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

BRIEF FOR PETITIONER

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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.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is GE Energy Power Conversion France SAS, Corp. ("GE Energy"), a foreign corporation formerly known as Converteam SAS. Petitioner is a wholly owned subsidiary of General Electric Company. No publicly owned corporation owns 10% or more of General Electric Company's stock.

Respondents are Outokumpu Stainless USA, LLC; Sompo Japan Insurance Company of America, as subrogee of Outokumpu Stainless USA, LLC; Pohjola Insurance Limited; Aigel Europe Limited, as subrogee of Outokumpu Oyj; Tapiola General Mutual Insurance Company, as subrogee of Outokumpu Oyj; AXA Corporate Solutions Assurance SA UK Branch, as subrogee of Outokumpu Oyj; HDI Gerling UK Branch, as subrogee of Outokumpu Oyj; MSI Corporate Capital Ltd., as sole Corporate Member of Syndicate 3210, as subrogee of Outokumpu Oyj; Royal & Sun Alliance, PLC, as subrogee of Outokumpu Oyj.

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OPINIONS BELOW

The Magistrate Judge's report and recommendation about Respondents' motions to remand and GE Energy's motion to dismiss (Pet.App.53a–81a) is unpublished but is available at 2016 WL 7423406 (S.D. Ala.). The district court's order adopting that report and recommendation (Pet.App.51a–52a) is unpublished but is available at 2016 WL 7422675 (S.D. Ala.). The district court's opinions granting GE Energy's motions to compel arbitration and to dismiss (Pet.App.23a–50a) are unpublished but are available at 2017 WL 401951 and 2017 WL 480716 (S.D. Ala.). The Eleventh Circuit's decision reversing and remanding in relevant part (Pet.App.1a–19a) is published at 902 F.3d 1316 (2018). The Eleventh Circuit's decision denying GE Energy's petition for rehearing en banc (Pet.App.20a–22a) is unpublished.

JURISDICTION

The Eleventh Circuit denied GE Energy's petition for rehearing en banc on November 9, 2018. GE Energy timely filed its petition on February 7, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article II of the New York Convention provides:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject

matter capable of settlement by arbitration.

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

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

2. Article V(1)(a) of the New York Convention provides:

> Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> > (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made . . . .

3. Article VII(1) of the New York Convention provides:

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

4. 9 U.S.C. § 201 provides: "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter."

5. 9 U.S.C. § 202 provides:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states . . . .

6. 9 U.S.C. § 206 provides: "A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement."

7. 9 U.S.C. § 208 provides: "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States."

INTRODUCTION

Equitable estoppel is a common-law doctrine that sometimes allows non-signatories to enforce arbitration agreements. Like other equitable doctrines, it reflects basic notions of fairness. For example, a signatory to a contract might sue a non-signatory for claims that arise out of the contract. When that happens, equitable estoppel prevents the signatory from relying on the substantive provisions of that contract while avoiding its duty to arbitrate.

As this Court held in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31 (2009), Chapter 1 of the Federal Arbitration Act ("FAA"), which governs *domestic* arbitration agreements, incorporates common-law doctrines like equitable estoppel. This case asks whether equitable estoppel is also available when one of the parties to an arbitration agreement is *foreign*. It is. If anything, the federal policy favoring arbitration applies even more forcefully to international agreements than domestic ones. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S.

614, 631 (1985). And the New York Convention—a treaty signed by the United States and 159 other nations—was intended to promote international arbitration, not to restrict it.

Chapter 2 of the FAA implements the New York Convention and therefore governs most international arbitration agreements in U.S. courts. Consistent with federal policy and the Convention's pro-arbitration goals, Chapter 2 incorporates the substantive law of Chapter 1, absent a "conflict" with Chapter 2 itself or the Convention. *See* 9 U.S.C. § 208. There is no conflict here. Neither Chapter 2 nor the Convention says anything that prevents non-signatories from enforcing arbitration agreements or that otherwise forecloses equitable estoppel. So equitable estoppel is available for international arbitration agreements under Chapter 2, just as it is for domestic agreements under Chapter 1.

Other traditional tools of treaty interpretation confirm that straightforward answer to the question presented. First, the Convention contains few specifics about enforcing arbitration agreements. Its structure necessarily contemplates that signatory nations (called Contracting States) will rely on their domestic law (like equitable estoppel) to fill the Convention's many gaps. Indeed, Article VII of the Convention expressly allows Contracting States to do more to promote arbitration than the Convention itself requires. Second, other Contracting States understand the Convention to allow non-signatories to invoke arbitration agreements under domestic law. Third, that understanding of the Convention accords with the international consensus, as reflected in the views of the United Nations Commission on International Trade

Law ("UNCITRAL"), the recent Restatement of the law, and the views of other leading commentators.

How, then, did the Eleventh Circuit go wrong? It concluded that the Convention conflicts with equitable estoppel solely because the Convention defines "agreement in writing" to include agreements that are "signed by the parties." N.Y. Conv., Art. II(2). But that provision is about the *formation* of a valid arbitration agreement; it does not address whether nonsignatories may *enforce* such an agreement. What's more, even for formation, the Convention does not *require* a "signed" agreement at all.

The Eleventh Circuit itself recoiled from the consequences of the rule it announced. If the Convention really did limit enforcement to signatories, then principles of agency, assignment, and corporate succession also would not apply in Chapter 2 cases. That result—which the Eleventh Circuit tried to disclaim—would contradict the Convention's animating purposes. It would dramatically restrict the availability of international arbitration. And it would put the United States at odds with the international consensus that the Convention invites Contracting States to apply domestic law to determine who may enforce an arbitration agreement.

This Court should reverse the decision below and hold that the New York Convention does not conflict with equitable estoppel.

STATEMENT

A. Legal Framework

1. Arbitration has many benefits. Compared to litigation, it offers "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to

resolve specialized disputes." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). Those benefits are even more pronounced for international commercial disputes, given the uncertainty inherent in litigating before foreign courts. *See Mitsubishi Motors*, 473 U.S. at 631 (explaining that the "emphatic federal policy in favor of arbitral dispute resolution . . . applies with special force in the field of international commerce"). International arbitration agreements eliminate that "uncertainty" by ensuring that disputes are resolved in a neutral forum and by "specifying in advance" the law that will apply. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974). For that reason, arbitration agreements are "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Id.*

These benefits of arbitration require the cooperation of courts, which must enforce arbitration agreements and awards. Nowadays, that cooperation—at least in most places around the world—is a given. But it was not always that way. English and American courts "traditionally considered irrevocable arbitration agreements as 'ousting' the courts of jurisdiction, and refused to enforce such agreements for this reason." *Id.* at 510–11 & n.4. Courts in other countries were similarly skeptical. In France, agreements to arbitrate future disputes were generally unenforceable into the twentieth century. *See* 1 G. Born, INTERNATIONAL COMMERCIAL ARBITRATION § 1.01[B][4] (2d ed. 2014) ("Born") (describing the hostility to such agreements that developed soon after the French Revolution). Germany likewise "systematically curtailed" arbitration in the wake of World War I. *Id.* § 1.01[B][6].

And in Asia, Africa, the Middle East, and Latin America, arbitration agreements "came to be regarded with mistrust," despite historical traditions supporting their use. *Id.* § 1.01[B][7].

2. The international business community set out to change that unworkable state of affairs. *See id.* § 1.01[C][1]. In 1923, at the initiative of the newly established International Chamber of Commerce ("ICC"), the League of Nations promulgated the Geneva Protocol on Arbitration Clauses. *See id.*; Robert Briner & Virginia Hamilton, *The History and General Purpose of the Convention*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 3, 5 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008) ("Briner & Hamilton"). The Protocol declared arbitration clauses to be valid, and required the courts of signatory states to compel arbitration when an arbitration agreement applied. Protocol on Arbitration Clauses, arts. 1, 4, *opened for signature* Sept. 24, 1923, 27 L.N.T.S. 158 (1924); *see also* Born, § 1.01[C][1]. The Geneva Convention on the Execution of Foreign Arbitral Awards, promulgated three years later, added protections for arbitral awards. Convention on the Execution of Foreign Arbitral Awards, *opened for signature* Sept. 26, 1927, 92 L.N.T.S. 302 (1929–1930); *see also* Born, § 1.01[C][2]; Briner & Hamilton at 6–7.

While these treaties encouraged signatory nations to enforce arbitration agreements and awards, both instruments had their shortcomings. For example, the Geneva Convention imposed many conditions on the party seeking enforcement. *See* Born, § 1.01[C][2]. Particularly burdensome was the requirement that

the party first obtain confirmation from the courts of the country where the award was made. *See id.*

3. The New York Convention of 1958 addressed these and other issues.

a. The Convention originated in a 1953 draft proposal from the ICC to the U.N. Economic and Social Council ("ECOSOC"). *See id.* § 1.04[A][1][a]; Briner & Hamilton at 8–11. Two years later, ECOSOC prepared its own draft and sought comments from governments and international organizations. Briner & Hamilton at 11–14. In 1958, ECOSOC convened a three-week "Conference on International Commercial Arbitration," with representatives from 45 states. Born, § 1.04[A][1][a]; Albert Jan van den Berg, THE NEW YORK ARBITRATION CONVENTION OF 1958 8 (1981) ("van den Berg, NEW YORK ARBITRATION CONVENTION"); *see also* Briner & Hamilton at 14.

