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 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The NAM's members include many companies that trade with and invest in foreign countries around the world, including foreign companies that bring investments and jobs to the United States. International trade and investment, and the laws and rules that ensure certainty and predictability with regard to trade and investment, are highly important to the NAM's members and help spur access to new markets, innovation, improved trade and investment relations, and stronger ties overseas.

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1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of the intent of *amicus curiae* to file this brief. The parties have consented to the filing of this brief.

In contracting with international partners, the NAM's members regularly rely on arbitration agreements to ensure predictability and reliability in resolving disputes. Naturally, then, the NAM has a strong interest in this case, which involves the enforceability of arbitration agreements in the international context. The NAM's members need certainty that international arbitration agreements—just like domestic arbitration agreements—can be enforced through basic principles of contract law.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Federal Arbitration Act ("FAA") was enacted to overcome judicial resistance to arbitration. To that end, it makes arbitration agreements "valid, irrevocable, and enforceable" as a matter of federal law. Chapter 1 of the FAA applies to domestic arbitration agreements; Chapter 2 applies to arbitration agreements in the context of international contracting.

Chapter 1 of the FAA establishes a "national policy favoring arbitration" by placing arbitration agreements on equal footing with all other contracts. *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443 (2006). This emphatic federal policy in favor of arbitration applies with even greater force in the context of international business transactions. *See Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth*, 473 U.S. 614, 629-31 (1985). By signing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention" or "Convention"), Sept. 30, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997, and enforcing the treaty through Chapter 2 of the FAA, the United States sought to

"encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1970).

In Chapter 2 of the FAA, Congress made Chapter 1 of the FAA applicable to all international arbitration agreements so long as that chapter does not conflict with Chapter 2 of the FAA or the Convention. 9 U.S.C. § 208. Chapter 1, in turn, allows arbitration agreements to be enforced "against (or for the benefit of) a third party under state contract law," *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009)—including under a theory of equitable estoppel, *id.* By design, then, the FAA permits the enforcement of international arbitration agreements under an equitable estoppel theory, unless there is conflicting language in Chapter 2 or the Convention. Because nothing in the Convention prevents a non-signatory from enforcing an international arbitration agreement, Petitioner should have been free to seek to enforce the arbitration agreement. The court below, however, purported to find conflicting language in a provision of Chapter 2 that does no more than require a signed writing for an arbitration agreement to be valid. In doing so, the court subverted the goals and purposes of the Convention and the FAA by refusing to allow third-party enforcement of an international arbitration agreement.

If left uncorrected, the decision below will create uncertainty in contracting that will increase the costs of international investment and thus inhibit international commerce. The NAM's members regularly rely on

international arbitration agreements. Arbitration provides lower costs, greater efficiency and speed, and numerous other advantages over traditional litigation. By worsening a circuit split, the decision below will deprive numerous businesses of these benefits and will lead to further uncertainty concerning whether and when a non-signatory can enforce an international arbitration agreement. The Court should grant the petition.

ARGUMENT

I. Chapter 2 of the FAA and the New York Convention Authorize Non-Signatories to Enforce International Arbitration Agreements.

A. The National Policy Favoring Arbitration Has Special Force in the Context of International Commerce.

Congress enacted the Federal Arbitration Act ("FAA") in 1925 "to reverse the longstanding judicial hostility to arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *see also Buckeye Check Cashing, Inc.,* 546 U.S. at 443. Its intended goal was "to place an arbitration agreement 'upon the same footing as other contracts, where it belongs.'" *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., at 1 (1924)). The FAA accomplishes this goal by making arbitration agreements "valid, irrevocable, and enforceable" as a matter of federal law, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Chapter 1 of the FAA is its most-commonly known part; it apples to written arbitration agreements between domestic parties. It creates a body of "federal substantive law requiring parties to honor arbitration agreements," *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984), and "establishes 'a liberal federal policy favoring arbitration,'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). This pro-arbitration policy reflects the fact that arbitration is a faster, cheaper alternative to litigation that is fair and beneficial to businesses and individuals. *Concepcion*, 563 U.S. at 345 (arbitration "reduc[es] the cost and increas[es] the speed of dispute resolution"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985) (emphasizing the relative "simplicity, informality, and expedition of arbitration").

Similarly, Chapter 2 of the FAA applies to international arbitration. Chapter 2 implements the New York Convention. *See* 9 U.S.C. § 202 ("The Convention … shall be enforced in United States courts in accordance with this chapter."). The Convention, which is in force in 159 countries, is designed to encourage businesses to use arbitration to resolve international commercial disputes by providing certainty that the nations that signed the Convention will enforce international arbitration awards. *See* Allen B. Green, *International Government Contract Law* § 11:26; United Nations Treaty Collection, *Status as of March 11, 2019: Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, https://bit.ly/1v7ZGhS (listing signatory countries). "The 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 and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk*, 417 U.S. at 520 n.15.

