No. 18-1048

IN THE

Supreme Court of the United States

GE ENERGY POWER CONVERSION FRANCE SAS, CORP., A FOREIGN CORPORATION FORMERLY KNOWN AS CONVERTEAM SAS,

Petitioner,

v.

OUTOKUMPU STAINLESS USA, LLC, *ET AL.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

Amanda K. Rice
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226

Sara Anne Ford
Wesley B. Gilchrist
Amie A. Vague
LIGHTFOOT, FRANKLIN & WHITE, L.L.C.
The Clark Building
400 North 20th Street
Birmingham, AL 35203

Shay Dvoretzky
Counsel of Record
Jeffrey R. Johnson
Caroline Edsall Littleton
Benjamin J. Cassady
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Petitioner

QUESTION PRESENTED

Whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") permits a non-signatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TREATIES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

This case asks whether the New York Convention "permits a non-signatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel." Pet. i. Respondents do not dispute that the answer is "yes," unless there is a "conflict" between the Convention and equitable estoppel. 9 U.S.C. § 208.

As GE Energy showed in its Opening Brief, there is no conflict. The Convention says what Contracting States "shall" do with arbitration agreements. But it does not say that they shall do *only* those things—or that they shall *not* do other things. Nothing in the Convention prohibits Contracting States from applying domestic doctrines like equitable estoppel that allow non-signatories to arbitrate. That understanding matches the Convention's structure, which sets a floor—not a ceiling—on what Contracting States can do to promote arbitration. It also tracks the views of other Contracting States, the Executive Branch, and the bulk of authoritative scholarship, not to mention the strong federal and international policy favoring arbitration.

GE Energy also explained the flaws in the decision below, which held that only persons who actually sign arbitration agreements can enforce them. That holding was based on a misunderstanding about the Convention's reference to an "agreement in writing." It also leads to absurd consequences. Non-signatories enforce (or are bound by) arbitration agreements all the time, for all kinds of reasons: Companies must adhere to agreements signed by their agents; assignees may enforce agreements signed by assignors; and alter egos and successors are routinely permitted or

compelled to arbitrate. A rule limiting arbitration to signatories would disrupt that well-settled law.

Respondents do not defend the Eleventh Circuit's rule. Instead, they would *allow* non-signatories to enforce arbitration agreements—but only consistent with a so-called "consent principle." Resp. Br. 2, 38. The origin and contours of that "principle" are mysterious. But as best as GE Energy can tell, it allows for nearly every non-signatory enforcement doctrine, in every Contracting State—except, conveniently enough, the particular form of equitable estoppel applicable here. *See id.* at 39-42, 44-47.

Respondents' consent rule has no textual basis. And the notion that other non-signatory enforcement doctrines involve consent—but this one form of equitable estoppel does not—is hard to swallow. On the one hand, Respondents seem to think that an individual compelled to arbitrate on a veil-piercing or alter ego theory consented to arbitration. On the other, they find consent lacking here even though the Contracts defined GE Energy as a party and Respondents sued GE Energy over its contract performance.

Respondents also try to dodge the question presented by insisting that German law—which they claim does not recognize equitable estoppel—controls arbitrability here. But the Eleventh Circuit never decided whether equitable estoppel applies to this case, or which body of law governs that question. It held that the Convention conflicts with that doctrine categorically. Once this Court reverses that ruling, Respondents may press their (forfeited, meritless) claims about German law on remand.

ARGUMENT

I. THE CONVENTION DOES NOT CONFLICT WITH EQUITABLE ESTOPPEL.

Respondents do not dispute that the Court should answer the Question Presented in GE Energy's favor unless they show that the Convention "conflict[s]" with equitable estoppel. 9 U.S.C. § 208. They have not shown that. The Convention does not speak to non-signatory enforcement, leaving Contracting States free to enforce arbitration agreements consistent with their domestic laws. That is unsurprising: Like many treaties, the Convention does not bar signatory nations from doing more than what it strictly requires.

A. The Convention Does Not Restrict Enforcement By Non-signatories.

1. Nothing in the Convention bars Contracting States from applying domestic doctrines that allow non-signatories to enforce arbitration agreements. Proving that negative is simpler in this case than most. Search Respondents' brief for a citation to the part of the Convention saying that *only* signatories can enforce arbitration agreements, that non-signatories *cannot* enforce them, or that Contracting States *shall not* apply domestic doctrines that support broader enforcement than the Convention requires. Better yet, read the Convention itself. (It's shorter.) You will find nothing there that conflicts with equitable estoppel.

