No. 18-1048

In the Supreme Court of the United States

GE ENERGY POWER CONVERSION FRANCE SAS, CORP., FKA 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 of *Amici Curiae* Professor George A. Bermann, R. Doak Bishop, Professor Andrea K. Bjorklund, Douglas Earl McLaren, Professor Alan S. Rau, Professor W. Michael Reisman and John M. Townsend in Support of Petitioner

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INTEREST OF *AMICI CURIAE*[*]

Amici curiae are prominent scholars and practitioners of international arbitration law. They also served as the Reporter and Advisers to the Restatement of the U.S. Law of International Commercial and Investor-State Arbitration, adopted by the American Law Institute in 2019 ("the Restatement").

In the view of *amici,* the judgment of the Court of Appeals in this case rests on an erroneous interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention" or the "New York Convention"). The Court of Appeals' interpretation is contrary to widespread international consensus and practice under the Convention. Its consequent misreading of Chapter 2 of the Federal Arbitration Act (the "FAA") is also contrary to the synthesis of U.S. law in the Restatement. *Amici* are concerned that the Court of Appeals' rigid and untenable reading of the Convention, and hence of the FAA, would disrupt the global system of fair resolution of international commercial disputes built up over the last half century.

Amici recognize that arbitration agreements are based primarily on express consent. However, there are limited but important and well-established

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[*] Counsel for all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici* and their counsel contributed monetarily to the preparation or submission of this brief.

exceptions for implied consent, and in some instances imputed consent, by which nonsignatories may be bound by or enforce international arbitration agreements, based on ordinary principles of contract, agency, equity and related principles. If the judgment below were to be affirmed, the resulting American doctrine would categorically bar, not only nonsignatory enforcement of international arbitration agreements on the basis of equitable estoppel – the question presented in this case – but much more.

It would invalidate nearly all of the many bases recognized and regularly used by States parties to the Convention – including by courts in diverse jurisdictions in the U.S. – on which nonsignatories may exceptionally be bound by or enforce international arbitration agreements. U.S. cases recognize a range of grounds to permit international arbitration by or against nonsignatories, based on ordinary principles of contract law, judicial estoppel, equitable estoppel, the direct benefits theory of estoppel, agency, alter ego, veil-piercing, incorporation by reference, assumption, and third-party beneficiary.

To the knowledge of *amici*, no appellate tribunal of any other nation has explicitly adopted so rigidly restrictive a reading of the signature provisions of the Convention. On the contrary, the principal international monitoring body – the United Nations Commission on International Trade Law, or UNCITRAL – officially interprets the signature provisions on which the Court of Appeals relied as "not exhaustive." Consistent with this interpretation, many States permit nonsignatories in exceptional

circumstances to be bound by or to enforce international arbitration agreements.

Amici are listed below. Affiliations are for identification only. Brief biographical information is included in Appendix A.

Reporter of the Restatement:

George A. Bermann is the Jean Monnet Professor of EU Law, Walter Gellhorn Professor of Law, and the Director of the Center for International Commercial and Investment Arbitration at Columbia Law School.

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R. Doak Bishop is a Partner in the International Arbitration practice of King & Spalding, specializing in the oil and gas, energy, construction, environmental and foreign investment sectors.

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Alan S. Rau is the Mark G. and Judy G. Yudof Chair Emeritus in Law at the University of Texas at Austin. He frequently serves as an arbitrator and is a

member of the panel of the AAA and the panel of mediators of the Court of Arbitration for Sport.

W. Michael Reisman is Myres S. McDougal Professor of International Law at the Yale Law School and Honorary President of the American Society of International Law. He has served as an arbitrator or counsel in many international arbitrations and has authored numerous scholarly publications on international commercial arbitration.

John M. Townsend is a litigation partner in the Washington, D.C. office of Hughes Hubbard & Reed LLP and co-chairs the firm's Arbitration practice group.[1] His arbitration practice includes representing parties in international and domestic commercial arbitration, investment treaty disputes, and acting as an arbitrator.

SUMMARY OF ARGUMENT

The Court of Appeals erred in holding that, "to compel arbitration, the Convention requires that the arbitration agreement be signed by the parties before the Court or their privities." *Outokumpu Stainless USA, LLC, v. et al. v. CONVERTEAM SAS, now known as GE Energy Power Conversion France SAS, Corp.*, 902 F.3d 1316, 1326 (11th Cir. 2018) (footnote omitted). Its broad holding – that arbitration cannot be compelled unless the "parties before the Court" or their

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[1] Former partners of Hughes Hubbard & Reed LLP advised clients in connection with the District Court stage of this litigation, but Mr. Townsend was not involved. Neither his firm nor its clients have made a monetary contribution to the filing of this brief.

privities signed the arbitration agreement – would categorically bar enforcement of international arbitration agreements by or against nonsignatories in all circumstances.

In thus misconstruing the New York Convention, the Court of Appeals completely disregarded all but one of the principal criteria utilized by this Court to interpret a treaty. It relied solely on the literal text of a single article in the Convention (which it misread). In contrast, this Court interprets treaties in light of multiple criteria: the text and structure of the treaty; the views of the Executive; the views of other States parties, including their case law; scholarly opinion; the history of the treaty; and the object and purpose of the treaty. *Abbott v. Abbott*, 560 U.S. 1, 10, 15, 16, 18, 19 and 20 (2010). The Court of Appeals also entirely overlooked a further criterion this Court takes into account, namely the post-ratification understanding of the Convention by other States. *Medellin v. Texas*, 552 U.S. 491, 516 (2008); *Zicherman v. Korean Airlines Co.*, 516 U.S. 217, 226 (1996).

International law on treaty interpretation is broadly consistent with this Court's criteria. Vienna Convention on the Law of Treaties, May 23, 1969, *entered into force*, Jan. 27, 1980, 1155 U.N.T.S. 331, art. 31.

The Court of Appeals considered only the literal text of a single article of the Convention – Article II – and got it wrong. It misread Article II, first, by treating signatures as the only means by which international arbitration agreements may be covered by the Convention and, second, by confusing the question of

the formalities for an agreement under the Convention with the separate question of who may enforce or be bound by such an agreement. As aptly explained by the Swiss Federal Tribunal, the inclusion of agreements "signed by the parties" in Article II (2) of the Convention refers to agreements signed by the parties to the original contract, and not necessarily by third-parties to which the scope of the arbitration agreement is extended. (See Part I.B below.)

Amici recognize that the primary basis of international arbitration is express consent. However, there are limited but important and well-established exceptions for implied and in some instances imputed consent. Petitioner argues persuasively that the text, as well as the object and purpose of the Convention, allow space for these exceptions. In particular, the Convention permits nonsignatories exceptionally to be bound by or enforce international arbitration agreements based on equitable estoppel.

Amici need not repeat Petitioner's arguments. Instead we focus on further criteria leading to the same interpretive result, each of which is within our particular expertise, and none of which was addressed by the Court of Appeals below. That the Convention permits nonsignatories exceptionally to be bound by or to enforce international arbitration agreements is shown by the consensus of States, joined in by the U.S. (Part I.A below); by the individual post-ratification understandings of States, embodied mainly in their case law and, in the case of the U.S., in an *amicus* brief submitted by the Executive (Part I.B below); and by

scholarly interpretations of the Convention. (Part II below).

In addition, with respect to implementation of the Convention in the U.S. through Chapter 2 of the FAA, we invoke the synthesis of U.S. law in the Restatement, which supports the position taken herein. (Part III below).