The Convention's main focus was enforcing *arbitral awards*. Indeed, from the first draft through the final days of the Conference, the Convention addressed arbitral awards only. *See* Briner & Hamilton at 16–17; van den Berg, NEW YORK ARBITRATION CONVENTION 9, 56, 86; UNCITRAL Secretariat, Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 39 (2016 ed.) ("UNCITRAL Guide"). The delegates voted to add provisions about enforcing *arbitration agreements* (which would become Article II) just five days before the Conference concluded. *See* U.N. Conference on International Commercial Arbitration, Working Party No. 2, *Text of Additional Protocol on the Validity of Arbitration Agreements*, at 1-2, U.N. Doc. E/CONF.26/L.52 (June 5, 1958) (proposed text for a separate protocol about arbitration agreements); U.N. Conference on

International Commercial Arbitration, *Summary Record of the Twenty-First Meeting*, at 17-23, U.N. Doc. E/CONF.26/SR.21 (June 5, 1958) (delegates vote to include text regarding arbitration agreements in the Convention itself and discuss amendments to that text, which would become Article II); Briner & Hamilton at 14 (explaining that the Conference lasted until June 10, 1958).

The Conference delegates approved the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, later known as the "New York Convention," on June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. Representatives of ten states signed at the close of the Conference, with fifteen more signing by year's end. Briner & Hamilton at 19. The Convention entered into force on June 7, 1959. Born, § 1.04[A][1][b]. It has since amassed 160 signatories, http://www.newyorkconvention.org/countries (last visited Sept. 17, 2019), making it perhaps "'the most effective instance of international legislation in the entire history of commercial law.'" N. Blackaby, *et al.*, REDFERN & HUNTER ON INTERNATIONAL ARBITRATION ¶ 2.11 (6th ed. 2015) (quoting Michael Mustill, *Arbitration: History and Background*, 6 J. INT'L ARB. 43, 49 (1989)) ("REDFERN & HUNTER"). The signatories include the United States, which joined the Convention—and enacted implementing legislation—in 1970. *See* 21 U.S.T. at 2517, 2560 (Dec. 11, 1970) (proclamation of President Nixon about the Convention); *id*. at 2560, 2566 (noting that the United States acceded to the Convention in September 1970); Pub. L. No. 91-368, 84 Stat. 692 (1970), *codified at* 9 U.S.C. §§ 201 *et seq*. (implementing legislation); *see also* 114

Cong. Rec. 29,605 (Oct. 4, 1968) (Senate approval of accession to the Convention).

b. Article I of the Convention describes the Convention's scope. It states that the Convention "shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought," and "to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." N.Y. Conv., Art. I(1). Although the very next Article addresses the enforcement of arbitration agreements (rather than arbitral awards), Article I does not mention arbitration agreements—a consequence of Article II's last-minute addition to the Convention. *See* UNCITRAL Guide at 39.

Article II itself—the only one dedicated to arbitration agreements—contains three subsections, each just one sentence long. Article II(1) requires Contracting States to "recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them." Article II(2) 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." And Article II(3) provides that a court "of a Contracting State" must refer parties to arbitration "when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article," unless the court "finds that the said agreement is null and void, inoperative or incapable of being performed."

Articles III through VI address arbitral awards. Article III establishes the general rule that Contracting States "shall recognize arbitral awards as binding," while Article V lists seven narrow grounds on which courts may refuse to recognize and enforce an arbitral award. Specifically, Article V allows a court to decline to enforce an arbitral award only in cases involving: (1) an invalid arbitration agreement, (2) lack of notice, (3) an arbitral award that transcends the bounds of the arbitration agreement, (4) an arbitral procedure not in accordance with the parties' agreement or "the law of the country where the arbitration took place,"(5) an arbitral award that is not binding or has been set aside, (6) a subject matter not capable of settlement by arbitration under national law, or (7) an arbitral award contrary to national public policy.

Finally, Article VII states that 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." N.Y. Conv., Art. VII(1). Article VII, like Article I, does not expressly mention arbitration agreements (a result, again, of Article II's late addition). But it is widely understood to apply to the entire Convention, so a party may rely on more favorable domestic law to enforce an arbitration agreement as well as an award. *See, e.g.*, van den Berg, NEW YORK ARBITRATION CONVENTION 86–88 (explaining that Article VII applies to "the enforcement of the arbitration agreement" as well as an ensuing award); Born, § 1.04[A][1][c][ii] (Article VII "preserves rights that

award-creditors enjoy under national law or other international treaties to recognize and enforce arbitral awards (and, by analogy, arbitration agreements)").

4. Congress enacted the FAA to serve the same goal as the Convention: to replace "widespread judicial hostility to arbitration agreements" with a "liberal federal policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal quotation marks omitted). Before the FAA's passage in 1925, American courts often refused to enforce arbitration agreements and arbitral awards. *See Scherk*, 417 U.S. at 510–11 & n.4. The FAA changed that. Because the Act "was designed to promote arbitration," it preempts state laws that "interfere[ ] with" it. *Id.* at 345–46; *see also, e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 357–59 (2008). The FAA contains three chapters, two of which are relevant here.

a. Chapter 1—sometimes called the "domestic FAA," *Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account*, 618 F.3d 277, 288 (3d Cir. 2010)—governs domestic arbitration agreements and arbitral awards. *See generally Johnson Controls, Inc. v. Edman Controls, Inc.,* 712 F.3d 1021, 1024–25 (7th Cir. 2013). Its "primary substantive provision" says that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (quoting 9 U.S.C. § 2). "That provision creates substantive federal law regarding the enforceability of arbitration agreements, requiring courts 'to place such agreements upon the same footing as other contracts.'" *Ar-*

thur Andersen, 556 U.S. at 630 (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). To that end, § 2 incorporates common-law contract doctrines "that exist at law or in equity." 9 U.S.C. § 2; *see Arthur Andersen*, 556 U.S. at 630 ("§ 2 explicitly retains an external body of law").

b. Congress added Chapter 2 to the FAA when the United States ratified the New York Convention. *See* 9 U.S.C. §§ 201–208. It governs the enforcement of arbitration agreements and arbitral awards "when both or all countries concerned are" among the Convention's 160 signatories. *See Johnson Controls*, 712 F.3d at 1024–25; *see* http://www.newyorkconvention.org/countries (last visited Sept. 17, 2019) (listing signatories). Chapter 2 largely addresses procedural issues: It provides federal jurisdiction over Convention-related actions, 9 U.S.C. § 203; delineates the appropriate venue for such actions, *id.* § 204; provides for removal from state to federal court, *id.* § 205; and authorizes courts to compel arbitration, *id.* § 206.

Substantively, Chapter 2 piggybacks on Chapter 1. It simply states that "Chapter 1 applies to actions and proceedings brought under this chapter to the extent [Chapter 1] is not in conflict with [Chapter 2] or the Convention." *Id.* § 208.

c. Although Chapter 1 of the FAA refers to an "agreement in writing," 9 U.S.C. § 3, it does not prevent an arbitration agreement from being "enforced by or against nonparties" to that agreement. *Arthur Andersen*, 556 U.S. at 631. To the contrary, Chapter 1 incorporates common-law principles that allow nonsignatories to enforce arbitration agreements in appropriate cases. *Id.* at 630. Those principles include

"'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver, and estoppel.'" *Arthur Andersen*, 556 U.S. at 631 (quoting 21 WILLISTON ON CONTRACTS § 57:19 (4th ed. July 2019 update)).

This case involves equitable estoppel, a legal concept "older than the country itself." *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232–34 (1959). In the realm of contract, equitable estoppel "precludes [a] party from claiming [the] benefits of a contract while simultaneously attempting to avoid [the] burdens that contract imposes." 1 DOMKE ON COMMERCIAL ARBITRATION § 13:9 (3d ed. June 2019 update); 21 WILLISTON ON CONTRACTS § 57:19 (4th ed. July 2019 update). The idea is "that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed." *See McNeely v. Walters*, 211 N.C. 112, 115 (1937). In other words, "equitable estoppel is based on an application of the golden rule to the everyday affairs of men." *Id.*

In the arbitration context, equitable estoppel allows a non-signatory to enforce an arbitration agreement when "a signatory to the written agreement must rely on the terms of that agreement in asserting its claims against the nonsignatory." 21 WILLISTON ON CONTRACTS § 57:19; *see also MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999). In addition, "application of equitable estoppel is warranted . . . when the signatory . . . raises allegations of . . . substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories." *MS Dealer*, 177 F.3d at 947 (internal quotation marks omitted); *see also* 21 WILLISTON ON CONTRACTS § 57:19. These circumstances arise in

many contexts, including subcontracts, employment agreements, distribution contracts, insurance arrangements, franchise agreements, partnership agreements, and pharmacy provider agreements. *See* 21 WILLISTON ON CONTRACTS § 57:19 (describing cases involving equitable estoppel); *see also, e.g., Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 373–75 (4th Cir. 2012) (employment agreement); *Crawford Professional Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 260–61 (5th Cir. 2014) (pharmacy provider agreement).