The federal policy in favor of arbitration applies even more forcefully in the context of Chapter 2 and international arbitration. As this Court has put it, the "emphatic federal policy in favor of arbitral dispute resolution … applies with special force in the field of international commerce." *Mitsubishi Motors Corp.*, 473 U.S. at 629-31; *see also David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 248 (2d. Cir. 1991) ("The policy in favor of arbitration is even stronger in the context of international business transactions."); *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 45 (1st Cir. 2008) ("[T]he national policy favoring arbitration has extra force when international arbitration is at issue."). This policy in favor of enforcing international arbitration agreements reflects "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes." *Mitsubishi Motors Corp.*, 473 U.S. at 629.

B. Chapter 1's Third-Party Enforcement Principles Apply in the International Context Unless Specifically Barred by Chapter 2.

Chapter 2 of the FAA expressly adopts the entirety of Chapter 1 and incorporates it into the international context, except to the extent there is a conflict between the two. 9 U.S.C. § 208 ("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."). Chapter 1's federal law of arbitrability, *see Southland*, 465 U.S. at 15 n.9, thus applies in the international context unless barred by the text of Chapter 2 or the New York Convention.

It is beyond dispute that the federal law of arbitrability includes standard principles of third-party enforcement of arbitration agreements. A decade ago, this Court made clear that Chapter 1 (through 9 U.S.C. § 2) incorporates "background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Arthur Andersen LLP*, 556 U.S. at 630 (citation omitted). Accordingly, under Chapter 1 of the FAA, arbitration agreements can be enforced "by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver, and estoppel.'" *Id.* (quoting 21 R. Lord, Williston on Contracts § 57:19, p. 183 (4th ed. 2001)); *see id.* at 631 ("If a written arbitration provision is made enforceable against (or for the benefit of) a third party under state contract law, the [FAA's] terms are fulfilled.").

Equitable estoppel is a classic mechanism for a nonparty to enforce a contract, including contracts with arbitration clauses. *Id.* "[E]quitable estoppel precludes a party from enjoying rights and benefits under a contract while at the same time avoiding its burdens and obligations." *InterGen N.V. v. Grina*, 344 F.3d 134, 145 (1st Cir. 2003). On this basis, "a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's

arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him." *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000). Generally, federal courts "have been willing to estop a signatory from avoiding arbitration with a nonsignatory when the issues to resolve in arbitration are intertwined with the agreement that the estopped party has signed." *Hogan v. SPAR Grp., Inc.*, 914 F.3d 34, 41 (1st Cir. 2019) (citation and alteration omitted); *see, e.g., CD Partners, LLC v. Grizzle*, 424 F.3d 795, 798-800 (8th Cir. 2005) (concluding that it was "clearly appropriate to allow the non-signatories to enforce the arbitration agreement against [the] signatory").

As explained above, these same principles apply in the context of international arbitration agreements, unless Chapter 2 of the FAA or the Convention provides otherwise. Thus, equitable estoppel may be applied to allow an arbitration agreement "to be enforced by or against nonparties," *Arthur Andersen*, 556 U.S. at 630, unless specifically barred by the text of Chapter 2 of the FAA or the Convention.

C. Contrary to the Decision Below, the New York Convention Does Not Bar the Enforcement of an Arbitration Agreement By a Third Party Via Equitable Estoppel.

Because Chapter 2 envisions the enforcement of international arbitration agreements by non-signatories, Petitioner should have been free to seek to enforce the arbitration agreement at issue under theories of equitable estoppel, despite the fact that it is a foreign corporation.

But the Eleventh Circuit rejected this plain reading of the FAA, instead finding a conflict in the Convention.

According to the lower court, the Convention's requirement that an arbitration agreement be "signed by the parties," N.Y. Convention, Article II, § 2, means that "to compel arbitration, … the arbitration agreement [must] be signed by the parties before the Court or their privities," Pet. App. 16a. Because "the Convention only allows the enforcement of agreements in writing signed by the parties and Congress has specified that the Convention trumps Chapter 1 of the FAA where the two are in conflict," Petitioner could not enforce the arbitration agreement. Pet. App. 17a (citing 9. U.S.C. § 208).

But this construction of the FAA and Convention makes no sense. As Petitioner explained, the Convention "simply prohibits [the enforcement of] unwritten arbitration agreements—that is, it requires only that an agreement be signed by the parties to that agreement for the arbitration clause to be valid." Pet. 25 (citing N.Y. Convention, Article II, § 2). This "signed by the parties" language says nothing at all about whether an arbitration agreement can be enforced by a non-signatory—and it certainly is not clear enough to overcome the presumption that the FAA incorporates background principles of common law. *See* Pet. 25-26.