Courts in the U.S. and other States parties to the Convention allow nonsignatories exceptionally to be bound by or to enforce international arbitration agreements based on a wide range of ordinary contract, agency, equitable and related doctrines.

Although the question presented in this case involves one such doctrine (equitable estoppel), the rationale of the Court of Appeals – that only signatories or their privities may be bound by or enforce international arbitration agreements – sweeps much more broadly. It conflicts, not only with the judgments in the First and Fourth Circuits concerning estoppel cited in the petition for *certiorari*, but also with a legion of judgments from diverse U.S. jurisdictions recognizing that arbitration by or against nonsignatories may exceptionally be permitted by ordinary principles of contract, agency, equitable and related principles. They include appellate decisions from at least the First, Second, Third and Fifth Circuits. *E.g.*, *InterGen N.V. v. Grina*, 344 F.3d 134, 144-50 (1st Cir. 2003) and other cases cited in Part I below.

These cases recognize a range of exceptional grounds to permit international arbitration by or against nonsignatories, based on ordinary principles of contract law, judicial estoppel, equitable estoppel, the direct benefits theory of estoppel, agency, alter ego, veil-piercing, incorporation by reference, assumption, and third-party beneficiary. (Part I below.)

As illustrated by these cases (and others cited in the Restatement), the rigid reading of the Convention by the Court of Appeals in this case is a distinctly minority view in U.S. case law.

Even more broadly, the erroneous interpretation of the Convention by the Court of Appeals would invalidate virtually all of the many legal and equitable bases recognized by States around the world to allow nonsignatories exceptionally to be bound by or to enforce international arbitration agreements. Although civil law States do not generally recognize the common law doctrine of equitable estoppel as such, they recognize comparable obligations under a range of legal and equitable doctrines as bases to enforce arbitration agreements by or against nonsignatories. Depending on the civil or common law jurisdiction, legal bases of nonsignatory arbitration may include agency, apparent or ostensible authority, implied consent, alter ego, veil-piercing, the "group of companies" doctrine, third party beneficiaries, guarantors, succession, assignment and other transfers of contractual rights, subrogation, estoppel, good faith, ratification, corporate officers and directors, shareholder derivative rights, and joint venture relations. (Part I.B below.)

The untenably strict reading of the Convention by the Court of Appeals would thus significantly disrupt the successful system of fair arbitral resolution of international commercial disputes painstakingly constructed over the last half century.

This Court has rightly rejected a ban on nonsignatory arbitration in the domestic context. It has held that nonsignatories may enforce or be bound by domestic arbitration agreements under Chapter 1 of the FAA in circumstances where "'traditional principles' of state law allow a contract to 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'." *Arthur Andersen LLP et al. v. Carlisle et al.*, 556 U.S. 624, 631 (2009), quoting 21 R. Lord, Williston on Contracts §57:19, p. 183 (4th ed. 2001).

No sound reason exists why nonsignatories may not also exceptionally be bound by or enforce international arbitration agreements based on the same "traditional principles" under Chapter 2 of the FAA. Section 208 of Chapter 2 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."

There is no such conflict. The Court of Appeals thought it found one in Convention Article II (2), which provides that arbitration agreements under the Convention shall "include" arbitral clauses or agreements "signed by the parties or contained in an exchange of letters or telegrams." 902 F.3d at 1325,

1327. However, the Court of Appeals both misread and misapplied Article II (2).

First, by including international arbitration agreements signed by the parties among those covered by the Convention, Article II (2) is "not exhaustive." Such is the authoritative interpretation of the international monitoring body – the United Nations Commission on International Trade Law ("UNCITRAL") – adopted by a consensus including the U.S. (Part I.A. below.)

Second, the issue of who may be bound by or enforce an agreement is in any event distinct from the question of whether the agreement is covered under the Convention. As Petitioner aptly argues, the Court of Appeals misconstrued the word "parties" in Article II (2). In context, it refers to the parties, not to the arbitral proceeding, but to the arbitration agreement.

Amici are aware of no appellate decision by the courts of any other nation which explicitly adopts the Court of Appeals' rigidly restrictive interpretation and misapplication of the signature provisions of Article II (2) of the Convention.

Because the Court of Appeals erroneously held that the Convention, and thus Chapter 2 of the FAA, categorically bar enforcing international arbitration agreements by or against nonsignatories, it did not reach the question of whether Respondents are equitably estopped from refusing arbitration in this case. *Amici* express no view on that separate question. This Court should reverse and remand for further

proceedings on whether equitable estoppel applies here.

ARGUMENT

The Court of Appeals erred in holding that, "to compel arbitration, the Convention requires that the arbitration agreement be signed by the parties before the Court or their privities." 902 F.3d at1326. Its broad holding – that arbitration cannot be compelled unless the "parties before the Court" or their privities signed the arbitration agreement – would categorically bar enforcement of international arbitration agreements either by or against nonsignatories in all circumstances.

The Court's misconstruction of the Convention caused it also to misconstrue Chapter 2 of the FAA, which implements the Convention in U.S. Law. In so interpreting the Convention, the Court entirely disregarded all but one of the principal criteria utilized by this Court to interpret a treaty. Moreover, it erred on the one criterion – the text of a single article of the Convention – which it did consider. In contrast, this Court interprets treaties by considering the text and structure of the treaty; the views of the Executive; the views of other States parties, including their case law; scholarly opinion; the history of the treaty; and the object and purpose of the treaty. *Abbott v. Abbott*, 560 U.S. 1, 10, 15, 16, 18, 19 and 20 (2010). Nor did the Court of Appeals consider the post-ratification understanding of the Convention by other States, which this Court also takes into account. *Medellin v. Texas*, 552 U.S. 491, 516 (2008); *Zicherman v. Korean Airlines Co.*, 516 U.S. 217, 226 (1996).

Although expressed in different formulations, this Court's criteria for treaty interpretation are broadly consistent with those of international law as set forth in the article 31 of the Vienna Convention on the Law of Treaties. The U.S. "considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties."[2]

The Court of Appeals interpreted the Convention on the sole basis of the literal text of Article II of the Convention. However, it misread the text in two ways. First, it treated the Article II (2) provision that the Convention shall "include" agreements "signed by the parties" as if it were exclusive of other agreements, which it is not. Second, the Court confused the question of what agreements are covered by the Convention with the separate issue of who may enforce or be bound by them. As well explained by the Swiss Federal Tribunal, the inclusion in Article II (2) of arbitration agreements "signed by the parties" refers to the parties to the original agreement, and not to third-parties to whom the scope of the arbitration agreement may exceptionally be extended. (See Part I.B below.)

The Court of Appeals also failed to take into account the object and purpose of the Convention:

> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the

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[2] U.S. State Dept., 2009-2017, Frequently Asked Questions, Vienna Convention on the Law of Treaties. https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm.

> 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, 417 U.S. 506, 520 n. 15 (1974).

These purposes would be significantly frustrated by the Court of Appeals' misreading of the Convention to categorically exclude enforcement of arbitration agreements by or against nonsignatories in the exceptional circumstances traditionally recognized by U.S. courts for domestic arbitrations, and by courts of other nations in both domestic and international arbitrations.

The primary basis of international arbitration is indeed express consent. However, ordinary principles of contract law, as well as the consensus of States parties on the interpretation of the Convention, recognize exceptional circumstances in which consent may be implied, or even imputed in the interest of equity. Comment a to Restatement section 2.3. Courts in the U.S. (and in other States parties; see Part I.B below) allow nonsignatories exceptionally to be bound by or to enforce international arbitration agreements based on a wide range of ordinary contract, agency, equitable and related doctrines.