The rationale for allowing non-signatories to compel arbitration in these situations is two-fold. First, equitable estoppel prevents signatories from avoiding the arbitral dispute-resolution process that they agreed to use, simply by suing a non-signatory defendant. That result would render arbitration agreements "meaningless" and undermine "the federal policy in favor of arbitration." 21 WILLISTON ON CONTRACTS § 57:19. Second, equitable estoppel prevents litigants from "hav[ing] it both ways," *id.*—that is, by "rely[ing] on the contract when it works to [their] advantage, and repudiat[ing] it when it works to [their] disadvantage." *Hughes Masonry Co., Inc. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 838–39 (7th Cir. 1981) (internal quotation marks and alterations omitted).

B. Factual Background.

1. Respondent Outokumpu, a U.S. company with a Finnish parent, operates a stainless-steel plant in Calvert, Alabama. Pet.App.3a; JA23 (Compl. ¶ 1). In November 2007, while that plant was still being built, Outokumpu entered into a series of contracts ("the Contracts") with Fives ST Corp. ("Fives"). Pet.App.3a,

24a; JA78–185 (one of the Contracts, hereinafter "Contract"). Both Outokumpu and Fives had different names when they entered the Contracts. *See* Pet.App.3a. Until a 2012 corporate ownership change, Outokumpu was called ThyssenKrupp Stainless USA, LLC, and was part of the Germany-based ThyssenKrupp group. *See* Pet.App.74a–75a; D.Ct.Dkt.38-1 at 5-6; D.C.Dkt.38-2 at 2; D.Ct.Dkt.7-1 at 2. Fives, for its part, was called F.L. Industries, Inc. until June 2014. D.Ct.Dkt.38-5 at 2.

The Contracts provided that Fives would produce three "cold rolling mills," which Outokumpu would use to manufacture and process steel products. Pet.App.3a. The Contracts define Outokumpu as "Buyer" and Fives as "Seller," and refer to "Buyer" and "Seller" "individually as 'Party' and collectively as 'Parties.'" JA81 (Contract). The Contracts also anticipated that Fives would engage subcontractors. One of those subcontractors, Petitioner GE Energy (a French company then known as Converteam SAS), even participated in meetings with Outokumpu to hash out the details of the project. *See* D.Ct.Dkt.38-3 at 2–3 (Meeting Minutes). Unsurprisingly, therefore, the Contracts provide that "Seller . . . shall be understood as Sub-Contractors included, except if expressly stated otherwise." JA89 (Contract § 1.2). And the Contracts contain an annex that lists Outokumpu's preferred subcontractors, which include GE Energy. JA184–85 (Annex A3, § 2.2 & table); Pet.App.4a.

Each Contract also has an arbitration clause, whose enforceability is at the heart of this case. JA171–72 (Contract, § 23). The clause provides that

"[a]ll disputes arising between both parties in connection with or in the performance of the Contract" are subject to arbitration. JA171 (Contract, § 23.1) The arbitration is to be held in Dusseldorf, Germany, under the ICC's Rules of Arbitration and German substantive law. *Id*. (Contract, §§ 23.2, 23.5).

Fives, GE Energy, and a third company also entered a separate agreement (the "Consortial Agreement") related to the Outokumpu project. Pet.App.5a; JA55–77 (Consortial Agreement). The Consortial Agreement provided that GE Energy and the third company would "act[] as subcontractors" to Fives. JA56 (Consortial Agreement, Preamble); Pet.App.5a. In its capacity as "Leading Party," Fives was responsible for "represent[ing]" the Consortium's "interests" in "negotiations" with Outokumpu, as well as for "[t]he signature of the CONTRACT" between Outokumpu and Fives. JA59–60 (Consortial Agreement, Art. III(2)(b), (d)); *see also* Pet.App.6a. The Consortial Agreement has its own arbitration clause, which gives Fives the right to join GE Energy to any arbitration under the Contracts. Pet.App.5a–6a; JA70–71 (Consortial Agreement, Art. XI).

2. As Fives' subcontractor, GE Energy supplied nine motors for the cold-rolling mills (three motors per mill). Pet.App.5a. After GE Energy manufactured the motors in France, they were delivered to Outokumpu's Alabama plant for installation in 2011 and 2012. *Id*.

Outokumpu alleges that motors at all three mills had failed by summer 2015. *Id*.; JA26–27 (Compl. ¶¶ 17–23). Outokumpu thus filed two lawsuits. First, it sued Fives and certain "Fictitious Defendants" in Alabama state court. JA39 (Fives Compl. ¶¶ 3-4). At

Fives' insistence, the state court ordered the parties to arbitrate. D.Ct.Dkt.38-6 (state court order compelling arbitration); *Outokumpu Stainless USA, LLC v. Fives ST Corp.*, 233 So.3d 921 (Ala. 2016) (unpublished) (affirming order compelling arbitration).

Second, Outokumpu and its insurers asserted four Alabama-law claims against GE Energy and certain "Fictitious Defendants" who were allegedly involved in manufacturing or selling the motors. JA22–37 (Compl.). Again, Outokumpu and its insurers sued in Alabama state court, rather than following the arbitration clauses in the Contracts. Indeed, in what can be understood only as an attempt to avoid arbitration, Outokumpu's Complaint did not mention the Contracts at all. Necessarily, however, it "borrow[ed] language directly from the Contracts in alleging that GE Energy had"—and breached—a duty of care regarding the motors. *See* Pet.App.71a. And it implicitly relied on the Contracts (the only potential source of privity) in alleging that GE Energy breached implied warranties of fitness and merchantability. JA31–32 (Compl. ¶¶ 44–50); *see Wellcraft Marine v. Zarzaour,* 577 So. 2d 414, 419 (Ala. 1990) (explaining that these claims require privity under Alabama law).[1]

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[1] Last month, Outokumpu amended its Complaint. JA192–216 (Am. Compl.). Like its predecessor, the Amended Complaint studiously avoids mentioning the Contracts. But it still asserts negligence and product liability claims against GE Energy arising out of the alleged failure of the motors supplied under the Contracts. JA206–09 (Am. Compl. ¶¶ 74–90). And it still borrows language from the Contracts in alleging that GE Energy breached a duty of care as to "the engineering, design, manufacture, fabrication, delivering, installation, and commissioning of the motors" for the project. JA206 (Am. Compl. ¶ 75(a)); *compare*

GE Energy removed the case to federal court. It relied on 9 U.S.C. § 205, which permits removal of an action whose subject matter "relates to an arbitration agreement . . . falling under the Convention." *See* D.Ct.Dkt.1 at 1. GE Energy then moved to dismiss and compel arbitration, based on the arbitration clause in the Contracts. D.Ct.Dkts. 6, 62. Outokumpu and the insurers opposed those motions and sought a remand to state court. D.Ct.Dkts.34–35, 64, 66.

The district court denied the remand motions, agreeing with the magistrate judge that removal was proper because the suit "relates to an arbitration agreement . . . falling under the Convention." *See* Pet.App.51a–81a. Satisfied with its jurisdiction, the court then granted GE's motions to dismiss and to compel arbitration. *See id*. at 23a–50a. In so doing, the court reasoned that the Contracts defined the terms "Seller" and "Parties" to include subcontractors like GE Energy, and that "in order for GE to be excluded" from the word "parties" in the arbitration provisions, the Contracts had to "expressly" say so. Pet.App.43a (internal quotation marks omitted). Since the arbitration provisions contained no such "express statement," Outokumpu had agreed—by the very terms of the Contracts—to arbitrate its dispute with GE Energy. Pet.App.42a–45a.

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id. with JA89 (Contract § 2.1) (requiring "Seller" to "supply and/or provide to" Outokumpu "the engineering, manufacturing, fabrication and/or procurement," as well as "[c]ommissioning," of the "Contract Equipment").

3. The Eleventh Circuit agreed with the district court that removal was proper, but reversed the district court's decision to dismiss the suit and compel arbitration.

As to removal, the Eleventh Circuit held that "this lawsuit sufficiently 'relates to' the arbitration agreement in the Outokumpu-Fives Contracts." Pet.App.13a. That is because Outokumpu's allegations against GE Energy "concern[] the performance" of the Contracts, "and the arbitration agreement contained in those Contracts . . . could conceivably affect the outcome of this case." *Id.*

But the Eleventh Circuit held that GE Energy could not compel Outokumpu to arbitrate. Pet.App. 14a–18a. The court reasoned that, on its view, the Convention permits a party to compel arbitration "only if . . . there is an agreement in writing within the meaning of the Convention." *Id.* at 14a (citation omitted). Article II(2), in turn, defines an "agreement in writing" as "includ[ing] an arbitral clause . . . signed by the parties or contained in an exchange of letters or telegrams." *Id.* at 14a (quoting N.Y. Conv., Art. II(2)). The Eleventh Circuit construed this language to mean that GE Energy could not compel Outokumpu to arbitrate because GE Energy's signature did not appear on the agreement. *Id.* at 14a–17a. "[T]o compel arbitration," the court explained, "the Convention requires that the arbitration agreement be signed by the parties before the Court or their privities." *Id.* at 16a. In other words, the Convention "require[s] that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration." *Id.* at 15a (emphasis in original).

