiam) (quoting *Gonzalez*, 565 U.S. at 146). Instead, the Court has cautioned that only when Congress "clearly states

that a threshold limitation on a statute's scope shall count as jurisdictional" should it be treated as such. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006). Conversely, "when Congress does not rank a statutory limitation . . . as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Id.* at 516; *see also Garcia v. Salvation Army*, 918 F.3d 997, 1006 (9th Cir. 2019).

The requirement that a binding arbitration agreement exist is not jurisdictional because it is not contained in or incorporated by any statute "clearly labeled jurisdictional" or "located in a jurisdiction-granting provision." *Garcia*, 918 F.3d at 1006 (quoting *Leeson v. Transamerica Disability Income Plan*, 671 F.3d 969, 976–77 (9th Cir. 2012)). The operative jurisdictional provision is 9 U.S.C. § 203, which covers any "action or proceeding falling under the Convention." Under 9 U.S.C. § 202, an arbitration award "falls under the Convention" if it is one "arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or [arbitration] agreement." *See Ministry of Def. of the Islamic Republic of Iran v. Gould Inc.*, 887 F.2d 1357, 1362 (9th Cir. 1989).

In the abstract, sections 202 and 203 could be read to mean that a dispute does not "aris[e] out of a legal relationship"—and therefore is not one "falling under the Convention"—if the parties have not entered into a binding agreement to arbitrate. But the phrase "arising out of" parallels the more familiar grant of federal-question jurisdiction in 28 U.S.C. § 1331, and we think that the two provisions should be read similarly. Section 1331 extends to civil actions "arising under" federal law, and it has long been understood that a claim can arise under federal law even if a court ultimately concludes that federal law does not provide

a cause of action. *Bell v. Hood*, 327 U.S. 678, 682–83 (1946). Thus, "the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction," at least so long as the asserted federal claim is neither "immaterial and made solely for the purpose of obtaining jurisdiction" nor "wholly insubstantial and frivolous." *Id.*; *accord Leeson*, 671 F.3d at 975; *Trustees of Screen Actors Guild–Producers Pension & Health Plans v. NYCA, Inc.*, 572 F.3d 771, 775 (9th Cir. 2009).

The same principle applies here. Neither section 202 nor section 203 requires a court to assess an award against the Convention's requirements before exercising jurisdiction. Instead, so long as a party makes a non-frivolous claim that an arbitral award is covered by the Convention, the court "must assume subject matter jurisdiction and hear the merits of the case." *Sarhank*, 404 F.3d at 660. If the court concludes that the award is not covered, the appropriate disposition is to deny enforcement, not to dismiss the petition for lack of subject-matter jurisdiction.

Although the requirement of a non-frivolous claim is a low bar, the heirs have managed to clear it only in part. In particular, as to Chevron U.S.A., the heirs have advanced no non-frivolous theory of enforcement. Chevron U.S.A. is not named in the arbitral award the heirs seek to enforce. *See* 9 U.S.C. § 207 (authorizing petitions to confirm awards "as against any other party to the arbitration"). Although the heirs make a vague reference to an "alter ego," they have not attempted to demonstrate that Chevron U.S.A. is Chevron Corporation's alter ego or that there is any other basis for enforcing the award against Chevron U.S.A. Accordingly, we affirm the district court's dismissal for lack of subject-matter jurisdiction as to Chevron U.S.A. *See Bell*, 327 U.S. at 682–83; *cf. Al-Qarqani v. Arabian Am. Oil Co.*, No. H-18-

1807, 2019 WL 3536640, at *4 (S.D. Tex. Aug. 2, 2019) (dismissing petition as to Aramco Services in parallel litigation for lack of subject-matter jurisdiction because "there is no arbitral finding that [Aramco Services] is liable").

By contrast, the heirs' claim that the award arose out of a legal relationship or arbitration agreement with Chevron Corporation is not frivolous. But as we will explain, it is also not meritorious. We review de novo the district court's decision to deny enforcement of the arbitral award, *Polimaster Ltd. v. RAE Sys., Inc.*, 623 F.3d 832, 836 (9th Cir. 2010), and we review its factual findings for clear error, *Stover v. Experian Holdings, Inc.*, 978 F.3d 1082, 1085 (9th Cir. 2020). We agree with the district court that there was no binding agreement to arbitrate between the parties. We therefore need not consider the alternative grounds identified by the district court for denying enforcement, including the serious irregularities in the arbitral proceedings.