Closely examining Article II—the only part of the Convention that speaks directly to enforcing arbitration agreements—supports that conclusion. Article II

contains three subsections. The first says that Contracting States "shall recognize" written arbitration agreements; the second says that such agreements "shall include" certain forms; and the third says that courts "shall" compel arbitration "at the request of one of the parties."

"Shall" does not mean "shall only." That is true in everyday language. "A direction to a teenage son that he 'shall' clean his room does not thereby forbid him from taking out the trash, walking the dog, or going to school." *FTC v. Tarriff*, 584 F.3d 1088, 1091 (D.C. Cir. 2009). It is also true of statutes. *See, e.g.*, *Marx v. General Revenue Corp.*, 568 U.S. 371, 384 (2013) (Congress "could have easily ... us[ed] the word 'only'" if it meant to); *see also* 2A Sutherland Statutory Construction § 47:25 (Oct. 2019 update) (statutes generally are not interpreted to "mean that anything not required is forbidden").

Indeed, *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009), suggested that Chapter 1 might have barred equitable estoppel "if § 3 mandated stays *only* for disputes between parties to a written arbitration agreement." *Id.* at 631 (emphasis added). "But that is not what [Chapter 1] says." *Id.* And it is not what the Convention says, either. Moreover, as explained below, the case for interpreting "shall" to mean "shall" (without implying an "only") is even stronger for treaties than for statutes. *See infra* 8-9.

2. Respondents gesture at all three parts of Article II in arguing that the Convention does conflict with equitable estoppel. None bears that reading.

a. Respondents first rely on Article II(1) and (2). Those provisions say that "Contracting State[s] shall

recognize an agreement in writing under which the parties undertake to submit to arbitration," and then define "agreement in writing" to "include" signed agreements. Respondents argue that these provisions show that the Convention contains a "minimum form" requirement that bars Contracting States from enforcing unwritten or unsigned agreements. *See* Resp. Br. 21-33.

To begin, any question about a "minimum form" requirement is not presented here. These Contracts were sealed with a signature, not a handshake. *See* JA183 (Contract). So there is no dispute that this case involves an "agreement in writing" under the Convention. Article II(1) and (2) say nothing about who may *enforce* such an agreement once it exists.

In any event, these provisions do "not establish a minimum form requirement, from which Contracting States may not derogate by adopting more lenient form requirements." 1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION § 5.02[A][2][e] (2d ed. 2014) ("Born"). Again, Article II(1) says only that Contracting States "*shall recognize* an agreement in writing." (emphasis added). It does not say that they *shall only* recognize written agreements (or that they *shall not* recognize other kinds of agreements). Thus, the Convention does not preclude Contracting States from enforcing agreements that do not qualify as "agreements in writing."

But even if a written agreement were required, a signature is not. For one thing, Article II(2) defines "agreement in writing" to include two kinds of unsigned agreements: those "contained in an exchange of letters" and those "contained in an exchange of ... telegrams." For another, the definition, which uses

the phrase "include," does not purport to be exhaustive, as authoritative commentators and foreign courts agree (despite some differences among the Convention's various translations). *See* UNCITRAL Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2006) ("UNCITRAL, 2006 Recommendation") (Article II(2) should "be applied recognizing that the circumstances described therein are not exhaustive"); RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION § 2.4 cmt. b & note b (AM. LAW INST. 2019) ("The Restatement … regards Article II(2)'s list of writings as illustrating, not exhausting, the documentation that meets the Convention's requirements[.]"). Then-Judge Alito's concurrence in *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 292-94 (3d Cir. 2003) is not to the contrary. That case involved two purported signatories, *id.* at 277 (majority op.), and the panel acknowledged that "estoppel principles" can apply in Convention cases, *id.* at 285 & n.11.

b. Respondents also rely on Article II(3), which provides that "[t]he 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 ...." That provision does not conflict with equitable estoppel either.

First, like the rest of Article II, Article II(3) says only what Contracting States "shall" do—not what they "shall *only*" or "shall *not*" do. *See supra* 3-4. It does not prohibit courts from enforcing arbitration

agreements in other appropriate contexts, including *sua sponte* or at a non-party's request.

Second, the operative iteration of "parties" in Article II(3) refers to the parties in a court case, not the parties to the agreement. That is a natural way to read that provision, given its focus on courts. Contrary to Respondents' assertion, *see* Resp. Br. 12, GE Energy has never argued otherwise: Although GE Energy has maintained that "parties" in Article II(2)—the only provision on which the Eleventh Circuit relied—refers to parties to the agreement, it has acknowledged that "other parts of the Convention"—including Article II(3)—"may well use the term 'parties' in a different sense, including to refer to litigants before a court." Opening Br. 52-53.