The Eleventh Circuit acknowledged the oddity of this result. If this had been a domestic arbitration agreement, the court noted, GE Energy may have been able to "compel arbitration through estoppel under Chapter 1 of the FAA." Pet.App.17a. It also recognized that Chapter 1 applies to cases under the Convention if it does not "conflict" with Chapter 2 or the Convention. *See id*. at 17a (citing 9 U.S.C. § 208). But, in the court's view, this case presents a conflict because the Convention "expressly restrict[s] arbitration to the specific parties to an agreement," and that restriction "trumps" any right to compel arbitration that GE Energy would have otherwise had. *See id*.

The Eleventh Circuit denied GE Energy's petition for rehearing en banc. Pet.App.20a–22a.

4. This Court granted GE Energy's petition for a writ of certiorari. The sole question presented is whether the Convention permits a non-signatory to compel arbitration based on the doctrine of equitable estoppel.

SUMMARY OF ARGUMENT

I. Nothing in the New York Convention forecloses equitable estoppel.

A. Chapter 2 of the FAA, which implements the Convention, requires courts to apply Chapter 1 unless doing so would "conflict" with Chapter 2 or the Convention. 9 U.S.C. § 208. Such "conflicts" are rare for three reasons. First, the Convention, like the FAA, reflects a strong "policy in favor of arbitral dispute resolution." *Mitsubishi Motors*, 473 U.S. at 631. Second, the Convention simply does not speak to many issues about enforcing arbitration agreements; it necessarily relies on the law of Contracting States to fill in the

gaps. Third, the Convention generally sets a floor, not a ceiling, for enforcing arbitration awards and agreements. That is, it ensures that Contracting States provide a minimum level of protection for arbitration agreements and awards, but does not prevent them from applying more arbitration-friendly domestic laws. For all of these reasons, courts have generally found a "conflict" only when the domestic FAA would be *less* friendly to arbitration than the Convention itself.

B. Equitable estoppel, one of several doctrines that allow non-signatories to enforce arbitration agreements under Chapter 1, does not conflict with Chapter 2 or the Convention.

1. Chapter 2 does not limit the enforcement of arbitration agreements by non-signatories. To the contrary, Chapter 2 adopts the substantive law of Chapter 1, 9 U.S.C. § 208, which includes common-law doctrines like equitable estoppel. *See Arthur Andersen*, 556 U.S. at 629–32.

2. The Convention does not limit enforcement of arbitration agreements by non-signatories either. Traditional tools of treaty interpretation support that conclusion.

a. The Convention's text does not restrict Contracting States from applying domestic doctrines that allow non-signatories to enforce valid arbitration agreements. The Convention is simply silent about enforcement by non-signatories.

b. That silence matches the Convention's structure and design. First, Article II's three sentences do not purport to answer every question that might arise about enforcing international arbitration agreements.

Instead, the Convention contemplates that Contracting States will fill gaps using their domestic law. Second, the Convention does not bar Contracting States from promoting arbitration in their own ways. Indeed, Article VII allows parties to "avail" themselves of domestic law that is more favorable to arbitration than the Convention itself.

c. Many foreign courts agree that the Convention does not prevent Contracting States from applying domestic law, including principles of estoppel, to determine who may enforce a valid arbitration agreement. Indeed, the Restatement—which reflects international consensus—provides that courts should enforce "an international arbitration agreement against or in favor of a nonsignatory . . . to the extent that the nonsignatory" is "bound by or entitled to invoke the agreement under applicable law." RESTATEMENT OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION § 2.3(b)(2) (2019) ("RESTATEMENT"). Foreign cases bear that out. *See, e.g.*, *The Titan Unity*, [2014] SGHCR 4 (Feb. 4, 2014) (Singapore High Court endorses American case law on equitable estoppel); Bundesgericht [BGer] [Federal Supreme Court] Apr. 17, 2019, 4A_646/2018 (Swiss Supreme Court applies Swiss law to allow a non-signatory to enforce an arbitration agreement on facts similar to those here). And leading commentators see it the same way.

d. Allowing Contracting States to apply pro-arbitration domestic doctrines, like equitable estoppel, also accords with the Convention's "objects and purposes," *see Abbott v. Abbott*, 560 U.S. 1, 20 (2010)—mainly promoting arbitration and international uni-

formity, *Scherk*, 417 U.S. at 520 n.15. Equitable estoppel advances these goals by ensuring that disputes involving cross-border contracts will be resolved in the forum those contracts specify.

This case illustrates the point. Outokumpu agreed to arbitrate disputes arising under the Contracts. And it understood from the start that subcontractors like GE Energy would help perform the Contracts. That is why Outokumpu and Fives defined the "parties" to the Contracts to include subcontractors. Equitable estoppel exists to prevent entities like Outokumpu from claiming the benefits of a contract while disclaiming the arbitration clause it contains.

II. The decision below was wrong. The Eleventh's Circuit's opinion contravenes the Convention's text, this Court's precedent, and common sense. Respondents' attempt to buttress that decision by overreading the word "parties" falls flat. And affirming the decision below would undermine the Convention's goals.

A. The Eleventh Circuit concluded that Article II(2)—which defines an "agreement in writing" to "include" agreements "signed by the parties"—requires "that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration." Pet.App.15a (emphasis in original); *id.* at 17a. But the court misread the Convention. Section 2 (like the rest of Article II) just explains what kinds of arbitration agreements Contracting States, at a minimum, must recognize. It says nothing that restricts enforcement of such an agreement by non-signatories.

Indeed, § 2 does not even require a signed agreement at all. It provides that agreements in writing "*include*" agreements "signed by the parties." N.Y.

Conv., Art. II(2) (emphasis added). But it does not *limit* agreements in writing to those "signed by the parties." *Id.*; *see also, e.g.,* RESTATEMENT § 2.4, cmt. b & note b (explaining that "Article II(2)'s list of writings" should be read "as illustrating, not exhausting, the documentation that meets the Convention's requirements as to form"); 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) ("2006 Recommendation") (explaining that Article II(2) should "be applied recognizing that the circumstances described therein are not exhaustive").

B. The Eleventh Circuit's interpretive error parallels the one this Court corrected in *Arthur Andersen*. In that case, the respondents argued that an "agreement in writing" requirement in Chapter 1 should be interpreted to preclude enforcement by non-parties. 556 U.S. at 629–30 (quoting 9 U.S.C. § 3). This Court rejected that argument because requiring that an agreement be "in writing" says nothing about who can enforce it. *See id.* at 630–31. The same is true here.

C. The Eleventh Circuit's opinion is also internally inconsistent. On the one hand, it says that the Convention requires "that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration." Pet.App.15a (emphasis in original). On the other hand, it purports to allow "incorporat[ion] by reference" and enforcement by "privities." *Id.* at 16a & n.1. Both cannot be true. If the Convention requires that a person "*actually sign*" an arbitration agreement to enforce it, then incorporation by reference should not be enough—nor should enforcement

by a privy. Still, one can hardly blame the Eleventh Circuit for trying, as the consequences of the rule it purported to endorse are staggering. It would, for example, prohibit an agent from signing an arbitration agreement on behalf of a principal, or one entity from succeeding to the obligations of another entity that signed the agreement. That cannot be right.

D. In their certiorari-stage briefing, Respondents tried to rehabilitate the Eleventh Circuit's decision through a different textual argument: that the word "parties" in § 2 refers to the parties before the court, so an arbitration agreement is enforceable only if the parties who signed the agreement are the same parties before the court. Even if § 2 did refer to the parties before the court, it would make no difference. Section 2's definition of an "agreement in writing" is not exhaustive; and, in any event, the Convention sets a floor, not a ceiling, on enforcement of arbitration agreements. But that is not the best reading of § 2 anyway. The word "parties" in § 2 is best read as referring to the parties to the agreement, not the parties before the court—and § 2 does not require that those be exactly the same persons. That is the best reading of "parties," first and foremost, because an *agreement* is the subject of § 2.

E. Holding that the Convention precludes nonsignatory enforcement would also contravene the Convention's goals of promoting arbitration and unifying international standards. It would undermine many common-law doctrines that protect the vitality of arbitration agreements. And it would make the United States an outlier among the Convention's 160 signatories, nearly all of whom agree that the Convention

does not foreclose the application of domestic doctrines like equitable estoppel.

ARGUMENT

I. EQUITABLE ESTOPPEL APPLIES TO ARBITRATION AGREEMENTS SUBJECT TO THE CONVENTION.

A. Domestic Doctrines Like Equitable Estoppel Apply to Arbitration Agreements Subject to the Convention Absent a "Conflict."

1. Chapter 1 of the FAA incorporates common-law contract doctrines. *See supra* at 12-13. It does so explicitly in § 2 by incorporating "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. And it does so by implication, too. *See Arthur Andersen*, 556 U.S. at 630 (explaining that nothing in Chapter 1 "purports to alter background principles of state contract law").

As this Court held in *Arthur Andersen*, among the common-law doctrines that Chapter 1 incorporates are those that define "the scope of agreements (including the question of who is bound by them)." *Id.* Equitable estoppel is one such doctrine. *See id.* at 631. "[A]ssumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, [and] waiver" are others. *Id.* (quoting 21 WILLISTON ON CONTRACTS § 57:19).