In the U.S., those cases are not limited to the decisions by the First and Fourth Circuits, on which the petition for *certiorari* was predicated, allowing

nonsignatory arbitration based on equitable estoppel. *Sourcing Unlimited v. Asimco Int'l*, 526 F.3d 38, 46-48 (1st Cir. 2008); *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-18 (4th Cir. 2000); *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 373-75 (4th Cir. 2012).

The precedents also include many other judgments from diverse U.S. jurisdictions, all recognizing that international arbitration by or against nonsignatories may be compelled in exceptional circumstances under ordinary principles of contract and agency law, equity and related doctrines. The following federal appellate decisions from the First, Second, Third and Fifth Circuits are among many cases cited by the Reporter's Notes to section 2.3 of the Restatement (Part III below): *InterGen N.V. v. Grina*, 344 F.3d 134, 144-50 (1st Cir. 2003) (general principles of contract and agency law, judicial estoppel, equitable estoppel, third-party beneficiary, agency, alter ego); *A/S Custodia v. Lessin Int'l Inc.*, 503 F.2d 318, 320 (2d Cir. 1974) (ordinary contract principles, agency); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, 9 F.3d 1060, 1064 (2d Cir. 1993) (ordinary principles of contract and agency, estoppel); *American Bureau of Shipping v. Tencara S.P.A.*, 170 F.3d 349, 352 (2d Cir. 1999) (incorporation by reference, assumption, agency, veil piercing/alter ego, and estoppel); *DuPont v. Rhone Poulonc Fiber*, 269 F.3d 187, 194-95 (3d Cir. 2001) (traditional principles of contract and agency law, third-party beneficiary, agency, equitable estoppel); *Century Indem. Co. v. Certain Underwriters at Lloyd's, London*, 584 F.3d 513, 532, 534 (3d Cir. 2009) (ordinary state-law principles of contract law, incorporation by reference); and *Sapic v.*

Government of Turkmenistan, 345 F.3d 347 (5th Cir. 2003) (ordinary principles of contract and agency law, incorporation by reference, assumption, agency, veil-piercing/alter ego, estoppel, "direct benefits" theory of estoppel, and third-party beneficiary).

The misreading of the Convention by the Court of Appeals below is thus clearly a minority view in U.S. case law.

Petitioner has persuasively analyzed the text of the Convention. *Amici* focus instead on additional criteria which lead to the same conclusion. Each is within our particular expertise; none was addressed by the Court of Appeals below. *Amici* address:

- The collective post-ratification understanding of States. This was authoritatively expressed in 2006 by the consensus – in which the U.S. joined --of the United Nations Commission on International Trade Law ("UNCITRAL") (Part I.A below);
- The individual understandings of States parties. In the U.S., these are embodied in an *amicus* brief filed by the Executive in 2016. The understandings of other States are found mainly in their case law (Part I.B below); and
- Scholarly interpretations of the Convention (Part II below).

Finally, with regard to interpretation of the Convention in the U.S. under Chapter 2 of the FAA, Part III below summarizes U.S. law as synthesized in the Restatement.

All these sources of interpretation of the Convention, and hence of Chapter 2 of the FAA, recognize that nonsignatories may be bound by or enforce international arbitration agreements in exceptional circumstances.

Indeed, the case for permitting nonsignatories exceptionally to enforce arbitration agreements – as here -- is arguably stronger than the case for enforcing the agreements against nonsignatories. *Sapic v. Government of Turkmenistan*, 345 F.3d 347, 361 (5th Cir. 2003). When nonsignatories enforce arbitration agreements, they do so against respondents who have at least agreed to arbitrate with respect to the dispute, even if not with respect to the particular disputant.

In the U.S. under Chapter 1 of the FAA, *domestic* arbitration agreements may be enforced by or against nonsignatories in circumstances – such as equitable estoppel -- where "background principles of state contract law" allow contracts to be enforced by or against non-parties. *Arthur Andersen LLP et al. v. Carlisle et al.*, 556 U.S. 624, 630 (2009).

This Chapter 1 principle properly extends as well to *international* arbitrations under Chapter 2 of the FAA. Section 208 of Chapter 2 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."

There is no such conflict. The Court of Appeals found a conflict only by misinterpreting Convention Article II (2), which provides that international

arbitration agreements covered by the Convention shall "include" agreements signed by the "parties." 902 F.3d at 1325, 1327.

However, this provision is not exhaustive. (Part A below.) Article II (2) does not limit the agreements States may cover under the Convention. It merely "lays down the minimum [that States must do], not the maximum [that they may do] to enforce arbitral agreements."[3]

Moreover, as Petitioner argues, the word "parties" in Article II (2) refers to the parties to the original arbitration agreement, not to the parties to the arbitral proceeding. In exceptional circumstances, arbitral proceedings may be initiated by or against parties who did not sign the arbitration agreement.

Because the Court of Appeals held that the FAA categorically bars non-signatories from enforcing international arbitration agreements under Chapter 2, it did not reach the question of whether estoppel applies here. *Amici* express no view on whether Respondents are estopped from denying arbitral jurisdiction in this case. This Court should reverse the erroneous holding below and remand for further proceedings to address whether equitable estoppel applies in this case.

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[3] Adam Samuel, *The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate*, 8 Arb. Int'l 257, 269 (1992).

I. The Interpretation of the New York Convention by the Court of Appeals Is Contrary to the Post-ratification Understanding of the Convention by States Parties.

As noted above, this Court's approach to treaty interpretation takes into account the post-ratification understanding of the treaty by other States parties. *Medellin*, 552 U.S. at 516; *Zicherman v. Korean Airlines Co.*, 516 U.S. 217, 226 (1996).

Likewise, the Vienna Convention provides that treaty interpretation shall take into account:

> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

Vienna Convention on the Law of Treaties, art. 31.3 (a) and (b).

The interpretation of the Convention by the Court of Appeals is contrary to the post-ratification understandings of the Convention by States, as embodied in both their "subsequent agreements" (Part A below) and their "subsequent practice" (Part B below).

A. The Interpretation of the Convention by the Court of Appeals Is Contrary to the Collective Understanding of States.

The interpretation of the Convention by the Court of Appeals is contrary to the collective understanding of States. That understanding is embodied in a 2006 Recommendation on the interpretation of Articles II (2) and VII (1) of the Convention (Appendix B to this brief).[4] The Recommendation was adopted by consensus of the sixty member States – including the U.S. – of the United Nations Commission on International Trade Law ("UNCITRAL").[5]

The Convention is a treaty of the United Nations. UNCITRAL is mandated by the United Nations General Assembly to promote "ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of international trade." (UN General Assembly Res. 2205 (XXI), 1966.) UNCITRAL's authoritative 2006 Recommendation was developed after lengthy deliberation by UNCITRAL's Working Group on

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[4] 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, Done in New York, 10 June 1958, Adopted by the United Nations Commission on International Trade Law on 7 July 2006, at its Thirty-ninth Session. Issued in *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (Annex A/61/17), annex II.

[5] Report of the UNCITRAL on the work of its thirty-ninth session (19 June-7 July 2006), UN General Assembly, Official Records, sixty-first session, Supplement No. 17 (A/61/17), ¶¶ 4, 12, 177-80 and Annex II.