Third, even if "party" means "party to the agreement," the Convention nowhere specifies how Contracting States should determine who counts. Like many other concepts in the Convention—including "null and void, inoperative or incapable of being performed," N.Y. Conv., art. II(3)—"party" is undefined. The Convention assumes that Contracting States will apply domestic law (and the relevant agreements) to identify the "parties." *See* Opening Br. 30-31; *infra* 8-9. Equitable estoppel is just one of many doctrines on which U.S. courts rely to determine when persons who did not sign an agreement should still be deemed parties. *See infra* 20-21.

* * *

The Court need not go further. The Convention says nothing that precludes non-signatory enforcement or otherwise conflicts with equitable estoppel. That answers the question presented.

B. The Convention Creates a Floor, Not a Ceiling.

That answer fits with the Convention's broader design. In particular, the Convention sets minimum requirements for enforcing arbitration agreements and arbitral awards; it does not prevent Contracting States from treating such agreements and awards even more favorably. That understanding matches background principles of treaty interpretation; the Convention's text; the understanding of other Contracting States, the Executive Branch, and most scholars; and the federal and international policy favoring arbitration.

1. It is no small thing for a sovereign nation to surrender its inherent power to enforce its own laws. For that reason, when a treaty is intended to derogate sovereign authority, it generally contains a "plain statement of … preemptive intent." *Societe Nationale Industriele Aerospatiale v. U.S. Dist. Ct. for S.D. Iowa*, 482 U.S. 522, 539 (1987); *cf. Medellin v. Texas*, 552 U.S. 491, 517 (2008) ("Given that ICJ judgments may interfere with state procedural rules, one would expect the ratifying parties … to have clearly stated their intent to give those judgments domestic effect, if they had so intended."). Relatedly, treaties generally "do not spell out details as precisely as other documents." Alex Glashausser, *What We Must Never Forget When It Is A Treaty We Are Expounding*, 73 U. CIN. L.R. 1243, 1302 (2005). Instead, "treaties by necessity often contain broad and general terms and leave the details of implementation to be worked out by each country internally." Curtis A. Bradley, *Bond, Clear Statement Requirements, and Political Process*, 108 AJIL UNBOUND 83, 83 (2014).

The upshot of these principles is that, as long as the signatories agree to abide by a treaty's minimum standards, they can rely on their own laws to interpret ambiguous terms or go beyond what the treaty requires. The Berne Convention for the Protection of Literacy and Artistic Works is a good example. It "prescribes only minimum requirements: member countries are free to grant more extensive protection." 7 PATRY ON COPYRIGHT § 23:41 (Sept. 2019 update); *see also Golan v. Holder*, 565 U.S. 302, 308 (2012). Likewise, the Convention on International Trade in Endangered Species of Wild Fauna and Flora is "a floor, not a ceiling, for protection of [covered] species." *Safari Club Int'l v. Zinke*, 878 F.3d 316, 321 (D.C. Cir. 2017); *see also, e.g.*, *Societe Nationale*, 482 U.S. at 538 (the Hague Evidence Convention "does not prevent a contracting state from using more liberal methods of rendering evidence"); *Andrus v. Allard*, 444 U.S. 51, 63 n.18 (1979) (the Migratory Bird Conventions "establish minimum protections for wildlife; Congress could and did go further").

2. The "remarkably short" New York Convention works the same way. MARIKE R.P. PAULSSON, THE 1958 NEW YORK CONVENTION IN ACTION § 1.01 (2016). Article II's three sentences do not purport to preempt the entire field of international arbitration or prohibit Contracting States from taking additional steps to promote arbitration. *See supra* 7. Indeed, the Convention assumes that, even when it speaks to an issue—like its command to enforce "agreements in writing"—Contracting States will apply their domestic laws to determine the details, like which "subject matter" are "capable of settlement by arbitration," which

agreements are "null and void," and, most relevant here, who qualifies as a "party."

Article VII makes the floor-not-ceiling principle explicit as to the enforcement of arbitral awards. *See* N.Y. Conv., art. VII(1) ("The ... Convention shall not ... deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."). To be sure, Article VII does not mention arbitration agreements. But as Respondents' preferred treatise explains, "[i]t is almost undisputed" that Article VII applies to them. NEW YORK CONVENTION: CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS OF 10 JUNE 1958; COMMENTARY, art. VII ¶ 45 (Reinmar Wolff ed., 2012); *see also* UNCITRAL, 2006 Recommendation; ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, at 86-88 (1981); Born, § 1.04[A][1][c][ii].