The heirs have advanced two theories of why they may invoke the arbitration clause contained in the 1933 concession agreement between Saudi Arabia and SOCAL. First, the heirs contend that they can enforce the 1933 concession agreement against Chevron directly. This theory fails because the agreement was signed by Saudi Arabia, not the heirs, and the heirs have not demonstrated that they may assert Saudi Arabia's interest in it. *See Britton v. Co-Op Banking Grp.*, 4 F.3d 742, 744 (9th Cir. 1993) ("An entity that is neither a party to nor agent for nor beneficiary of the contract lacks standing to compel arbitration."). To be sure, the lands at issue were the subject of the 1933 concession agreement, and Al-Qarqani received a partial ownership interest in some of those lands. But there is no evidence that the partial transfer of ownership rights carried with it the

right to enforce the arbitration clause of the 1933 concession agreement. Nor is there evidence that Saudi Arabia assigned its rights under the 1933 concession agreement to Al-Qarqani or the heirs. *See id.* at 746.

Even if the heirs could establish a right to enforce the arbitration clause, the district court did not clearly err in finding that Chevron's rights and obligations under the 1933 concession agreement were extinguished long ago. Chevron's predecessor, SOCAL, was a signatory to the 1933 agreement. But by the time Al-Qarqani obtained any interest in the lands, SOCAL had assigned its rights and obligations to California Arabian Standard Oil Company (which later became Aramco) and relinquished control of Aramco. SOCAL therefore was no longer bound by the 1933 agreement, so the heirs cannot enforce the agreement's arbitration clause against Chevron.

The heirs object that Chevron has not produced a formal document memorializing the assignment to Aramco. "[G]eneral contract principles dictate that to prove an effective assignment, the assignee must come forth with evidence that the assignor meant to assign rights and obligations under the contract[]." *Britton*, 4 F.3d at 746. But while "[a] contract provision specifying [an assignment] is evidence of such an intent," *id.*, it is not the only evidence capable of demonstrating an assignment. Here, the district court's finding of an assignment is supported by contemporaneous company records, as well as the sworn declaration of one of the petitioners below.

Second, the heirs contend that the 1949 deed, which contained the lease agreement between Al-Qarqani and Aramco, incorporated the 1933 concession agreement's arbitration clause by reference. The parties dispute what law governs our analysis of that issue: Chevron invokes federal

common law, while the heirs say that Saudi law applies. We need not decide the choice-of-law question because the heirs' theory fails whichever law applies. *See Andersen v. Bureau of Indian Affs.*, 764 F.2d 1344, 1349 n.4 (9th Cir. 1985). Chevron is not bound by the 1949 deed because it was not a party to the deed and it did not control Aramco when the deed was executed. And in any event, as the district court noted, the 1949 deed's only reference to the 1933 concession agreement "is a notation that the transfer of rights under the 1949 Deed '[is] based on the requirements of Article (25) of the . . . Concession Agreement[,]' which authorized Aramco to acquire the 'surface rights of the lands which the Company deems necessary for use.'" Accordingly, the 1949 deed does not incorporate by reference the arbitration clause contained in the 1933 agreement. *See Cariaga v. Local No. 1184 Laborers Int'l Union*, 154 F.3d 1072, 1075 (9th Cir. 1998); Royal Decree No. M/34 (Law of Arbitration), 16 Apr. 2012, art. 9, § 3 (Kingdom of Saudi Arabia); 11 Williston on Contracts § 30:25 (4th ed. 2021).

Finally, we reject the heirs' contention that Chevron is precluded from resisting enforcement of the award because it did not first appeal to the arbitral tribunal or move to vacate the award. The heirs rely on rules applicable to certain domestic arbitrations under the Federal Arbitration Act. *See* 9 U.S.C. § 12; *Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 v. Celotex Corp.*, 708 F.2d 488, 490 (9th Cir. 1983). But neither the New York Convention nor its implementing statute contains such a rule.

We conclude that the district court reached the correct result but, with respect to Chevron Corporation, incorrectly attached a jurisdictional label to what should have been a decision on the merits. The Supreme Court has held that we may affirm a district court's judgment if the court mistakenly

dismisses a claim for lack of subject-matter jurisdiction rather than for failure to state a claim—remand in those circumstances is "unnecessary" because it "would only require a new Rule 12(b)(6) label for the same Rule 12(b)(1) conclusion." *Morrison v. National Austl. Bank Ltd.*, 561 U.S. 247, 254 (2010); *accord Seismic Reservoir 2020, Inc. v. Paulsson*, 785 F.3d 330, 332 (9th Cir. 2015). Here, the proper disposition is not a dismissal under Rule 12(b)(6) but a denial of the enforcement petition on the merits. *See TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 940 (D.C. Cir. 2007). Because there is no reason to remand to the district court simply to direct it to affix a new label to its order, we affirm the judgment.

All pending motions are denied as moot.

AFFIRMED.