In turn, Chapter 2 of the FAA, which governs agreements subject to the Convention, incorporates Chapter 1 "to the extent that chapter is not in conflict with [Chapter 2] or the Convention." 9 U.S.C. § 208. Common-law doctrines like equitable estoppel, therefore, apply to arbitration agreements that fall under

the Convention unless the statute or treaty precludes their application.

Interpreting a treaty, like construing a statute or contract, is "a matter of determining the parties' intent." *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 37 (2014). That search for intent begins "with the text of the treaty and the context in which the written words are used." *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1508-09 (2017) (quoting *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988)). "The practice of treaty signatories" also "counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed." *United States v. Stuart*, 489 U.S. 353, 369 (1989); *see also Medellin v. Texas*, 552 U.S. 491, 507 (2008). Finally, a treaty's "objects and purposes" illuminate its meaning. *Abbott*, 560 U.S. at 20.

2. Applying these principles to the Convention rarely unearths a "conflict" with Chapter 1 of the FAA. That is because the Convention, like the FAA, promotes arbitration; because the Convention contains few specifics about how arbitration agreements are to be enforced, leaving the details to domestic law; and because the Convention generally does not limit Contracting States from fostering arbitration through their own laws.

a. The FAA and the New York Convention rarely conflict because both documents point in the same direction: toward the arbitral forum, rather than away from it. They both reflect an "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors*, 473 U.S. at 631. That policy "applies with special force in the field of international commerce." *Id.*

Indeed, "[t]he goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts." *Scherk*, 417 U.S. at 520 n.15.

b. Conflicts between the Convention and the FAA are also rare because the Convention just does not say very much about enforcing arbitration agreements. Article II—the only part of the Convention dedicated to arbitration agreements—has three sections, each only one sentence long. Unsurprisingly, those three provisions do not address every issue that might come up about enforcing arbitration agreements. There is no reason they would. By the time of the Convention, most nations had extensive bodies of law that developed over the course of centuries to answer questions about forming and enforcing contracts. Rather than displace all of that law, the drafters of the Convention envisioned that Contracting States would do exactly what Congress did in Chapter 2 of the FAA: use existing domestic law to deal with the questions the Convention leaves unanswered.

That understanding follows from Article II's text. Section 1, for instance, refers to "subject matter capable of settlement by arbitration." Domestic law, not the Convention, determines which subject matters those are. *Mitsubishi Motors*, 473 U.S. at 639 n.21. Section 3, in turn, refers to agreements that are "null and void, inoperative or incapable of being performed." N.Y. Conv., Art. II(3). Again, courts look to domestic law to add meaning to those terms. RESTATEMENT § 2.14, cmts a, d & notes a, d; *id.* § 2.18, cmt. d & note d; *see generally id.* §§ 2.9, 2.13–2.21 (ex-

plaining the role of domestic law with regard to defenses against arbitration agreements). Likewise, nothing in Article II purports to define the "parties" to an arbitration agreement. Domestic law has to fill that gap. Born, § 10.01[C]-[D].

c. Relatedly, the Convention does not prevent Contracting States from taking their own steps to encourage arbitration—which, after all, was the Convention's animating purpose. *See Scherk*, 417 U.S. at 520 n.15. To the contrary, the text of the Convention, domestic and foreign case law, and international commentary all confirm that Article II generally serves as a floor, not a ceiling, for enforcing arbitration agreements.

i. Article VII makes this principle explicit. Again, it provides that 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." Article VII's so-called "more favorable right" provision also applies to enforcing arbitration agreements. *See supra* at 11; van den Berg, NEW YORK ARBITRATION CONVENTION 86–88; Born, § 1.04[A][1][c][ii].

Other parts of the Convention accord with Article VII. Article II(1), for example, says that Contracting States "shall recognize an agreement in writing under which the parties undertake to submit to arbitration." It does not say that Contracting States "shall *only* recognize an agreement in writing," or that they "shall *not* recognize" other agreements. Likewise, Article III provides that Contracting States "shall recognize arbitral awards as binding" and "shall not . . . impose[] substantially more onerous conditions or higher fees

or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." That provision requires Contracting States to enforce arbitral awards that fall under the Convention. It also bars them from imposing "*more* onerous conditions or *higher* fees" on arbitral awards subject to the Convention. But it does not prohibit them from enforcing arbitral awards that do *not* fall under the Convention. And it does not prohibit them from imposing *less* onerous conditions or *lower* fees on arbitral awards subject to the Convention.

ii. U.S. and foreign courts also see the Convention as setting a floor, not a ceiling.

In *Commissions Import Export S.A. v. Republic of the Congo*, 757 F.3d 321 (D.C. Cir. 2014), for example, the D.C. Circuit interpreted Chapter 2's requirement that courts enforce arbitral awards subject to the Convention when a suit is filed "[w]ithin three years." 9 U.S.C. § 207. Otherwise-applicable D.C. law provided a longer period for enforcement of a foreign judgment. *Commissions Imp. Exp.*, 757 F.3d at 325 (citing D.C. Code § 15-369). The court held that Chapter 2's three-year window did not prevent the petitioner from relying on that D.C. law to enforce a foreign judgment that, in turn, enforced an arbitral award. "The New York Convention," the court reasoned, "does not limit the period for enforcement of arbitral awards." *Id.* at 328. To the contrary, Article VII "expressly preserves . . . arbitral parties' right to rely upon domestic laws that are *more favorable* to award enforcement than are the terms of the Convention." *Id.* (emphasis in original). "Thus," the court reasoned, the Convention "does not

limit treaty members from affording more protections than the Convention requires." *Id.*

The courts of other Contracting States agree. In the words of the German Federal Court of Justice:

> The New York Convention aims at making the international enforcement of arbitration agreements easier, not at establishing stricter requirements than in national law. Art. II(1)–(2) of the New York Convention contains formal requirements that were comparatively liberal at the time of the conclusion of the Convention in 1958 and clearly less strict than those of many national laws. Since then many legal systems, in the context of a more arbitration-friendly attitude, have so relaxed their formal requirements that they now set more limited requirements than Art. II(1)–(2) of the New York Convention. An interpretation under which Art. II(1)–(2) of the New York Convention, against its original intention, becomes an obstacle to recognition contradicts this background[.]

Bundesgerichtshof [BGH], *Danish assignee v. Indian legal successor of licensee*, May 8, 2014, XXXIX Y.B. Comm. Arb. 401, ¶27 (2014). And the French Court of Cassation has likewise concluded that "[t]he New York Convention provides for the application of a national law that is more favorable to the recognition of the validity of arbitration agreements." *Groupama Transport v. MS Regine Hans und Klaus Heinrich KG*, Nov. 21, 2006, XXXII Y.B. Comm. Arb. 294, 296 (2007).

iii. This international consensus about the Convention also underpins a formal recommendation

from UNCITRAL as well as learned commentaries more broadly.

The United Nations established UNCITRAL "with the object of promoting the progressive harmonization and unification of the law of international trade." 2006 Recommendation. In 2006, UNCITRAL issued an official recommendation that Article VII(1) "should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement." *Id.* That recommendation reflects "the 'opinions of our sister signatories'" and, as a result, is "'entitled to considerable weight.'" *Abbott*, 560 U.S. at 16 (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999)) (internal quotation marks and alterations omitted).

The "weight of well-reasoned commentary" confirms this understanding of the Convention. Born, § 5.02[A](2)(e). Gary Born's seminal treatise, for example, explains that Article VII "ensures that the Convention does not, through the establishment of one set of guarantees as to the enforceability of arbitration . . . agreements[,] override or undermine other protections granted by national law." *Id.* Albert Jan van den Berg, an "oft-quoted academic-practitioner," *Commissions Imp. Exp. S.A.*, 757 F.3d at 328, agrees. As he sees it, the "Convention is aimed at facilitating recognition and enforcement of foreign arbitral awards; if domestic law or other treaties make recognition and enforcement easier, that regime can be relied upon." A. Jan van den Berg, *The New York Convention of 1958: An Overview*, in ENFORCEMENT OF AR-

BITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 39, 66 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008); van den Berg, NEW YORK ARBITRATION CONVENTION 86-88 (explaining "that the general rule of having the freedom to rely on another basis for the enforcement includes the enforcement of the arbitration agreement").

3. For all three of these reasons—the Convention's pro-arbitration purpose, Article II's limited scope, and the Convention's provision for more arbitration-friendly domestic law—"conflicts" between the Convention and the domestic FAA are rare. Indeed, they generally arise only when the FAA is *less* friendly to arbitration than the Convention. For example, Chapter 1 excludes "contracts of employment of seamen" from arbitration, 9 U.S.C. § 1; that provision conflicts with the Convention, which contains no such exception. *See Francisco v. Stolt Achievement MT*, 293 F.3d 270, 273–76 (5th Cir. 2002). Likewise, Chapter 1 allows for the modification of arbitral awards based on a "material miscalculation," 9 U.S.C. § 11; that, too, conflicts with the Convention, which does not include miscalculation as a "ground[] justifying refusal to recognize an arbitral award" rendered abroad. *M&C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 850–51 (6th Cir. 1996). These rare cases in which a principle of domestic law disfavors arbitration are the sorts of "conflicts" Chapter 2 generally contemplates.