The initial plan was to make Article II (about arbitration agreements) part of a separate protocol; the decision to include it in the Convention came "late in the Conference," "[i]n the then prevailing atmosphere of haste." *1958 Report of the U.S. Delegation to the United Nations Conference on International Commercial Arbitration*, 19 AM. REV. INT'L ARB. 91, 107 (2008). Indeed, only on the final day did a Netherlands delegate propose rewording Article V(1)(a) to reference Article II. *U.N. Conference on International Commercial Arbitration, Summary Record of the Twenty-Fourth Meeting*, at 2, 7, U.N. Doc. E/Conf.26/SR.24 (Sept. 12, 1958). The drafters then simply failed to update Article VII, Article I, or even *the title of the Convention*, all of which refer only to awards.

Even if Article VII does not itself cover arbitration agreements, it does not purport to strip Contracting States' authority to enforce those agreements under domestic law. After all, if Article VII's reference to awards implied the opposite rule for agreements, surely someone would have said so—in the Convention itself, during the drafting process, or even in later commentaries. But Respondents fail to cite a *single source* that understands Article VII's omission of "agreements" that way. *See* Resp.Br. 17-18.

3. To the contrary, other Contracting States, the Executive Branch, and most scholars agree that the Convention allows Contracting States to apply more favorable domestic law. Respondents' efforts to chip away at this consensus only confirm its force.

a. Other Contracting States, whose "opinions" are "entitled to considerable weight," *Abbott v. Abbott*, 560 U.S. 1, 16 (2010), nearly uniformly regard the Convention as a floor, not a ceiling. That understanding underlies both UNCITRAL's 2006 Recommendation and the 2019 Restatement. *See* UNCITRAL 2006 Recommendation; RESTATEMENT § 2.3(b)(2) & cmts. a & c. Despite Respondents' efforts to undermine those authorities, see Resp. Br. 35-36 & n.8, they are nothing to sneeze at. UNCITRAL is a U.N. body tasked with promoting and implementing the Convention; a Commission with delegates from 48 Contracting States adopted UNCITRAL's 2006 Recommendation. UNCITRAL, Rep. on the Work of Its Thirty-Ninth Session ¶¶ 4-5, 181 & Annex II, U.N. Doc. A/61/17 (2006). And the 2019 Restatement, whose Reporter and Advisors filed an amicus brief in support of GE Energy here, *see* Bermann Br. 1-3, is a recent, expert synthesis of controlling law.

That consensus is borne out in many foreign decisions applying pro-arbitration domestic doctrines, including those that allow non-signatories to enforce arbitration agreements. *See* Opening Br. 33, 39-42, 47-48; Bermann Br. 23-30; S.G. Br. 26-28; Chamber Br. 27-29; Miami Int'l Arb. Soc'y Br. 7 & n.2, 9-13. At least one of those cases, *The Titan Unity*, [2014] SGHCR 4 (Feb. 4, 2014), expressly endorsed U.S. equitable estoppel doctrine, which "exists to prevent a litigant from unfairly receiving the benefit of a contract while at the same time repudiating ... the contractual arbitration provision." *Id.* ¶ 30 (quoting *S. Ill. Beverage, Inc. v. Hansen Beverage Co.*, No. 07-CV-391-DRK, 2007 WL 3046273, at *11 (S.D. Ill. Oct. 15, 2007)). And many others "reached comparable results to those provided under most forms of estoppel by different avenues," such as by invoking principles of "good faith, abuse of right, or *venire contra factum proprium*." Born, § 10.02[K].

Respondents and their amici identify just *one* foreign case, from a trial court in British Columbia, that even arguably limits arbitration to signatories. *See Javor v. Francoeur*, 2003 BCSC 350 (2003). That result—which was affirmed on appeal in a "surprising" and "very brief judgment"—has been roundly criticized. *See* Henri C. Alvarez, *Autonomy of International Arbitration Process*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 119, 132-33 (Loukas A. Mistelis & Julian David Mathew Lew eds., 2006). And British Columbia courts have declined to follow it, relying instead on "international arbitration law in this jurisdiction and elsewhere" showing that "non-signatories have been held to be bound by arbitration agreements in various ways," including "estoppel." *CE Int'l*

Res. Holdings LLC v. Yeap Soon Sit, 2013 BCSC 1804, ¶¶ 24-35; *accord. Northwestpharmacy.com Inc. v. Yates*, 2017 BCSC 1572, ¶¶ 53-59 ("Having sought the benefits of the arbitration clause, the plaintiff should not be able to escape the burdens.").