International Arbitration.[6] It was finally adopted by a consensus -- which included the official U.S. Delegation -- after full consideration, debate and revision by the entire Commission.[7]

The Court of Appeals' misreading of the Convention is contrary to the UNCITRAL Recommendation in two respects.

First, the Recommendation clarifies that Convention Article II (2) – which the Court of Appeals erroneously held to be the exclusive basis of international arbitration agreements covered by the Convention -- is "not exhaustive."

Second, the Recommendation provides that Article VII (1) of the Convention should be applied to allow "any interested party" to assert its rights "under the laws ... of the country" to enforce an arbitration agreement. This is sometimes referred to as the "more-favorable right principle." (See judgment of the German Federal Supreme Court in Part B below.)

Because U.S. law confers rights on nonsignatories exceptionally to enforce arbitral agreements in domestic arbitrations under Chapter 1 of the FAA, *Arthur Andersen LLP et al. v. Carlisle et al.*, 556 U.S. 624, 630 (2009), the import of the UNCITRAL "more favorable right" principle under Article VII (1) is to

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[6] UNCITRAL, Report of the Working Group on Arbitration and Conciliation on the work of its forty-fourth session (New York, 23-27 January 2006), UN Doc. A/CN.9/592, 27 February 2006, ¶¶ 82-88 and Annex III.

[7] Note 5 above.

grant nonsignatories the same rights exceptionally to enforce international arbitration agreements under Chapter 2 of the FAA.

In short, the Court of Appeals misread Article II (2) of the Convention and ignored Article VII (1). For both reasons, there is no conflict between Chapter 1 of the FAA and the Convention, as implemented in Chapter 2 of the FAA.

B. The Interpretation of the Convention by the Court of Appeals Is Contrary to the Individual Understandings of States

The interpretation of the Convention by the Court of Appeals is also contrary to the post-ratification understandings of many individual States parties.

In interpreting a treaty, this Court treats the views of the Executive with great respect. *Abbott v. Abbott*, 560 U.S. at 15 (citation omitted). We therefore begin with the U.S. In addition to joining in the consensus UNCITRAL Recommendation of 2006, the Executive more recently made its views known in an *amicus* brief filed in the Second Circuit. On September 12, 2016, the U.S. Attorney for the Southern District of New York and the Departments of Justice and State filed an *amicus* brief on behalf of the U.S. in the case of *DA Terra Siderurgica LTDA v. American Metals International*, Docket No. 15-1133 (L), 15-1146 (con).[8]

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[8] The eventual Second Circuit ruling was reported as *CBF Indústria Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017). It cited the U.S. amicus brief with approval, but on another point. 850 F.3d at 72.

One issue addressed by the U.S. *amicus* was whether a foreign arbitral award governed by the New York Convention and Chapter 2 of the FAA must be confirmed prior to enforcement against an award-debtors' alleged "alter egos or successors-in-interest." *Amicus* Brief at 2. The Government answered that an award-creditor "may seek, in the appropriate circumstances, to confirm a foreign arbitral award directly against alleged alter egos or successors." *Id.*

The Government relied in part on cases where federal courts exercised jurisdiction under Chapter 2 of the FAA "to compel arbitration by non-signatories to the agreement." In particular, the Government cited the First Circuit decision in *Sourcing Unlimited* and the Second Circuit decision in *Deloitte Noraudit*. As noted *supra*, both cases recognize estoppel as an exceptional basis to enforce international arbitration agreements by or against nonsignatories. The U.S. Brief continued (p. 14):

> Courts interpret the scope of "the agreement" under [FAA Chapter 2] ... in accordance with the common law principles (such as assumption, alter ego, and estoppel) ... Courts therefore compel participation in arbitration by entities that have not signed an arbitration agreement when they are nonetheless bound to the agreement for a valid legal reason.

The Executive thus relied on the case law that nonsignatories may exceptionally be bound by international arbitration agreements under Chapter 2 of the FAA. This position is directly contrary to the

restrictive view of Chapter 2 erroneously adopted by the Court of Appeals in the present case.

Not only the views of the U.S. Executive, but also the views of other States parties, are entitled to "considerable weight" in interpreting a treaty. *Abbott v. Abbott*, 560 U.S. 1 at 16, quoting *El Al Israel Airlines Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999) and *Air France v. Saks*, 470 U.S. 392, 404 (1985). In the present case, the views of other States have been expressed in their post-ratification understandings of the Convention articulated in their case law.

To the knowledge of *amici*, no appellate tribunal of any other State explicitly adopts the restrictive view taken by the Court of Appeals in this case. On the contrary, foreign jurisdictions which exceptionally recognize one or more doctrines of nonsignatory arbitration include at least Austria, Belgium, Canada, China, Denmark, France, Germany, Hong Kong, India, Israel, Italy, Malaysia, The Netherlands, Peru, Romania, Russia, Singapore, Spain, Sweden, Switzerland and the United Kingdom. Gary Born, International Commercial Arbitration (Kluwer Law International 2d ed. 2014) 1418-501 and accompanying footnotes; notes 9 and 10 below.

Civil law countries do not generally recognize the common law doctrine of estoppel as such. However, civil law courts permit nonsignatories exceptionally to be bound by or enforce international arbitration agreements in a "wide range of circumstances in which entities that do not themselves execute a contract ('non-signatories') may nonetheless be parties to, and bound by or permitted to invoke, the associated

arbitration agreement." *Id.* at 1423. Depending on the jurisdiction, legal bases of nonsignatory arbitration may include agency, apparent or ostensible authority, implied consent, alter ego, veil-piercing, the "group of companies" doctrine, third party beneficiaries, guarantors, succession, assignment and other transfers of contractual rights, subrogation, estoppel and related doctrines in civil law countries (e.g., good faith), ratification, corporate officers and directors, shareholder derivative rights, and joint venture relations. *Id.* at 1418-1501. Both civil law[9] and common law as well as mixed courts,[10] take into

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[9] E.g., **Belgium**: Court of Appeal of Brussels, Case No. 2013/AR/1830, 25 October 2018, *in* Annet van Hooft and Jean-François Tossens (eds), b-Arbitra | Belgian Review of Arbitration, (Wolters Kluwer 2019, Volume 2019 Issue 1) pp. 201 – 206 (Belgian law does not distinguish between domestic and international arbitrations); **Peru**: Article 14 of Peruvian Arbitration Act, Decreto Legislativo No. 1071 of June 27, 2008 (article 1.1 of the Act makes it applicable to both domestic and international arbitrations, without prejudice to Peru's treaty obligations); **Spain**: *Dima Distribución Integral, S.A., y Gelesa Gestión Logística, S.L. v. Logintegral 2000, S.A.U.*, Superior Court of Justice of Madrid, 68/2014, 16 December 2014 (the Spanish arbitration law applies to both domestic and international arbitrations, without prejudice to Spain's treaty obligations, Ley 60/2003, de 23 de diciembre, de Arbitraje, art.1.1.); **Switzerland**: Swiss Federal Tribunal, *Parties not indicated*, No. 4A_128/2008, 19 Aug. 2008; Swiss Federal Tribunal, *X. v. Y Engineering S.p.A.*, No. ATF 4A_450, Apr. 7, 2014.

[10] **Hong Kong**: *Dickson Valora Group (Holdings) Co Ltd v. Fan Ji Qian [2019] HKCFI 482*, High Court of Hong Kong, Court of First Instance, Miscellaneous Proceedings No. 1954 of 2018, 20 February 2019. The Hong Kong 2011 Arbitration Ordinance does not distinguish between domestic and international arbitrations

account good faith and equity exceptionally to justify nonsignatory arbitration. Applying a doctrine palpably equivalent to estoppel, a German court barred a party which participated in an arbitration from later denying that it was subject to arbitration, based on the principle of the "prohibition of contradictory behavior."[11]

In explaining the widely accepted practice of permitting nonsignatories in limited circumstances to be bound by or enforce international arbitration agreements, foreign courts sometimes expound on the interpretation of Articles II and VII of the Convention.