Indeed, if the New York Convention says anything about third-party enforcement, it is that arbitration agreements *can* be enforced by and against non-signatories. Article V of the Convention, which deals with the recognition and enforcement of arbitral awards, draws a distinction between "parties" in a dispute in

arbitration and "parties to the agreement." The section states that recognition and enforcement of an arbitral award may be refused at the request of the "party against whom [the award] is invoked" if that party provides proof that the "parties *to the agreement* referred to in article II" (*e.g.*, the signatories) were under some incapacity. N.Y. Convention, Article V, § 1(a); *see also id.* Article V, § 1(b) (arbitral award may be refused if "the party against whom the award is invoked was not given proper notice"). By using the phrase "parties to the agreement" immediately after a reference to the "party against whom it is invoked," the Convention distinguished between the two terms. This textual distinction evidences that the Convention contemplated that the party "against whom" an arbitral award is invoked might not be a "part[y] to the [arbitration] agreement" itself. Interpreting the text in this manner is consistent with the canon that different terms must be given different meanings. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]e refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.").

Further, Section 1(a) of Article V provides that a party "against whom" an arbitral award is invoked may defeat enforcement of the award by demonstrating that one of the "parties to the agreement" was "under some incapacity." Article V, § 1(a). Incapacity makes an agreement voidable—but of the parties to an agreement, only the one suffering the incapacity can invoke this defense to contract enforcement. *See* Restatement (Second) of Contracts §§ 12, 14, 15, 175. That Section 1(a) contemplates incapacity of *either* contracting party as a

defense to enforcement means that the Convention must have contemplated enforcement of arbitration agreements by or against third parties. The Eleventh Circuit's holding to the contrary was error.

II. International Commerce Will Suffer if Non-Signatories Cannot Enforce International Arbitration Agreements.

A. International Arbitration Provides Numerous Benefits to Contracting Businesses.

More than three decades ago, the Court recognized that "[a]s international trade has expanded …, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity." *Mitsubishi*, 473 U.S. at 638. Today, "[b]usinesses around the world rely upon arbitration to settle international disputes in a prompt, effective, and neutral manner." Aubrey L. Thomas, *Nonsignatories in Arbitration: A Good-Faith Analysis*, 14 Lewis & Clark L. Rev. 953, 978 (2010). "Given the increasingly global nature of business, it has become normal to expect that many business disputes will involve corporations, investors, creditors, affiliates, franchises, or any other interested parties who (1) are from different countries, and (2) have included a clause in their business agreements providing that any potential contractual disputes will be resolved through international arbitration." Michael P. Daly, *Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration*, 62 U. Miami L. Rev. 95, 96 (2007).

The use of arbitration agreements in international commerce has increased so dramatically because of the myriad benefits they provide:

Removing Uncertainty. An arbitration agreement furthers international commerce by removing much of the uncertainty (and risk of economic loss) facing contracting entities. *See Mitsubishi*, 473 U.S. at 629 ("[A]greeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting."). Such agreements avoid the "uncertainty [that] will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-law rules." *Scherk*, 417 U.S. at 516. "A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Id.* Without these assurances, "the dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Id.* at 517.

Neutral Decisionmaker. International arbitration also eliminates "the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved." *Id.* at 516. A pre-dispute agreement as to the forum avoids any "unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." *Id.* at 516-17. For example, a foreign company

could not be faulted for being suspicious that it might receive "'hometown justice'—having a dispute resolved by a court in the other party's home country." Christopher R. Drahozal, *Regulatory Competition & the Location of International Arbitration Proceedings*, 24 Int'l Rev. L. & Econ. 371, 372 (2004).

Efficient, Low-Cost Resolution of the Dispute. Arbitration is typically faster and cheaper than litigation in the state and federal courts, as this Court has repeatedly observed. *See, e.g., Concepcion*, 563 U.S. at 345 (Arbitration "reduc[es] the cost and increas[es] the speed of dispute resolution."); *Stolt-Nielsen S.A*, 559 U.S. at 685 (Arbitration provides "lower costs" and "greater efficiency and speed."); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."); *Mitsubishi Motors Corp.*, 473 U.S. at 628 (noting the "simplicity, informality, and expedition of arbitration"). For example, in 2018, the median civil lawsuit in the federal court took more than *two years* to reach trial. *See* U.S. Courts, *U.S. District Courts—Nat'l Judicial Caseload Profile* (2018), https://bit.ly/2NRgwAU. By contrast, as the Court has recognized, there is "a strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes." *Mitsubishi*, 473 U.S. at 631. International arbitrations typically have streamlined procedures that allow focused discovery. *See* Jenna M. Godfrey, *Americanization of Discovery: Why Statutory Interpretation Bars 28 U.S.C. S 1782(a)'s Application in Private International Arbitration Proceedings*, 60 Am. U. L. Rev. 475, 511 (2010). The limited scope of discovery is "often what contributes to the efficiency and lower cost of participating in arbitration." *Id.*