Javor is the exception that proves the rule. None of Respondents' other cases holds that the Convention bars non-signatory enforcement under governing domestic law. *See* Resp. Br. 16, 37-38. In each, courts simply found that domestic standards for non-signatory enforcement were not satisfied.[1]

---

[1] *See, e.g., IMC Aviation Sols. Pty. Ltd. v. Altain Khuder LLC AS*, [Supreme Court of Victoria Court of Appeal (Australia)], Aug. 22, 2011, VSCA 248, ¶¶ 273-76, 288-93, 297 (finding that a non-signatory was not a party under Mongolian law); *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Gov't of Pak.*, [U.K. Supreme Court], Nov. 3, 2010, 2010 UKSC 46, ¶¶ 2, 11, 132, 148-49 (explaining that French law requires a "common intention" to be bound and finding no such intention); *Judgement of Aug. 19, 2008*, [Federal Tribunal of Switzerland, First Civil Law Division], Aug. 19, 2008, 4A_128/200, ¶¶ 3.2, 4.1.1.-.2 (explaining that Swiss law "recognize[s] that an arbitration agreement may bind even those who did not sign it," but finding that principle inapplicable); *Peterson Farms Inc. v. C&M Farming Ltd.*, [England Wales High Court], Feb. 4, 2004, EWHC 121, ¶¶ 62-68 (finding that a non-signatory could not establish a viable non-signatory theory under Arkansas or English law); *Hussmann (Eur.) Ltd. v. Al Ameen Dev. & Trade Co.*, [English High Court], Apr. 19, 2000, EWHC 210, ¶¶ 15, 19-20 (finding that the assignment at issue was invalid under Saudi Arabian law); *Glencore Grain Ltd. (UK) v. Sociedad Ibérica de Molturación, S.A.* [Supreme Court of Spain], Jan. 14, 2003, Case No. 16508/2003, 2005 Y.B. Comm. Arb., Vol. XXX, at 606-09 (finding no agreement to arbitrate "based on … communications and conduct"); *Concerie Est Parteio SpA - CEP (Italy) v. James Garnar & Sons Ltd. (UK), Corte di Apello* [Court of Appeal of Salerno (Italy)],

"[V]ariation among signatory states"—over non-signatory enforcement and other things—comports with the Convention's floor-not-ceiling nature. Chamber Br. 29. Just as the Convention does not forbid Contracting States from allowing non-signatories to enforce or be bound by arbitration agreements, neither does it require Contracting States to do so. Indeed, the Convention expressly contemplates divergent outcomes of that sort. Article V, for example, provides that a Contracting State may decline to enforce arbitral awards that concern a subject matter "not capable of settlement by arbitration under the law of that country" or that are "contrary to the public policy of that country." N.Y. Conv., art. V(2)(a)-(b). It follows that the courts of one nation may occasionally decline to enforce awards lawfully obtained under the laws of another. *See* Resp. Br. 51-52. But that is a feature of the Convention, not a bug.

b. The United States also understands the Convention to allow Contracting States to apply pro-arbitration domestic doctrines generally, and equitable estoppel specifically. *See* SG Br. 21-22. Its views would be entitled to substantial deference even if its perspective had evolved. *See Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184 n.10 (1982) (according "great weight" to the State Department's interpretation of a treaty, "[h]owever ambiguous [its] position may have been previously"). But Respondents' claim that the Executive Branch "expressed the opposite" position "at the time of the Convention's adoption," Resp. Br. 33, is meritless.

Dec. 31, 1990, 1996 Y.B. Comm. Arb., Vol. XXI, at 577-79 (finding that a non-signatory had not established assignment).