(except for certain optional provisions which do not address nonsignatory arbitration); **India**: *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. (US) et al.*, Supreme Court of India, Civil Appeal No. 7134 of 2012 with Civil Appeal Nos. 7135-7136 of 2012, 28 September 2012, published in Albert Jan Van den Berg (ed), Yearbook Commercial Arbitration 2013 - Volume XXXVIII, pp. 392 – 396, ¶¶ 68, 109; **Israel**: Supreme Court decision no. 9542/06, *Lichtenshtein v. A.I.G. Hajzakot Bemashkantaot Ltd.*, ¶ 13 of the decision, cited in "*Israel No. 10, Darie Engineering Ltd v. Alstom International SAS et al., District Court, Tel Aviv, 17 February 2013 and Supreme Court, 13 February 2014*", in Albert Jan van den Berg (ed), Yearbook Commercial Arbitration 2014 - Volume XXXIX, pp. 413 – 420; "*Israel No. 10, Darie Engineering Ltd v. Alstom International SAS et al., District Court, Tel Aviv, 17 February 2013 and Supreme Court, 13 February 2014*", ¶¶ 37 and 39, in Albert Jan van den Berg (ed), Yearbook Commercial Arbitration 2014 - Volume XXXIX, p. 413.

[11] Germany No. 147 / E27, *Werner Schneider as liquidator of Walter Bau A.G. v. The Kingdom of Thailand*, Higher Regional Court of Berlin, Case No. 20 Sch 10/11, 4 June 2012 and Federal Court of Justice of Germany, Case No. III ZB 40/12, 30 January 2013.

For example, the German Federal Supreme Court recently articulated the historical context and trends underlying the contemporary understanding of Articles II and VII.[12] A lower court had refused to refer a dispute to arbitration on the ground that the claimant had not signed the contract containing the arbitration agreement on which the respondent relied. In remanding the case, the Court instructed that the formal signature provisions of Article II (1) and (2) would not bar nonsignatory arbitration, since the Convention must be interpreted in favor of arbitration and allows, in any event, for the application of less strict formal requirements pursuant to Article VII(1).

With regard to Article II, the Court explained that:

> Art. II (1) ... would not be an obstacle to [the nonsignatory being bound by the arbitration agreement]. 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) ... 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

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[12] Bundesgerichtshof, III ZR 371/12, 8 May 2014, English translation published in Albert Jan van den Berg (ed), Yearbook Commercial Arbitration 2014 - Volume XXXIX, Yearbook Commercial Arbitration, Volume 39 (© Kluwer Law International; Kluwer Law International 2014) pp. 401 – 405.

> requirements that they now set more limited requirements than Art. II (1)-(2) ... An interpretation under which Art. II (1)-(2) ..., against its original intention, becomes an obstacle to recognition contradicts this background (...).

The Court further explained the difference – confused by the Court of Appeals in the instant case – between the formal requirements of an arbitration agreement under Article II and the separate question of who may be bound by or enforce the agreement:

> ... [I]t does not follow automatically from the circumstance that there are formal requirements for an arbitration agreement that there are also form requirements for the extension to a third party, respectively that the third party is only bound when he himself signs the arbitration agreement or adheres to it in writing (...).

The Court also emphasized the "more-favorable right principle" of Article VII (1) of the Convention:

> Apart from [Article II], Art. VII (1) ... expressly allows for the application of an arbitration-friendly national law pursuant to the so-called more-favorable-right principle. ...

The Swiss Federal Tribunal similarly articulates the distinction between whether an agreement is covered by Article II of the Convention and the separate question of who may enforce or be bound by it. Most recently the Tribunal explicitly held that Article II (2) of the Convention does not bar nonsignatory

arbitration.[13] The Tribunal explained that the reference to "signed by the parties" in Article II (2) means that the arbitration agreement must be signed by the parties to the original contract, but not necessarily by third-parties to which the scope of the arbitration agreement is extended.

The Tribunal's interpretation of the Convention thus parallels its earlier decision similarly interpreting the Swiss arbitration statute (which also contains a formal requirement that the arbitration agreement be in writing). *Swiss Federal Tribunal, X. S.A.L., Y. S.A.L. et A. v. Z. Sàrl*, 4P.115/2003, 16 October 2003.

The Supreme Court of India adopts a similar interpretation of Article II of the Convention. It has held that

> [t]he question of formal validity of the arbitration agreement is independent of the nature of parties to the agreement, which is a matter that belongs to the merits and is not subject to substantive assessment. Once it is determined that a valid arbitration agreement exists, it is a different step to establish which parties are bound by it. Third parties, who are not explicitly mentioned in an arbitration

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[13] Swiss Federal Tribunal, *Parties not indicated*, No. 4A_646/2018, 17 Apr. 2019 (in German). *See* English Summary by N. Voser and L. Groselj, *Extension of arbitration agreement to non-signatory upheld under New York Convention (Swiss Supreme Court)*, Practical Law, May 22, 2019; V. Hirsiger-Meier and L. Innerebener, *Federal Supreme Court upholds extension of arbitration agreement to non-signatories under the New York Convention*, Global Arbitration News, June 18, 2019.

agreement made in writing, may enter into its ratione personae scope.[14]

Likewise, the Singapore High Court has held that the formalities of Article II of the Convention do not bar the extension of an arbitration agreement to a third party.[15] Citing decisions from Belgium, Switzerland and the U.S., the High Court held that "where the objective circumstances and parties' conduct reveal that the parties to the arbitration agreement have consented to extend the agreement to a third person who is not a party to the agreement, and that third person has shown by its conduct to accept to be bound by the agreement, parties can be found to have impliedly consented to form an agreement to arbitrate where this has been clearly and unequivocally shown be the parties' objective intention."[16]

In contrast, to the knowledge of *amici*, no foreign appellate court adopts the restrictive interpretation of the Convention adopted by the Court of Appeals in this case. In 2003 a trial court in British Columbia refused nonsignatory enforcement. *Javor v. Francoeur*, 2003 BCSC 350 (2003). The decision was affirmed on appeal

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[14] *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. (US) et al.*, Supreme Court of India, Civil Appeal No. 7134 of 2012 with Civil Appeal Nos. 7135-7136 of 2012, 28 September 2012, published in Albert Jan Van den Berg (ed), Yearbook Commercial Arbitration 2013 - Volume XXXVIII, pp. 392 – 396, ¶ 109.

[15] The 'Titan Unity' [2014] SGHCR4, Admiralty in Rem No 276 of 2012 (Summons No 3952 of 2013), 4 February 2014, ¶ 35.

[16] *Id.* ¶¶ 30-35.

in a one-page opinion with no explicit discussion of the issue, 2004 BCCA 134 (2004). However, even in British Columbia, its precedential weight appears to be nil. In 2013 another British Columbia trial court rejected an argument based on *Javor*. An arbitral tribunal had found arbitral jurisdiction over a nonsignatory, based on grounds of both alter ego and estoppel. The Court affirmed that those rulings were "consistent with international arbitration law in this jurisdiction and elsewhere." The Court pointed out that the Canadian statute does not limit enforcement to signatories of an arbitration agreement, but defines a party to an arbitration agreement to include a person claiming "through or under a party." Moreover, citing several leading commentaries, the Court observed that "nonsignatories have been held to be bound by arbitration agreements in various ways that include piercing the corporate veil (alter ego) and estoppel ..." *CE International Resources Holdings LLC v. Yeap Soon Sit*, 2013 BCSC 1804, pars. 24-35 (2013).