B. Neither Chapter 2 nor the Convention Conflicts with Equitable Estoppel.

Equitable estoppel is one of several common-law doctrines that promote arbitration by allowing non-

signatories to enforce arbitration agreements in appropriate circumstances. It does not "conflict" with Chapter 2 or the Convention. Thus, U.S. courts may apply that doctrine to agreements subject to the Convention. *See* 9 U.S.C. § 208.

1. Chapter 2 Does Not Conflict With Equitable Estoppel.

Respondents have never argued—and, to GE Energy's knowledge, no court has ever held—that Chapter 2 itself conflicts with equitable estoppel. It does not.

Chapter 2, like the rest of the FAA, reflects an "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors*, 473 U.S. at 631. To that end, § 206 gives courts broad authority to "direct that arbitration be held in accordance with the [arbitration] agreement." 9 U.S.C. § 206. Chapter 2 says nothing about enforcement by non-signatories. Nor does it otherwise limit who may enforce a valid arbitration agreement. To the contrary, Chapter 2 adopts the substantive provisions of Chapter 1 and the common-law doctrines it incorporates. *See id.* § 208; *supra* at 13. That includes doctrines, like equitable estoppel, that authorize enforcement by non-signatories in appropriate circumstances. *See Arthur Andersen*, 556 U.S. at 629–32.

2. The Convention Does Not Conflict With Equitable Estoppel.

The traditional tools of treaty interpretation—including text, context, international practice, and purpose—all confirm that the New York Convention does not conflict with equitable estoppel either.

a. The text of Article II, which addresses the enforcement of arbitration agreements, says nothing about enforcement by non-signatories. Section 1 requires Contracting States to "recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them." Section 2 provides that the "term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties." And § 3 requires courts to refer parties to arbitration "when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article." None of these provisions *bars* non-signatories from enforcing valid arbitration agreements under applicable domestic law.

b. Two aspects of the Convention's broader structure confirm that it does not "conflict" with enforcement by non-signatories.

First, as already explained, Article II (like the Convention itself) is short. It could not possibly answer every question about enforcing arbitration agreements. *See supra* Part I.A.2.b. May a non-signatory principal enforce an arbitration agreement signed by his agent? May a non-signatory successor corporation enforce an arbitration agreement signed by its predecessor? May a non-signatory assignee enforce an arbitration agreement signed by the assignor? The Convention does not resolve these and many other recurring issues. Instead, "[t]he most natural reading" of the Convention is that "[t]hose questions are to be answered by the domestic law selected by the courts of contracting states." *Zicherman v. Korean Air Lines*

Co., Ltd., 516 U.S. 217, 225 (1996) (holding that, under the Warsaw Convention, domestic law answers "the substantive questions of who may bring suit and what they may be compensated for").

Second, as also already explained, the Convention sets a floor, not a ceiling, for enforcing arbitration agreements. *See supra* Part I.A.2.c. Article VII makes that principle explicit. *See* N.Y. Conv., Art VII(1) (explaining that 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" domestic law); *see also supra* at 11 (explaining that Article VII also applies to enforcing arbitration agreements). And it confirms that there is no conflict between equitable estoppel—a fundamentally pro-arbitration doctrine—and the Convention.

c. "The postratification conduct of the contracting parties displays the same understanding," *Zicherman*, 516 U.S. at 226–27. The Convention does not conflict with domestic doctrines that permit enforcement by non-signatories, including through what U.S. courts would call equitable estoppel.

The recently finalized Restatement of the U.S. Law of International Commercial and Investor-State Arbitration reflects this broad international consensus. Section 2.3(b)(2) of the Restatement says that, "[u]pon request, a court enforces an international arbitration agreement against or in favor of a nonsignatory to the agreement to the extent that the nonsignatory" is "bound by or entitled to invoke the agreement under applicable law." RESTATEMENT § 2.3(b)(2). The comments explain that "applicable law" includes "ordinary principles of contract law, as well as other legal doctrines that operate legally to bind parties," such as

"implied consent, estoppel, and waiver." *Id.*, cmts. a, c. As for estoppel, the reporters' notes specifically state that the doctrine of equitable estoppel may "permit nonsignatories to seek to compel signatories to arbitrate." *Id.*, note c.

Cases from many foreign courts bear out this understanding. The Indian Supreme Court has explained, "[o]nce it is determined that a valid arbitration agreement exists, it is a different step to establish which parties are bound by it." *Chloro Controls Ltd. v. Severn Trent Water Purification Inc.*, Sept. 28, 2012, XXXVIII Y.B. Comm. Arb. 392, ¶ 112 (2013). As part of that "different step," "[t]hird parties, who are not explicitly mentioned in an arbitration agreement made in writing, may enter into its *ratione personae* scope." *Id.* In the Indian view, case law and commentary make "abundantly clear that reference of even non signatory parties to [an] arbitration agreement can be made." *Id.* ¶ 113.

Similarly, the Swiss Federal Tribunal has concluded that the Convention does not specify "'which are the parties which are bound by the agreement.'" Born, § 10.04 (quoting Tribunal fédérale [TF] Oct. 16, 2003, 4P.115/2003, *X. S.A.L., Y. S.A.L. et A. v. Z*, 22 ASA Bull. 364, 386 (2003)); *see* Nathalie Voser & Luka Groselj, "Extension of arbitration agreement to non-signatory upheld under New York Convention (Swiss Supreme Court)," Practical Law UK Legal Update Case Report w-020-4702 ("Voser & Groselj") (explaining that a 2019 Swiss Supreme Court decision confirms that this 2003 decision applies in the context of Article II). The Swiss rule, too, is that "third parties which are not mentioned therein [may] nevertheless

enter into its scope *ratione personae*." Born, § 10.04 (quoting 22 ASA Bull. at 387).

Applying these sorts of principles, numerous foreign courts have thus enforced arbitration agreements against or at the request of non-signatories, consistent with their domestic law. For example, foreign courts generally agree that an arbitration agreement signed by an agent may be enforced against the principal. *See* Born, § 10.02[A]. Likewise, foreign courts rely on domestic principles of legal succession to allow corporate successors to enforce arbitration agreements signed by their predecessors. *See id.* § 10.02[H]. Similarly, foreign courts often rely on domestic principles of assignment to enforce arbitration at the request of assignees. *See id.* § 10.02[I]. And the examples do not end there. Piercing the corporate veil, alter ego concepts, the "group of companies" doctrine, third-party beneficiaries, and estoppel are all doctrines that foreign courts often cite in enforcing an arbitration agreement by or against a non-signatory. *See generally id.* § 10.02; B. Hanotiau, COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS chs. 1–2 (2006); REDFERN & HUNTER ¶¶ 2.42-2.53; S. Brekoulakis, *Chapter 8: Parties in International Arbitration: Consent v. Commercial Reality* ¶¶ 8.20-8.100, *in* S. Brekoulakis, *et al.*, THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION 122-143 (2016) ("Brekoulakis").

The United States is not the only country to rely on the doctrine of equitable estoppel, and to conclude that it comports with the Convention. For example, the Singapore High Court addressed equitable estoppel in *The Titan Unity*. That case, governed by the Convention, involved a shipping contract between

Portigon and Oceanic. [2014] SGHCR 4, ¶ 2 (Feb. 4, 2014). A third company, Singapore Tankers, carried the cargo in question. *Id.* ¶ 5. When Portigon sued Singapore Tankers, the court found that "the very basis of [Portigon's] cause of action against Singapore Tankers lies in the contract in which the arbitration agreement is found." *Id.* ¶ 36. Relying on several U.S. cases, the court emphasized that the doctrine of equitable estoppel "exists to prevent a litigant from unfairly receiving the benefit of a contract while at the same time repudiating what it believes to be a disadvantage in the contract, namely the contractual arbitration provision." *Id.* ¶ 30 (quoting *S. Ill. Beverage v. Hansen Beverage Co.*, 2007 WL 3046273, at *11 (S.D. Ill. 2007)); *see generally id.* ¶¶ 30–35. The Singapore High Court ultimately concluded that "it would not lie in the mouth of Portigon to say that it did not consent to have its claim against Singapore Tankers arbitrated." *Id.* ¶ 36.