Respondents identify several ratification-era quotes emphasizing the voluntary nature of arbitration. *Id.* at 33-34. But none of those snippets addresses non-signatory enforcement. And none reflects an understanding that the Convention prevents U.S. courts from applying more favorable domestic law to determine whether a voluntary agreement exists and who may enforce it. To the contrary, the Executive Branch appears to have understood at ratification what it argues now: that the Convention creates a floor, not a ceiling, for enforcing arbitration agreements. *See, e.g.*, S. Exec. Rep. No. 90-10, at 7-8 (1968) (statement of Richard D. Kearney) (explaining that the domestic FAA "already provides more with respect to disputes in foreign and interstate commerce than is required under this convention").

c. Most scholars agree. *See* Opening Br. 33-35; Bermann Br. 31-33. Respondents quote Born's treatise for the proposition that scholars interpret the Convention as setting a ceiling in one specific respect—*i.e.*, that the "'agreement in writing' requirement specifies an irreducible 'minimum form' that 'supersedes national laws purporting to give effect to international arbitration agreements based on lesser form requirements.'" Resp. Br. 21 (quoting Born, § 5.02[A][2][e]). They don't quote what Born says next—that "despite" the authorities on which Respondents rely, the "weight of well-reasoned commentary" supports *GE Energy*'s position. Born, § 5.02[A](2)(e). "[A]n interpretation of Article II(2) as imposing a minimum form requirement is impossible to reconcile with either the text ... or the basic purposes of the Convention." *Id.*

Regardless, the "minimum form" point—on which there is some limited scholarly disagreement—does not help Respondents. Again, this case indisputably involves a written agreement. *See supra* 5. And there is an "overwhelming consensus of leading scholars" that, once a written agreement exists, nothing in the Convention prevents non-signatories from enforcing it. Bermann Br. 33.

4. Interpreting the Convention as setting a floor not a ceiling also best serves the "emphatic federal policy" favoring arbitration, which "applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). More important, it accords with the Convention's own "objects and purposes." *Abbott*, 560 U.S. at 20. Those include, first and foremost, promoting arbitration. *See* Opening Br. 6-11 (describing the problems the Convention was designed to solve); *see also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) ("The goal of the Convention ... was to encourage the recognition and enforcement of commercial arbitration agreements[.]"). The Convention's text reflects that goal throughout. *See generally* N.Y. Conv., arts. II-III.

Of course, "unify[ing] the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries" was also among the Convention's goals. *Scherk*, 417 U.S. at 520 n.15. But the Convention sought uniformity in the same sense many treaties do—uniformity on minimum standards, not maximum ones. *See supra* 8-9. The Convention meant to ensure that arbitration agreements and arbitral awards that satisfy those standards would be predictably and reliably enforced

despite local hostility to arbitration. *See* Opening Br. 7-8; SG Br. 22-24. But—as even Respondents concede as to arbitral awards, *see* Resp. Br. 18—it was never meant to prohibit Contracting States from doing more to promote arbitration.

II. RESPONDENTS' ATEXTUAL, UNWORKABLE CONSENT RULE DOES NOT HELP THEM.

Without addressing the arguments above, the Eleventh Circuit held that only signatories can enforce arbitration agreements covered by the Convention. Respondents do not defend that holding, and they offer no coherent alternative. Their consent-based line lacks any basis in the Convention's text and is both over- and underinclusive. And even if there were such a line, this case falls on the right side of it.

A. The Eleventh Circuit held that the Convention conflicts with equitable estoppel because, in its view, Article II(2)'s definition of "agreement in writing" "require[s] that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration." Pet.App. 15a (emphasis in original). It is hard to fault Respondents for abandoning that position. As Respondents acknowledge, even "Outokumpu itself did not literally sign the arbitration agreement here, but became party to the agreement by consensually succeeding to the obligations of ThyssenKrupp." *Id.* at 38. In fact, ThyssenKrupp did not "literally sign" it either: Dr. Michael Rademacher and Michael Lutter signed on ThyssenKrupp's behalf. JA183 (Contract). And no one thinks a rule limiting arbitration to those individuals makes any sense. Still, at least the Eleventh Circuit tried to ground its rule in the Convention's text.

B. The same cannot be said for Respondents. Rather than locate a "conflict" in any particular provision, they read Article II, "as a whole," to limit enforcement to the "parties" to an agreement. Resp. Br. 15-16. Then, relying on a "consent principle," Respondents seem to define "parties" to encompass all manner of non-signatories. *See id.* at 38. For example, Respondents appear to concede that the Convention allows application of "[s]uch familiar legal doctrines as agency, assignment, succession, and alter ego." *Id.* They even allow for "a narrow form of traditional estoppel," under which an individual or entity is found to have "manifest[ed] an intent to arbitrate against another even absent contractual agreement to do so." *Id.* at 39-42 (emphases omitted). Yet Respondents' consent-based rule stops just short of covering the equitable estoppel theory on which GE Energy relies. *See id.* at 44-49. According to Respondents, that kind of equitable estoppel differs from every other non-signatory enforcement doctrine (both in the United States and abroad) because it alone "involve[s] no form of consent to arbitrate with the non-party." *Id.* at 46.