The post-ratification understandings of individual States are thus in accord with their collective understanding as expressed in the UNCITRAL Recommendation: Convention Article II (2) does not bar nonsignatory arbitration. Moreover, Article VII (1) ensures that where nonsignatory arbitration is exceptionally allowed by domestic law – as in Chapter 1 of the FAA – nonsignatory arbitration extends as well to international arbitrations under the Convention.

II. The Judgment Below Is Contrary to the Interpretations of the New York Convention by Leading Scholars.

As noted above, in treaty interpretation, this Court takes scholarly views into account. *Abbott v. Abbott*, 560 U.S. at 18. Similarly, among the sources of international law are "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." Statute of the International Court of Justice, art. 38.1 (d).

Leading scholars agree with the post-ratification understandings of the Convention by States. As noted by Reporter's Note a to Restatement section 2.3, "the general proposition that nonsignatories can be bound by or invoke an arbitration agreement is also well established in the scholarly literature as practically and legally necessary to give effect to parties' agreements to arbitrate." Among other leading commentaries, the Note cites scholarly publications by Gary B. Born, William W. Park, Daniel Busse, James M. Hosking, Carolyn B. Lamm & Jocelyn A. Aqua, and *amicus* John M. Townsend. Other *amici* have published to like effect.

Some scholars argue that there are even stronger grounds to allow nonsignatories to invoke arbitration agreements – as here -- than to bind them by such agreements. For example, *amicus* Professor Alan S. Rau has written that the argument is

> that "it is more foreseeable, and thus more reasonable, that a party who has actually agreed

> in writing to arbitrate claims with someone might be compelled to broaden the scope of his agreement to include others."[17] ... [S]uch a presumption brings all the advantages of efficiency with limited impingement on contractual autonomy. That an arbitration clause may in fact sweep most broadly when asserted against a signatory to the agreement is not a novel proposition, ...[18]

As explained by another eminent authority in the field, Jan Paulsson:

> The question is whether the respondent has consented to arbitration of the claim being brought, irrespective of who brings it ... It may be that parties do not so much agree to arbitrate with a person as with respect to a transaction or a venture.[19]

And in the words of Professor Park:

> When a non-signatory asks to arbitrate against a signatory, the threshold for extending the arbitration clause thus may be set at a lower

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[17] Quoting *Sapic v. Turkmenistan*, 345 F.3d 347, 361 (5th Cir. 2003), in turn quoting *J. Douglas Uloth & J. Hamilton Rial, III, Equitable Estoppel as a Basis for Compelling Nonsignatories to Arbitrate - A Bridge Too Far?*, 21 Rev. Litig. 593, 633 (2002).

[18] Alan S. Rau, *Arbitral Jurisdiction and the Limits of Party 'Consent'*, in Multiple Party Actions in International Arbitration (Oxford 2009), at ¶3.83.

[19] Jan Paulsson, The Idea of Arbitration (2014), p. 53.

> level ... The signatory resisting joinder of the third party might argue that it never agreed to arbitrate with the particular affiliate seeking to enter the proceedings. The argument has some force, albeit limited in nature. The resisting party did agree that disputes related to the subject in question would be settled by arbitration.[20]

At the very least, there can be no justification in international cases for disallowing enforcement *by* nonsignatories if enforcement *against* them is allowed.

In all events, the interpretation of the Convention by the Court of Appeals is contrary to the overwhelming consensus of leading scholars that nonsignatories may exceptionally be bound by or enforce international arbitration agreements. As succinctly summarized by experienced international arbitration practitioners, "[n]owadays, there is no doubt that – under certain circumstances – an arbitral agreement can be extended to non-signatories."[21]

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[20] William W. Park, Non-signatories and international contracts: an arbitrator's dilemma in MULTIPLE PARTIES IN INTERNATIONAL ARBITRATION, (Oxford 2009) at ¶1.75.

[21] Eduardo Silva Romero and Luis Miguel Velarde Saffer, *The Extension of the Arbitral Agreement to Non-Signatories in Europe: A Uniform Approach?,* 5 Am. Univ. Bus. L. Rev. 371, 371 (2015).

III. The Court of Appeals' Consequent Misreading of Chapter 2 of the Federal Arbitration Act Is Contrary to the Restatement of U.S. Law of International Commercial and Investor-State Arbitration.

The Restatement was adopted by the 2019 Annual Meeting of the American Law Institute, following over a decade of extensive research, consultations, published drafts, and deliberations.

The Restatement recognizes the general rule that parties must expressly consent to arbitration: "Ordinarily, only persons who have formally executed an international arbitration agreement or otherwise expressly assented to it are bound by or may invoke such an agreement." Comment a to Restatement section 2.3.

However, contrary to the mistaken view of the Court of Appeals, there are exceptions based on implied and in some instances imputed consent. Comment a to section 2.3. The Restatement affirms that under U.S. law non-signatories can both invoke and be subject to international arbitration agreements in exceptional circumstances. Section 2.3 (b) provides that a court, upon request, "enforces an international arbitration agreement against or in favor of a nonsignatory to the agreement to the extent that the nonsignatory: (1) is deemed to have consented to such agreement, or (2) is otherwise bound by or entitled to invoke the agreement under applicable law."

Comment a explains that "ordinarily" only signatories are bound by or may enforce an international arbitration agreement. However, nonsignatories may invoke or be bound by an *arbitration agreement, not only when they are deemed* to assent to it "under ordinary principles of contract law," but also under "other doctrines that operate legally to bind the parties."

Among the bases of arbitration by or against nonsignatories recognized in the Comments are actual or apparent agency; implied consent; estoppel; waiver; incorporation by reference; alter ego; veil piercing and corporate relationships; succession, subrogation, assignment, and other transfers; and third-party beneficiaries. Comments (b) – (f) to section 2.3.

These multiple theories have in common that

> the primary purpose of each inquiry is to discern the intent of the parties. In some instances, an intent might be imputed to them to accomplish *the purpose of the arbitration agreement or to* avoid irrational or unfair application of the arbitration clause.

Comment a to section 2.3.

The Reporter's Notes to section 2.3 cite numerous precedents under Chapter 2 of the FAA recognizing that nonsignatories may exceptionally be bound by or enforce international arbitration agreements. Even considering only citations to federal appellate cases (district court precedents are also cited), the Notes cite Chapter 2 cases from at least the First, Second, Third, Fourth and Fifth Circuits (listed in Part I above).

One among the bases of nonsignatory arbitration recognized by the Restatement is estoppel. Comment c to section 2.3 explains that "a party may impliedly consent to an arbitration agreement in various ways. It may, for instance, perform obligations established by the underlying contract" – as here -- [or] "affirmatively invoke the arbitration agreement to commence an arbitration ..." – also as here. "The same circumstances may give rise to estoppel ..."

The Reporter's Note a to section 2.3 adds that while "ordinarily" only signatories are bound by or may enforce arbitration agreements, "[c]ourts have long held ... that a party may be bound even in the absence of formal assent" to an arbitration agreement. There is a "general proposition that nonsignatories can be bound by or invoke an arbitration agreement."