Finally, while "civil law jurisdictions do not necessarily recognize the [equitable] estoppel doctrine as such," they "have 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]; *see also* Brekoulakis, ¶¶ 8.56, 8.105. For example, a recent Swiss case involved a distribution agreement between a principal and a distributor. When the principal sued a third company that performed the agreement, the third company invoked the agreement's arbitration clause, and the Swiss Supreme Court referred the parties to arbitration. The court applied Swiss doctrine providing that when a non-signatory is involved in performing an agreement

and manifests an intent to be bound by its arbitration clause, the non-signatory may enforce that arbitration clause. The court found no conflict between this doctrine and Article II of the Convention. *See* Voser & Groselj (summarizing Bundesgericht [BGer] [Federal Supreme Court] Apr. 17, 2019, 4A_646/2018). The French Court of Cassation has invoked a similar doctrine, holding that "the effect of an international arbitration agreement extends to the parties directly implicated in the execution of the contract and the litigation that may result." *Alcatel Business Systems v. Amkor Technology*, Court of Cassation, 1e civ., Mar. 27, 2007, No. 04-20.842.

d. Reading the Convention to allow equitable estoppel under domestic law supports its primary purposes: (1) "to encourage the recognition and enforcement of commercial arbitration agreements" and (2) "to unify the standards by which [such] agreements . . . are observed." *Scherk*, 417 U.S. at 520 n.15; *see also Abbott*, 560 U.S. at 20 (relying on a treaty's "objects and purposes" in determining its meaning).

i. Equitable estoppel "encourage[s] the recognition and enforcement of commercial arbitration agreements in international contracts." *Scherk*, 417 U.S. at 520 n.15. That is the role the doctrine plays domestically. *See supra* at 13-14. And it is even more important on the international stage. "International contractual agreements increasingly tend to contain interwoven and multilayered legal obligations" that can implicate non-signatories. *See* Michael P. Daly, Note, *Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration*, 62 U. MIAMI L. REV. 95, 103 (2007). These contracts often contain arbitration clauses, which are "an

almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Scherk*, 417 U.S. at 516. Equitable estoppel assures signatories and non-signatories alike that disputes involving their obligations under a cross-border contract will be resolved in the arbitral forum that the contract specifies.

ii. Allowing non-signatories to compel arbitration under domestic-law principles also helps "unify the standards" for enforcing arbitration agreements in Contracting States. *Id.* at 520 n.15. As already explained, courts of other Contracting States often allow non-signatories to compel arbitration under the Convention, including based on "[p]rinciples of good faith and estoppel" that have near "universal application." Born, § 5.02[A][2][i]; *see supra* Part I.B.2.c. If this Court follows suit, the enforceability of international arbitration agreements in this country will be governed by a set of principles shared widely (in one form or another) by our co-signatories.

iii. The question whether GE Energy ultimately satisfies the requirements of equitable estoppel is for remand. But this case shows how equitable estoppel promotes both arbitration and uniformity. Outokumpu sued GE Energy—a French subcontractor—in Alabama state court. Although GE Energy itself did not sign the Contracts containing the arbitration clause, the Contracts include GE Energy, as a subcontractor, among the "parties." *See supra* at 15, 18; JA81, 89 (Contract). GE's duties and performance under the Contracts form the heart of Outokumpu's claims. And Outokumpu has proceeded on the theory that GE Energy engaged in "concerted misconduct" with Fives, a signatory to the Contracts. *See MS*

Dealer, 177 F.3d at 947 (internal quotation marks and citation omitted). Despite all that, Outokumpu has tried to avoid its agreement to arbitrate, including by bringing separate lawsuits against Fives and GE Energy.

Equitable estoppel should prevent that "manifestly inequitable" result. *Hughes Masonry*, 659 F.2d at 839. Allowing GE Energy to compel arbitration of Outokumpu's claims would ensure that signatories cannot evade their arbitration agreements through artful pleading. It would treat Outokumpu's claims against GE Energy the same as its claims against Fives. And it would align the United States' approach with that of other Contracting States, which would apply domestic law to determine whether GE Energy, as a non-signatory, can compel arbitration. Nothing about that result "conflicts" with the Convention.

II. THE DECISION BELOW WAS WRONG.

The Eleventh Circuit's contrary ruling lacks any basis in the Convention's text, repeats the analytical mistake this Court corrected in *Arthur Andersen*, and ignores the consensus of foreign courts and respected commentators. On top of that, it is inconsistent even on its own terms. And Respondents' attempt to prop up the decision below with their new argument based on the word "parties" fails, too. Thus, neither the Eleventh Circuit nor Respondents can square their view with the Convention's text, its purposes, or the precedent, construing it.

A. The Eleventh Circuit Misconstrued the Convention.

The Eleventh Circuit correctly acknowledged that "parties can compel arbitration through estoppel under Chapter 1 of the FAA." Pet.App.17a. It also recognized that the same would be true under the Convention absent a "conflict" with Chapter 2 or the Convention. *See id.* It went awry, however, when it concluded that Article II(2) of the Convention—which defines an "agreement in writing" to "include" agreements "signed by the parties"—"expressly restrict[s] arbitration to the specific parties to an agreement." *Id.* The Eleventh Circuit's analysis bears none of the hallmarks of proper treaty interpretation. No wonder, then, that it turns entirely on the erroneous assumption that § 2 says anything about who may enforce a valid arbitration agreement, when § 2 does not even require a signed agreement in the first place.

1. The Eleventh Circuit did not follow any of the steps necessary to construe a treaty. The court conducted no analysis of § 2's text. Had it done so, it might have recognized that § 2 says nothing about enforcement by non-signatories. *See supra* Part I.B.2.a. The court did not address other portions of the Convention that help explain § 2's relationship with domestic doctrines. Had it done so, it might have noticed Article VII, which confirms that the Convention invites Contracting States to apply domestic law that promotes arbitration. *See supra* Parts I.A.2.c, I.B.2.b. The court did not consider the practice of other Contracting States. Had it done so, it would have seen that the courts of those States understand the Convention to be consistent with domestic doctrines that

permit non-signatories to enforce arbitration agreements. *See supra* Part I.B.2.c. And the court did not address the purposes of the Convention. Had it done so, it would have found its decision irreconcilable with them. *See supra* Part I.B.2.d.

2. The Eleventh Circuit also offered no sound explanation of how § 2—which simply speaks to *forming* a valid arbitration agreement—says anything about who may *enforce* an agreement once it exists. Indeed, the Eleventh Circuit's ruling is all the more perplexing because § 2 does not *require* a signed agreement at all (though the Contracts here were signed, *see* JA183)—let alone demand a signature from those who would enforce an agreement.

a. The full text of § 2 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*." N.Y. Conv., Art. II(2) (emphases added). That language makes doubly clear that agreements in writing are not limited to those "signed by the parties."

First, the definition of "agreement in writing" "include[s]" not only agreements "signed by the parties" but also those that are "contained in an exchange of letters or telegrams." *Id.* The Convention's use of the word "or" makes clear that these are independently sufficient criteria. *See United States v. Woods*, 571 U.S. 31, 45–46 (2013) (explaining that "the conjunction 'or' . . . is almost always disjunctive, that is, the words it connects are to 'be given separate meanings'" (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). Because either a signature or an exchange of

letters or telegrams can constitute an "agreement in writing," a signature is not a prerequisite.

Second, the Convention's use of the word "include" makes clear that the enumerated examples are just that: examples. They do not exhaust the universe of "agreements in writing" under the Convention. *See Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."); *United States v. Wyatt*, 408 F.3d 1257, 1261 (9th Cir. 2005) ("The use of the word 'includes' suggests the list is non-exhaustive rather than exclusive."). Other kinds of "agreements in writing"—for example, exchanges of emails or faxes—also qualify, whether they bear any signatures at all.

b. That reading of § 2 adheres to the notion, reflected in Article VII, that the Convention does not prohibit Contracting States from doing more than the Convention requires to promote arbitration. *See supra* Parts I.A.2.c, I.B.2.b. Section 2, in other words, sets a floor for the kinds of agreements Contracting States must recognize. But it does not restrict Contracting States from recognizing arbitration agreements not specifically described in the Convention.

c. Courts of Contracting States understand Article II(2) that way. *See, e.g.*, *Aloe Vera of America, Inc. v. Asianic Food*, *Pte Ltd*, [2006] SGHC 78, ¶ 16 (May 10, 2006) (concluding that Article II(2) "is an illustrative and inclusive clause and not an exhaustive list of what constitutes an agreement in writing"); *Proctor v. Schellenberg*, [2003] 2 WWR 621, ¶ 18 (Dec. 11, 2002) (explaining that Article II(2)'s definition of an "agreement in writing" is "inclusive rather than exhaustive,"

so the Convention does "not limit the definition to these articulated methods of documentation"). So does UNCITRAL, whose Model Law on International Commercial Arbitration does not require that arbitration agreements be signed. *See* UNCITRAL, Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, Art. 7, https://uncitral.un.org/en/texts/arbitration/model-law/commercial_arbitration (last visited Sept. 17, 2019). Commentators do too. The Restatement, for example, "regards Article II(2)'s list of writings as illustrating, not exhausting, the documentation that meets the Convention's requirements as to form." RESTATEMENT § 2.4, cmt. b & note b.

* * *

In short, the Eleventh Circuit failed to engage in anything like a rigorous analysis of the Convention, and the analysis it did perform turned on a faulty premise. Contrary to the Eleventh Circuit's reasoning, § 2 does not require an arbitration agreement to be "signed by the parties" at all. So surely that language cannot mean that only signatories may enforce it. Such a rule would make no sense for unsigned agreements.

B. The Eleventh Circuit's Reasoning Cannot Be Reconciled With *Arthur Andersen*.

The Eleventh Circuit's decision also contravenes this Court's decision in *Arthur Andersen*, 556 U.S. at 629–31. There, the Sixth Circuit had held "that those who are not parties to a written arbitration agreement are categorically ineligible for relief" under Chapter 1

of the FAA. *Id.* at 629. Defending that judgment before this Court, the respondents relied on Chapter 1's provision for staying any action that is "referable to arbitration *under an agreement in writing*." *Id.* at 631 (quoting 9 U.S.C. § 3 (emphasis added)). This reasoning should sound familiar: Because Chapter 1 required an agreement in writing, the respondents believed that only the parties who signed that agreement could enforce it.