1. Respondents' "consent principle" has no textual basis. The only time the Convention uses the word "consent" is in addressing ratification procedures. *See* N.Y. Conv., art. X(3). And Respondents' concessions about other non-signatory enforcement doctrines make any possible text-based rule—including one based on signatures or party status—a non-starter.

Respondents try to ground their principle in scattered statements in the Convention's drafting history about the voluntariness of arbitration. *See* Resp. Br. 23-26. But *none* of those statements addresses the

question here: whether the Convention forbids applying domestic law to determine whether non-signatories can compel arbitration. And "generalization[s]," as opposed to "statement[s] focused specifically upon the issue here," cannot carry the day. *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 227 (1996).

2. Moreover, the atextual "consent principle" on which Respondents' gerrymander relies is both over- and underinclusive.

a. On the one hand, consent does not underlie many of the doctrines Respondents endorse. Take piercing the corporate veil. It is "difficult to identify any element of consent" in a doctrine used to bypass corporate formalities created to *prevent* one entity from being forced to assume the obligations of another. Bernard Hanotiau, *Consent to Arbitration: Do We Share a Common Vision?*, 27 ARB. INT'L 539, 543 (2011). The same goes for alter ego. That doctrine is based not on consent, but "on the finding of a virtual abandonment of separateness ... such that adhering to separateness would promote fraud and injustice." *Id.*; *see also* Stavros Brekoulakis*, Parties in Commercial Arbitration: Consent v. Commercial Reality*, at 144, *in* THE EVOLUTION AND FUTURE OF INTERNATIONAL COMMERCIAL ARBITRATION 144 (Stavros Brekoulakis et al. eds., 2016).

The same is arguably true of assignment and succession. Those doctrines are sometimes justified on grounds of "presumed consent," but "in most civil law systems, the transmission of the arbitration agreement with the assignment of a right [under the broader contract] is quasi-automatic, without an analysis of the parties' consent." Hanotiau, 27 ARBITRATION INT'L at 541. "[T]he concept of consent that we

normally use to test whether two signatories have agreed to arbitrate" never comes into play. Brekoulakis, *supra*, at 150; *see also* Juan Marcos Otazu, *The Law Applicable to Veil Piercing in International Arbitration*, 5 MCGILL J. OF DISP. RESOL. 30, 35 (2018-2019) ("[V]eil piercing (alter ego), estoppel, apparent authority, and succession are non-consensual theories.").

b. On the other hand, equitable estoppel *does* involve consent—both doctrinally and on the facts here.

Equitable estoppel recognizes that, where fairness dictates, consent to arbitrate can be inferred from conduct. *See Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354, 361-62 (2d Cir. 2008) ("[C]onsent need not always be expressed in a formal contract made with the party demanding arbitration[.]"). The doctrine "precludes a party from asserting rights he otherwise would have had against another when *his own conduct* renders assertion of those rights contrary to equity." *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (emphasis added) (internal quotation marks omitted). In such cases, "[t]he circumstances of the parties' relationship will be seen as 'tantamount' to an agreement" to arbitrate, "notwithstanding that traditional formalities may be absent or unclear." William W. Park, *Non-Signatories and International Contracts: An Arbitrator's Dilemma*, *in* MULTIPLE PARTIES IN INTERNATIONAL ARBITRATION ¶ 1.45 (2009). Consent-by-conduct is especially obvious when signatory plaintiffs sue non-signatory defendants on claims intertwined with the contract: "Not only have such plaintiffs decided the theories on which to sue the non-signatory, they also have consented to arbitrate the

claims against the signatory defendant anyway." *Molecular Analytical Sys. Inc. v. Ciphergen Biosystems, Inc.*, 111 Cal. Rptr. 3d 876, 894 (Cal. Ct. App. 2010) (internal quotation marks and alterations omitted).

This case proves the point. Even before entering the Contracts, Outokumpu met with GE Energy to discuss plans for the project. D.Ct.Dkt. 38-3 at 2-6 (Meeting Minutes). In the Contracts themselves, Outokumpu listed GE Energy as one of its mandatory subcontractors. JA184-85 (Annex A3, § 2.2 & table). And, as a subcontractor, GE Energy was defined as a "party" to the Contracts themselves. Pet. App. 3a-4a, 42a-45a; JA81, 89, 171. As the District Court found, that should have been enough to render GE Energy a "party" to the agreement—and to establish Outokumpu's consent to arbitrate with GE Energy. Pet. App. 42a-45a.