Exceptional nonsignatory arbitration can rest, not only on consent, but also on equity. As the Note explains,

> While most theories focus on determining the intent of the parties, some doctrines, like estoppel and veil piercing, are based on more equitable considerations that, rather than posit consent, seek to avoid irrational or unfair application of the arbitration clause.

Equity can run both ways. Most cases involving equitable doctrines and nonsignatories deploy those doctrines in order to bind nonsignatories. However, as the Note observes, "In addition to finding that nonsignatories may under some circumstances be bound by an arbitration agreement, courts at times

permit nonsignatories to seek to compel signatories to arbitrate."

The Note continues, "Use of the doctrine of equitable estoppel for these purposes occurs mainly in two circumstances[:]"

- First, "when a nonsignatory must rely on the terms of the written agreement containing an arbitration clause in asserting its claims against the signatory."
- Second, "when a signatory alleges interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the agreement containing an arbitration clause."

Estoppel can thus be used both by and against nonsignatories. For example, the Note cites a case holding that, because claims against a nonsignatory were "intimately founded in and intertwined with" a contract containing an arbitration clause, the signatory was estopped from refusing to arbitrate those claims. *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993).[22]

This Court should reverse and remand for consideration of whether equitable estoppel applies on the facts of this case.

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[22] Although *Sunkist* was an FAA Chapter 1 case, the same rationale should apply to FAA Chapter 2 cases under the "more favorable right" principle of Convention art. VII (1).

In contrast to the Restatement, the Court of Appeals would strictly limit international arbitration to signatories and their privities. The Court of Appeals thereby interprets the Convention to prohibit all bases of nonsignatory arbitration. Arbitration by or against nonsignatories would be categorically prohibited, no matter how irrational or unfair the result, and no matter how contrary to the purpose of the arbitration agreement.

This would mean that international arbitration agreements -- unlike other contracts under ordinary principles of contract law -- could not in any circumstances be subject to enforcement by or against nonparties to the agreement. This anomaly is unsupported by any consideration other than the Court of Appeals' untenable interpretation of Article II (2) and that Court's complete disregard of Article VII (1) of the Convention. Moreover, it would severely undermine the purpose of the FAA to place arbitration agreements "on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

Comment b to Restatement section 2.4 notes that it is "unlikely that the Convention drafters intended for the writing requirement to perform a rigorous gate-keeping role." It points out that the FAA "touches upon writings only in a limited and somewhat ambiguous fashion."

Comment b concludes on both policy and structural grounds:

> Ultimately, no compelling policy supports maintaining more rigorous writing standards for international arbitration agreements than for agreements falling under [FAA] Chapter 1. ... In addition to leading to anomalous results under the [FAA], a restrictive interpretation of Article II (2) as implemented by Congress would tend to reduce the utility of the Convention over time as new usages and modes of communicating become established in international trade.

In addition, Comment b observes that the Restatement's "pragmatic treatment" of the writing requirement is consistent with the treatment given by UNCITRAL, the Convention's "sponsoring organization," which recommends that Convention Article II (2) should not be read to "state exhaustively the arbitration agreements to which the Convention applies."

In sum, U.S. law on who can enforce or be bound by international arbitration agreements, as synthesized in the Restatement, is consistent with the international consensus: nonsignatories can, in exceptional but important and well-recognized circumstances, be bound by or enforce international arbitration agreements under the Convention where fairness and justice so require.

CONCLUSION

The Judgment below is contrary to the collective and individual post-ratification understandings of the New York Convention by States including the U.S., to the interpretation of the Convention by leading

scholars, and to the synthesis of U.S. law in the Restatement. The Court should reverse and remand for further proceedings on whether the doctrine of equitable estoppel applies to require arbitration on the facts of this case.

Respectfully submitted,

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September 24, 2019

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APPENDIX A

Brief Biographies of *Amici Curiae*

George A. Bermann is the Jean Monnet Professor of EU Law, Walter Gellhorn Professor of Law, and the Director of the Center for International Commercial and Investment Arbitration (CICIA) at Columbia Law School. He was chief Reporter of the Restatement.

A Columbia Law School faculty member since 1975, Professor Bermann teaches courses in, and has written extensively on, transnational dispute resolution (international arbitration and litigation), European law, administrative law, and WTO law. He is an affiliated member of the School of Law of Sciences Po in Paris and the MIDS Masters Program in International Dispute Resolution in Geneva. He is also a visiting professor at the Georgetown Law Center.

Professor Bermann is an active international arbitrator in commercial and investment disputes; co-author of the UNCITRAL Guide to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; chair of the Global Advisory Board of the New York International Arbitration Center (NYIAC); co-editor-in-chief of the American Review of International Arbitration; and founding member of the governing body of the ICC Court of Arbitration and a member of its standing committee.

R. Doak Bishop is a Partner in and past Chair of the International Arbitration practice of King &

Spalding, specializing in the oil and gas, energy, construction, environmental and foreign investment sectors, with a focus on Latin America. He was an Adviser to the Restatement.

Mr. Bishop has served as Chairman of the Institute of Transnational Arbitration and as a Director of the American Arbitration Association (AAA). He is also a member of the U.S. delegation to the North American Free Trade Act (NAFTA) Advisory Committee on Private Commercial Disputes. He previously served on the Executive Council of the American Society of International Law. Among other publications, he is co-editor of Foreign Investment Disputes – Cases, Materials and Commentary (Wolters Kluwer, 2nd ed. 2014) and The Art of Advocacy in International Arbitration (JURIS Arbitration Law, 2nd ed. 2010).

Mr. Bishop has served as both an arbitrator and counsel. As an arbitrator, he has led or participated in more than 70 arbitrations under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), UN Commission on International Trade Law (UNCITRAL), International Centre for Dispute Resolution (ICDR), AAA, the Inter-American Commercial Arbitration Commission (IACAC) and the Center for Public Resources (CPR), as well as in ad hoc arbitrations.

Andrea K. Bjorklund is Full Professor and Associate Dean (Graduate Studies) of the Faculty of Law of McGill University, where she holds the L. Yves Fortier Chair in International Arbitration and

International Commercial Law. She was an Adviser to the Restatement.

In 2017, she was named one of McGill's Norton Rose Fulbright Scholars in International Arbitration and International Commercial Law. In 2018, she was a Plumer Fellow at St. Anne's College and a Visiting Fellow in the Law Faculty, University of Oxford, as well as a Visiting Fellow at the Lauterpacht Centre for International Law at the University of Cambridge. In 2019, she was elected a vice-president of the Executive Council of the American Society of International Law.

She is also a member of the Advisory Board of the Investment Treaty Forum of the British Institute for International and Comparative Law. Professor Bjorklund was the inaugural ICSID Scholar-in-Residence for 2014-2015 and was Editor-in-Chief of the *Yearbook on International Investment Law and Policy* (OUP) from 2012 to 2015. She sits on the panel of arbitrators of the AAA's International Centre for Dispute Resolution and on the roster of NAFTA Chapter 19 arbitrators. Professor Bjorklund is widely published in investment law and dispute resolution and transnational contracts.

Douglas Earl McLaren is an attorney with over 30 years of legal, business and engineering experience, both domestically and internationally in infrastructure, energy, environmental, and commercial projects. He was an Adviser to the Restatement.

Mr. McLaren has served on many commercial and securities arbitrations for the American Arbitration Association, International Centre for Dispute

Resolution, ICC International Court of Arbitration and the Financial Industry Regulatory Authority. He is a member of the American Law Institute.