The Protection of Trade Secrets and Intellectual Property. International arbitration agreements allow companies to ensure confidentiality when the contract might involve sensitive trade secrets or intellectual property. For manufacturers, their trade secrets and intellectual property rights are highly valuable property and investments. Unlike traditional litigation, in which such information may become public, arbitration can ensure that the confidentiality of these assets is preserved. *See* Godfrey, *supra*, 511 ("[M]any arbitration institutions provide for exemptions for trade secrets, which provide companies with the ability to keep their business strategies protected."); Thomas, *supra*, 981.

Enforcing the Award. The judgments from foreign courts are often difficult to enforce. In fact, "[i]n the current legal climate, it is more likely for a company to enforce an international arbitration award than a judgment from a foreign court." Thomas, *supra,* 978-79; Drahozal, *supra*, 372 ("Arbitration also results in an award that is more readily enforceable internationally than a court judgment." (citation omitted)). Nearly 160 countries have ratified the Convention, which requires recognition of arbitral awards, *see* United Nations Treaty Collection, *supra*, but no equivalent multilateral treaty exists in which countries agree to recognize judgments, *see* Gary B. Born & Peter R. Rutledge, *International Civil Litigation in United States Courts* 1080 (5th ed. 2011) ("Unlike many foreign states, the United States is not a party to any international agreement regarding the recognition of judgments."). This increased likelihood of enforcement fosters predictability and reliability in contracting, which facilitates international commerce.

Expertise. Litigation is usually tried before a judge (who is usually a generalist) or a jury. But it is often advantageous for companies to appear before arbitrators with special expertise in the subject matter. "One of the most attractive features of arbitration is that the proceedings are generally conducted in ad hoc courts of arbitration specifically designed to deal with a particular dispute." Carla S. Copeland, *The Use of Arbitration to Settle Territorial Disputes*, 67 Fordham L. Rev. 3073 (1999). "Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). This "ability to choose expert adjudicators to resolve specialized disputes," *Stolt-Nielsen S.A.*, 559 U.S. at 685, has special force in the context of disputes involving international contracts, which are often highly technical and complex, *see, e.g.,* John W. Hinchey, *International Construction Arbitration Handbook* § 1:1 (2018) (describing the extreme complexity of international construction disputes).

B. If Left Uncorrected, the Decision Below Will Deprive Contracting Parties of the Benefits of International Arbitration and Thereby Harm International Commerce.

Given the significant benefits of international arbitration, it is no surprise that non-signatories, such as Petitioner, would want to enforce an arbitration agreement. "As businesses conduct more and more transactions in the world market, companies look to the courts … to ensure that disputes between international parties—regardless of whether the parties signed the contract—are resolved in a neutral forum and not subjected to the potentially biased laws of another country." Thomas, *supra*, 955.

The resolution of the issue presented by the Petition is critically important to international commerce. "Disputes involving nonsignatories are inevitable in the context of modern international business transactions that typically involve complex webs of interwoven agreements, multilayered legal obligations and the interposition of numerous, often related, corporate and other entities." James M. Hosking, *Non-Signatories and International Arbitration in the United States: the Quest for Consent*, 20 Arb. Int'l 289, 289 (2004). Indeed, "the question of how to deal with nonsignatories who become entangled in disputes over such agreements … has become a regular issue before international arbitral tribunals." Daly, *supra*, 96.

The Court should grant the petition to make clear that non-signatories may enforce international arbitration agreements. At a minimum, however, the Court should grant the petition to resolve the uncertainty on this issue. As Petitioner explains, Pet. 14-19, the circuit courts are split on the enforceability of international arbitration agreements by non-signatories (a split the Eleventh Circuit has only deepened). Such uncertainty inhibits international commerce. "International transactions should be uniform and predictable so parties may properly balance the risks and benefits of a potential transaction." Thomas, *supra*, 982; *David L. Threlkeld & Co.*, 923 F.2d at 248 ("Stability in international trading was the engine behind the Convention in the Recognition and Enforcement of Foreign Arbitral awards").

Without the Court's intervention, the forum to resolve international disputes (which regularly involve tens of millions of dollars in damages) could turn on the ability of

the party seeking to avoid arbitration to find jurisdiction in a circuit where arbitration cannot be enforced. This "unseemly and mutually destructive jockeying … to secure tactical litigation advantages" is precisely what the FAA was meant to avoid. *Scherk*, 417 U.S at 516-17.

CONCLUSION

Amicus curiae respectfully requests that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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