And that's only the half of it. Outokumpu sued a signatory (Fives), alleging that Fives and GE Energy had breached the Contracts and arguing that "any subcontractors of [Fives] are defined as 'sellers' and, therefore, are parties to the Contracts." D.Ct.Dkt. 38-1 at 13 (Exhibit A); *see also* JA38-54 (Fives Compl.). It then filed this separate suit against GE Energy, challenging GE Energy's performance under the Contracts. *See* JA22-37 (Compl.); JA192-216 (Am. Compl.). If an alter ego "consents" just because it "derogat[ed] ... corporate separation formalities," Resp. Br. 38, surely Outokumpu consented here.

III. GERMAN LAW IS NOT PROPERLY BEFORE THIS COURT.

Finally, Respondents spend six pages arguing about German law. *See* Resp. Br. 53-59. That argument presents, at most, a question for remand. It is also both forfeited and wrong.

A. The Eleventh Circuit never addressed whether GE Energy prevails under the doctrine of equitable estoppel, or which body of law controls that question. Once the court held that the Convention "require[s] that the parties *actually sign* an agreement ... in order to compel arbitration," Pet.App.15a (emphasis in original), there was nothing left for it to decide. With non-signatory enforcement off the table, neither the facts of this case nor the controlling law made any difference.

In the wake of that categorical ruling, GE Energy asked this Court "[w]hether the Convention ... permits a non-signatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel." Pet. i. Respondents argued that this case would be a poor vehicle for resolving that question because German law—which they say does not recognize that doctrine—might control arbitrability. *See* BIO 13-16. But as GE Energy noted, that is a question for remand. *See* Cert. Reply 6-9. If this Court holds that there is no conflict between the Convention and equitable estoppel, the Eleventh Circuit can decide whether GE Energy may rely on that doctrine, and which body of law applies to that question. That is what happened in *Arthur Andersen*. *See* 556 U.S. at 632 (holding that Chapter 1 does not conflict with equitable estoppel, and leaving for remand the questions whether "the relevant state contract law recognizes

equitable estoppel" and "whether petitioners would be entitled to relief under it"). And that is what should happen here. *See* Resp. Br. 58 (acknowledging that the Court could remand this issue).

B. In any event, Respondents forfeited any argument that German law governs arbitrability. They never pressed that point in the District Court. On appeal, the Insurer Respondents affirmatively argued that *Alabama law* controls, and Outokumpu raised German law only in reply. *See* BIO 15-16 & n.8. Even at the cert stage, Respondents never affirmatively endorsed German law. *See id.* at 3 ("[W]hether equitable estoppel can apply *may* be a question of German law[."] (emphasis added)). It is too late for them to make that argument now. *See, e.g., Fruge v. Amerisure Mut. Ins. Co.*, 663 F.3d 743, 747 (5th Cir. 2011) (a party waives choice-of-law arguments by failing to present them to the district court); *InterGen N.V. v. Grina*, 344 F.3d 134, 143 & n.4 (1st Cir. 2003) (applying federal common law to assess non-signatory issues where no one "ha[d] suggested" foreign law applied).

C. Respondents' newfound preference for German law is misguided anyway. First, "the better view, generally adopted by U.S. lower courts, remains that federal common law should govern issues of alter ego, agency, estoppel, and the like." Born, § 10.05[A]; *see also id.* at § 4.04[A][2][j][iv] ("The better-reasoned decisions of U.S. courts ... apply … federal common law ... to questions of formation and validity of international arbitration agreements[.]"); *Invista S.a.r.l. v. Rhodia, S.A.*, 625 F.3d 75, 84-85 (3d Cir. 2010) (reciting federal-common law standards governing non-signatory issues). Second, even if German law applies, Respondents seem to recognize that German courts allow non-

signatories to enforce arbitration agreements in some contexts. *See* Resp. Br. 42-43, 58. Particularly given GE Energy's status as a "party" to the Contracts, its entitlement to arbitrate under German law is, at the least, an open question that this Court should not resolve in the first instance.

CONCLUSION

This Court should reverse and remand the judgment below.

December 23, 2019

Respectfully submitted,

Amanda K. Rice
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226

Sara Anne Ford
Wesley B. Gilchrist
Amie A. Vague
LIGHTFOOT, FRANKLIN & WHITE, L.L.C.
The Clark Building
400 North 20th Street
Birmingham, AL 35203

Shay Dvoretzky
Counsel of Record
Jeffrey R. Johnson
Caroline Edsall Littleton
Benjamin J. Cassady
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Petitioner