Prior to opening his Law Office in Washington, D.C., Mr. McLaren was Senior Government Affairs Representative with Bechtel SAIC Company, LLC; and worked for TRW, and ICF Kaiser Engineers. He has resolved legal, financial, regulatory and engineering disputes related to commercial contracts and leases, joint venture and partnership agreements, and sales of business enterprises. He was formerly a Financial/Planning Analyst with ExxonMobil, a Management Consultant with KPMG, a Project Officer with Jamaica National Investment Company, and a Civil Engineer with Hue Lyew Chin Associates.

Alan S. Rau is the Mark G. and Judy G. Yudof Chair Emeritus in Law at the University of Texas at Austin. Professor Rau frequently serves as an arbitrator and is a member of the panel of the AAA and the panel of mediators of the Court of Arbitration for Sport. He was an Adviser to the Restatement.

Professor Rau is the author of many scholarly publications, including his book, Processes of Dispute Resolution: The Role of Lawyers (4th ed. 2006). Two of his book chapters most relevant to the issue in this case are "Arbitral Jurisdiction and the Limits of Party 'Consent'," in Multiple Party Actions in International Arbitration (Oxford 2009), and his lectures at the Hague Academy of International Law, published as "The Allocation of Power Between Arbitral Tribunals and State Courts," particularly chapter 3 (Hague Academy Pocketbooks, 2018). Among his numerous

other articles are "The Limits of Arbitral Power: Yet Another Trilogy" (American Review of Int'l Arbitration, 2012); "Arbitrating 'Arbitrability'" (World Arbitration and Mediation Review, 2013); "Arbitrators Without Powers? Disqualifying Counsel in Arbitral Proceedings" (Arbitration International, 2014), and ""Crossing the Threshold: Arbitral Jurisdiction after BG Group," *Mélanges en l'honneur de Pierre Mayer* (2014). He has been Visiting Professor at the University of Toronto Faculty of Law; at the China University of Political Science and Law in Beijing; at the University of Geneva Faculty of Law; and at the University of Paris-I and the University of Paris-II. In 2014 he was a Distinguished Professor in Residence at Queen Mary University, London.

W. Michael Reisman is Myres S. McDougal Professor of International Law at the Yale Law School. He has served as an arbitrator or counsel in many international arbitrations and has authored numerous scholarly publications on international commercial arbitration. He was an Adviser to the Restatement.

He has been a visiting professor in Tokyo, Hong Kong, Berlin, Basel, Paris and Geneva. He is a Fellow of the World Academy of Art and Science and a former member of its Executive Council, a former member of the Advisory Committee on International Law of the Department of State, President of the Arbitration Tribunal of the Bank for International Settlements, and a member of the Board of The Foreign Policy Association. He has been elected to the Institut de Droit International. He is Honorary President of the American Society of International Law, of which he

was previously Vice-President and Honorary Vice-President. He was President of the Inter-American Commission on Human Rights of the Organization of American States, Editor-in-Chief of *the American Journal of International Law*, and Vice-Chairman of the Policy Sciences Center, Inc. He has served as arbitrator and counsel in many international cases and was presiding arbitrator in the OSPAR arbitration (*Ireland v. UK*) and arbitrator in the Eritrea/Ethiopia Boundary Dispute and in the Abyei (Sudan) Boundary Dispute.

His most recent books are: *International Commercial Arbitration: Cases, Materials, and Notes on the Resolution of International Business Disputes* (with W. Laurence Craig, William Park and Jan Paulsson) (Foundation Press) (2nd Edition) (2015); *Foreign Investment Disputes: Cases, Materials and Commentary* (with R. Doak Bishop and James R. Crawford) (Kluwer Law International) (2nd Edition) (2014); *Fraudulent Evidence Before Public International Tribunals: The Dirty Stories of International Law* (Hersch Lauterpacht Memorial Lectures) (with Christina Parajon Skinner) (Cambridge University Press) (2014); and *The Quest for World Order and Human Dignity in the Twenty-first Century: Constitutive Process and Individual Commitment: General Course on Public International Law* (Hague Academy of International Law, 2012).

John M. Townsend is a litigation partner in the Washington, D.C. office of Hughes Hubbard & Reed LLP and co-chairs the firm's Arbitration practice group. His practice focuses on complex disputes,

particularly international disputes, both in court and before arbitral tribunals. His arbitration practice includes representing parties in international and domestic commercial arbitration, investment treaty disputes, and acting as an arbitrator. He was an Adviser to the Restatement.

Mr. Townsend served as Chair of the Board of Directors of the American Arbitration Association (AAA) from 2007 to 2010 and as chair of the Executive Committee of the AAA from 2004 to 2007 and currently chairs the AAA's Law Committee. He was a member and a vice president of the Court of Arbitration of the LCIA from 2014 to 2019. He was the first chair of the Mediation Committee of the International Bar Association (IBA). In February 2008, he was appointed by President George W. Bush as one of the American members of the Panel of Arbitrators of the International Centre for the Settlement of Investment Disputes (ICSID), on which he served until 2016.

Mr. Townsend has served as an arbitrator in more than 75 arbitrations, including commercial and investment treaty cases under all major sets of arbitration rules. He is the author of *Non-signatories in International Arbitration: An American Perspective*, in ICCA International Arbitration Congress, International Arbitration 2006: Back to Basics? (Kluwer Law International 2006, ed. Albert Jan van den Berg, 2006), pp. 359-365.

APPENDIX B

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 (UNCITRAL 2006)

The United Nations Commission on International Trade Law,

Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the object of promoting the progressive harmonization and unification of the law of international trade by, inter alia, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

Conscious of the fact that the different legal, social and economic systems of the world, together with different levels of development, are represented in the Commission,

Recalling successive resolutions of the General Assembly reaffirming the mandate of the Commission as the core legal body within the United Nations system in the field of international trade law to coordinate legal activities in this field,

Convinced that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral

Awards, done in New York on 10 June 1958,[1] has been a significant achievement in the promotion of the rule of law, particularly in the field of international trade,

Recalling that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, inter alia, that the Conference "considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes",

Bearing in mind differing interpretations of the form requirements under the Convention that result in part from differences of expression as between the five equally authentic texts of the Convention,

Taking into account article VII, paragraph 1, of the Convention, a purpose of which is to enable the enforcement of foreign arbitral awards to the greatest extent, in particular by recognizing the right of any interested party to avail itself of law or treaties of the country where the award is sought to be relied upon, including where such law or treaties offer a regime more favourable than the Convention,

Considering the wide use of electronic commerce,

Taking into account international legal instruments, such as the 1985 UNCITRAL Model Law on

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[1] United Nations, *Treaty Series*, vol. 330, No. 4739.

International Commercial Arbitration,[2] as subsequently revised, particularly with respect to article 7,[3] the UNCITRAL Model Law on Electronic Commerce,[4] the UNCITRAL Model Law on Electronic Signatures[5] and the United Nations Convention on the Use of Electronic Communications in International Contracts,[6]

Taking into account also enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,

Considering that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,

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[2] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I, and United Nations publication, Sales No. E.95.V.18.

[3] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), annex I.

[4] Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), annex I, and United Nations publication, Sales No. E.99.V.4, which contains also an additional article 5 bis, adopted in 1998, and the accompanying Guide to Enactment.

[5] Ibid., *Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), annex II, and United Nations publication, Sales No. E.02.V.8, which contains also the accompanying Guide to Enactment.

[6] General Assembly resolution 60/21, annex.

1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, 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.

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