This Court rejected that reading of Chapter 1. The requirement of an arbitration agreement in writing, the Court explained, does not limit enforcement of that agreement to its "parties." *See id.* "If a written arbitration provision is made enforceable against (or for the benefit of) a third party under state contract law," the Court held, "the statute's terms are fulfilled." *Id.*

The Eleventh Circuit relied on the same logic that this Court rejected in *Arthur Andersen*. Like Chapter 1, the Convention refers to an "agreement in writing." Art. II(1)–(2). Also like Chapter 1, the Convention says nothing that precludes non-signatories from enforcing such an agreement. "If a written arbitration provision is made enforceable against (or for the benefit of) a third party under state contract law," it should follow, the Convention's "terms are fulfilled." *Arthur Andersen*, 556 U.S. at 631.

C. The Eleventh Circuit's Decision Is Internally Inconsistent.

The Eleventh Circuit's decision fails even on its own terms. The court reasoned that § 2 requires "that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration."

Pet.App.15a (emphasis in original). But not even the Eleventh Circuit could stomach the consequences of that logic. So it "h[e]ld" that, "to compel arbitration, the Convention requires that the arbitration agreement be signed by the parties before the Court *or their privities*." *Id.* at 16a (emphasis added). A footnote elaborates that "[n]othing in this opinion" disturbs the court's prior "holdings that an arbitration agreement is 'signed by the parties' when signed by a party's privy or incorporated by reference in an arbitration agreement." *Id.* at 16a n.1.

Something does not add up. Of course, if the Convention requires that a party "*actually sign*" an arbitration agreement to enforce it, *id.* at 15a (emphasis in original), then a privy (whatever the court may have had in mind by that term) cannot do so. Nor could an arbitration agreement be incorporated by reference. As the Eleventh Circuit seemed to recognize, however, that result would be untenable (and inconsistent with its own prior precedent).

Thus, the court apparently contemplated that *some* non-signatories sometimes could enforce arbitration agreements under the Convention after all. *See id.* at 16a & n.1. But it offered no way to distinguish among the many common-law doctrines that authorize enforcement by anyone other than the individual who actually put pen to paper. *See Arthur Andersen*, 556 U.S. at 631 (describing various "'traditional principles' of state law [that] allow a contract to be enforced by or against nonparties to the contract" (quoting 21 WILLISTON ON CONTRACTS § 57:19)). If a signatory's privy can enforce an arbitration agreement, can his principal? What about an alter ego? What about a successor to the corporation on whose behalf the

agreement was signed? Indeed, how is a court even to determine whether the individual signatory had the authority to bind the corporation in the first place?

The decision below gives no answer. But if § 2 means what the Eleventh Circuit says—*i.e.*, if it limits enforcement of arbitration agreements to the persons who "*actually sign[ed]*" them, Pet.App.15a (emphasis in original)—then none of these doctrines should apply. The Eleventh Circuit's attempt to disclaim that inevitable result only highlights the unworkability of its signature-focused interpretation. It is possible to imagine a scenario in which an international arbitration involves only those individuals who inked their signatures on the arbitration agreement. In the real world, however, international commerce depends on corporations' ability to act through representatives, assign contractual rights and obligations, and change corporate form.

D. Respondents' Reliance on the Word "Parties" Is Both Beside the Point and Wrong.

In their certiorari-stage briefing, Respondents tried to shore up the Eleventh Circuit's bottom line with a different textual point: that the word "parties" in Article II(2) refers to the parties before the court, so it requires that the parties before the court be the very same persons who signed the agreement.

1. Even if that were true, it makes no difference for three familiar reasons. First, regardless of the meaning of "parties," § 2 says nothing that restricts who may enforce an arbitration agreement. *See supra* Part I.B.2.a. Second, § 2 does not provide an exhaustive definition of "agreement in writing." *See supra*

Part II.A.2. Third, the Convention does not preclude Contracting States from applying doctrines that are more favorable to arbitration than the Convention itself requires. *See supra* Parts I.A.2.c, I.B.2.b; N.Y. Conv., Art. VII(1).

2. In any event, the word "parties" in § 2 refers to the parties to the agreement, not parties before the court—and it does not require that those be exactly the same persons. Standing alone, the word "parties" is indeterminate. *See, e.g.*, "Party," BLACK'S LAW DICTIONARY (11th ed. 2019) (listing seven potential meanings of "party"). Depending on context, it can refer to either the parties to an agreement or (as Respondents would have it here) persons "by or against whom a lawsuit is brought." *Id.* In Article II(2), however, context makes clear that the drafters of the Convention did not have a lawsuit in mind. Instead, they used the term in its primary legal sense: to refer to "[s]omeone who takes part in a transaction," such as "a party to the contract." *Id.*

Here, that is the only natural reading of "parties." "Agreement" is the subject of § 2. It is also the subject of Article II(1), which contains the term § 2 elaborates. By contrast, neither provision mentions court cases. "Agreement" is thus the only reasonable referent. Article V(1) of the Convention makes that even clearer. It states that enforcement of an arbitration award "may be refused" if "[t]he parties *to the agreement referred to in article II* were . . . under some incapacity." N.Y. Conv., Art. V(1)(a) (emphasis added). The cross-reference confirms that Article II(2) is talking about "parties to the agreement."

To be sure, other parts of the Convention may well use the term "parties" in a different sense, including

to refer to litigants before a court. Although courts sometimes assume that a word carries the same meaning throughout a legal document, that canon "is not an absolute." *See Lockhart v. United States*, 136 S. Ct. 958, 963 (2016) (internal quotation marks omitted); ANTONIN SCALIA AND BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170–71 (2012) (because "drafters more than rarely use the same word to denote different concepts," this canon is "particularly defeasible by context"). And it cannot carry the day here for two reasons.

First and most important, whatever "parties" means in other provisions, the only reasonable interpretation of it in § 2 is that it refers to "agreement." *See supra* at 46. Second, a party cannot benefit from a canon of interpretation when its own reading does not apply that canon consistently. *Cf. Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011). Respondents have not disputed that "parties" at least sometimes refers to "parties to the agreement." Indeed, Article V(1) uses that phrase exactly. So the "same meaning" canon simply does not work for the Convention. That is hardly surprising, given the inherent indeterminacy of the word "parties," *see supra* at 46, and the haste with which Article II was drafted, *see supra* at 8-9.

E. Reading § 2 to Bar Enforcement by Non-Signatories Would Undermine the Convention's Goals.

Holding that the Convention bars Contracting States from applying domestic law to permit enforcement by non-signatories would undermine the two

primary purposes of the Convention: (1) "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts," and (2) "to unify the standards by which agreements to arbitrate are observed." *Scherk*, 417 U.S. at 520 n.15.

1. Holding that non-signatories cannot enforce arbitration agreements under the Convention would inhibit "the recognition and enforcement of commercial arbitration agreements." *Id.* Protecting the integrity of those agreements is the whole point of equitable estoppel. If that doctrine were categorically unavailable, "arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted." 21 WILLISTON ON CONTRACTS § 57:19.

And it is not only equitable estoppel that would be unavailable if § 2 bars enforcement by non-signatories. At least five other common-law doctrines allow non-signatories to compel arbitration in appropriate circumstances: "(1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; . . . and [(5)] third party beneficiary." *Id.* Each has a long historical pedigree. *See id.* And each helps protect agreements to arbitrate. *See id.* If Respondents are right that "the only parties who can seek to compel arbitration or that the court can compel to arbitration are the parties who signed the arbitration agreement," Brief in Opposition 19, every one of those doctrines is out the window.

2. As for "unify[ing]" standards, *Scherk*, 417 U.S. at 520 n.15, a broad international consensus recognizes that the Convention does not preclude Contracting States from applying domestic law that allows non-signatories to enforce (or be bound by) arbitration

agreements. *See supra* Part I.B.2.c. Although not every Contracting State recognizes "equitable estoppel" by name, most allow non-signatories to enforce arbitration agreements—including in circumstances very similar to equitable estoppel. *See id.*

If this Court holds otherwise, it would render the United States an outlier among the Convention's 160 signatories. It would disfavor international arbitration agreements in the United States compared to most other places in the world, creating incentives for forum shopping. *See Scherk*, 417 U.S. at 516–17 (enforcing international arbitration agreements helps prevent "unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages"). And even in the United States, it would treat international arbitration agreements less favorably than domestic ones. *See Arthur Andersen,* 556 U.S. at 630–31 (holding that common-law doctrines about non-signatory enforcement, including equitable estoppel, apply under Chapter 1 of the FAA). This, even though the United States has an "emphatic federal policy in favor of arbitral dispute resolution," which "applies with special force in the field of international commerce." *Mitsubishi Motors*, 473 U.S. at 631.

Equitable estoppel, a doctrine designed to protect the integrity of arbitration agreements, applies under domestic law. The Convention was adopted to promote arbitration, which is even more important in the international context. Nothing in the Convention conflicts with equitable estoppel.

CONCLUSION

This Court should reverse the Eleventh Circuit's judgment and hold that the Convention does not conflict with equitable estoppel.

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